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WHAT CORPORATE VEIL?

*Joshua C. Macey**

WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS. By *Adam Winkler*. New York and London: Liveright Publishing Corporation. 2018. Pp. xxiv, 395. Cloth, \$28.95; paper, \$19.95.

INTRODUCTION

A crucial turning point in the development of corporate constitutional rights was built on a fabrication.¹ In 1881, the Southern Pacific Railroad Company argued that a California tax on railroad property was unconstitutional discrimination under the Fourteenth Amendment's Equal Protection Clause.² At the time, this was an audacious argument. After the Civil War, Congress passed the Fourteenth Amendment to protect the rights of freed slaves and guarantee equality before the law.³ The text itself guarantees equal protection rights to "persons."⁴ It does not say anything about corporations. Yet a brilliant and uniquely qualified lawyer named Roscoe Conkling appeared before the justices and argued that the drafters wrote the Fourteenth Amendment to apply to corporations as well as to people.⁵

Conkling would know. He was the last surviving member of the congressional committee that drafted the Fourteenth Amendment, and he had twice been nominated to the Supreme Court, declining on both occasions due to financial hardship (p. 114). At oral argument, Conkling told the justices that he had brought his personal journal, which he claimed included notes about the committee's deliberations (p. 133). He told the Court that his

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1. See pp. 114–18, 130–36.

2. *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 409 (1886).

3. See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1809 (2010) ("The new powers in the Reconstruction Amendments served a different purpose: They gave Congress the power to protect equal citizenship and equality before the law. Article I, Section 8 powers were necessary because states could not effectively solve certain problems of governance; the Reconstruction Powers were necessary because history had shown that states would not protect equal citizenship and equality before the law.").

4. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

5. P. 130 ("I come now to say that the Southern Pacific Railroad Company and its creditors and stockholders are among the 'persons' protected by the Fourteenth Amendment of the Constitution of the United States." (quoting Conkling at oral argument)).

notes showed that the drafting committee had purposefully replaced the word “citizens” with “persons” in order to make sure that corporations also enjoyed Fourteenth Amendment protections.⁶ This change, he said, was intended to ensure that the Amendment applied to corporations as well as people (p. 130).

The problem with Conkling’s argument is that it was not true. His journal did record the congressional committee’s deliberations, but it did not say that the committee changed the word “citizen” to “person” or even mention that the committee ever thought about whether the Amendment would apply to corporations (pp. 134–36). In short, Conkling lied, but the case ultimately supported numerous Supreme Court decisions extending constitutional protections to corporate entities. While the Supreme Court decided to duck this constitutional question in *Southern Pacific* by ruling for the corporation on other grounds, the Court eventually agreed with Conkling and granted Fourteenth Amendment protections to corporations.⁷ It now regularly cites *Southern Pacific* to defend decisions to extend Fourteenth Amendment protections to corporations.⁸

Southern Pacific is at the heart of Adam Winkler’s *We the Corporations: How American Businesses Won Their Civil Rights*.⁹ The book, a finalist for the National Book Award,¹⁰ is provocative and important, and it is filled with stories documenting the case law that has, by now, put corporations on nearly the same constitutional footing as individuals. *We the Corporations* surveys over three hundred Supreme Court cases. What emerges is a fascinating and original picture about the development of corporate constitutional rights.

Specifically, Winkler identifies the legal foundations of these rights and traces their historical development over a four-hundred-year history. What is perhaps most surprising, however, is that—despite creative and daring legal arguments such as those brought by Conkling—it is a more prosaic argument that ultimately put corporations on nearly the same constitutional footing as people. In fact, Conkling’s view that corporations are “persons” has repeatedly failed to convince the Court to extend constitutional protec-

6. See pp. 130, 133.

7. *Southern Pacific*, 118 U.S. at 411–16 (asserting that, because California illegally counted the fences running beside the tracks in its assessment of the total value of the railroad’s property, the county could not collect the taxes in the first place).

8. See p. 157; see also *Smyth v. Ames*, 169 U.S. 466, 522 (1898) (explaining that *Southern Pacific* held that corporations are entitled to Fourteenth Amendment protections); cf. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985) (surveying cases that extend Fourteenth Amendment protections to corporations).

9. Adam Winkler is a Professor of Law, UCLA School of Law.

10. *We the Corporations: How American Businesses Won Their Civil Rights: Finalist, National Book Awards 2018 for Nonfiction*, NAT’L BOOK FOUND., <https://www.nationalbook.org/books/we-the-corporations-how-american-businesses-won-their-civil-rights/> [<https://perma.cc/7EYA-U9AS>].

tions to corporate entities.¹¹ Although it is common to criticize the notion—popularized by Republican presidential candidate Mitt Romney¹²—that corporations are people,¹³ on Winkler’s account, the legal foundation of corporate constitutional rights lies not in the Supreme Court’s recognition that corporations have a “separate personhood” but rather in the doctrine that corporations are simply “associations of citizens.”¹⁴ Conkling, in short, embraced the wrong legal theory.

This thesis is somewhat counterintuitive. Corporations can be thought of alternatively as either an aggregation of individual persons—the shareholders and managers who own and operate the company—or as legal entities separate and distinct from their investors and managers.¹⁵ Although politicians often mock the idea that corporations are separate legal entities, Winkler argues that it is actually the theory that corporations are “associa-

11. See pp. 130, 387–88.

12. See pp. 377–78.

13. See, e.g., S.J. Res. 33, 112th Cong. (2011) (proposing a constitutional amendment introduced by Bernie Sanders, stating that the Constitution only protects the rights of natural persons, that corporations are not natural persons, and therefore that corporations do not have constitutional rights).

14. The phrase “associations of citizens” was used three times in *Citizens United v. FEC*, which prohibited the government from restricting independent expenditures for corporate communications. 558 U.S. 310, 349, 354, 356 (2010). Winkler is not the only scholar to have observed that corporate constitutional rights are based on the view that corporations are associations of persons. Margaret Blair and Elizabeth Pollman, for example, have shown that historically “the Court accorded constitutional rights based on a view of corporations as associations of persons.” Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1677 (2015). Blair and Pollman argue that “this view was largely consistent with what the actual population of corporations in the United States looked like during the period of the Court’s earliest jurisprudence,” but that it “has not properly evolved to account for the wide spectrum of organizations labeled ‘corporations.’” *Id.*

15. As a general matter, scholars often say that there are three theories of the corporation. See Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1001 (describing the “standard theories found in [the] literature” as “the aggregate theory, which views the corporation as an aggregate of its members or shareholders; the artificial entity theory, which views the corporation as a creature of the State; and the real entity theory, which views the corporation as neither the sum of its owners nor an extension of the state, but as a separate entity controlled by its managers”). The latter two theories regard corporations as separate legal entities, though they disagree about what makes a corporation an entity. However, even those three theories mask a number of distinct and conflicting views about what it means for a corporation to actually be a separate legal entity. For example, “separate legal entity” theory contains adherents who view the corporation as a “nexus of contracts.” See Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1285 (1982); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 862 (1984); Kenneth E. Scott, *Corporation Law and the American Law Institute Corporate Governance Project*, 35 STAN. L. REV. 927, 930 (1983). Others, however, view the creation of a separate legal entity as a legal means that allows the separation of ownership and control. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 302–03 (1983).

tions of people” that has historically provided the legal justification for recognizing corporate constitutional protections. Time and again, Winkler shows, the Supreme Court has found that such protections are necessary to vindicate the rights of the citizens who own and manage private companies.

Winkler persuasively frames his book as a liberal critique of the Supreme Court cases that conferred constitutional rights on corporations, and he is right to do so. In demonstrating that the development of corporate constitutional rights is contingent on a particular conception of the corporation, Winkler challenges readers to reject the status quo and suggests that it is possible for judges and legislators to narrow the scope of corporate constitutional rights.

But Winkler’s characterization of the legal theory the Supreme Court embraces in corporate-rights cases is somewhat misleading. He claims that the Supreme Court is piercing the corporate veil when it extends constitutional protections to corporations.¹⁶ This is not quite true. Winkler is correct that the Supreme Court treats corporations as associations of persons, but he is incorrect that this treatment constitutes piercing the corporate veil. Winkler is undoubtedly aware that piercing the corporate veil describes the technical doctrine by which courts determine that the corporate form is a sham—that a corporation is being used for some illicit purpose, such as to shield personal assets from personal liability.¹⁷ Still, it is worth noting that the court does not pierce the corporate veil in the corporate-rights cases Winkler analyzes. When a court pierces the corporate veil, it performs a practical, fact-based inquiry in which it determines whether the corporation is truly a separate juridical entity from its shareholders, creditors, and directors.¹⁸ If the court determines that there is no legal separateness, then it can hold shareholders personally liable for the obligations of the corporation.¹⁹

16. *E.g.*, p. 381 (“[A]s with many previous Supreme Court cases invoking corporate personhood, the underlying logic of *Hobby Lobby* [*Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)] reflected instead piercing the corporate veil.”).

17. In fact, he provides a textbook definition of veil-piercing in his analysis of early corporate-rights pieces. *See* p. 55 (“In a small number of highly unusual cases . . . the courts will pierce the corporate veil, ignoring the separate legal status of the corporation and imposing liability on the stockholders personally. Piercing the corporate veil in business law cases is very rare, and courts typically only do it when someone uses the corporate form to perpetuate a fraud or commit wrongdoing.”).

18. *See, e.g.*, *Cancun Adventure Tours, Inc. v. Underwater Designer Co.*, 862 F.2d 1044, 1047–48 (4th Cir. 1988) (“[W]hen substantial ownership is combined with other factors, such as commingling of corporate and personal assets and diversion of corporate funds to the dominant shareholder, a court may peer behind the corporate veil”); *My Bread Baking Co. v. Cumberland Farms, Inc.*, 233 N.E.2d 748, 751–52 (Mass. 1968) (discussing how the separate identities of affiliated corporations may be disregarded when “there is a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting”); *Cheatle v. Rudd’s Swimming Pool Supply Co.*, 360 S.E.2d 828, 831 (Va. 1987) (stating that the corporate fiction may be disregarded if the plaintiff shows that the corporation was the

The Supreme Court does not provide any such analysis in the cases Winkler discusses. Rather than consider whether a particular corporation has acted in a manner that suggests that it is not truly a separate juridical entity, the Supreme Court seems to assert that corporations are *never* distinct from their shareholders when they are claiming constitutional protections.²⁰ And the Court has offered no legal or theoretical defense for that assertion.

Winkler may be using the language of veil-piercing in a metaphorical sense simply to describe situations in which the Court treats corporations as mere associations of shareholders. But in doing so, he downplays the degree to which the Supreme Court has embraced—without justifying—a theory of the corporation in constitutional cases that bears little resemblance to the theory of the corporation that attaches in other contexts.

Based on this observation, I argue that the phenomenon Winkler observes (though mislabels) provides a powerful, albeit undertheorized, critique of hundreds of years of corporate-rights jurisprudence. Both veil-piercing and treating the shareholders as an association of persons look behind the corporate form, but the way the Court has treated corporations in corporate-rights cases is more radical and less justifiable than Winkler's metaphor suggests. What Winkler has identified is not that the Supreme Court "pierces the corporate veil" in constitutional cases but rather that the Supreme Court refuses to recognize the very existence of the corporate form in those cases altogether. In describing this phenomenon as "piercing the corporate veil," Winkler implies that the Supreme Court's treatment of the corporation in constitutional cases is part of a sensible and coherent corporate law doctrine. In this way, Winkler's use of the phrase "piercing the corporate veil" legitimates a practice that bears little resemblance to the doctrine and softens the full force of his criticism of the canonical corporate-rights cases. What Winkler actually shows is that the Supreme Court's existential theory of the corporation in constitutional rights cases is radically at odds with the existential theory of the corporation it adopts in every other area of the law.

Winkler correctly implies that the Supreme Court's constitutional cases are based on a suspect—or at least undertheorized—analytical foundation,²¹

alter ego of the individual shareholders and was a sham used to avoid liability or conceal fraud).

19. *E.g.*, *Cancun Adventure Tours*, 862 F.2d at 1047–48.

20. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) ("Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all." (disapprovingly quoting *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013))).

21. I should note that Winkler himself is a bit more equivocal than I am suggesting. He explicitly states that his book is not "an attack on corporate rights." P. xxiv. Nonetheless, he points out that the seminal corporate constitutional rights cases "have usually rejected the core principle of corporate personhood." P. 395. To the extent that much of the book emphasizes inconsistencies in the Supreme Court's conception of corporate personhood, one might reasonably conclude that Winkler himself is skeptical of the Supreme Court's views on this subject. At the very least, he draws attention to the fact that corporations have appealed to the

and he is right that this argument flows logically from the historical analysis he conducts in *We the Corporations*. To reach that conclusion, however, one must recognize that the United States treats corporations as associations of people in some circumstances and as distinct legal entities in others, and that the Court's decision to abandon the theory of the corporation that it applies in other contexts requires at least some explanation. Winkler's claim that the Court is piercing the corporate veil—whether used metaphorically or not—masks larger inconsistencies in its reasoning.

This is not to say that every corporate constitutional rights case has been wrongly decided. In forthcoming work, Chief Justice Leo Strine and Professor Jonathan Macey argue that the majority in *Citizens United* embraced an indefensible theory of corporate personhood.²² My view is somewhat different. I agree that the theory of the corporation in *Citizens United* is at odds with the theory of the corporation the Court has adopted in other contexts. In my view, however, the deeper problem is that the Court has failed to explain why corporate separateness ceases to apply in constitutional decisions. Of course, corporations may deserve many of the same constitutional protections as people. But if those protections are based on the view that corporations are associations of persons, then the Court should explain why that theory of the corporation applies in certain circumstances and not in others. This critique, moreover, is not limited to *Citizens United* but applies to the vast majority of corporate-rights cases. By using the language of veil-piercing to describe this phenomenon, Winkler gives the misleading impression that the Supreme Court's corporate jurisprudence relies on the same theory of the corporation as the rest of its jurisprudence. But what Winkler actually shows is that *many canonical corporate-rights cases* lack a coherent theory of the corporation and therefore seem like exercises of raw political power divorced from principled legal decisionmaking.

This Review proceeds in four parts. Part I summarizes Winkler's book, giving special emphasis to his argument that the seminal corporate constitutional rights cases have been decided on the ground that corporations are associations of people deserving of constitutional protections. Part II provides a brief overview of the doctrine of piercing the corporate veil. Part III argues that the Supreme Court's treatment of corporations as associations of citizens is a radical departure from the Court's treatment of corporations in all other areas of the law. What Winkler actually shows is not that the Supreme

Constitution to support a deregulatory agenda. He recognizes, for example, that “[c]orporations have a straightforward motivation to seek constitutional rights: to fight laws and regulations that restrict business autonomy and interfere with the pursuit of profit.” Pp. xxi–xxii.

22. See Jonathan R. Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. (forthcoming 2019) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3233118 [<https://perma.cc/X2RW-PW7T>] (“Our challenge considers and rejects the *Citizens United* majority’s conception of the corporation as an ‘associations of citizens’ and reaffirms its status as an artificial, metaphysical, and legal construct that exists separate and apart from its investors.”).

Court pierces the corporate veil in corporate constitutional rights cases but that it fails to even treat corporations as corporations in those cases. Rather, it treats corporate entities as common law partnerships. This confused treatment of corporations supports Winkler's point that corporations have fought hard to be treated as either separate juridical entities or aggregate collections of individual investors—depending on which treatment is in their interest. This Review concludes by suggesting that the original menu of organizational options is properly understood as offering associates to a prospective business venture a choice to organize as a limited liability company or as a partnership. If someone chooses to organize as a corporation, she would receive the benefits of limited liability but forfeit some of the benefits of that organizational form. If she chooses to organize as a partnership, her investment would enjoy constitutional protections, but investors could be held personally liable for the debts of the corporation. In allowing investors to enjoy the benefits of unlimited liability while retaining constitutional protections, the cases analyzed by Winkler have eroded that choice.

I. A SHORT SUMMARY OF *WE THE CORPORATIONS*

We the Corporations is a truly outstanding book. The focus of this Review is on only one—albeit an important one—of Winkler's arguments. But Winkler's contribution spans beyond his argument about piercing the corporate veil. His basic project is to document the process by which corporations came to “have nearly all the same rights as individuals: freedom of speech, freedom of the press, religious liberty, due process, equal protection, freedom from unreasonable searches and seizures, the right to counsel, the right against double jeopardy, and the right to trial by jury” (p. xvi).

Winkler shows, for example, that both America's founding²³ and the American Revolution were inextricably linked to a corporate dispute,²⁴ that more than half of the Fourteenth Amendment cases that went before the Supreme Court in the half century after the Amendment's ratification were brought by corporations (pp. 157–58), and that many corporate victories remained hidden in plain sight. On a more theoretical level, Winkler shows that corporations have acted both as “constitutional first movers” and as “constitutional leveragers” (p. xxiii; emphases omitted). By “constitutional first movers,” Winkler means that corporations have developed creative legal theories that have ultimately trickled down to minorities and other oppressed groups.²⁵

23. Pp. 6–19 (explaining how the Virginia Company's desire to make a profit off its endeavor led to numerous reforms that allowed colonists to successfully farm American soil).

24. Pp. 25–30 (arguing that the right to increase colonial taxes could best be understood as a bailout of the East India Company).

25. One example of this from Winkler's book is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). In that case, the Supreme Court considered whether a corporate entity—the NAACP—could enjoy constitutional protections. The Court “look[ed] past the corporate form and base[d] the decision instead on the associational rights of members.” P. 274.

Winkler's argument about constitutional leveragers is similarly intriguing. Winkler uses the term "constitutional leveragers" to describe situations in which corporations seized upon legal theories that originated to protect oppressed individuals and co-opted those theories to strike down regulations.²⁶ Ralph Nader's battle to protect consumers illustrates this phenomenon. Nader spearheaded a legal team that sought to ensure that consumers were able to receive accurate information about prescription prices (pp. 293–97). The team secured a key victory in the Supreme Court that recognized consumers' interests in commercial information (p. 297). However, because the decision was based on the First Amendment rights of the listener—and not the rights of the speaker—it created an opening for corporations to claim that the doctrine protected their speech.²⁷

But Winkler is not wholly critical of the development of corporate constitutional rights. His first-mover argument shows that a corporation's willingness to use its immense resources to try out novel constitutional theories can pave the way for other constituencies to claim those same constitutional protections and to do so without having to expend resources experimenting with long-shot legal theories. Even the legal theory I criticize—that corporations are associations of persons—provided the theoretical justification for the case that allowed corporations to appear and defend themselves in court.²⁸

In short, Winkler makes a lot of different points, and he provides a nuanced and detailed history of the development of corporate constitutional rights. These are important contributions. Perhaps Winkler's most im-

26. Two examples illustrate this strategy. One example of corporations trying to leverage protections designed for others is Roscoe Conkling's claim that the Fourteenth Amendment was designed to protect corporations as well as individuals. P. 114. For a description of Conkling's Fourteenth Amendment argument, see Chapter Four. Conkling's theory, though factually inaccurate, helped corporations secure due process protections and thereby weaponize the Constitution to strike down regulations. A second example of constitutional leveraging was the corporate bar's successful application of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), which struck down a law prohibiting pharmacists from advertising the prices of prescription drugs; the decision was originally hailed as a liberal consumer-rights decision. See p. 297 ("Blackmun's opinion in *Virginia Pharmacy* appeared, like *Roe*, to be a liberal decision, one that would help consumer rights activists like Nader."). Its reasoning, however, eventually helped corporations strike down regulations designed to prevent them from making misleading advertisements. P. 299. The case's logic was based on the idea that listeners have an "interest in the free flow of commercial information." *Va. Pharmacy*, 425 U.S. at 763.

27. See pp. 299–300 ("Over the next two decades, the doctrine created by *Virginia Pharmacy* . . . would be invoked instead by tobacco companies challenging restrictions on tobacco advertising; gaming interests seeking to overturn restrictions on television and radio ads for casinos; the liquor industry in an effort to invalidate laws limiting alcohol advertising; and dairy producers hoping to defeat requirements to disclose the use of synthetic growth hormones.").

28. Specifically, the associations-of-people theory of the corporation allowed the First Bank of the United States to challenge state taxes that would have prevented the federal government from establishing a federal bank. See pp. 66–67.

portant contribution, however, is his claim that corporations have won constitutional protections predominantly by making a single argument: that corporations are merely associations of people. While the battle for corporate constitutional protections has been fought along a number of dimensions, it is this theory of corporate personhood that has formed the basis for the most important decisions that have extended constitutional protections to corporate entities.

Winkler claims that the Court pierces the corporate veil when it justifies decisions extending constitutional protections to corporations on the view that corporations are associations of people. The first corporate-rights case, according to Winkler, was *Bank of the United States v. Deveaux*, which considered whether Congress could grant corporations the right to sue or be sued in federal court.²⁹ Chief Justice Marshall found that the corporation was “just a stand-in for a group of ‘individuals[,] who, in transacting their joint concerns, may use a legal name.’”³⁰ To deny the corporation constitutional protections, this thinking goes, would be to deny the rights of the individuals who constitute the particular corporate entity. Winkler says that Marshall “embrace[d]” the doctrine of “piercing” (p. 67). He concludes his analysis of *Deveaux* by claiming that “[p]iercing the veil, and allowing a corporation to claim the rights of its members, would be the conceptual tool the court would use to justify the extension of a wide variety of constitutional rights to corporations” (p. 68).

Time and again, Winkler shows, the Supreme Court granted constitutional protections to corporate entities on the ground that corporations are associations of people. The famous case *Trustees of Dartmouth College v. Woodward*, for example, is a high-profile example of the phenomenon Winkler identifies.³¹ *Dartmouth College* held that a legislative grant to a private company was a contract within the meaning of Article I, Section 10 of the Constitution and that business corporations therefore enjoyed the protections of the Contracts Clause.³² According to Winkler, Chief Justice Marshall found that “[t]he rights of the corporation were defined by the rights of the individual members” (p. 86). Winkler again claims that Marshall “pierced the corporate veil” (p. 86). The view that corporations are aggregations of people ultimately provided a theoretical basis for granting corporations Fourteenth Amendment protections (pp. 144–45), the right to freely associate (pp. 273–74), the right to exercise their religious beliefs (pp. 380–81), and the right to speak freely (pp. 363–65).

It is worth noting, moreover, that Winkler also points out that Supreme Court decisions refusing to extend constitutional protections to corporations have historically been supported by the opposite view of the nature of the

29. See 9 U.S. (5 Cranch) 61 (1809).

30. P. 66 (quoting *Deveaux*, 9 U.S. at 87).

31. 17 U.S. (4 Wheat.) 518 (1819).

32. *Dartmouth Coll.*, 17 U.S. at 650, 654.

corporate entity—that corporations are separate legal entities.³³ For example, he argues that “[b]y embracing corporate personhood, rather than piercing the corporate veil, the Taney court imposed boundaries on the rights of corporations” (p. 75). Winkler thus shows that corporate constitutional protections have generally been sustained on the ground that corporations are separate legal entities and that those protections have been extended on the ground that corporations are associations of people. Winkler uses the term “piercing the corporate veil” to describe what the Court is doing when it assumes that corporations are associations of persons, and he shows that this view of corporations has supported legal decisions extending constitutional protections to corporations.

Winkler is clearly correct that when the Supreme Court has extended constitutional protections to corporations, it has embraced the theory that corporations are associations of people. As the next Part argues, however, he is incorrect that the phenomenon he identifies is properly construed as “piercing the corporate veil.”

II. PIERCING THE CORPORATE VEIL

Winkler shows that the view that corporations are associations of people undergirds the Supreme Court’s pivotal constitutional cases, and he uses the phrase “piercing the corporate veil” to describe what the Court is doing when it treats corporations in that way. But piercing the corporate veil refers to a very specific corporate law doctrine. Courts will only pierce the corporate veil when there is some reason to doubt that this separateness exists in practice. The Supreme Court has taken the opposite approach in the constitutional cases Winkler analyzes. What the Court is actually doing, it seems, is imposing some of the principles of partnership law onto corporate entities, at least when it comes to defining those entities’ constitutional rights.

Piercing the corporate veil is an exception to the general rule of limited liability, which is the doctrine that an investor’s losses are limited to the amount that the investor puts into the corporation.³⁴ The doctrine of limited liability allows corporations to enter contractual agreements, sue and be sued, and engage in all sorts of other activities without risking any money beyond that which the shareholders and creditors put in when they made their initial investment.³⁵ Limited liability is generally considered “the primary benefit of the corporate form”³⁶ and has been credited with making it

33. Pp. 74–75 (discussing the Taney Court’s corporate-rights cases that “treated the corporation as if it were a person . . . as an independent legal entity”).

34. See Frank H. Easterbook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89–90 (1985) (“The rule of limited liability means that the investors in the corporation are not liable for more than the amount they invest.”).

35. See *id.*

36. Timothy P. Glynn, *Beyond “Unlimiting” Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 337 (2004).

easier to raise capital and, by extension, contributing to the tremendous economic growth that occurred during the twentieth century.³⁷

The doctrine of piercing the corporate veil refers to the narrow set of situations in which courts ignore the default rule of limited liability and allow shareholders to be held personally liable for the debts of the corporation. Limited liability doctrine has been praised for allowing companies to raise capital,³⁸ and it has been criticized for improperly shifting costs onto innocent creditors and tort victims.³⁹ When a court decides to pierce the corporate veil, it determines that shareholders should be held personally liable for the debts of the corporation.

While courts can justify a decision to pierce the corporate veil on a number of different grounds,⁴⁰ all of the reasons courts give are based on the idea that individuals are using the corporate form illicitly and with the intention of skirting their own private legal obligations.⁴¹ Courts that pierce the corporate veil thus assume that corporations are distinct juridical entities. Veil-piercing thus occurs when courts start to believe that the corporation is acting as some sort of alter ego for its owner and is being used to skirt regulatory obligations.

This is not quite the phenomenon Winkler describes. As Winkler observes, treating a corporation as an association of citizens collapses “the distinction between the corporation and its members, suggesting the courts see right through the corporation and focus instead on the people who compose

37. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000) (“The truly essential aspect of asset partitioning is, in effect, the reverse of limited liability—namely, the shielding of the assets of the entity from claims of the creditors of the entity’s owners or managers.”); Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259 (1967) (arguing that large corporate entities would not exist without limited liability).

38. See, e.g., Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 495 (2001) (“[T]here is a widely shared view that limited liability was, and remains, essential to attracting the enormous amount of investment capital necessary for industrial corporations to arise and flourish.”); Easterbrook & Fischel, *supra* note 34, at 90–98; Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 164 (1992) (“If it is true that the original justification for limited liability was that it encourages investment in the small firm, or investment by entrepreneurs of modest means, and if we are still interested in encouraging individual entrepreneurship through incorporation, this ought to be, perhaps, the most crucial aspect to be considered in veil-piercing doctrine.” (footnote omitted)).

39. See, e.g., Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1880 (1991); Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 61 (1996).

40. Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 107–08 (2014) (summarizing the reasons courts give to pierce the corporate veil).

41. See *id.*

it” (pp. 54–55). Winkler repeatedly uses the metaphor of veil-piercing to describe this phenomenon.⁴²

But the central premise of the doctrine of piercing the corporate veil is that a corporation is a “juridical entity with the characteristic of legal ‘personhood.’”⁴³ The default view in veil-piercing cases is thus that the legal status of corporations can—and should—be separated from the individuals who own and operate them and that courts will only overlook that status distinction after engaging in a fact-intensive inquiry designed to show that there is no genuine separateness between a particular corporate entity and its shareholders. To pierce the corporate veil, the court must find that the shareholders used the corporate form to skirt their individual regulatory obligations.

And veil-piercing cases take this legal separateness very seriously. So seriously, in fact, that courts allow individuals to create a corporation “for the very purpose of escaping personal liability.”⁴⁴ An important tenet of corporate law is that it is very difficult to pierce the corporate veil and hold shareholders personally liable for the obligations of the corporation.⁴⁵ Thus, courts will continue to treat a corporation as a separate juridical entity even when the corporation was established to limit or evade regulatory obligations. Rather, “[t]o state a ‘veil-piercing claim,’ the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors.”⁴⁶ Veil-piercing thus requires that a corporation be used with the specific intent of swindling, cheating, or otherwise harming other parties with an interest in a corporation. It is only when an individual uses the corporate form as part of a scheme to shirk her individual obligations that a court will look past a corporation’s separate legal identity and determine that there was no separateness in a particular case. In short, courts exercise their authority to pierce “reluctantly” and “cautiously,”⁴⁷ and judicial piercing should be “limited to rare cases involving fraud or abuse” (p. 67).

42. *E.g.*, p. 55 (“Corporate lawyers today have a name for this way of thinking about corporations. They call it ‘piercing the corporate veil.’ The ordinary rule, ever since the days of Blackstone, is that there is a strict separation between the corporation and the people behind it. [That is why the corporation, not the stockholders, is liable if someone is injured using the company’s products.] In a small number of highly unusual cases, however, the courts will pierce the corporate veil, ignoring the separate legal status of the corporation and imposing liability on the stockholders personally.”).

43. *See* Macey & Mitts, *supra* note 40, at 100.

44. *Bartle v. Home Owners Coop.*, 127 N.E.2d 832, 833 (N.Y. 1955).

45. *See, e.g., Renault, Inc. v. Marble*, 317 F.2d 265 (10th Cir. 1963) (outlining the contours of limited liability).

46. *Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003).

47. *DeWitt Truck Brokers v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976) (quoting *Pardo v. Wilson Line of Wash., Inc.*, 414 F.2d 1145, 1149 (D.C. Cir. 1969), and quoting *Country Maid, Inc. v. Haseotes*, 299 F. Supp. 633, 637 (E.D. Pa. 1969)).

By contrast, in the constitutional cases Winkler analyzes, the Supreme Court has conceptualized the corporation as an association of people without determining whether the corporation has engaged in any kind of misconduct. The critical distinction between traditional veil-piercing cases and the constitutional rights cases is that veil-piercing occurs when a corporation behaves improperly, whereas constitutional rights do not require that a corporation do anything at all. In constitutional rights cases, the Supreme Court has assumed that the corporation is an association of people regardless of whether shareholders, creditors, managers, or employees (or whoever happens to make up the association) have even engaged in any behavior in the first place. Constitutional rights seem to simply flow organically out of the nature of the corporation. This could be understood to establish an alternative, existential theory of the corporation that assumes that corporations are *never* distinct juridical entities. For those reasons, it is somewhat misleading to equate the treatment of the corporation as an association of individuals with the corporate law doctrine of piercing the corporate veil.

Rather than viewing *Citizens United*, *Hobby Lobby*, and *Southern Pacific* as veil-piercing cases, it would be more precise to recognize that the Court presupposes that there is simply no veil to be pierced in those cases. What Winkler has discovered is that the Court assumed that there is no separation between the corporation and its shareholders. This, it seems, constitutes an existential theory about the very nature of the corporation.

III. CORPORATIONS ARE NOT ASSOCIATIONS OF PEOPLE

The doctrine of piercing the corporate veil assumes that corporations are separate and distinct from their shareholders, creditors, and managers. By contrast, the view that corporations are associations of people assumes that there is no veil to pierce. In a forthcoming Article, Chief Justice Leo Strine and Jonathan Macey offer a comprehensive analysis of *Citizens United* and show that the Supreme Court's conception of the corporation in that case is inconsistent with the conception of the corporation that attaches in other corporate cases.⁴⁸ Their analysis builds on work by Vincent Buccola and Elizabeth Pollman, who have argued that the Supreme Court has failed to articulate a coherent theory of corporate constitutional rights.⁴⁹

48. Macey & Strine, *supra* note 22 (manuscript at 4) (“Our challenge considers and rejects the *Citizens United* majority’s conception of the corporation as an ‘associations of citizens’ and reaffirms its status as an artificial, metaphysical, and legal construct that exists separate and apart from its investors.”).

49. See, e.g., Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 502 (2016) (observing that “one searches the case law in vain for a comprehensive explanation” of the Supreme Court’s corporate rights cases but arguing that the principle of “organizational neutrality” can be understood to provide “a unifying method in the Court’s apparent madness”); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 32 (2014) (stating that “the Court has not developed a coherent method or test for” determining which rights corporations hold). It is worth noting that not all scholars think that the Supreme Court’s constitutional cases are straightforward extensions of federal power. Both

This Part agrees with Macey and Strine that the view of the corporation that the Supreme Court has adopted in *Citizens United* is a radical departure from the view of the corporation that the Court has embraced in other contexts and is inconsistent with basic principles of American corporate law. But this critique applies broadly to hundreds of years of corporate-rights cases and need not be cabined to *Citizens United*. Moreover, in showing that the Supreme Court has consistently embraced a theory of the corporation in constitutional cases that is analytically distinct from the theory it adopts in other corporate cases, Winkler suggests that the Court has simply failed to articulate a theoretical or analytic justification of corporate constitutional rights. Simply put: in virtually all nonconstitutional cases involving corporations, the Supreme Court assumes that corporations are separate juridical entities. The examples of diversity jurisdiction, taxation, and criminal liability are illustrative.

A. Diversity Jurisdiction

Conceiving of the corporation as an association of people is inconsistent with the theory of the corporation that supports the doctrine of diversity jurisdiction. 28 U.S.C. § 1332 grants jurisdiction to federal courts when there is complete diversity among parties. According to the Supreme Court, a corporation can establish complete diversity by showing that its principal place of business is in a different state than that of its counterparties.⁵⁰ The Supreme Court has explained that a corporation's principal place of business is "the place where the corporation's high-level officers direct, control, and coordinate the corporation's activities."⁵¹

This view of diversity jurisdiction would not make sense if a corporation were an association of the people who own and operate it. That is because if the Court truly embraced the associational view consistently across its corporate jurisprudence, then a corporation would be "present" for purposes of diversity jurisdiction in every state where its shareholders reside. As Macey and Strine point out, "[b]ecause shareholders of large publicly held corporations generally reside in all fifty states," the view of the corporation that the Supreme Court has adopted in constitutional cases—and that Winkler so

Buccola and Pollman have argued that the corporate constitutional cases actually preserve a role for states to delineate the bounds of corporate rights. See Vincent S.J. Buccola, *States' Rights Against Corporate Rights*, 2016 COLUM. BUS. L. REV. 595, 597–98 ("The practical meaning of the corporate-rights cases is less a function of the Constitution than of garden-variety state laws. . . . [T]he states can already enact ordinary legislation that would practically undermine their domestic corporations' federal rights."); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 642–43 (2016) (arguing that "in expanding corporate rights, the Supreme Court has pointed to state corporate law as the mechanism for resolving disputes among corporate participants" and critiquing these decisions as having "upended the traditional function and domain of state corporate law").

50. See *Hertz Corp. v. Friend*, 559 U.S. 77, 80–81 (2010).

51. *Id.*

cogently identifies—“would undermine the plain meaning of the federal diversity of citizenship statute for corporations.”⁵²

Moreover, it is worth noting that diversity jurisdiction treats other organizational forms in a manner that is more consistent with the proposition that they are associations of people. For example, courts recognize that partnerships, limited partnerships, and limited liability corporations are citizens of the states in which the organization’s partners or members are citizens.⁵³ In establishing that corporations are distinct from other organizational forms in this respect, corporate law recognizes corporations have more legal separateness than partnerships.

B. *Taxation*

Since Congress passed the federal income tax in 1909,⁵⁴ corporations often have had to pay “double taxation” because the corporation pays taxes at the corporate level when it earns profits, and then its shareholders pay a second tax when profits are distributed as dividends that are subject to the individual income tax.⁵⁵ The fact that corporate profits are taxed both when the corporation reports and a second time when it pays dividends is consistent with the view that a corporation is a distinct legal entity that can earn profits in its own right but not with the associational view of the corporation.

And note that tax law respects the fact that corporate personhood flows out of legislative enactments delineating the scope of corporate rights and obligations. Under Subchapter S of the Internal Revenue Code, certain closely held corporations enjoy the right to be taxed in the same manner as a partnership.⁵⁶ In this way, the federal government has determined that certain closely held corporations can be understood to be “less separate” than larger corporations. At least in the tax context, Congress has designed regulatory regimes that reflect the particular concerns of particular organizational forms. In doing so, it has exercised its authority to demarcate the degree of

52. Macey & Strine, *supra* note 22 (manuscript at 53).

53. 13F CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3630.1 (3d ed. 2009) (“[T]he Supreme Court has held that the state citizenship of all members of an unincorporated association will be taken into account in determining the association’s citizenship when a question of diversity jurisdiction arises.”); *see, e.g.*, 3123 SMB LLC v. Horn, 880 F.3d 461, 465 (9th Cir. 2018) (“For purposes of diversity jurisdiction, a limited liability company ‘is a citizen of every state of which its owners/members are citizens.’” (quoting *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006))).

54. Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 11, 112–17.

55. *See* Michael S. Knoll, *An Accretion Corporate Income Tax*, 49 STAN. L. REV. 1, 2 n.4 (1996). Congress enacted the double taxation of corporate income in 1936. Steven A. Bank, *Corporate Managers, Agency Costs, and the Rise of Double Taxation*, 44 WM. & MARY L. REV. 167, 170–71, 228 (2002).

56. Specifically, Subchapter S allows corporations to be taxed as partnerships if they have one hundred or fewer shareholders and meet certain other requirements. I.R.C. § 1361 (2012 & Supp. V 2018).

a corporation's separateness. This would not be possible if all corporations were associations of their shareholders and managers.

C. Criminal Liability

In addition, corporate criminal liability is inconsistent with the associations-of-people view of the corporation and reflects the view that corporations are separate legal entities. In fact, the view that corporations are associations of people suggests that corporations cannot be held criminally liable for the actions of their agents. Today, corporations can be held "criminally liable for the federal crimes its employees or agents commit in its interest."⁵⁷ The Supreme Court first found that corporations could be held criminally liable in *New York Central & Hudson River Railroad Co. v. United States*.⁵⁸ In that case, the Court explained that a "statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy."⁵⁹ According to Margaret Blair and Elizabeth Pollman, the Supreme Court cases that recognized that corporations could be held criminally liable were notable because they indicated that the Court had "moved into a new area of constitutional protection for corporations—one arguably beyond contract and property interests—and it did not stop to explain whether the associational view still fit this purpose, who was included in this characterization, and whether it appropriately described the corporations involved in the underlying matter."⁶⁰ Thus, like the doctrines of diversity jurisdiction and double taxation, corporate criminal liability treats corporations as separate legal entities that can be regulated in their own right. But the implications of the associations-of-people view of the corporation are even more far-reaching in the criminal law context. Under the associational view of the corporation, it would not be possible to hold corporations criminally responsible for the actions of their agents, because only the individuals who make up the corporation—and not the corporation itself—would be capable of committing a crime.

Of course, the fact that corporations are separate juridical entities does not mean that they have *all* of the same rights and obligations as people. Rather, corporations enjoy certain privileges, such as limited liability, that do not extend to individual persons. In exchange, they incur unique liabilities such as double taxation.

57. CHARLES DOYLE, CONG. RESEARCH SERV., R43293, CORPORATE CRIMINAL LIABILITY (2013), <https://fas.org/sgp/crs/misc/R43293.pdf> [<https://perma.cc/Y76V-Z3D6>].

58. 212 U.S. 481 (1909).

59. *N.Y. Cent. & Hudson River R.R.*, 212 U.S. at 494-95.

60. Blair & Pollman, *supra* note 14, at 1718.

D. *General Partnership*

Corporate law scholars actually have a name for the organizational form that treats business entities as associations of persons, and it is not “corporation.” A more appropriate description for a group of people who get together to jointly own and manage a business venture without creating a separate juridical entity—or at least by creating a juridical entity that is more closely tied to its owners and managers—is a “general partnership.”⁶¹

Partnerships are not separate juridical entities in the same way as corporations. In a general partnership, the owners are jointly liable for the partnership’s debts.⁶² There is no limited liability because the debts of the partnership attach directly to the partners. Moreover, partnerships are pass-through entities, which means that they are not subject to double taxation.⁶³ The implication is that, unlike a limited liability corporation, a general partnership is more closely tied to its owners and, therefore, more closely approximates a true association of people.

Thus, while the Supreme Court continues to treat corporations as corporations when it comes to their property rights, it effectively treats them as common law partnerships when it considers whether to extend constitutional protections. This treatment is inconsistent with a vast body of corporate law and misunderstands how corporate ownership actually works.

CONCLUSION

Recognizing what is actually going on in the major corporate constitutional rights cases reveals the full force of Winkler’s claim. Winkler has discovered that the Supreme Court has extended constitutional protections to corporations based on a vision of the corporation that is inconsistent with the theory that undergirds the rest of corporate law.

It is unfortunate that Winkler describes the Supreme Court’s theory of the corporation in corporate constitutional rights cases as “piercing the corporate veil,” because that phrase conceals what the Supreme Court is actually doing. As Part II showed, piercing the corporate veil is a legal doctrine that respects the fact that corporations are separate juridical entities. The doctrine is therefore consistent with the large body of corporate law that also regards the corporation in this way. In claiming that the Supreme Court is

61. See UNIF. P’SHP ACT § 301(1) (UNIF. LAW COMM’N 1997) (“An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.”).

62. See *id.* § 306(a) (“Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.”).

63. See Paul B. Stephan III, *Disaggregation and Subchapter C: Rethinking Corporate Tax Reform*, 76 VA. L. REV. 655, 659 (1990).

piercing the corporate veil when it says that corporations are associations of people, Winkler could be understood to suggest that the Court has adopted a theory of the corporation that is coherent and not in tension with the rest of corporate law.

But that is misleading. As the previous two Parts showed, the theory of the corporation that the Supreme Court has adopted in constitutional cases is radically at odds with the theory of the corporation that it has embraced in the rest of its jurisprudence. Whereas the rest of the law regards corporations as separate juridical entities, the Supreme Court has carved out a narrow area of the law and asserted—without explaining why—that in that area, the law will treat corporations in a different manner. Winkler’s use of the phrase “piercing the corporate veil” thus legitimates the Supreme Court’s treatment of corporate entities in constitutional rights cases because that phrase falsely suggests that the theory of the corporation that supports those cases can be reconciled with the theory of the corporation that the Court adopts in other areas of its jurisprudence. While Winkler may be using the phrase metaphorically to describe situations in which the Court treats corporations as associations of people, the phrase is an inapt metaphor. It suggests that the theory of the corporation the Court has adopted in its constitutional rights jurisprudence is consistent with the rest of corporate law.

Both veil-piercing and treating the shareholders as an association (or the enterprise as a general partnership) look behind the corporate form, but the way the Court has treated corporations in corporate-rights cases is more radical and less justifiable than Winkler’s metaphor suggests. Winkler’s use of that phrase thus also conceals some of the more radical implications of his argument and, in my view, weakens his broader critique of Supreme Court decisions extending constitutional protections to corporations. What is perhaps most provocative about *We the Corporations* is that, through painstaking historical research, Winkler has discovered that the Supreme Court has consistently embraced a theory of the corporation in constitutional cases that is inconsistent with the theory of the corporation that undergirds other areas of the law. Perhaps most importantly, Winkler shows that the Supreme Court has failed to explain its decision to treat corporations as associations of people in constitutional cases but not in other cases⁶⁴ and that there is no principled legal reasoning behind the special treatment corporations receive. The Supreme Court’s inconsistent conception of the corporation—and its failure to explain this inconsistent treatment—is what makes Winkler’s critique of the Court’s logic in constitutional rights cases so powerful.

Corporations’ special legal treatment does not, as Winkler suggests, stem simply from the fact that courts have extended the same constitutional protections to corporations as have been extended to people. Rather, their special legal treatment arises because they are able to both enjoy constitutional protections and have the unique ability to shift the costs of harmful behavior

64. See pp. 54–56, 57, 59–60, 62, 66, 67–68, 74, 75, 87–88, 100–01, 107, 145, 176, 273, 275, 364, 378, 381, 385–86.

onto other members of society through doctrines such as limited liability and the business judgment rule.

Generally, corporate law allows business entities to choose either to be treated as separate legal entities, in which case they are able to enjoy limited liability, or to be treated as a partnership, in which case they enjoy pass-through tax benefits but are personally liable for the debts of the partnership. The idea is that American law provides a menu of organizational options and that choosing to opt into one confers certain benefits and imposes certain costs. Theoretically, the benefit of corporate organization is that corporations are treated as separate legal entities, which means that investors enjoy limited liability. The downside of creating a separate legal entity is that the corporation can be regulated as such, which means it has to pay taxes and can be subjected to criminal sanctions. Corporate law thus forces individuals to live with the consequences of the organizational form they select.

The natural consequence of the Supreme Court's decision that corporations are associations of people is in tension with the logic of limited liability, double taxation, and corporate criminal liability. How can a corporation be fined for a criminal infraction if the corporation is simply an association of people? On the associations-of-people view of the corporation, a corporation could not possibly commit a crime because it does not exist separate and apart from the people who own and manage it. For that reason, criminal sanctions could only attach to the individuals who committed a crime. Similarly, how could a corporation enjoy limited liability if it is nothing more than an association of shareholders and creditors? The theory that corporations are separate juridical entities provides the theoretical justification that allows them to possess their own property. But if they are simply associations of people, then there is nothing to separate the property of the corporation from the property of the corporation's shareholders.

Winkler shows that the Supreme Court has selectively applied the existential theory that corporations are associations of people and has done so without coherently explaining why corporations and shareholders are separate legal entities in some situations but not in others. If corporations are not "associations of citizens" in every case, then it is not immediately apparent why they should be regarded as such in constitutional cases. At the very least, the Supreme Court's assertion that corporations are associations of people in constitutional cases demands an explanation. Moreover, applying the court's reasoning to traditional corporate law cases would destroy the concept of limited liability and, in doing so, undermine what many see as a central pillar of modern economic development.

It may be the case that corporations deserve some of the same constitutional protections as people. Winkler has shown, however, that the Supreme Court has failed to articulate a justification for extending constitutional protections to corporations. That is because if corporate constitutional rights are derivative of individuals' constitutional rights, as the Supreme Court has claimed on numerous occasions, then it would seem that a constitutional infraction would require showing that an *individual*—not a *corporation*—is the wronged party. Perhaps some of the Supreme Court's constitutional cases

could be defended on this ground. The important point, however, is that Winkler has shown that this kind of logic is entirely missing from the canonical cases that have given corporations constitutional rights.