



Lisa Danetz on Anniversary of Citizens United Ruling

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When thinking about campaign finance issues, I always like to step back and think about the following question, which really motivates much of my work: How can we ensure adequate representation in a democracy and, more to the point, how will a particular rule, regulation or decision impact democratic representation?

For example, we have limits on contributions to candidates, and those limits address two distinct problems: first, to make sure the size of one's wallet doesn't determine the strength of one's say in our democracy; and second, to prevent a winning candidate's gratitude for a large contribution from skewing that candidate's ultimate policy decisions as an officeholder. Each of those issues is a problem because democratic theory is based on the idea that elected officials should represent and address the concerns of all their constituents and not be concerned only with the constituents who "bought" them their seats. In other words, what's ultimately at stake with money and politics is how much say *average citizens* have over the policies that govern their lives.

And I think, unfortunately, the impact of the *Citizens United* decision does not have a positive impact on democratic representation.

As a threshold, it's important to recognize that money in politics, at some level, is a necessary evil. It is required – because it is money that pays for campaign staff, space, and crucially in today's campaigns for media time. But in our current system of unlimited spending, elections often come down to a simple matter of economics: who raises and spends the most money wins. That means candidates need a lot of money supporting their candidacies, and they rely in a deep way on those who can provide funding.

By now, having heard from my co-panelists, I assume you are well aware that the holding of *Citizens United* was that, for the first time in a century, corporations must be allowed to spend their general treasury funds –that is, money raised by selling widgets rather than collected

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specifically for political purposes—in the political arena. The opinion allows corporations, state chartered and created by law, to have the same speech rights as natural born persons. In my opinion, this is absolutely ridiculous. And the decision obviously allows a huge influx of new money into the system. With huge corporations given free reign, average citizens are going to have an even tougher time getting the attention of their representatives.

Beyond this holding, which is huge in and of itself, there are at least two other incredibly important and disturbing aspects of the *Citizens United* opinion. First, *Citizens United* feels like the final nail in the coffin for legal recognition of political equality as a concern of constitutional dimension within campaign finance jurisprudence. This has not been discussed much in the national conversation about the opinion. It is true that *Buckley* disavowed “equality” as an acceptable rationale underlying campaign finance regulation but important aspects of “equality” lived on elsewhere. In making its ruling in *Citizens United*, the Supreme Court not only set into motion a string of events that deepens political inequality by allowing an even greater and outsized role for the wealthy in our society but also established legal precedent sanctioning that political inequality. It did so by overturning *Austin v. Michigan Chamber of Commerce*, a case from 20 years ago that recognized “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.” In other words, the current Supreme Court is completely okay with winners in the economic marketplace using their financial success as leverage to become the winners in the political arena.

The other problematic aspect within the Court's ruling, which is having a huge effect on elections, is the categorical rejection of the idea that independent spending—spending not coordinated with or controlled by a candidate-- can be corrupting and therefore cannot be limited. So, to use a recent example of independent spending, casino magnate Sheldon Adelson – who grew up nearby in Dorchester—could not give Newt Gingrich's campaign \$5 million because that might be corrupting but, in response to Newt's request, Mr. Adelson was able to provide that same \$5 million to Newt's SuperPAC -- and the Court thinks that somehow will have a different impact and is not corrupting.

Indeed, this categorical insistence that independent spending cannot be corrupting is what is behind the rise of SuperPACs—clearly the big player in the 2012 election season. SuperPACs are entities, supporting a particular candidate or several candidates, that operate in parallel to candidate campaigns. Because they do not donate to or coordinate with candidates but only

spend their money “independently” of candidates – if you watch The Daily Show or The Colbert Report, you know that this is defined in a very narrow way-- they can accept unlimited amounts of money from individuals, unions, for-profit corporations, or nonprofit corporations, often funneling big business money to avoid disclosure – and therefore they can raise and spend obscene amounts of money.

It is simply crazy to think that the candidates who benefit will not be just as grateful for a donation to the SuperPAC as to their campaigns. Indeed, the candidates will arguably be *more* grateful because the amount of money contributed to a SuperPAC is likely to be much larger than the amount that legally can be contributed directly to a campaign. And legislative outcomes may not be affected only by this gratitude but also by fear: If a candidate does not do the bidding of a moneyed interest, that interest might instead give its money to a SuperPAC supporting an opposing candidate, or start its own SuperPAC just to attack the legislator with the gall to go his or her own way.

So where does that leave us – other than despair?

There are definitely beginning signs that “We, the People” are ready to fight back. We see it in the Occupy Wall Street movement. We see that, in the national discourse, people throughout the country are starting to make the connection between the economic pain they are feeling and the deficits in our democracy embodied by the *Citizens United* decision.

We’ve also seen the emergence of a movement pushing for a constitutional amendment to address the problems created by *Citizens United* and to reject the divorced-from-reality reasoning embraced within it. There are many versions of amendments that are out there now and, in the near term, it is probably less important to decide which is the right amendment and more important for the idea to catch on – because, absent a reversal of the decision by the Supreme Court, an amendment is the only way to fix the problem.

And we actually even see signs of hope in the legal arena, because a decision by the Montana Supreme Court issued in late December has suddenly created a new opportunity to revisit *Citizens United*, by upholding Montana’s long-standing state law restricting corporate expenditures in Montana elections. This 5-2 decision of the Montana Supreme Court is remarkable in the trenchant analysis, not only by the majority but *especially by* the dissent, of the dangers that unrestrained corporate spending on politics poses to self government in Montana.

Justice Nelson, the dissenter who I just referred to in passing, felt that *Citizens United* required Montana's ban to be struck down but clearly was not happy to vote in favor of further entrenching corporate power. The justice had the following to say:

On political equality: "It is utter nonsense to think that ordinary citizens or candidates can spend enough to place their experience, wisdom, and views before the voters and keep pace with the virtually unlimited spending capability of corporations to place corporate views before the electorate. In spending ability, bigger really is better; and with campaign advertising and attack ads, quantity counts. In the end, candidates and the public will become mere bystanders in elections."

On corruption, he stated: "The notion that corporations are disadvantaged in the political realm is unbelievable. Indeed, it has astounded most Americans. The truth is that corporations wield inordinate power in Congress and in state legislatures. It is hard to tell where government ends and corporate America begins; the transition is seamless and overlapping."

And finally, he had this to say about *corporate personhood*: "Corporations are not persons. Human beings are persons, and it is an affront to the inviolable dignity of our species that courts have created a legal fiction which forces people—human beings—to share fundamental natural rights with soulless creations of government. Worse still, while corporations and human beings share many of the same rights under the law, they clearly are not bound equally to the same codes of good conduct, decency, and morality, and they are not held equally accountable for their sins. Indeed, it is truly ironic that the death penalty and hell are reserved only to natural persons."

So maybe, just maybe, *Citizens United* will not only have a negative impact on our representative democracy but, in the process, also will catalyze a movement to restore the role of "We, the People" – also known as "the rest of America" or even "the 99%" -- in our democracy.