

## Corporations and the First Amendment

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2010-2011 Zicklin Center Faculty Funding Research Project

On January 21, 2010, the Supreme Court issued its much anticipated decision in *Citizens United v. Federal Elections Commission*, No. 08-205, holding, *inter alia*, that corporations are no different from individual persons for purposes of claiming the First Amendment's protections for political speech. In the wake of *Citizens United*, corporations may use their resources – frequently, resources that dwarf those any individual could amass – to influence the outcome of political elections through the dissemination of speech supporting or opposing candidates for office.

Moreover, it is not just the *Citizens United* decision that affirms a vision of the corporation as a legitimate political actor within a democratic polity; corporations' First Amendment rights also receive protection in laws that recognize corporations' "conscience-based" authority to refuse to provide certain pregnancy termination or end-of-life treatments. Thus, for example, an Executive Order accompanying the federal health care reform bill signed into law on March 23, 2010, makes clear that "[u]nder the Act, longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact and ... prohibit discrimination against health care facilities ... because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions." *Executive Order -- Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion* (Mar. 24, 2010).

The notion that a corporation has a conscience that the government must recognize, like the notion that the corporation harbors political views that the government cannot restrict, is likely to upset those on the ideological left. But the critiques of these purported corporate rights have so far not distinguished the rights in question from their corresponding individual rights. The threat to democracy posed by allowing corporations, with their immense aggregations of wealth, to function as political speakers arises as well under a regime that allows individual citizens, who may also accumulate tremendous wealth, to spend as much of that wealth as they choose on political speech. Similarly, the threat to abortion rights posed by allowing corporations to refuse to offer abortion services arises as well under a regime that recognizes that individual physicians should be permitted to refuse to offer abortion services.

The way to counter these legal developments, I believe, is not to argue that they are wrong whether it is individual or corporate rights that are at stake, but instead to argue that the corporation is not such as to legitimately claim to possess the rights in question. Briefly put, the anticipated article will contend that the corporation is not the kind of entity that possesses the capacities necessary to qualify for the First Amendment's protections. It is not, that is, a citizen for political purposes.

In the first part of the anticipated article, I will articulate the conditions for membership in a political community, and for possession of a conscience. In the second part of the article, I will argue that corporations fail to satisfy these conditions. To preview the central argument here: To qualify as a citizen and to possess a conscience (or be conscientious) requires that one be capable of participating in a community of moral judgment – one must be able to judge others (hence the civic obligation of jury duty, for example), and to judge oneself (this is just the way one's conscience operates). Corporations do not possess a capacity to form moral judgments, I will argue, and so cannot qualify as citizens or conscientious beings. The nature of this research is theoretical.