Calling on Corporate Law to Defend Democracy

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This article is part of Democracy After Citizens United*, a forum on the Supreme Court's decision to strike down McCain-Feingold and what it means for our democracy.*

Ever since *Citizens United*, I've discussed the outcome with voter groups throughout the United States. I tell them that the decision grants corporations the right to spend unlimited amounts in elections and that CEOs can use corporate checkbooks (instead of their own) to buy political ads. In the case of a publicly traded company, a CEO can use other people's money to promote his or her own political agenda. And corporations could outspend every private contributor in future elections.

After I say this, the dismay among audiences, from Montana to D.C., is palpable. I feel like a grief counselor instead of a lawyer. In the question-and-answer sessions, people inevitably ask, "how could the Supreme Court get corporate rights so wrong?" Polls show roughly 80 percent of Americans disagree with the decision.

Lawrence Lessig puts his finger directly on the majority's error in the case—a narrow fixation on bribery, which ignores important and broader problems such as institutional corruption. By giving corporations and unions the constitutional right to spend treasury funds on both independent expenditures and "electioneering communications," *Citizens United* without a doubt damages our democracy. Under a convoluted theory of corporate free speech, the Court has granted corporations and unions permission to run ads directly before an election, attacking or praising candidates for their positions on issues. These same groups now also have the ability to run classic election ads that explicitly urge the public to vote for or against a candidate. McCain-Feingold had prevented sham issue ads and 1947's Taft-Hartley Act had prevented corporate independent expenditures, but in *Citizens United* the Court threw out these protections.

Yet Lessig is fighting the last war by pointing out the decision's flagrant flaws. We are going to live with the new paradigm for a long time, so we need to focus on what policy solutions are available.

The good news in *Citizens United*, although hard to find, is that eight of the nine justices concluded that Citizens United could be constitutionally subject to disclosure and disclaimer requirements because of voters' interest in knowing who is behind a political ad. The Court doubled down on this pro-transparency stance in *Doe v. Reed*, a decision last June in which the Court upheld disclosure in the context of ballot initiatives. These cases suggest that one way to address corporate political spending is to upgrade corporate law to keep pace with the new political rights. If corporations are political actors, then the United States needs to democratize corporations through improved transparency and meaningful shareholder consent.

In the wake of *Citizens United*, corporate law should be changed to empower shareholders to limit corporate managers' urge to splurge on politics. *Citizens United* itself supports this role for shareholders. As Justice Kennedy wrote for the majority, "Shareholder objections raised through

the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosures rapid and informative." Yet, under the current real-world rules of corporate governance, shareholders cannot exercise their new *Citizens United* spending rights. Rather, that power belongs to corporate managers with their hands on the purse strings and nearly unfettered leeway to spend under the "business judgment rule."

While Lessig is rightly concerned about institutional corruption, Congress is not the only institution at risk. Corporations themselves may be corrupted by political spending. As Harvard Law professor Lucian Bebchuk has noted, corporate meddling in politics is potentially bad for capitalism because managers may seek to water down corporate-governance rules to the detriment of investors. Moreover, given that shareholders likely will hold a range of political convictions, corporate managers' spending inclinations may not match up with shareholders' preferences.

Corporate-governance problems come down to two essentials: (1) shareholders don't have a meaningful way to consent (or object) to corporate political spending, and (2) loophole-riddled campaign finance-reporting schemes make it unlikely that shareholders even will know which candidates are being supported by the companies they own and in what measure.

These corporate-governance flaws can be addressed either with changes to the federal securities laws or state corporate laws. The British have a corporate-law model that Americans can follow. Since the amendments to the Companies Act in 2000, the United Kingdom has required that corporate managers obtain shareholder approval before spending corporate money on political campaigns. The same law requires that managers disclose past corporate political spending to shareholders. The Shareholder Protection Act, introduced in the House by Representative Mike Capuano, would adopt both requirements. Analogous bills have been introduced at the state-level in New York, Massachusetts, and California.

As Columbia Law professor John Coffee testified before Congress, the goals of corporate-governance reform should be to

(1) increase managerial accountability to shareholders in a very low visibility context where managerial and shareholder interests are not well aligned, and
(2) spread the sunlight of full disclosure over the very opaque process by which corporations today indirectly subsidize electioneering expenses.

Giving shareholders salient information and a say in corporate political spending won't be the same as the earlier corporate-spending ban, but it could have real impact. After the United Kingdom implemented the new Companies Act, the flow of corporate money dropped from a gush to a trickle.

However, better corporate governance alone will not restore voters to their rightful place in our elections. As Lessig suggests, Congress needs to embrace the Fair Elections Now Act, which would empower small donors by matching their contributions to candidates with public dollars. Adopting the Fair Elections model would be the ultimate response to the escalation of privately funded or even corporate-funded elections. And just like more muscular disclosure rules and improvements to corporate governance, the Fair Elections approach is perfectly constitutional.