

National Journal

Citizens United and the Frailty of the Rich and Famous

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June 8, 2012 | 1:27 p.m.

Who imagined that fat cats are so fragile? That bigshot corporate titans, bold entrepreneurs, cutthroat hedge fund managers and muscle-bound political interest groups are in truth frail and dainty?

Well, they are not, of course. In American politics, the rich give as good as they get - or better. But conservatives, flush with cash and casting about for a rationale to keep their donors secret, now argue that America's business tycoons are in fact delicate creatures, who would undergo emotional distress should the rabble discover that they're underwriting a particular cause or candidate.

For years, conservative pundits and Republican lawmakers have offered "transparency" and "disclosure" as preferred alternatives to campaign finance limits and rules. Let anybody who wants give anything to anyone, but put it all up instantly on the Internet and let the people decide, they said.

Yet now that conservative 501(c)(4) groups are collecting tens of millions of dollars from deep-pocketed donors who insist that their names be kept secret, and using the money to launch withering attacks on Democratic candidates, the Right has changed its mind.

"Disclosure is chilling speech," said John Samples, a scholar at the libertarian Cato Institute, briefing congressional aides on Friday. Donors could be subjected to "a lot of nastiness" from their political foes. There might be efforts "to hunt down these people," he said. American corporations, worried about their brands, might cut back on their campaign contributions.

"This is...a reason to reconsider rules that require the disclosure of political donations," said the *Wall St. Journal* editorial page last month, signaling to the faithful that a change is in the wind. "The Supreme Court has ruled that disclosure is Constitutional, and these columns have supported it as part of a political compromise that would allow unlimited donations. But it's increasingly clear that the real point of these disclosure laws is not to inform voters but to get donor names in order to intimidate them from participating in politics."

The Supreme Court upheld disclosure - and praised it as a safeguard - in the *Citizens United* decision. But Samples says the reasoning was "muddled." He and others point approvingly to Justice Clarence Thomas, who dissented in part on *Citizens United*, because the ruling "does not go far enough."

In recent elections involving flammatory social issues like gay marriage, donors have been "blacklisted, threatened or otherwise targeted for retaliation," Thomas wrote. "This Court should invalidate mandatory disclosure and reporting requirements."

Disclosure on the Internet "will chill protected speech," Thomas warned, because it provides "political opponents with the information needed to intimidate and retaliate against their foes."

"I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property or pre-emptive and threatening warning letters," he concluded.

The shift in conservative doctrine arrives just in time, as the Democrats hope to bring a Disclose Act to the Senate floor this summer. The Republican leader, Sen. Mitch McConnell, R-Ky., is scheduled to give a speech on the First Amendment at the conservative American Enterprise Institute on June 15. It will be closely watched to see if McConnell, a longtime foe of campaign finance regulation, promotes the "chilling speech" rationale. Not all conservatives feel this way.

In a 2010 case, *Doe v. Reed*, Supreme Court Justice Antonin Scalia ridiculed the notion that citizens who engage in public debate need to be protected from rudeness.

"There are laws against threats and intimidation," Scalia wrote, in a case on whether the state of Washington could publicly release signed referendum petitions. Let the laws be enforced. But "harsh criticism," he noted, "is a price our people have traditionally been willing to pay for self-governance."

"Requiring people to stand up in public for their political acts fosters civic courage," Scalia said, "without which democracy is doomed."