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Free speech and Citizens United, three years later

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It is fitting that the third anniversary of *Citizens United v. Federal Election Commission* fell on inauguration weekend. The case allowed new ways for citizens to participate in campaigns -- a fact publicly derided by progressives and reformers yet privately taken advantage of by the candidates they support, including President Obama. Despite the liberal condemnation of the money *Citizens United* brought to campaigns, the decision has benefited the American voter.

Citizens United allowed corporations and unions to make independent expenditures in support of or opposition to a candidate. A case decided by the U.S. Court of Appeals just weeks later, *SpeechNow.org v. Federal Election Commission*, held that organizations with a major purpose of making such independent expenditures must register as political action committees, but further that it infringed on the right of free speech to limit the source or size of contributions to such an independent expenditure-only PAC.

Taken together, the *Citizens United* and *SpeechNow.org* decisions allow for-profit corporations and unions to spend on political activity from their general treasuries, but this is the least important part of the opinion, because very few corporations do this. The cases' real impact has been to allow individuals (and corporations and unions) to give as much as they want to groups that make independent expenditures in election campaigns (super-PACs), and they allow nonprofit membership organizations, such as the National Association for the Advancement of Colored People, Planned Parenthood, the Chamber of Commerce and the National Rifle Association, to expend money from their treasuries in support of or opposition to candidates -- although such groups would have to register as PACs should this become their primary purpose.

Citizens United had nothing to do with the legal concept of "corporate personhood," a doctrine that is almost as old as corporations, and which the Supreme Court has recognized in hundreds of cases beginning with *Dartmouth College v. Woodward* in 1819 (in which all members of the court concurred). *Citizens United* did not change any of the laws governing disclosure of campaign spending. Despite all the hysteria around "dark money," all political ads must in fact include disclosure information about the organizations or campaigns running the ads. Those organizations not required to disclose donor names accounted for only 7 percent of political ads in 2012.

We have now had two elections under Citizens United. In the 2010 midterms, Republicans scored huge gains. In the 2012 presidential cycle, Democrats won solid victories across the board. Both elections were highly competitive, and independent spending permitted by Citizens United and SpeechNow.org added significantly to the competitiveness of a great many House and Senate races. Turnover and enthusiasm were high.

Nevertheless, the political Left -- and parts of the Right -- remains hostile to unregulated speech about politics and politicians. Even as the Left hopes for the appointment of new Supreme Court justices who will overturn Citizens United, the Left has moved to silence conservative speakers in new ways. For example, in New York, Comptroller Thomas DiNapoli is suing Qualcomm for more information about its contributions to trade groups and other nonprofits, with the intent of pressuring the company into withdrawing support from trade groups that fight against liberal political initiatives.

President Obama's Securities and Exchange Commission is considering new rules to force companies to publicly disclose not only their political spending, but their support for groups and trade associations that oppose parts of the progressive agenda. The goal is to force the information into the public, where the Left can organize selective boycotts of its opposition and the government has information it can use to retaliate and intimidate.

Another buzzword going forward is "disclosure" of donors. Already, more information about political donors is available than at any time in history. But this is not an unmitigated good, as our courts have held. In recent years, we have seen people who financially supported groups opposed to same-sex marriage publicly harassed and hounded from their jobs. The president has personally vilified those who have financially opposed his initiatives. The irony is that even as President Obama demands more disclosure of donations to conservative causes out of one side of his mouth, his top aides and advisers have established a 501(c)(4) intended to raise money to support the president's agenda going forward, which will not disclose its donors.

At the FEC, at the SEC and in Congress, we see that the Left hopes to chase conservatives out of the political marketplace of ideas by making it too costly to exercise the rights guaranteed by Citizens United. Ironically, constitutionally recognized protection against excessive compulsory disclosure of political participation, speech and funding is a legacy of the civil rights era, when the NAACP and other organizations fought states' efforts to force public disclosure of their supporters.

Ironic, because Monday was not only Inauguration Day. It was also Martin Luther King Jr. Day. Here's hoping Americans remember that champion of free speech and reject those who seek to use the law to intimidate political opponents from speaking their minds.

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