Barking Up the Wrong Tree

Why Proposals to Abolish Corporate Personhood Are Misguided

David Gindis
University of Hertfordshire, UK

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Corporate rights quiz (1/2)

Do you agree with the following statements?

1. Corporations have the right to freedom of contract
2. Corporations have the right to own assets
3. Corporations have the right to sue
4. Corporations have the right to a fair trial
5. Corporations have the right to privacy
Do you agree with the following statements?

6. Corporations have the **right to life**

7. Corporations have the **right to education**

8. Corporations have the **right to asylum**

9. Corporations have the **right to free speech**

10. Corporations have the **right to freedom of religion**

While some seem **unequivocal** (contract, property, litigation) and others are perhaps **less obvious but nonetheless clear** (fair trial, privacy), some seem **disputable** (life, education, asylum, free speech, freedom of religion) and seem to involve serious category errors.


SCOTUS has recently protected corporate freedom of religion rights (Burwell v. Hobby Lobby Stores, 2014).
**Grassroots proposal**

Widespread discontent with SCOTUS interpretation of corporations as persons with constitutional rights

In reaction to apparent **proof that corporations rule America** grassroots movement (Move to Amend, Restore Democracy, Occupy, etc.) to **abolish corporate personhood** spreads

To make matters worse...

**Proposal in Congress**

115th CONGRESS 1st SESSION  
**H. J. RES. 48**

Proposing an amendment to the Constitution of the United States providing that the rights extended by the Constitution are the rights of natural persons only.

"Section 1. The rights protected by the Constitution of the United States are the rights of natural persons only. Artificial entities, such as corporations, limited liability companies, and other entities, established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law. The privileges of artificial entities shall be determined by the People, through Federal, State, or local law, and shall not be construed to be inherent or inalienable.
Failure to notice that corporate personhood is a central institutional feature of all corporate forms

Not just the “evil” (large) business corporation in pathological pursuit of profit and power

But also presumably benign corporate entities like associations, nonprofits, charities, foundations, mutuals, cooperatives, trade unions, political parties, universities, churches, municipalities, etc.

⇒ If we abolish corporate personhood we cripple not just big business but also these central features of democracy (including many 501(c)(4) nonprofits such as Move to Amend!!)

Understanding legal personhood

P1 “person” = mask: performative/political view emphasising capacity of taking part in public sphere, goes back to Roman law

P2 “person” = rational agent: intrinsic/theological view going back to Boethius, Aquinas, Locke, etc.

P2 is explicit in human rights discourse that equates “person” and “human being”: “all human beings are … endowed with reason and conscience” (Art. 1 UN Declaration); “everyone has the right to recognition everywhere as a person before the law” (Art. 6)

P3 “person” = responsible subject: intrinsic/ethical point of view going back at least to Locke (“person … is a forensic term appropriating actions and their merit”)

P3 underlies positive law, specifically rules concerning property, contract, standing, responsibility, etc.
Adopt P1 to avoid equivocation

**P1**: only legally-endowed capacities, particularly the capacity to be a point of imputation for rights and duties that arise in legal relations (Naffine, 2003; Gindis, 2016), thereby to play a role in the institutional drama of life.

The problem isn’t corporate personality per se but the ambiguous language (conflating several meanings of personhood) used to justify controversial decisions (SCOTUS) and to attack these decisions (Move to Amend).

Dewey (1926: 656) explained:

“What ‘person’ signifies in popular speech, or in psychology, or in philosophy or morals, [is] as irrelevant, to employ an exaggerated simile, as it would be to argue that because a wine is called ‘dry,’ it has the properties of dry solids; or that, because it does not have those properties, wine cannot possibly be ‘dry.’

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Back to square one

With P1 it is clear that both humans and corporations are persons in the exact same legal sense of being endowed with a mask serving as a point of reference for key legal capacities.

The compelling distinction between the two types of legal persons is not that one is "natural" or "legitimate" and the other is "artificial" or "illegitimate" (there is no such thing as a natural legal person).

Better argument: while both humans and corporations are persons in the exact same legal sense, there is no reason to assume that all legal persons attract then same set or bundle of rights and duties.

⇒ This directs attention to distinctions between several kinds of rights and duties.

⇒ Calls for Hohfeldian analysis (liberties, claims, powers, immunities).
### Distinguishing rights

**R1** = “functional rights”: minimal set or bundle of legal-economic capacities that *human and corporate legal persons* need to **play a role in the economy**

- R1 includes contractual, property and litigation rights, along with the set of rights that support these (e.g. fair trial)

**R2** = “fundamental rights”: maximal set or bundle of political-civil capacities that *human legal persons* need to **play a role in the polity**

- R2 includes life, free speech, freedom of religion, education, asylum, along with set of rights that support these (e.g. freedom from slavery, freedom of peaceful assembly, right to rest and leisure, various entitlements, legal aid, etc.)

*Humans legal persons* normally, albeit conditionally, **have the capacity to attract the full sets or bundles of R1 and R2**

### A Kantian proposal

**Corporations aren’t ends in themselves but means to human ends**

On these **Kantian grounds** there is **no reason to grant corporations** anything resembling **R2**

But it is a mistake to claim that corporations don’t or shouldn’t have any rights, or that all "corporate" rights are in fact the rights of the individuals involved

The **referent** of the **minimal set or bundle of R1** that the corporation must have in order to function, i.e. serve human ends, is **the corporation itself**

⇒ This does not preclude the possibility that the specific set or bundle of rights afforded to various P1 legal persons (both human or corporate) in society changes over time, and depends on the economic, political and moral evaluation of a given community

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The distinction between functional and fundamental rights isn’t strict, as there is clearly some overlap.

In a Hohfeldian analysis of jural relations rights and duties are correlatives, but it may be possible to imagine an asymmetry between rights and duties.

E.g., in a legal relation between a human legal person and a corporate legal person the former may have more rights while the latter may have more duties.

In the meantime one conclusion can already be drawn:

**Legitimate causes** (e.g. limiting corporate power, restoring democracy) are ill-served by misguided arguments (e.g. abolish corporate personhood).