

Are Corporations People?

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DURING THE OBAMA YEARS, the American left has regularly and forcefully claimed that “corporations are not people.” Progressives ranging from ordinary protestors all the way up to President Obama have insisted that, because corporations are not living, breathing human beings, corporate personhood—the idea that corporations have certain legal and constitutional rights—is a fiction. As they would have it, corporate personhood was foisted upon the country by the radical conservatives of the Roberts Court and Republican officeholders with only one thing in mind: helping big business.

But contrary to what we may hear from Elizabeth Warren and ThinkProgress, corporations are, as a matter of fact, people in the eyes of the law. They have been since the beginning of the American republic, making corporate personhood deeply rooted in our legal and constitutional tradition.

When conservatives point out, as Mitt Romney notably did in his presidential campaign, that corporations are and should be considered people for certain purposes, they’re pointing out what the left seems to have forgotten. They’re pointing out that, though corporations may not be natural persons—that is, discrete, individual human beings whose rights somehow originate in nature—corporations nevertheless are and should be entitled to certain legal and constitutional rights.

This is not to say that corporate rights operate in the same way as do the rights of natural persons. In many cases the law justifiably treats the rights of natural persons and artificial persons differently. It is to say, however, that respect for the rights of corporations, no less than respect for the rights of individuals, is advantageous for our social order and has

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been essential to America's development as a prosperous, free, and good society. Accordingly, America's perpetuation as such a society requires that we understand and defend corporate personhood and corporate rights against this criticism from the left.

THE LONG TRADITION OF CORPORATE RIGHTS

The idea that corporations have legal rights, and therefore a kind of personhood, is not an invention of contemporary conservatives. Its roots stretch all the way back through the history of American law and deep into the English common-law tradition. That tradition was captured most comprehensively—and communicated to the American founders most forcefully—by William Blackstone's *Commentaries on the Laws of England*. The very table of contents of that work bears witness to the legal tradition of granting rights to corporate persons. Chapter 18, "Of Corporations," is placed in "Book the First: The Rights of Persons."

Corporations as legal forms, Blackstone explained, are "artificial persons," created by law "for the advantage of the public." The rights accorded to the corporate form, he thus suggested, were granted in order to encourage cooperation among individuals with a view to socially useful ends. Without the corporate form, an association of individuals could not make binding rules to govern its members or internal structure. Without certain rights, it could not hold property indefinitely as an association—the death of the association's members would mean the death of the association. Without granting corporations certain rights, individuals could not securely create an association that would have a life, an identity, and a mission that could continue from one generation to the next.

Blackstone's account importantly teaches us that legal recognition of corporations is not limited to the for-profit kind. The corporate form was developed, he noted, particularly for "the advancement of religion, of learning, and of commerce." Just as in Blackstone's day, when corporations would have included not only the British East India Company but also Oxford and Cambridge, today's concept of the corporation embraces not only for-profit enterprises like Apple and General Electric but also non-profit institutions like the Metropolitan Museum of Art and the New York Philharmonic. Indeed, the first corporation chartered in America was not a business but an institution of higher learning—what is now Harvard University.

There is, moreover, nothing outlandish in Blackstone's view that such institutions should have rights, or that the discussion of those rights belongs in the context of a larger account of the "rights of persons." A corporation is simply a legally recognized group of people cooperating with a view to some common end. Indeed, the very purpose of that legal recognition and the rights that accompany it is to provide a framework for a group of citizens to freely associate with one another in a stable, productive, and harmonious way.

The wisdom of this traditional English legal institution found its way to America through Blackstone's *Commentaries*, which was assiduously studied by lawyers of the founding generation and by many of the founders themselves. Understandably, the founders chose to preserve England's legal tradition in substantial form; for all the new things they created, the founders could not invent, by themselves, an entirely new system of legal principles.

It is therefore not surprising to find that Blackstone's understanding of corporations as legal persons were echoed by the great lawyers and jurists of the founding generation. In Alexander Hamilton's *Opinion as to the Constitutionality of the Bank of the United States*, for instance, we find the nation's first secretary of the treasury observing that to "erect a corporation, is to substitute a *legal* or *artificial* to a *natural* person." In other words, when government recognizes a corporation, it effectively creates a "legal or artificial person."

In his *Lectures on Law*, James Wilson offered an even more complete restatement of Blackstone's account. Within states, Wilson noted, "smaller societies may be formed by a part of its members." These smaller societies, he continued, are "deemed to be moral persons" whose "actions are cognizable by the superior power of the state, and are regulated by its laws." Ordinarily, at law, such societies are called "corporations," he added. A legal corporation, then, is "described to be a person in a political capacity created by the law." Wilson also followed Blackstone in acknowledging the kinds of purposes for which the corporate form had originally been developed. These "artificial persons," he observed, "have been formed to promote and to perpetuate the interests of commerce, of learning, and of religion."

Because of this long tradition of legal understanding, it is not unusual for the word "person," when found in legal texts, to apply to corporations. In this common parlance, it simply means that corporations have

certain legal rights and responsibilities. Congress acknowledged this principle explicitly in the so-called Dictionary Act of 1871, which laid down rules for construing federal laws. Contained in Section 1 of Title 1 of the United States Code, this provision notes that, “unless the context indicates otherwise,” the “words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”

The Constitution, moreover, is a legal text, written and ratified by men steeped in this legal tradition according to which corporations are artificial persons capable of holding certain rights under the law. Accordingly, the view that some constitutional rights attach to corporations as well as individuals is by no means a conservative manipulation of law, as the opponents of corporate personhood suggest.

To be sure, a given reference to “persons” and their rights in the Constitution may or may not be intended to refer to corporations. Frequently, as the language of the Dictionary Act indicates regarding the interpretation of statutes, it depends on the context. For example, the framers surely did not intend to refer to corporations when they provided that representation in the House of Representatives shall be determined with reference to “the whole Number of free Persons” in each state. The Census Bureau, then, quite properly does not count corporations when ascertaining each state’s population. Similarly, when the Constitution holds that “no Person shall be a Representative who shall not have attained to the Age of twenty five Years,” it is certainly not suggesting that a corporation could be elected to Congress.

And yet, one cannot easily dismiss the idea that some constitutional provisions *do* properly apply to corporations as well as individuals. But this is exactly what the left is now attempting with its flat, simple claim that “corporations are not people.”

CONSTITUTIONAL RIGHTS

Progressives are, as a matter of fact, wrong on the question of whether corporations are people under American law. But the evidence for this is not limited to the English legal tradition and the legal educations of the framers and their successors. If indeed corporations were not people, as progressives insist, strange and dangerous consequences would quickly follow.

For instance, the Fifth Amendment to the Constitution provides that “no person shall be . . . deprived of . . . property without due process of

law; nor shall private property be taken for public use, without just compensation.” If progressives are committed to their initial claim, they would have to say that the Fifth Amendment’s protections don’t and never did apply to corporations. This would mean that a corporation’s property could be taken arbitrarily, with no compensation, for any reason and at any time. Surely the American founders, who were ardent advocates of the right to property, did not intend this passage to protect the property rights only of individuals and not of corporations.

If the founders did not believe government is required to guarantee the property rights of corporations, then they conceded that natural persons could make their property subject to arbitrary and uncompensated seizure by the government by placing it in a corporation. But as Hamilton observed in his *Opinion as to the Constitutionality of the Bank of the United States*, the very point of allowing incorporation is, in the first place, to permit “one or more natural persons” to “hold property” together as a single, legal person.

Setting aside the framers’ intentions, committing ourselves to denying corporate personhood would mean stripping corporations of their property rights and making their property subject to arbitrary seizure without compensation. Private companies and businesses, which are nothing more than corporations, would have little choice but to close down. Non-profits, including traditionally left-of-center ones like the Sierra Club and the NAACP, would also be subject to property expropriation by the government.

Other examples of corporate rights derived from the Constitution abound. The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fourteenth Amendment, which was passed in the wake of the Civil War to protect the rights of the newly freed slaves, provides that “no State shall...deny to any person within its jurisdiction the equal protection of the laws.” If corporations are not protected by these rights, as progressives insist by claiming they aren’t people, it would be lawful to, say, search the offices of any business or non-profit without a warrant. It would also mean states could enact laws discriminating against corporations based on the owner’s race, religion, sex, or any other currently protected characteristic.

No one, however, would contend that the rights enshrined in these amendments are held only by individuals to the exclusion of

corporations—nor that they should be. To do so would mean not only misreading the Constitution, but also subjecting the private cooperation of private citizens to potential tyranny.

CORPORATIONS AND THE FIRST AMENDMENT

Of course, the idea that corporations have both property rights and equal-protection rights has not raised the left's ire so much as the notion that they have rights to freedom of speech and religion. Two cases in particular—*Citizens United v. FEC*, which reaffirmed corporations' First Amendment right to free speech, and *Burwell v. Hobby Lobby*, which held that the expansive religious freedom afforded to individuals under the Religious Freedom Restoration Act also applies to closely held corporations—have sparked the greatest reaction. The left has vehemently denounced these rulings, despite the fact that the opinions come from straightforward readings of the relevant constitutional and legal provisions.

The First Amendment does not use the word “person” when protecting freedom of speech. It simply states that “Congress shall make no law ... abridging the freedom of speech.” The amendment's use of such general language suggests that the question of personhood—whether the person speaking is natural or artificial—might, in fact, be irrelevant to a constitutionally correct free-speech inquiry. The provision seeks to protect “freedom of speech,” without any reference to who is speaking, whether one or many, and, if many, how they are organized. The plainest reading of the amendment, therefore, would protect the speech of both individuals and corporations, and even groups that are not formally incorporated. All of this seems to support the Court's conclusion in *Citizens United* that the Constitution protects the speech rights of corporations.

Furthermore, unacceptable consequences would result from any attempt to deny corporations the freedoms of the First Amendment. If corporations are not protected by the First Amendment, then, among other publications, the *New York Times*—a for-profit corporation—would not have First Amendment rights. This would mean that the *Times*, simply because it is an artificial person, lacks the right to speak freely. It would also mean that the *Times* is not protected by the freedom of the press, which is enshrined in the First Amendment just after to the right of free speech. In such a world, the government would seem to retain the ability to censor the country's most popular newspaper—and any other media outlet not consisting of a single individual—for any reason.

The left is not unaware of the practical consequences of their simplistic assault on corporate personhood. More often than not, they try to exempt certain institutions in proposals to curb the results of court decisions like *Citizens United*. For example, a failed constitutional amendment proposed by Senate Democrats would have empowered Congress to prohibit corporations from spending money to “influence elections.” The amendment’s language implicitly concedes the validity of the vast body of Supreme Court precedent holding that corporations have a right to free speech, even political speech, in contexts other than elections. Moreover, the proposed amendment would not even have tried to exclude all corporations from exerting influence on elections: It carved out an exemption for the institutional media.

That this amendment didn’t go so far as to embrace a wholesale denunciation of corporate rights shows the naïveté of the denial of corporate personhood. After all, why should corporations in general have a constitutional right to engage in speech—even political speech—but not the most important kind of political speech, namely, that which concerns elections? And why should the institutional press have a right to influence elections, while that right is withheld from other corporations? The answer to this question cannot be that the press is not, unlike ordinary corporations, animated by selfish economic interests—most of the institutional press is operated for profit, and the proposed amendment would permit Congress to exclude even non-profit corporations from spending money to influence elections. It is not possible to think through the Democrats’ proposed amendment without concluding that it aimed not to establish or protect any neutral political principle, but simply to impede the kinds of speech, by the kinds of actors, disapproved of by its sponsors.

A similar inquiry into religious freedom yields similar results. Once more, the First Amendment does not use the word “person” when it provides for freedom of religion. It simply states that “Congress shall make no law . . . prohibiting the free exercise [of religion].” As in the case of freedom of speech, the most straightforward reading of this language would indicate that the freedom is protected regardless of who is exercising it, whether a natural or an artificial person. Indeed, it would be strange if the right did not extend to corporations, since, as Blackstone observed of England and as was also true of early America, religious organizations were often established as corporations.

The Religious Freedom Restoration Act, the federal law at issue in the *Hobby Lobby* case, *does* use the word “person.” It provides that “Government shall not substantially burden a person’s exercise of religion” except where it can show a compelling governmental interest being advanced by the least restrictive means. The only sensible reading of this language would require that the law’s protections extend to both natural and artificial persons. The alternative would be to hold that the Religious Freedom Restoration Act might not afford protection to churches (since they aren’t natural persons), the vast majority of which are incorporated.

THE ART OF ASSOCIATION

Apart from ignoring the long legal history of corporate personhood and the consequences of scrapping the doctrine now, the left severely underestimates corporate personhood’s historical contributions to America’s prosperity. Beyond a doubt, American society would not have developed as it has without the aid of corporations. After all, such institutions, Blackstone noted, are created as persons in the law for “the advantage of the public,” especially for religious, educational, and commercial purposes.

When we think of corporations nowadays, we think first of commerce. It is certainly worth remembering that America became a great and powerful commercial nation largely through the operations of corporations. It is unlikely that we could have achieved such prosperity, or attained our economic place in the world, had corporations not been afforded significant legal rights. This point has been acknowledged, at least implicitly, even by the greatest of liberal heroes: In his “Commonwealth Club Address” of 1932, Franklin Roosevelt attributed the growth of America into a colossal manufacturing power to the activities of large “industrial combinations” — which he also called “great corporations.” To be sure, Roosevelt argued that these corporations had become too powerful and should be regulated more strictly by the government. But he never suggested that they should be stripped of their legal existence and the rights that accompany it. On the contrary, he explicitly rejected that idea, even in relation to the most powerful corporations.

An earlier generation of Americans, he observed, had not responded to the problems that attend a strong central government by abolishing it. “Nor today,” he added, “should we abandon the principle of strong

economic units called corporations, merely because their power is susceptible of easy abuse. In other times we dealt with the problem of an unduly ambitious central government by modifying it gradually into a constitutional democratic government. So today we are modifying and controlling our economic units.”

In addition to their role in commerce, corporations have been essential to the organization of important charitable endeavors — as Blackstone reminds us, and as is still true today. Most American churches and colleges have been and are organized as legal corporations, albeit non-profit ones. Attention to our political and legal history continually reminds us of this fact. Alexander Hamilton’s tombstone — which one can still visit in lower Manhattan — is inscribed as having been erected by “the Corporation of Trinity Church.” When the Supreme Court considered *Dartmouth College v. Woodward* in 1819, it was the college itself — in other words, the trustees acting on behalf of the corporation — that exercised its right to sue in order to defend the integrity of its original charter against the State of New Hampshire’s effort to alter it and take control of the college.

The clearest articulation of incorporation and association’s contributions to the prosperity of the early republic is found in Tocqueville. In *Democracy in America*, he praises Americans for their spirit of association, their ability to cooperate for the common good without always calling on the government. Tocqueville thought this spirit was essential to maintaining America as both a democratic and a free country. The spirit of association he so admired, however, depended then (as it does now) on the ability of citizens to form legal corporations to ratify the cooperative associations that they make.

According to Tocqueville, democracy does not, by itself, tend to foster an energetic and thriving civil society. On the contrary, the democratic social state, by rendering all men equal, tends to leave them socially weak. Precisely because of their social equality, democratic men lack influence over one another and therefore cannot easily organize themselves with a view to common action. In contrast, aristocracy facilitates such cooperation: Aristocrats wield the social authority to marshal resources and men with a view to some common, publicly beneficial end. Democracy, then, needs to develop a vigorous spirit of voluntary cooperation in order to replace the kind of social activity formerly spearheaded by noblemen.

In his account of the importance of the spirit of association, Tocqueville anticipates and corrects the kind of thinking characteristic of modern American progressivism. Many of his own contemporaries, Tocqueville noted, thought they saw a simpler and more direct way to remedy the weakness of individuals under democratic conditions: “They judge that as citizens become weaker and more incapable, it is necessary to render the government more skillful and more active in order that society be able to execute what individuals can no longer do.” Tocqueville cautioned, however, that this solution is not as adequate as its proponents tend to believe.

In the first place, Tocqueville suggested that no government could “ever be in a state to suffice for the innumerable multitude of small undertakings that American citizens execute every day with the aid of an association.” In Tocqueville’s America, much of society’s essential work was accomplished not by government but by freely cooperating citizens. Americans formed not only “commercial and industrial associations,” but also “a thousand other kinds: religious, moral, grave, futile, very general and very particular, immense and very small.” They used associations “to found seminaries, to build inns, to raise churches, to distribute books, to send missionaries to the antipodes,” and to “create hospitals, prisons, schools.” Tocqueville’s point is as sound today as it was when he wrote it: It is impossible to imagine the government of the United States today providing all of the services—educational, cultural, and charitable—which are currently provided by voluntary associations, for-profit corporations among them.

In the second place, Tocqueville indicated that even if a government *could* perform all those functions on behalf of the citizenry, it would end up doing more harm than good. “The morality and intelligence of a democratic people,” he observed, “would risk no fewer dangers than its business and its industry if the government came to take the place of associations everywhere.” A government that seeks to provide for all social needs ultimately infantilizes its own people. In contrast, while reliance on the spirit of voluntary association may not produce results as quickly as a government program, over time it fosters the kind of social energy and skill that, in the end, accomplishes far more than a centrally administered society.

Finally, of course, Tocqueville identifies the danger of tyranny. By assuming more and more responsibility for society’s welfare, a government

deadens the citizens' spirit of association, thereby turning the citizens more and more into equally helpless, dissociated individuals. It makes them, in other words, material for tyranny. In the now-vanished feudal past, the social hierarchy acted as a check on tyranny: The power of nobles and an established church prevented the monarch from having his will in all things. Lacking such traditional and aristocratic intermediary institutions, democracy needs to develop new ones if it is to avoid the kind of tyranny to which it is prone. Those new institutions are the voluntary, incorporated associations of civil society.

CORPORATIONS AND THE NEW CIVIL SOCIETY

Doubters might think that the preceding discussion needlessly conflates the Tocquevillian spirit of association with the legal form of the corporation. After all, many of the American associations that Tocqueville praised would not have been formally established as corporations at the time. Therefore, they would say, granting legal rights to corporations is not necessary to the flourishing of the small associations that Tocqueville thought were essential to a healthy democracy.

This rejoinder is imperfect as an account of Tocqueville's America, and it is inadequate as an account of today's America. Although many associations were not formally incorporated, associations taking the corporate form were still incredibly significant in fostering the spirit of association that Tocqueville observed in 19th-century America. And the country's development since then has rendered the corporation more, not less, necessary to sustaining that spirit.

It is true that in Tocqueville's time many associations were organized — and accomplished much good — without being formally recognized as corporations. Nevertheless, one could not accurately contend that the corporate form was therefore of only marginal importance in the development of civil society. Take higher education, for example, which in early America was almost entirely provided by private colleges. Like the aforementioned Dartmouth College, these institutions needed the corporate form to preserve their ability to hold property and to maintain their principles of organization over a period of many generations. A well-educated foreign visitor like Tocqueville could judge Americans to be an enlightened people in part because many Americans had been instructed by colleges that had been incorporated as legal or artificial persons. Thus, even if we consider only higher education, we

can reasonably say that America's culture would have been decisively different—and indeed notably less admirable—without the principle of corporate personhood.

If granting legal recognition to corporations nurtured the spirit of association in Tocqueville's time, it is absolutely indispensable to fostering that same spirit today. One of the well-known benefits of modern incorporation law is the principle of limited liability. The owner of a non-incorporated entity can be held personally liable for the full extent of any damages done in the course of business. A limited-liability company, by contrast, enables owners to limit their exposure to lawsuit insofar as any recovery is limited to the corporation's assets, not the owner's personal assets. In other words, an individual carpenter might lose his own personal assets if he harms a customer while working. A carpenter incorporated as a limited-liability company causing the same harm might lose his business assets, such as his tools or business truck, but he won't lose his home.

This protection might not have been essential in Tocqueville's time, but it certainly is in ours. It enables a host of innovative, risk-taking behaviors that grease the wheels of the American economy. In today's complex economy, incorporation is a necessary protection for any association that includes more than a few people and that seeks to operate on a considerable scale and for an indefinite period of time. Put another way, in modern America, any effort to do anything—whether it be creating jobs or providing charitable services—beyond a very modest scale requires the corporate form. Without it, very few people would be willing to take the legal risks, and America's spirit of association would wither.

The corporation also contributes something more positive to our capacity for association by actually stimulating the desires that lead people to create new institutions within civil society. The American founders understood that many people are drawn into public service by the desire to win recognition. Hamilton spoke of the "love of fame" as the "ruling passion of the noblest minds," and observed that it often leads men to "plan and undertake extensive and arduous enterprises for the public benefit." As we have learned from Tocqueville, however, this political love of fame cannot succeed in doing all the good that society needs done—government alone can never be safely entrusted with all the tasks that are accomplished by voluntary associations. A healthy society, then, must find some way to stimulate the ordinary man's more modest ambitions. The love of political fame may

nurture great statesmen, but society also needs to foster the more limited yearning for recognition in the private but prominent citizen. It is, after all, just such citizens who take the lead in forming the institutions of civil society. Their desire for recognition as public benefactors is the lifeblood of the spirit of association.

The corporation is well suited to encourage these wholesome ambitions. Incorporation creates the possibility that an institution can outlast its founding members and therefore holds out the promise of legacy, a kind of worldly immortality. The greatest political ambitions can be realized only by a tiny few—hardly anyone gets to be a senator, a governor, or president. The legal form of the corporation, by contrast, makes possible the prominence of ordinary private citizens. This can happen on a relatively grand scale, as with Henry Ford or John Harvard; but it can also happen on a more modest scale, as when someone establishes a local business that lasts for generations, or when a local benefactor establishes a local library, museum, or hospital. And of course even those who do not found but merely work for or manage such corporations can feel that they are part of the history of an institution that is itself a part of the history of the larger community and the nation. Giving legal recognition to corporations, then, is indispensable to a healthy democratic civil society because such recognition democratizes, in a sense, the love of fame and brings its satisfaction, on a limited scale, within the reach of the ordinary citizen.

Would all the good work that has been done in America through corporations have been accomplished without them? It is impossible to say. But their impact on our society is incalculable, and so would be the consequences of jettisoning—in a fit of liberal pique—the legal tradition that allows them to exist and operate.

RECOVERING CORPORATE PERSONHOOD

The left's rejection of corporate personhood in the wake of *Hobby Lobby* and *Citizens United* is unsurprising. Rather than attack a perceived problem—overspending in elections—by tailoring a solution to it, progressives have again jumped at the opportunity to destroy a traditional institution without understanding why it was instituted in the first place. Nothing else adequately explains the trivial arguments of politicians like Elizabeth Warren: “Corporations are not people. People have hearts. They have kids. They get jobs. They get sick. They cry. They dance. They live. They love. And they die.”

Here, conservatism's sympathetic attention to tradition uncovers the sound reasons for creating and preserving corporate personhood. True, corporations are not natural persons, and so Warren is right that, in a very plain way, corporations do not flourish in the same way that individuals do. Nevertheless, corporations are vital to making the flourishing of individuals possible. Human beings do not flourish in isolation, nor are they born as isolated individuals, as even Senator Warren points out. They are born into communities and develop their individual identities in that context. Their natural sociability demands that throughout their lives they continue to cooperate with others in enterprises of common advantage. The corporate form facilitates cooperation by providing a stable and legal footing for that cooperation. People are led by their hearts and their love for each other to create charitable institutions. They are led by their desire for jobs to create businesses that provide employment for themselves and their fellow citizens. Legal recognition of corporate rights encourages those admirable strivings by offering the possibility that the organizations to which they give rise can be established on a solid legal foundation.

None of this is to say that there is no difference between natural and artificial persons. Corporations cannot have exactly the same rights as individuals, nor should they. Even as he explained the traditional view that a corporation is a kind of legal person, Hamilton acknowledged that certain kinds of legal rights cannot attach to such a person. Laws of descent cannot apply to a corporation because it can have no heirs, just as laws of distribution cannot apply to it because it cannot die. Similarly, corporations as artificial persons are subject to certain legal duties, like paying taxes, and exempt from others, like conscription. The traditional view, then, provides the materials by which to make reasonable distinctions between natural and artificial persons and to justify reasonable regulations on corporations.

We must recognize that corporations are an inextricable part of American law and culture. They have contributed immensely to the development of our civil society, and it is impossible to mount a wholesale attack on their status and rights without also undermining the social goods to which corporations contribute. Whatever abuses might be committed by individual corporations, the legal principle of corporate personhood should be defended against the left's irresponsible rhetoric.