

A Growing Consensus on What to Do About Citizens United

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Any professional boxer worth his salt will tell you the rules of the game matter. Fighters box in weight classes with specific rules like no hitting below the belt. It's boxing after all; not a gladiator match. Democracy could take a few lessons from boxing, especially now that corporations have the same First Amendment rights as living, breathing citizens. Over the past few weeks, a growing consensus among shareholders, corporate leaders and corporate law experts has emerged. All are urging increased transparency for corporate money in politics.

What are the key rules of the game in a modern American election? Who can be a candidate, who can vote, and who can spend money on the election. It was this third rule that changed last year. Before 2010, corporations were barred from spending in federal elections and in roughly half the states. The Supreme Court changed this in *Citizens United* allowing them to purchase as many political ads as they could afford. So if democracy were a boxing match, now we have flyweights in the ring with super heavy weights. This is why so many election watchers consider *Citizens United* to be an electoral game changer.

But election wonks are not the only ones worried about the impact of corporate dollars in American elections. Corporate law experts have also voiced their objections. Corporate law professors including Bebchuk and Coates at Harvard, Jackson and Gilson at Columbia and Klausner at Stanford have expressed concern that the Supreme Court has fundamentally misunderstood how corporate democracy works. Or as Former Chancellor William T. Allen stated at a recent symposium called [Accountability After Citizens United](#), "normatively, I believe business corporations should not be in the business of making political contributions. It's not what the institution is designed for."

While the Supreme Court in *Citizens United* envisioned a world where shareholders could hold managers accountable for political spending, corporations have several clever legal ways to hide their role in politics from the public. This lack of transparency has been noted by Professors Schepers and Gardberg at Baruch who recently released a [corporate political disclosure index](#). They found that on average those companies spending the most on politics were disclosing the least.

Our capital markets are premised on transparency of information so that investors can compare firms apples-to-apples and invest in the best fit. Keeping big corporate political expenditures hidden from investors may distort markets. Furthermore, shareholders can't hold managers accountable for political spending that they don't know about. The ability of shareholders to object to spending that they can't see is like asking them to box blindfolded.

This week the Committee for Economic Development (CED) is urging companies to [stay out of the political thicket](#). CED is a nonpartisan organization of more than 200 business executives and university presidents, and is a thought leader in the business world. CED is also urging that if companies engage in politics then, they should do so transparently.

Meanwhile shareholders have also quickly engaged on the issue of corporate political spending post-Citizens United. One problem is corporate political spending may trigger costly objections from customers or business partners. The boycotts of Target over its political expenditures in the 2010 Minnesota governors race showed this to be true. Nearly a year later, shareholders were still voicing their objections to this spending at Target's annual meeting in 2011. The reason why Target's shareholders knew about this spending was Minnesota has some of the best political disclosure laws in the country. (Minnesota's good law was recently upheld by the Eighth Circuit, but it was [reheard en banc last week](#)).

This is why we need common sense corporate law solutions to address the multiple problems created by Citizens United. There is legislation which would address this problem called the Shareholder Protection Act. It has been introduced in both Houses of Congress and it would give shareholders not only the ability to see corporate political spending, but also the ability to have a say through a vote at annual meetings. The bill is based on the UK's Companies Act, which requires shareholder authorization of corporate political expenditures before the money is spent, as well as clear disclosure of where the money went. And this will have an impact not just on corporate law. If the investing public can see the source of corporate political spending, then so will voters who could take this information into account at the ballot box.

Of course, legislation can take a long time to come to fruition especially with our current fractured Congress. In the meantime, investors can file shareholder proposals (under Rule 14a-8) directly with companies requesting more transparency and accountability. One such proposal won over 53% of the vote this year at Sprint. Another approach is to send the Securities and Exchange Commission (SEC) petitions requesting a new rule for publicly traded companies. A [petition was recently filed by 10 corporate law professors](#) urging the SEC to adopt a new disclosure rule on corporate political spending.

With corporations on the American political scene for the foreseeable future, we need to adopt new sensible rules of the game so that we have fair, clean fights in elections to come.