

DOES CORPORATE PERSONHOOD MATTER? A REVIEW OF, AND RESPONSE TO, ADAM WINKLER'S *WE THE CORPORATIONS*

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ABSTRACT

*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.” 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,” (2) “the history of corporate rights has largely been a struggle between the disparate poles of personhood and piercing,” 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.”

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.

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I. INTRODUCTION

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.”¹ The book has been highly praised by some of the greatest minds in corporate and constitutional law,² 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.³ This review will focus on unpacking some of these assertions, hopefully helping to ensure that

¹ ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018).

² *Id.* at back cover (quoting, among others, The Honorable Leo E. Strine, Jr., Chief Justice, Delaware Supreme Court (“In this compelling book, Adam Winkler exposes the stark distance between our nation’s rhetorical commitment to equal justice under law and the reality of corporate power.”), and Dean Erwin Chemerinsky, Jesse H. Choper Distinguished Professor of Law, Berkeley Law (“This is a brilliant, beautifully written book . . . Any future discussion of rights for corporations will be shaped by this wonderful book.”)).

³ Corporate personhood may be understood as a binary concept, which is to say a corporation either is or is not a person for purposes of a particular statute or Constitutional provision. Corporate personality theory, on the other hand, may be understood as answering the subsequent; and perhaps more important question: What kind of person is the corporation?

advocates who rely on the book will be informed as to alternative approaches to key issues.

Following this Introduction, Part II will provide a brief overview of “We the Corporations.” Part III will then provide an overview of the traditional theories of corporate personhood: concession theory (also known as artificial entity theory), aggregate theory (often associated with the nexus-of-contracts theory), and real entity theory (also known as natural entity theory). This part will also address the functional/realist approach to corporate personhood, which argues that focusing on corporate personhood as a means of determining corporate rights is unhelpful, and that we should rather be simply asking whether granting corporations the right at issue will advance the goals that underlie the existence of the right in the first place. Finally, this part will discuss other more recent or less mainstream theories of corporate personhood.

Part IV will then discuss whether Winkler is correct to view the expansion of corporate rights as being a function of courts ignoring corporate personhood and/or piercing the corporate veil, or whether it is better to take the view that courts are simply applying the aggregate or real entity view of the corporation in these cases. Part V will then examine Winkler’s interpretation of the famous *Dartmouth College* case,⁴ wherein Chief Justice Marshall described the corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law,”⁵ and wherein he also noted that, because a corporation is “. . . the mere creature of law” it “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.”⁶ Is it correct, as Winkler asserts, that all the scholars who have repeatedly cited *Dartmouth College* as representative of the concession theory of the corporation were wrong?

Part VI will then examine whether critics of opinions like *Citizens United*⁷ are correct (1) to blame corporate personhood for what they see as the corrupt expansion of corporate rights, and (2) to pursue the reduction or elimination of personhood rights for corporations as a remedy. Perhaps, as Winkler suggests, their hope lies rather in the opposite

⁴ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

⁵ *Id.* at 659.

⁶ *Id.* at 637.

⁷ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (holding that “the Government may not suppress political speech on the basis of the speaker’s corporate identity”).

direction, and a robust corporate personhood is the means by which corporate obligations under the law are strengthened and expanded. This part will also discuss the difference between personhood as a basis for standing (e.g., determining whether corporations are persons for purposes of the Religious Freedom Restoration Act) as opposed to a means of determining how closely corporate rights should track the rights of natural persons after standing has been granted (e.g., determining whether corporations are akin to classes of persons that have diminished rights in certain contexts—like in the case of the political speech rights of government employees). Finally, I provide concluding remarks in Part VII.

While I provide reasons for questioning a number of Winkler's 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 talking 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.

II. A BRIEF OVERVIEW OF “WE THE CORPORATIONS”

“We the Corporations” is 471 pages long. While the table of contents is broken into ten chapters, a “Chronology of Corporate Rights” at the end of the book provides perhaps a better basis for a brief overview, as it does broadly track the arc of the book. Winkler starts the chronology at 300 BC, noting that this is when the Romans “invent [an] early version of the corporation to enable groups of people to hold property together.”⁸ From here, this first part of the chronology, entitled “Before the Constitution,” notes that in 1607 “The Virginia Company found[ed] England's first permanent colony as a business venture.”⁹ This part of the chronology also notes that in 1758 William Blackstone, the influential English scholar, “describes the corporation as an ‘artificial person’ with a separate legal identity and certain rights, including property, contract, and access to court.”¹⁰

The next section of the chronology, entitled “First Corporate Rights Cases, 1787–1860,” includes the 1809 case of *Bank of the United*

⁸ WINKLER, *supra* note 2, at 399.

⁹ *Id.*

¹⁰ *Id.* at 399–400.

States v. Deveaux,¹¹ the 1819 case of *Dartmouth College v. Woodward*,¹² and three cases spanning 1837 to 1853 wherein the Taney court slows down the march to ever-expanding corporate rights.¹³ Most of these cases are discussed in more detail later in this Essay.

Next comes the section “Property but Not Liberty Rights, 1861-1953,” which covers a period including three Supreme Court cases that end up announcing that “corporations are persons entitled to equal protection and due process under the Fourteenth Amendment.”¹⁴ Perhaps the most fascinating aspect of these cases is that there was never any express analysis of the issue in the opinions, and the apparent basis for the conclusion was a lie:

In December of 1882, Roscoe Conkling . . . appeared before the justices of the Supreme Court of the United States to argue that corporations like his client, the Southern Pacific Railroad Company, were entitled to equal rights under the Fourteenth Amendment. . . . Conkling’s claim was remarkable. The Fourteenth Amendment had been adopted after the Civil War to guarantee the rights of the freed slaves, not to protect corporations. Conkling, however, had unusual credibility with the justices. . . . And when it came to the history surrounding the drafting of the Fourteenth Amendment, Conkling’s expertise was unparalleled. As a member of Congress during Reconstruction, Conkling had been on the very committee that wrote the amendment. . . . To back up his improbable story, Conkling produced a musty, never-before-published

¹¹ *Id.* at 400 (“Horace Binney persuades the Supreme Court to recognize corporations’ right of access to federal court under Article III of the Constitution and the Judiciary Act.”).

¹² *Id.* (“The Supreme Court under Chief Justice John Marshall adopts Daniel Webster’s argument that corporations are private entities, akin to individuals, under the contract clause of the Constitution.”).

¹³ *Id.* at 400 (citing *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837) (refusing “to read monopoly privileges into a corporate charter”); *Bank of Augusta v. Earle*, 38 U.S. 519 (1839) (holding that “corporations do not have the privileges and immunities of citizens under the comity clause of Article IV of the Constitution”); *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314 (1854) (using corporate personhood “to make corporations more easily amenable to suit in federal court”).

¹⁴ *Id.* at 400–01 (citing *San Mateo Cty. v. S. Pac. R.R. Co.*, 116 U.S. 138 (1885); *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888)).

journal that purported to detail his committee's deliberations. A close look at the journal, Conkling suggested, would show that while the nation was focused on the rights of the freedmen, he and the other members of Congress had also been worried about laws that unduly burdened business. It was for this very reason that the Fourteenth Amendment used the word *person*. An early draft of the amendment had guaranteed the rights of "citizens," Conkling said, but the language was later changed specifically to include corporations There was just one small problem with Conkling's account of the drafting of the Fourteenth Amendment: it was not true.¹⁵

This portion of the chronology also includes the *Lochner* era (1897-1936),¹⁶ which Winkler describes as "often friendly to business", but also as establishing "a new boundary on the rights of corporations, entitling them to property rights but not liberty rights."¹⁷ The Supreme Court case of *Hale v. Henkel*,¹⁸ holding that ". . . corporations do not have a Fifth Amendment right against self-incrimination but do have a limited Fourth Amendment right against unreasonable searches and seizures,"¹⁹ is also included, as is the Tillman Act.²⁰

Finally, Winkler's chronology covers the period entitled "Liberty Rights, 1936—current," which includes the cases *Grosjean v. American Press*

¹⁵ *Id.* at xiii–xiv.

¹⁶ See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding that statute limiting employment in bakeries to sixty hours a week and ten hours a day "necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer"), *overruled in part by* *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421 (1952) and *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See also Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991) ("Legal scholars . . . have . . . depicted the *Lochner* era as a deviant period during which the Supreme Court broke from the constitutionalism that the Marshall Court established and the New Deal Court restored. They maintain that the *Lochner* era Court, which struck down much . . . industrial regulation . . . overprotect[ed] private property.").

¹⁷ WINKLER, *supra* note 9, at 401.

¹⁸ 201 U.S. 43 (1906), *overruled on other grounds by* *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964).

¹⁹ WINKLER, *supra* note 9, at 401.

²⁰ *Id.* (noting that "[a]fter the revelations of the Great Wall Street Scandal, Congress enact[ed] the first modern campaign finance law, a ban on corporate contributions to federal candidates").

Company (1936),²¹ *NAACP v. Alabama ex rel. Patterson* (1958),²² *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1971),²³ *First National Bank of Boston v. Bellotti* (1978),²⁴ *Citizens United v. Federal Election Commission* (2010),²⁵ and *Burwell v. Hobby Lobby Stores, Inc.* (2014).²⁶ (I will discuss at least some of these cases in more detail below.) This section also notes that Lewis Powell, months before being nominated to the Supreme Court, authored “an influential memorandum to the Chamber of Commerce outlining how business could better defend its interests.”²⁷

Having thus provided a brief overview of the scope of “We the Corporations,” we will now turn to laying the foundation for the rest of this Essay by reviewing the traditional theories of corporate personhood.

III. AN OVERVIEW OF TRADITIONAL THEORIES OF CORPORATE PERSONHOOD

In this Part III, I will review what at least some refer to as the traditional theories of corporate personhood: concession theory, aggregate theory, and real entity theory.²⁸ 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)²⁹ views the

²¹ *Id.* at 402 (“The Supreme Court rules that the First Amendment right of freedom of the press extends to newspaper corporations”).

²² *Id.* (“The Supreme Court holds that a voluntary membership corporation can assert its members’ rights of association”).

²³ *Id.* (“Siding with Ralph Nader’s consumer rights group, the Supreme Court adopts the listeners’ rights theory of free speech to protect commercial speech”).

²⁴ *Id.* (“Justice Lewis Powell authors the Supreme Court’s opinion recognizing corporations have a free speech right to influence ballot measure campaigns”).

²⁵ *Id.* at 403 (“The Supreme Court holds that corporations have a First Amendment right to spend money to influence candidate elections”).

²⁶ *Id.* (“The Supreme Court declares corporations have religious freedom under a federal statute.”).

²⁷ *Id.* at 402.

²⁸ S.I. Strong, *Congress and Commercial Trusts: Dealing with Diversity Jurisdiction Post-Amercold*, 69 FLA. L. REV. 1021, 1057 (2017) (identifying “the three traditional theories of corporate personhood” as “the concession theory, the aggregate theory, and the real entity theory”); See Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 NEV. L. J. 811, 819 (2018) (identifying “the major theories of corporate personhood” as “the artificial entity/concession theory, aggregate theory, or real entity theory”).

²⁹ 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

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.³⁰ 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.³¹ For example, someone advancing a real entity view of the firm might identify the relevant association as the board of directors.³² As a general matter, aggregate theory and real entity theory tend to view corporations as standing on the private side of the public-private divide, while concession theory tends to view corporations as standing more on the public side.³³ In addition to the foregoing, I will also discuss the functional approach to corporate personhood, which argues that focusing on corporate personhood as a means of determining corporate rights is unhelpful, and that we should rather be simply asking whether granting corporations the right at issue will advance the goals that underlie the existence of the right to begin with. Finally, I will note some other more recent or less mainstream theories of corporate personhood.

A. *Concession / Artificial Entity Theory*

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.”).

³⁰ 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.”).

³¹ 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 . . .”).

³² *But cf.*, Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 365 (2017) (“The work of German legal theorist Otto von Gierke played a key role in the development of real entity theory. Gierke posited that groups have a ‘collective spirit’ that gives them an identity separate and apart from the individuals composing them.”).

³³ Cf. Ronit Donyets-Kedar, *Challenging Corporate Personhood Theory: Reclaiming the Public*, 11 L. & ETHICS HUM. RTS. 61, 80 (2017) (“In a deep sense, . . . corporate personhood jurisprudence feeds off the more general private/public divide.”).

In the 1819 Supreme Court case of *Dartmouth College*, Chief Justice Marshall famously stated that:

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.³⁴

This formulation has been commonly associated with concession theory, also known as artificial entity theory.³⁵ We will later revisit the claim that *Dartmouth College* is representative of concession theory, as this is one of the places where Winkler parts ways with what I would describe as the conventional view, but for now it is simply worth noting that the artificial entity / concession theory grants the state, as creator of the corporate fiction, great dominion to regulate its creation in furtherance of the public interest.³⁶

How might concession theory's greater deference to government regulation of corporations play out in practice? Beyond the most common application of simply citing the state-created nature of corporations as inherent support for regulation, I have previously suggested that adoption of concession theory could lead to a type of burden shifting:

This deference might play out in application by, for example, placing the burden of proof in a particular case

³⁴ Tr. of *Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636–37 (1819).

³⁵ J.W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970* 9 (1970) (describing the original “standard formula” as one wherein the state “not only gave an indispensable consent, but itself created . . . any business association which took the corporate form,” and noting that “[b]orrowing from Coke and Blackstone, Marshall gave this view classic expression” in *Dartmouth College*); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 72 n.36 (1992) (citing *Dartmouth College* 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*, at 636).

³⁶ Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 933 (1984) (“the concession approach is perceived to support more extensive regulation of corporations”); Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L. J. 183, 212 (2004) (“corporations . . . historically have been treated as creatures of law and therefore have been particularly vulnerable to regulation”).

on the party seeking to avoid government regulation of corporations. For example, in *Citizens United*, both Justice Scalia and Justice Stevens believed the other had the burden of proving their preferred interpretation of the Framers' attitude toward corporations and the implications thereof for interpreting the scope of the First Amendment. . . . [C]oncession theory . . . would favor placing the burden here on Justice Scalia³⁷

In addition, concession theory could justify a less onerous scrutiny of government regulation of corporations generally, essentially expanding the commercial speech doctrine to cover all corporate speech.³⁸

As a hopefully relevant aside, it may be worth noting that proponents of deregulation often cite the doctrine of unconstitutional conditions as a bar to the type of regulation that concession theory arguably supports. As Kathleen Sullivan describes it,

The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.³⁹

However, as I have written previously in my article *Rehabilitating Concession Theory*, “there are at least five good reasons to conclude that the

³⁷ Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 334–35 (2014).

³⁸ Jason Zenor, *A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 66 (2016) (“[U]nder the *Central Hudson* test, commercial speech that is false is never protected. . . . All other ‘truthful’ commercial speech must survive an intermediate level of scrutiny.”) (citing *Cent. Hudson*, 447 U.S. at 563). Cf. Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1211 (2015) (“First Amendment doctrine is rife with specialized tests For a lower court genuinely trying to . . . apply Supreme Court case law, it may be difficult to decide whether . . . a required disclosure . . . merits rational basis review, intermediate scrutiny . . . , or . . . strict scrutiny”); Joseph K. Leahy, *Intermediate Scrutiny for Corporate Political Contributions*, 44 FLA. ST. U. L. REV. 1119 (2017) (“This Article departs from the scholarly consensus that courts should apply the business judgment rule to review corporate political contributions. Instead, courts should apply the intermediate level of scrutiny--the *Unocal* test--that is applied whenever management adopts defensive measures in the face of a hostile takeover.”).

³⁹ Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (“The *Lochner* Court first fashioned the doctrine.”).

unconstitutional conditions doctrine would not constitute an insurmountable obstacle to the viability of concession theory,”⁴⁰ including that “it is unclear what . . . would be added to the relevant analysis by applying the unconstitutional conditions doctrine because, like the Free Speech Clause of the First Amendment . . . , it does not actually constitute a complete bar to government action, but rather requires the government to satisfy some form of heightened scrutiny.”⁴¹ While further details of those arguments are beyond the scope of this Essay, I encourage the interested reader to review the relevant parts of that article directly.

In addition, a “listeners’ rights” rationale has been employed to shift the focus of analysis from the corporate speaker to the natural persons who have a right to be informed, and this was one of the key arguments underlying *Citizens United*, wherein the Supreme Court concluded that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.”⁴² However, “even if one understands the *Citizens United* opinion to be fundamentally about listeners’ rights, there remains the question whether there is something about corporations that would justify including them in the line of cases carving out exceptions for particular identity-based restrictions on speech.”⁴³ As I have also written elsewhere, the *Citizens United* majority “was well aware of this line of cases upholding identity-based speech restrictions, but dismissed them as irrelevant by simply asserting that “[t]he corporate independent expenditures at issue in this case . . . would not interfere with governmental functions, so these cases are inapposite.”⁴⁴ Again, I flesh this analysis out further in my previously published *Rehabilitating Concession Theory* article, but suffice it to say that a bald assertion that unleashing the full force of corporate treasuries on our political debates “would not interfere with governmental functions” is a hard pill for many to swallow.⁴⁵

⁴⁰ Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 354 (2014).

⁴¹ *Id.* at 355.

⁴² *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010).

⁴³ Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 349 (2014).

⁴⁴ Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 351 (2014) (quoting *Citizens United v. FEC*, 558 U.S. 310, 341 (2010)).

⁴⁵ *Cf.* Joan MacLeod Heminway, *Thoughts on the Corporation As A Person for Purposes of Corporate Criminal Liability*, 41 STETSON L. REV. 137, 143 (2011) (“Under the Court’s view in *Citizens United*, it appears that once one concludes that a corporation is a person, it is a person for all purposes, bar none. As the Stevens opinion points out, this ignores policy underpinnings of the various laws that may use the concept of corporate personhood.”).

Finally, there are a number of arguments routinely trotted out to support the contention that concession theory is obviously untenable, such as “the argument that concession theory died along with special charters.”⁴⁶ I believe I also offer some worthwhile rebuttals to these and related arguments in the *Rehabilitating Concession Theory* article referenced above, and the interested reader is again encouraged to look there for further analysis.⁴⁷

B. *Aggregate / Nexus-of-Contracts Theory*

In 1809, before *Dartmouth College*, Chief Justice Marshall authored another opinion, *Bank of U.S. v. Deveaux*, which has been repeatedly described as embracing the aggregate theory of the corporation.⁴⁸ As Elizabeth Pollman describes it, in *Deveaux* “the Court made clear that a corporation is not a ‘citizen’ for purposes of Article III diversity jurisdiction . . . but that the Court could look to the natural persons composing a corporation and find that diversity jurisdiction exists where there is complete diversity of citizenship between the corporate shareholders and the opposing party.”⁴⁹ In other words, “corporations are

⁴⁶ Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 346 (2014) (“As we moved from a special charter system of incorporation to a system based upon enabling acts, which required little more than a simple filing for practically any person who desired to incorporate to do so, the notion that some special grant was being conveyed lost some of its luster.”). *But 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.”).

⁴⁷ Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 342–43, 346, 349 (2014) (addressing “four arguments frequently advanced to undermine concession theory: (1) that corporate theory is excessively malleable; (2) that concession theory died along with special charters; (3) that listeners’ rights trump corporate theory; and (4) that the unconstitutional conditions doctrine trumps concession theory”).

⁴⁸ Daniel J.H. Greenwood, *Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights*, 2017 U. ILL. L. REV. 163, 181–82 (2017) (“*Deveaux* contended that for diversity purposes a corporation should be seen as its members, in what has come to be known as the ‘aggregate’ theory.”). *Cf.* Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1008 (2010) (“How can one explain the shift in Marshall’s view of the corporation from aggregate (*Deveaux*) to artificial (*Dartmouth College*) . . .? In part, it stems from the circumstances of these particular cases.”).

⁴⁹ Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 658 (2016). *But see* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L. J. 1593, 1598 (1988) (“The associational view of corporate citizenship dominated the Marshall period until *Deveaux* was overruled by the Taney Court in *Louisville, Cincinnati & Charleston Railroad v. Letson*. *Letson* held that a corporation should be ‘deemed . . . a person,

people, my friend,”⁵⁰ and the aggregate theory of corporate personhood focuses on these people in order to view corporations as a mere “associations of citizens”⁵¹ who should not have their freedom impinged simply because they choose to associate via the corporate form. However, blurring the line between shareholders and the corporation in which they own shares creates at least one very serious problem for shareholders, which will be discussed next.

C. *Real / Natural Entity Theory*

Critics of artificial entity / concession theory argue that it overstates the government’s role in the creation of corporations, places the corporation too far on the public side of the public-private divide, and subjects the corporation to excessive/inefficient regulation. Critics of aggregate theory, on the other hand, take the opposite side on these arguments, and point out further that the logical conclusion of aggregate theory is the loss of limited liability for shareholders, since that limited liability is arguably rooted in the corporate separation of ownership from control because the corporation, as a separate entity, stands between the shareholders’ personal assets and the corporation’s creditors.⁵² Thus, when one characterizes the corporation as a mere association of individuals, one

although an artificial person,’ and ‘an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person.”) (citing 43 U.S. (2 How.) 497 (1844)). *Cf.* *Hertz Corp. v. Friend*, 559 U.S. 77, 85 (2010) (“In 1928, this Court made clear that the “state of incorporation” rule was virtually absolute.”).

⁵⁰ Frank James, *Romney’s ‘Corporations Are People’ A Gift To Political Foes*, IT’S ALL POLITICS (August 11, 2011), available at <https://www.npr.org/sections/itsallpolitics/2011/08/11/139551684/romneys-corporations-are-people-getting-lots-of-mileage>.

⁵¹ *Citizens United v. FEC*, 558 U.S. 310, 356 (2010) (“... certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech”); *Id.* at 343 (“The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”).

⁵² See Thomas C. Folsom, *Evaluating Supernatural Law: An Inquiry into the Health of Nations (The Restatement of the Obvious, Part II)*, 21 REGENT U. L. REV. 105, 148 (2008) (“Limited liability entities are based on the moral intuition of nonagency because there is separation of ownership from control.”). *Cf.* *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1179 (10th Cir. 2013) (Matheson, concurring in part and dissenting in part) (“The structural barriers of corporate law give me pause about whether the plaintiffs can have their corporate veil and pierce it too.”), *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

is basically back to a partnership, wherein the partners are jointly and severally liable for the debts of the business.⁵³

Real entity theory tries to address these concerns by viewing the corporation as an entity that is separate from both the state and the shareholders.⁵⁴ The theory has a variety of incarnations, but perhaps the simplest modern view is to align the corporation with the board of directors.⁵⁵ However, this view ultimately favors those who want to limit the regulation of corporations, since it still places the corporation on the private side of the public-private divide, merely replacing the private-citizen shareholders with the private-citizen directors.⁵⁶ The Supreme Court case most commonly cited as adopting the real entity theory is the 1906 case of *Hale v. Henkel*, wherein the court extended Fourth Amendment protections to corporations (though it denied corporations the protection of the Fifth Amendment right against self-incrimination).⁵⁷

⁵³ Cf. Jonathan R. Macey & Leo E. Strine, *Citizens United As Bad Corporate Law* (2018) [NOTE: This is an article, not a book.], (arguing that corporations are not associations of citizens because, among other things, “the treatment of corporations as separate legal entities is what distinguishes corporations from general partnerships and sole proprietorships and what justifies the legal notion of ‘limited liability’ and other central characteristics of the corporate form, such as the ability to contract and to sue and be sued”), available at <https://ssrn.com/abstract=3233118>.

⁵⁴ Cf. Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 914 n.174 (2011) (“The real entity theory is also known as the natural entity theory.”).

⁵⁵ Compare Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 359 (2017) (“The work of German legal theorist Otto von Gierke played a key role in the development of real entity theory. Gierke posited that groups have a ‘collective spirit’ that gives them an identity separate and apart from the individuals composing them.”), with Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 560 (2003) (“[I]n the limited extent to which the corporation is properly understood as a real entity, it is the board of directors that personifies the corporate entity.”). But cf. Stephen Bainbridge, *Is the corporation an entity? With application to the SCOTUS* PROFESSORBAINBRIDGE.COM (Apr. 4, 2012) (“this passage should not be understood as embracing either the real or artificial entity theory of the corporation”), available at <http://www.professorbainbridge.com/professorbainbridge.com/2012/04/is-the-corporation-a-entity.html>.

⁵⁶ But cf. Mark M. Hager, *Bodies Politic: The Progressive History of Organizational “Real Entity” Theory*, 50 U. PITT. L. REV. 575, 588 (1989) (“Gierke established the understanding that the real entity theory was pro-liability while the fiction theory was anti-liability.”).

⁵⁷ *Hale v. Henkel*, 201 U.S. 43 (1906). See Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 806–07 (2013) (“beginning with *Hale v. Henkel* in 1905, the Supreme Court began articulating real entity theory arguments for the extension of further constitutional rights to corporations”).

D. *The Functional / Realist Approach*

In 1926, John Dewey published an article in the Yale Law Journal entitled *The Historical Background of Corporate Legal Personality*,⁵⁸ wherein he concluded that “each theory” of group personality “has been used to serve ... opposing ends.”⁵⁹ His analysis was so compelling, that many cite his article as ushering in a sort of Dark Ages for corporate personhood theory, from which we have only recently emerged.⁶⁰ This perspective has led to a call for replacing a focus on corporate personhood theory with a more functional analysis.⁶¹ As Elizabeth Pollman puts it:

[A] metaphor or philosophical conception of the corporation is not helpful for the type of functional analysis that the Court should conduct. The Court should consider the purpose of the constitutional right at issue, and whether it would promote the objectives of that right to provide it to the corporation--and thereby to the people underlying the corporation.⁶²

However, in 1992 Morton Horwitz responded to Dewey’s criticism with the following:

I wish to dispute Dewey’s conclusion that particular conceptions of corporate personality were used just as

⁵⁸ John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 669 (1926).

⁵⁹ *Id.* at 669; see also, John Hasnas, *Where Is Felix Cohen When We Need Him?: Transcendental Nonsense and the Moral Responsibility of Corporations*, 19 J.L. & POL’Y 55, 57 (2010) (“Deciding cases by reifying the abstract concept of the corporation is a classic example of transcendental nonsense.”) (discussing Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935)).

⁶⁰ *But cf. id.* at 673 (arguing for enforcing “the value of eliminating the *idea* of personality *until* the concrete facts and relations involved have been faced and stated on their own account”) (second emphasis added); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1572 (2013) (“Dewey’s perceptive critique highlighted the fact that these conceptions do not engage the interests that ground particular rights claims, nor do they provide any sense of how those interests are implicated within corporations.”).

⁶¹ *Cf.* Harry G. Hutchison, *Religious Liberty for Employers as Corporations, Natural Persons or Mythical Beings? A Reply to Gans*, 120 PENN ST. L. REV. 537, 557 (2015) (“[S]cholars . . . question whether corporate theory in the form of a metaphysical inquisition provides a basis for courts to ascertain whether corporations are the kinds of beings that can or should have rights, or instead, proffer a realist appraisal that looks at society’s interests and the functional relations involved.”).

⁶² Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1631 (2011).

easily to limit as to enhance corporate power. I hope to show that, for example, the rise of a natural entity theory of the corporation was a major factor in legitimating big business and that none of the other theoretical alternatives could provide as much sustenance to newly organized, concentrated enterprise.⁶³

As I have written elsewhere, to the extent Horwitz achieved his goal (and there is good reason to believe he did), “it may well be the better view that while corporate theory may not be able to precisely predict outcomes in all cases, it is nonetheless meaningful in terms of eliminating certain conclusions and allocating burdens.”⁶⁴ Furthermore, to the extent a functional approach to corporate rights is preferable to an approach relying on theories of corporate personhood in whole or in part as a normative matter, we still must confront the fact that decisions are nonetheless being made on the basis of personhood/personality characterizations as a positive matter,⁶⁵ so to ignore the debate surrounding these theories is to leave that application under-theorized.⁶⁶ As I have written elsewhere:

[A]nyone in doubt of the power of corporate personality theory in cases like this would do well to read, or re-read, the U.S. Supreme Court’s opinion in *Citizens United*. I am not alone in having argued that corporate personality theory had a major role to play in the disposition of that case. Imagine showing up to argue that case having dismissed any role for corporate personality theory as too indeterminate, only to find the justices engaging in a heated debate about whether the corporation is better treated as a mere association of citizens or creature of the

⁶³ HORWITZ, *supra* note 36, at 68.

⁶⁴ Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 343 (2014) (providing additional critiques of the functional approach).

⁶⁵ Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 95–96 (1995) (“[R]egulation of corporations raises many issues concerning the constitutional limits of government power. Although these issues generally have been examined through the broad lens of constitutional law, their resolution has in fact often depended on how the corporation is characterized.”).

⁶⁶ See generally, Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court’s Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831 (2013); cf. ERIC SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 2–3 (2012) (“[B]ecause judges are governmental officials who exercise coercive power, it is important that they explain their legal decisions with honesty and transparency.”).

state, along with opposing counsel ready to defend his or her preferred view of the firm. One ignores corporate personality theory in such cases at one's own risk.⁶⁷

E. Other Theories of Corporate Personhood

The theories and approaches discussed above are not the only ones available to choose from when trying to determine the proper scope of corporate rights, though they may fairly be considered the dominant ones. Two other approaches are perhaps worth mentioning here. First, it might be argued that former Chief Justice Rehnquist espoused a unique theory of the corporation and was perhaps one of the few Supreme Court justices to do so. As I have written elsewhere:

Justice Rehnquist's stand-alone dissent in *Bellotti* provides . . . [an] example . . . of a Justice affirmatively adopting a theory of the corporation for purposes of determining the constitutional rights of corporations--though not via the express adoption of one of the traditionally recognized theories. Specifically, Justice Rehnquist relied on Justice Marshall's *Dartmouth College* opinion to conclude that: "Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons . . . our inquiry must seek to determine which constitutional protections are 'incidental to its very existence.'" Thus, while it may be true that "a corporation's right of commercial speech . . . might be considered necessarily incidental to the business of a commercial corporation[, i]t cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes."⁶⁸

Thus, then-Justice Rehnquist could perhaps be understood as advancing an "incidental powers" view of corporate rights, with the relevant question

⁶⁷ Stefan J. Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 TENN. J. BUS. L. 415, 451–52 (2017).

⁶⁸ Padfield, *supra* note 67, at 853. *Cf. First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 828 (1978) (Rehnquist, J., dissenting) ("It is true. . . that recent decisions of this Court have emphasized the interest of the public in receiving the information offered by the speaker seeking protection. The free flow of information is in no way diminished by the Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity.").

being whether a particular right is “necessarily incidental to the business of a commercial corporation.”⁶⁹

Another new theory of corporate personhood worth mentioning here is Eric Chaffee’s collaboration theory. As I have previously described it:

Professor Chaffee’s collaboration theory views the corporation as similar to a joint venture or partnership to the extent that “the state and the individuals organizing, operating, and owning a corporation are collaborating within the corporate form, i.e., they are ‘[j]oint adventurers’ within the contractual relationship that generates the corporation.” This characterization differentiates collaboration theory by imposing a requirement that corporations seek pro-social ends whenever the expected value of a transaction is unknowable or the contemplated pro-social action is shareholder wealth neutral.⁷⁰

IV. PIERCING OR IGNORING THE CORPORATE PERSON VERSUS APPLYING AGGREGATE OR REAL ENTITY THEORY

In *We the Corporations*, Winkler barely mentions the traditional theories of the corporation.⁷¹ 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.”⁷² 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.”⁷³

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

⁶⁹ *Bellotti*, 435 U.S. at 825 (Rehnquist, J., dissenting).

⁷⁰ Padfield, *supra* note 68, at 448 (quoting Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 374 (2017)).

⁷¹ For example, a search of the Kindle version of the book revealed that the word “concession” does not appear once.

⁷² ADAM WINKLER, *WE THE CORPORATIONS* 62 (2018).

⁷³ WINKLER, *supra* note 73, at 62 (concluding that: “Expansive constitutional rights for corporations were built into the logic of piercing.”).

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.⁷⁴ 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.⁷⁵

⁷⁴ 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’s 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.’”); 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.”) (emphasis omitted).

⁷⁵ WINKLER, *supra* note 73, at 55

Perhaps these competing perspectives can be explained as flowing from differences between corporate and constitutional law. As Winkler describes it: “piercing 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.”⁷⁶ Or perhaps they constitute a distinction without a difference.⁷⁷ At the very least, it is likely important for advocates to understand that they may get very different reactions depending on whether they describe the justification for granting corporations rights as being rooted in piercing the corporate veil or ignoring corporate personhood, as opposed to 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*,⁷⁸ 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.⁷⁹ 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.⁸⁰

⁷⁶ WINKLER, *supra* note 73, at 67–68.

⁷⁷ *Cf.* WINKLER, *supra* note 73, 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.”).

⁷⁸ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

⁷⁹ *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.”).

⁸⁰ *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).

Leading up to the case, I signed on to the Brief of Amici Curiae Corporate Law Professors, authored by Kent Greenfield⁸¹ and Daniel Rubens,⁸² 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.”⁸³ Thus, the Court certainly should have been aware of the issue. However, the Court at least assumed for the purposes of the opinion that the corporations both 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.*⁸⁴ 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.”⁸⁵

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 mere associations of individuals, thereby embracing aggregate or real entity theory, or state creations subject to greater government control than natural persons, thereby embracing concession / artificial entity theory.⁸⁶

⁸¹ Professor and Dean’s Distinguished Scholar, Boston College Law School.

⁸² Senior Associate, Orrick, Herrington & Sutcliffe LLP.

⁸³ Brief of Amici Curiae Corporate Law Professors in Support of Respondents at 3, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

⁸⁴ Available at <https://slate.com/news-and-politics/2018/06/masterpiece-cakeshop-grants-constitutional-religious-liberty-rights-to-corporations.html>.

⁸⁵ *Id.* at 2.

⁸⁶ *Cf.* Howard Kislowicz, *Business Corporations as Religious Freedom Claimants in Canada* (“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

V. DEBATING *DARTMOUTH COLLEGE*

As noted above, the U.S. Supreme Court case of *Trustees of Dartmouth College v. Woodward*⁸⁷ is routinely cited as representative of concession theory.⁸⁸ 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.⁸⁹

As also previously noted, 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.⁹⁰

cannot hold the requisite religious or conscientious belief to ground such a claim.”), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3001258.

⁸⁷ 17 U.S. (4 Wheat.) 518 (1819).

⁸⁸ See *supra* note 36.

⁸⁹ G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. Rev. 517, 544 n.175 (1989).

⁹⁰ *Dartmouth College*, 17 U.S. 518, 636–37 (1819).

However, in *We the Corporations*, Prof. Winkler describes this characterization as a mistake.⁹¹ Instead, Winkler posits that the opinion 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.⁹²

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.⁹³ So how should an advocate use the opinion?

⁹¹ See ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 66 (2018) (“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.”).

⁹² ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 86–87 (2018).

⁹³ 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 . . .”).

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.⁹⁴ However, depending on the advocate's goals, noting the 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.

VI. 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

⁹⁴ 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 shows that four of the five positively associate *Dartmouth College* with concession theory in at least some manner. See Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 Geo. Wash. L. Rev. 14, 68 (1992) (“[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 College* . . .”); Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 Brook. L. Rev. 767, 774 (1989) (“the ‘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., dissenting) (“the 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 Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 Hastings Const. L.Q. 541, 578 (1991), and citing *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L.Ed. 629 (1819)).

limit the rights of corporations.”⁹⁵ 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.”⁹⁶ Putting aside questions about Webster’s era,⁹⁷ piercing the corporate veil,⁹⁸ and the role of Taney in the corporate civil rights movement,⁹⁹ 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.¹⁰⁰ *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*,

⁹⁵ Winkler, *supra* note 91, at 62.

⁹⁶ *Id.* at 75.

⁹⁷ Cf. Liam Séamus O’Melinn, *Neither Contract Nor Concession: The Public Personality of the Corporation*, 74 *Geo. Wash. L. Rev.* 201, 231 (2006) (“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)).

⁹⁸ See *supra* notes 72–86.

⁹⁹ See Winkler, *supra* note 91 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.”).

¹⁰⁰ Cf. Stephen Bainbridge, *Citizens United, Corporate Personhood, and Nexus of Contracts Theory* (Jan. 21, 2010) (“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.”), <http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-corporate-personhood-and-nexus-of-contracts-theory.html>.

represented a rejection of corporate personhood.”¹⁰¹ 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 context.¹⁰² 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.¹⁰³

¹⁰¹ Winkler, *supra* note 91, at 381 (“as with many previous Supreme Court cases invoking corporate personhood, the underlying logic of *Hobby Lobby* reflected instead piercing the corporate veil”).

¹⁰² Cf. Catherine Hardee, *Who’s Causing the Harm* (“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.”), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237116.

¹⁰³ Winkler, *supra* note 91, 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 *Obio Life*

VII. CONCLUSION

Adam Winkler has written an excellent book on the history of corporate rights. Hopefully, this Essay adds something of value to that work, however small, by pointing out some of the ways in which advocates relying on the book's analysis should proceed with caution. In the end, comparing the lens of piercing-versus-personality to aggregate-versus-concession may provide opportunities for other arguments. For example, by pointing out how treating corporations as mere associations of individuals is akin to piercing the corporate veil, the risk that approach creates for limited liability may be highlighted. In addition, by explaining concession / artificial entity theory as a means of actually respecting the separateness of corporate personhood, the stigma that has accompanied those theories in recent memory can be replaced with a more balanced view that those theories at bottom seek simply to recognize the central role of the state in a corporation's existence.¹⁰⁴

Ins. & Tr. Co. v. Debolt, 57 U.S. 416 (1853), 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.

Id. at 435.

¹⁰⁴ Cf. Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL. L. REV. 741, 777 n.237 (1998) (describing modern day arguments that constitute “a variant on the old concession theory,” but nonetheless concluding that “[i]t has been a long time since mainstream corporate legal theory took the concession theory seriously”).