

THE PERSONHOOD PARADOX: *CITIZENS UNITED* AS REJECTION OF CORPORATE PERSONHOOD?

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I recently received reprints of my essay, *Does Corporate Personhood Matter? A Review of, and Response to, Adam Winkler's We the Corporations*,¹ and was reminded that Professor Tracy Thomas, Seiberling Chair of Constitutional Law and Director of the Center for Constitutional Law at the University of Akron School of Law, had generously offered to publish an excerpt thereof in *ConLawNOW*, the online legal journal published by the Center.² The essay itself was an invited piece, my contribution to a CLE workshop, *Business Law: Connecting the Threads II*, at the University of Tennessee College of Law on September 14, 2018.³ What I have chosen to excerpt here, following a brief introduction, addresses three questions of corporate personhood that should be of interest to readers of this journal.

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1. 20 TRANSACTIONS: TENN. J. BUS. L. 1009 (2019).

2. See *Center for Constitutional Law*, U. OF AKRON SCH. OF L., <https://www.uakron.edu/law/cccl/> [<https://perma.cc/NP75-TQHQ>] (“Congress established the Center for Constitutional Law at Akron in 1986 as one of four national resource centers dedicated to legal research on constitutional issues.”).

3. See Joan Heminway, *Connecting the Threads II - Laboring on Labor Day*, BUSINESS LAW PROF BLOG (Sep. 3, 2018), https://lawprofessors.typepad.com/business_law/2018/09/connecting-the-threads-ii-laboring-on-labor-day.html [<https://perma.cc/EH3R-WREM>] (“[O]ur second annual Business Law Prof Blog symposium . . . will be held at The University of Tennessee College of Law on September 14. The symposium again focuses on the work of many of your favorite Business Law Prof Blog editors, with commentary from my UT Law faculty colleagues and students.”).

INTRODUCTION⁴

UCLA Law Professor Adam Winkler has published an excellent book on the history of corporate rights. The book, *We the Corporations: How American Businesses Won Their Civil Rights*, “reveals the secret history of one of America’s most successful yet least-known ‘civil rights movements’—the centuries-long struggle for equal rights for corporations.”⁵ The book has been highly praised by some of the greatest minds in corporate and constitutional law, and the praise is well-deserved. However, the book is not without its controversial assertions, particularly when it comes to its characterizations of some of the key components of corporate personhood and corporate personality theory. This response essay will focus on unpacking some of these assertions, hopefully helping to ensure that advocates who rely on the book will be informed as to alternative approaches to key issues.

Specifically, the propositions examined in this Essay include: (1) “corporate personhood has played only a small role in the expansion of constitutional rights to corporations,”⁶ (2) “the history of corporate rights has largely been a struggle between the disparate poles of personhood and piercing,”⁷ and (3) “in *Dartmouth College*. . . . Marshall was saying that corporations were too ethereal to be the basis for constitutional rights and that, instead, the court should focus on the corporation’s members.”⁸

While I provide reasons for questioning each of the foregoing propositions, I ultimately conclude that none of these criticisms undermine the book’s overall value. Most, if not all, of the issues I identify may be viewed as providing alternative ways of thinking about what is essentially the same perspective. However, advocates relying on Winkler’s book who have not been alerted to these criticisms risk being caught off guard in ways that will undermine their objectives. Thus, this Essay will hopefully provide a useful adjunct to Winkler’s impressive work.

4. Excerpted from Padfield, *supra* note 1, at 1009.

5. ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS*, at back cover (2018).

6. *Id.* at 37.

7. *Id.* at 61-62.

8. *Id.* at 66 (discussing *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)).

I. PIERCING OR IGNORING THE CORPORATE PERSON VERSUS APPLYING AGGREGATE OR REAL ENTITY THEORY⁹

By way of introduction, concession theory (also known as artificial entity theory) views the corporation as a creature of the state that is presumed to be subject to much greater regulation than citizens. Aggregate theory (often aligned with the nexus-of-contracts theory of the corporation)¹⁰ views the corporation as merely an association of individuals (typically, the shareholders) who, like many other associations, can assert a variety of rights against government regulation, even when acting in the corporate form.¹¹ Finally, real entity theory is quite similar to aggregate theory, except that it views the relevant association as either broader than or different from an association of shareholders in order to, among other things, avoid jeopardizing the shareholders' limited liability.¹²

In *We the Corporations*, Winkler barely mentions the traditional theories of the corporation.¹³ Rather, he presents the relevant issue as one of piercing versus personhood or, alternatively, ignoring versus respecting corporate personhood. For example, he argues that “the history of corporate rights has largely been a struggle between the disparate poles of personhood and piercing.”¹⁴ Elsewhere, he states that when the Supreme Court has “ignored the corporate form and looked to the rights of the individuals who made up the corporation, the rulings naturally tended to give corporations nearly all the same rights as individuals.”¹⁵

9. Excerpted from Padfield, *supra* note 1, at 1015-16, 1026-29.

10. Cf. Joseph F. Morrissey, *A Contractarian Defense of Corporate Regulation*, 11 TENN. J. BUS. L. 135, 138 (2009) (“The most problematic portion of the nexus-of-contracts framework for me has been the normative claim that many proponents of the framework have proffered: that, because the corporation can be viewed as this bundle of privately ordered contracts, regulation is largely unnecessary and undesirable.”).

11. Cf. Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of “Nexus of Contracts” Theory*, 109 MICH. L. REV. 1127, 1130 (2011) (“Corporations are not creatures of contract. One cannot contract to form a corporation. The individuals involved must apply to a state for permission to create such an entity. The fact that this permission is readily granted . . . does not change the fact that permission is required.”).

12. Cf. *Bank of Augusta v. Earle*, 38 U.S. 519, 586 (1839) (“If it were held . . . that the members of a corporation were to be regarded as individuals carrying on business in their corporate name . . . they . . . would be . . . a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation . . .”).

13. For example, a search of the Kindle version of the book revealed that the word “concession” does not appear once.

14. WINKLER, CORPORATIONS, *supra*, note 5, at 62.

15. *Id.* at 62 (concluding that “[e]xpansive constitutional rights for corporations were built into the logic of piercing.”).

Thus, we are left with two competing characterizations. On the one hand, we might characterize the relevant cases as acknowledging corporate personhood while applying the aggregate or real entity view to focus on the natural persons making up the corporation. On the other hand, we can characterize the analysis as ignoring corporate personhood, and piercing the corporate veil to get at those same natural persons. However, at least one of the problems with stating the case as one of ignoring corporate personhood is that this flies in the face of corporate personhood being what gets the corporation through the courthouse doors in the first place. I will address this point in more detail below.

Relatedly, the problem with using the narrative of piercing is that piercing is generally understood to be a means of imposing liability on shareholders, not expanding the scope of their rights against regulation to encompass their actions via the corporate form.¹⁶ Winkler acknowledges this last point when he writes that:

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. 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.¹⁷

16. Reverse piercing may be used to allow a plaintiff to access the assets of a corporation owned by a defendant who has been found liable to the plaintiff. Ariella M. Lvov, *Preserving Limited Liability: Mitigating the Inequities of Reverse Veil Piercing with A Comprehensive Framework*, 18 U.C. DAVIS BUS. L.J. 161 (2018) (describing reverse piercing as “facilitating access to a corporation’s assets for satisfaction of a wrongdoing-shareholder’ personal debt”). *But see* Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2d 235, 242 (2013) (“At least one court has recognized the potential for using [reverse veil piercing] in the mandate cases, opining that these cases ‘pose difficult questions of first impression,’ including whether it is ‘possible to ‘pierce the veil’ and disregard the corporate form in this context,’ which merit ‘more deliberate investigation.’”) (citation omitted); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 902 (2016) (“[A]lthough the [Deveaux] Court held that a corporation could be considered as a ‘company of individuals’ for jurisdictional purposes, it did not suggest that it would pierce the corporate veil and look through to the individuals comprising the corporation for any purposes that were not incidental to the corporation’s existence—such as spending money on a political campaign.”).

17. WINKLER, CORPORATIONS, *supra*, note 5, at 55.

Perhaps these competing perspectives can be explained as flowing from differences between corporate and constitutional law. As Winkler describes it: “[P]iercing the veil in business law cases is limited to rare cases involving fraud or abuse; it is the exception, not the rule. In constitutional law, by contrast, the exception would become the rule.”¹⁸ Or perhaps they constitute a distinction without a difference.¹⁹ At the very least, it is likely important for advocates to understand that they may get very different reactions depending on whether they (1) describe the justification for granting corporations rights as being rooted in piercing the corporate veil or ignoring corporate personhood, as opposed to (2) acknowledging a need and respect for corporate personhood, but focusing on the aggregate and/or real entity theory of corporate personhood to justify the extension of rights.

A word here about *Masterpiece Cakeshop*,²⁰ the recent U.S. Supreme Court case wherein a baker, operating in the corporate form, had been found by the Colorado Civil Rights Commission (CCRC) to have violated the Colorado Anti—Discrimination Act by refusing to bake a wedding cake for a same-sex couple due to his religious objection to same-sex marriage. The Supreme Court ultimately ruled in favor of the baker by a vote of 7-2, finding that that the CCRC had failed to comply with the U.S. Constitution’s Free Exercise Clause’s requirement of religious neutrality by displaying a hostility to religion in its proceedings.²¹ What is of particular relevance here is that the Court completely ignored the argument that the plaintiff in the case was a corporation rather than the individual baker, and that at the very least the right of a corporation to claim religious freedom under the U.S. Constitution had not yet been decided, and that such a right should not be granted to corporations.²²

Leading up to the case, I signed on to the Brief of Amici Curiae Corporate Law Professors, authored by Kent Greenfield²³ and Daniel

18. *Id.* at 67-68.

19. *Cf. id.* at 378 (“Romney and the justices used the language of personhood but employed the logic of piercing. They called corporations ‘people,’ yet pierced the corporate veil, looking right through the corporate form to base the decision on the rights of the corporations’ members.”).

20. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

21. *Id.* at 1729 (“The Civil Rights Commission’s treatment of [the baker’s] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.”).

22. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (holding that corporations had standing under the Religious Freedom Restoration Act, which is understood to grant broader protection for religious exercise than the First Amendment).

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Rubens,²⁴ which argued in part that “because of the separate legal personality of corporations and shareholders, the constitutional interests of shareholders should not be projected onto the corporation.”²⁵ Thus, the Court certainly should have been aware of the issue. However, the Court at least assumed for the purposes of the opinion both that the corporation had standing, and that nothing about its corporate status should differentiate the relevant analysis from what it would have been had the plaintiff been a natural person.

Following issuance of the opinion, Winkler wrote a column in *Slate* with the headline: *Masterpiece Cakeshop’s Surprising Breadth: The Supreme Court granted constitutional religious liberty to corporations—without explaining why.*²⁶ Winkler did note the possibility that “future courts, when confronted with corporate assertions of religious liberty, will say that *Masterpiece Cakeshop* leaves the issue open and sets no definitive precedent,” but further noted that history “suggests another outcome” because corporations have repeatedly “won rights through Supreme Court decisions that, like *Masterpiece Cakeshop*, provide little or no justification for why corporations as such should be able to claim those rights.”²⁷

To return to the theme of this section, it is likely too early to tell whether *Masterpiece Cakeshop* will strengthen Winkler’s claim that corporate rights expand when courts ignore corporate personhood, or whether the issue will be deemed to have been left open, and future resolution will involve at least some discussion of whether corporations are better conceived of as (1) mere associations of individuals, thereby embracing aggregate or real entity theory, or (2) state creations subject to greater government control than natural persons, thereby embracing concession/artificial entity theory.²⁸

24. Senior Associate, Orrick, Herrington & Sutcliffe LLP.

25. Brief for Corporate Law Professors as Amici Curiae Supporting Respondents at 3, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S.Ct. 1719 (2018) (No. 16-111), 2017 WL 5127303.

26. Adam Winkler, *Masterpiece Cakeshop’s Surprising Breadth*, *SLATE* (June 6, 2018), <https://slate.com/news-and-politics/2018/06/masterpiece-cakeshop-grants-constitutional-religious-liberty-rights-to-corporations.html> [<https://perma.cc/R6RB-CQ8U>].

27. *Id.*

28. Cf. Howard Kislowicz, *Business Corporations as Religious Freedom Claimants in Canada*, 51 *REVUE JURIDIQUE THÉMIS DE L’UNIVERSITÉ DE MONTRÉAL* 337, 337-38 (2017) (“The argument for categorically denying a corporation’s religious freedom claims usually rests on a conception of what the corporation is: as an artificial person, a corporation simply cannot hold the requisite religious or conscientious belief to ground such a claim.”).

II. DEBATING DARTMOUTH COLLEGE

The U.S. Supreme Court case of *Trustees of Dartmouth College v. Woodward*²⁹ is routinely cited as representative of concession theory.³⁰ G. Richard Shell provides a general description of the case:

In *Dartmouth College* the Court held that the state of New Hampshire violated the contract clause of the U.S. Constitution by attempting to revoke a royal charter granted to Dartmouth College before the American Revolution. Justice Story opined that the Constitution would not be offended by changes in state corporation law if the state conditioned the granting of its charters with a reserved power to alter or amend the corporate statute. *Dartmouth College*, 17 U.S. (4 Wheat.) at 675, 712 (Story, J., concurring). This lawyerly advice led to enactment of ‘reserve power’ clauses in all state corporation statutes under which states reserved the right to alter, amend, or repeal provisions of their corporate codes without constitutional limitation.³¹

The characterization of *Dartmouth College* as representative of concession theory stems primarily from the following and related language in the opinion:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. The objects for which a corporation is created are universally such as the government wishes to promote.³²

However, in *We the Corporations*, Prof. Winkler describes this characterization as a mistake.³³ Instead, Winkler posits that the opinion

29. 17 U.S. (4 Wheat.) 518 (1819).

30. J.W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970* at 9 (“borrowing from Coke and Blackstone, Marshall gave this view classic expression” in *Dartmouth College*); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* at 72 n.36 (1992) (citing *Dartmouth College*, 17 U.S. at 636, in connection with discussion of concession theory of the corporation); Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1006 (2010) (“This language reflects the artificial entity view of the corporation.”) (quoting *Dartmouth College*, 17 U.S. at 636).

31. G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 544 n.175 (1989).

32. *Dartmouth College*, 17 U.S. at 636-37.

33. See WINKLER, *CORPORATIONS*, *supra* note 5, at 66 (“Although some have mistakenly interpreted that language in *Dartmouth College* to mean that Marshall embraced corporate personhood, in fact he meant the opposite. Marshall was saying that corporations were too ethereal to be the basis for constitutional rights and that, instead, the court should focus on the corporation’s members.”).

and quoted language represents more piercing of the corporate veil and ignoring of corporate personhood in order to expand corporate rights:

[W]hen Marshall echoed his line from *Bank of the United States* and described the corporation in *Dartmouth College* as “an artificial being, invisible, intangible, and existing only in contemplation of law,” he was offering a justification for once again rejecting corporate personhood. The artificiality and invisibility of the corporation made it appropriate to look right through the corporation to focus instead on the members.³⁴

While it is true that *Dartmouth College* could have treated the corporation as subject to even greater state control than it did, the oft-quoted language—particularly that being “the mere creature of law,” a corporation “possesses only those properties which the charter of its creation confers upon it,” and that the “objects for which a corporation is created are universally such as the government wishes to promote”—is simply not congruent with the view that corporations are merely associations of individuals. Rather, the language quite clearly expresses the view that corporations are materially different from natural persons, and that this difference is rooted in the state’s role in their creation and scope of rights.

Having said that, the opinion just as clearly does not ignore the natural persons carrying out the various roles that make corporations manifest, and it places meaningful constitutional limits on the state’s power to amend the bargain it has entered into with those people, absent adequate notice.³⁵ So how should an advocate use the opinion?

My advice to advocates intending to make use of the opinion, or likely to encounter it, is to recognize that the artificial entity/concession theory language is just too strong, and the history of the opinion being cited as standing for those theories too long, to think it effective to start citing and discussing it as representative of aggregate theory or piercing.³⁶ However, depending on the advocate’s goals, noting the

34. *Id.* at 86-87.

35. *Cf.* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 69 (1992) (“Advocates of Contract Clause protection for shareholders are aware of the ‘reserve’ clauses resulting from *Dartmouth College*, but they appear to underestimate the full import of these powers. States have ‘reserved’ the freedom . . . to ‘impair’ the rights of shareholders . . .”).

36. On August 24, 2018, I ran a Westlaw search for “‘Dartmouth College’/ s (‘concession theory’ ‘artificial entity’).” The search returned 18 secondary source citations, and a quick review of the five most cited showed that four of the five positively associate *Dartmouth College* with concession theory in at least some manner. *See* Orts, *supra* note 35, at 68 (“[T]he new Contract Clause challenge asks courts to accept the recently minted and influential ‘contracts theory’ of the corporation. This theory derides the ‘concession theory’ of the corporation attributable to *Dartmouth*

emphasis of the opinion on the contractual nature of the corporation, as well as the fact that the opinion limited government intrusion into the workings of the corporation by at least in part highlighting its private rather than public status, are important qualifications to at least be aware of.

III. DOES CORPORATE PERSONHOOD MATTER?

In *We the Corporations*, Winkler writes that “[t]oday’s critics of *Citizens United* often blame corporate personhood for the Supreme Court’s expansive protection of corporate rights. Yet historically, the logic of personhood has usually been employed by populists seeking to narrow or limit the rights of corporations.”³⁷ Elsewhere, he argues that “for those today who wish to see the Supreme Court restrict the constitutional rights of corporations, looking back to Webster’s era reveals a potential model. By embracing corporate personhood, rather than piercing the corporate veil, the Taney court imposed boundaries on the rights of corporations.”³⁸ Putting aside questions about Webster’s era,³⁹ piercing the corporate veil,⁴⁰ and the role of Taney in the corporate

College . . .”); Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 774 (1989) (“[T]he ‘concession’ theory . . . view of the corporation was stated in the first great corporation case of this country, *Trustees of Dartmouth College v. Woodward*.”); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1635 (2011) (“*Trustees of Dartmouth College v. Woodward*, illustrates how the concession theory animated the Supreme Court’s early view of the corporation.”); Ann E. Conaway Stilson, *Reexamining the Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors’ Duties to Creditors*, 20 DEL. J. CORP. L. 1, 101 (1995) (“As recently as 1987, the Supreme Court has quoted with approval the concession theory articulated in *Dartmouth*.”) (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987)). *But see* Liam Séamus O’Melinn, *Neither Contract Nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 209 (2006) (“The stark and simple alternatives of contract and concession have transfixed and distracted us, ultimately preventing us from seeing that *Dartmouth College* treated the corporation not as a creature of the state, but as an “immortal being” and formidable personality whose life was to be governed not on the basis of contract, but on principles of trust.”). *Cf.* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 428 (2010) (Stevens, J., concurring in part) (“[T]he notion that business corporations could invoke the First Amendment would probably have been quite a novelty, given that ‘at the [founding], the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign.’”) (quoting David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L.Q. 541, 578 (1991), and citing *Dartmouth College*, 17 U.S. at 636).

37. WINKLER, CORPORATION, *supra* note 5, at 62.

38. *Id.* at 75.

39. *Cf.* O’Melinn, *supra* note 36, at 231 (“Daniel Webster, who represented the trustees in *Dartmouth College*, thought that the notable feature of his era was that ‘public improvements are brought about by a voluntary association and combination.’”) (quoting Arthur M. Schlesinger, *Biography of a Nation of Joiners*, 50 AM. HIST. REV. 1, 9 n.16 (1944)).

40. *See supra* notes 13-25.

civil rights movement,⁴¹ these quotes, along with others in the book, could be read to suggest that Winkler views progressive attempts to rein in corporate power by seeking to end corporate personhood as counter-productive. In fact, rather than seeking to end corporate personhood, Winkler argues these advocates should seek to strengthen it.

There's a lot to unpack here, but the point I want to focus on is that there is a distinction between corporate personhood as a basis for legal standing, and corporate personhood as a justification for the scope of rights granted once standing is granted.⁴² *Hobby Lobby* provides a good example of the distinction. While Winkler acknowledges that a major issue in the case was whether corporations are persons under the relevant statute (in this case the Religious Freedom Restoration Act), he ultimately concludes that “[p]roperly understood, Alito’s decision, like *Citizens United*, represented a rejection of corporate personhood.”⁴³ How are we to understand this apparent contradiction?

Perhaps a better way of understanding *Hobby Lobby* is to view corporate personhood as being essential to granting religious exercise rights to corporations because, after all, had a majority of the court concluded, as the dissent argued, that corporations are unable to exercise religion and thus should not be deemed persons under the statute, then the case would have ended there, and the corporations would not have been allowed to claim exemption from generally applicable laws by way of an accommodation of their religious exercise rights. On the other hand, once corporations are deemed persons under the statute, we are still left with the question of what type of person they should be treated as. There are a number of Supreme Court cases that differentiate the extent to which certain types of natural persons can claim certain rights, balancing the needs of the person against the needs of society and the state in a particular

41. See WINKLER, CORPORATION, *supra* note 5, at xix (“Chief Justice Roger Taney, the author of the infamous *Dred Scott* case, whose reactionary views on race have left him one of the most reviled figures in the history of the Supreme Court, was one of the most forceful advocates for limiting the constitutional rights of corporations.”).

42. Cf. Stephen Bainbridge, *Sonia Sotomayor and the Corporate Personhood*, PROFESSORBAINBRIDGE.COM (Sep. 17, 2009) (“Government regulation of corporations obviously impacts the people for whose relationships the corporate serves as a nexus. . . . It’s useful to allow the corporation to provide those persons with a single voice when seeking constitutional protections. Indeed, doing so is not just useful, it is necessary to protect the rights of the parties to those various contracts.”), <https://www.professorbainbridge.com/professorbainbridge.com/2009/09/sonia-sotomayor-and-the-corporate-personhood.html> [https://perma.cc/EC65-5ESB].

43. WINKLER, CORPORATION, *supra* note 5, at 381 (“[A]s with many previous Supreme Court cases invoking corporate personhood, the underlying logic of *Hobby Lobby* reflected instead piercing the corporate veil.”).

context.⁴⁴ So, when Winkler says Alito rejected corporate personhood, he may be better understood to be saying that Alito rejected any conception of corporate personhood that would differentiate the rights of the corporations from those of the average citizen. In other words, Alito adopted the aggregate or perhaps real entity view of the corporation, and rejected the artificial entity/concession theory.

Thus, progressive advocates for limiting corporate power arguably are justified in both (1) seeking to end corporate personhood, and (2) seeking to advance a theory of corporate personhood that highlights the distinction between the corporate entity and, for example, the shareholders of that corporation. Furthermore, when Winkler argues that “for those today who wish to see the Supreme Court restrict the constitutional rights of corporations, looking back to Webster’s era reveals a potential model,” he may best be understood as referring to the model of concession theory.⁴⁵

44. Cf. Catherine A. Hardee, *Who’s Causing the Harm?*, 106 KY. L.J. 751, 754 (2018) (“Under *Hobby Lobby*, the answer to who is causing the harm is neither a corporation nor an individual, but rather an individual granted the powers and privileges afforded corporations under state law.”).

45. WINKLER, CORPORATION, *supra* note 5, at 75 (“Moreover, for those today who wish to see the Supreme Court restrict the constitutional rights of corporations, looking back to Webster’s era reveals a potential model. By embracing corporate personhood, rather than piercing the corporate veil, the Taney court imposed boundaries on the rights of corporations.”). Comparing this quote to the following authored by Justice Taney in the case of *Ohio Life Ins. & Tr. Co. v. Debolt*, arguably provides at least some basis for describing the relevant model as concession theory.

The grant of privileges and exemptions to a corporation are strictly construed against the corporation, and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving, undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken.

57 U.S. 416, 435 (1853).