Limiting *Citizens United's* ill effects

The first election cycle after *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is now over. Record amounts of money were spent on elections at all levels. Some have said that the decision did not appear to make much difference in the outcome of the presidential election and have inferred from this that *Citizens United* isn't going to matter much in the electoral system. But this overlooks the significant effects of the ruling on elections for other officials at all levels of government. Now that the elections are over, attention should turn to what legislatures can do to ameliorate the ill effects of that decision.

*Citizens United* means that corporations can spend unlimited amounts of money to get candidates elected or defeated. Prior to *Citizens United*, corporations could spend money in elections by creating political action committees and raising money for them. *Citizens United* changed the law by holding that corporations could spend funds, even vast sums, directly from corporate treasuries.

From the outset, my sense was that the most pernicious effects of the decision would be less in the presidential race where both major candidates can raise huge amounts of money, and more in local elections - elections for members of state legislatures and city councils, for members of the House of Representatives, and for those running for state and local offices. Money for advertising is more likely to have an effect in these lower visibility races. There is a greater danger that corporate money will drown out other voices. Moreover, many may choose not to run if they know that corporate money is arrayed against them.

Measuring the effects of corporate expenditures in terms of who runs and who wins will be difficult. But no one denies that the effects are profound and that *Citizens United* dramatically altered the election landscape.

In the almost three years since *Citizens United*, a great deal of effort has gone into drafting possible constitutional amendments to overturn the decision. Although these efforts are well-intentioned, they are purely futile and they have diverted attention from what legislatures can do to lessen the ill effects of the decision.

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Amending the Constitution requires approval of two-thirds of both houses of Congress and then three-fourths of the states. A constitutional amendment to
overturn the decision is impossible, at least in the current political climate. I have heard defenders of a constitutional amendment to overcome *Citizens United* argue that the effort might succeed in the long-term and that it will help mobilize people to change the political system. It is impossible to know the chances of such long term success and there is no indication that the efforts to amend the Constitution to limit corporate spending are having any meaningful effect in mobilizing efforts.

The problem is that the focus on amending the Constitution is diverting attention from what might be done to lessen the effects of *Citizens United* that could make a real difference. For example, at the very least there can be far stricter disclosure laws at the federal, state and local levels. It is often overlooked that in *Citizens United*, the court upheld, 8-1, the disclosure requirements in the Bipartisan Campaign Finance Reform Act. Federal disclosure laws, however, are relatively weak. The Disclose Act, which would have significantly strengthened disclosure requirements, passed the House of Representatives in 2010, but was blocked by a filibuster by Senate Republicans. State and local governments also can adopt strict disclosure laws for their elections.

Another reform is laws that would require corporations to obtain shareholder consent before spending money in independent expenditures in election campaigns. In June 2012, in *Knox v. Service Employees International Union 1000*, 132 S. Ct. 2277 (2012), the court held that unions must get the consent of their non-members before spending money in election campaigns, at least with regard to special assessments. The same requirement should be imposed on corporations which are spending their shareholders’ money.

Congress could adopt such a requirement for all corporations in interstate commerce, including all that are regulated by the Securities and Exchange Act. Additionally, a state could do this for all corporations that are incorporated within it and perhaps even for all doing business within the state. This likely would significantly limit corporate campaign spending and protecting shareholders from having their money spent without their consent.

Yet another reform would be to prevent corporations that enter into contracts with a government from spending any money on an election of officers for that government entity. Thus, businesses contracting with the federal government would be prevented from spending money in elections for president, senators and representatives. Likewise, a business that contracts with a city would not be able to spend money to get candidates for the city’s mayor or city council members elected or defeated.

The clear analogy is to civil service laws, such as the Hatch Act, which prevent government employees from engaging in partisan political activities. The Supreme Court on several occasions has expressly upheld this as constitutional. Just as civil service employees lose some of their First Amendment protections by virtue of government employment, so should it be that corporations contracting with a government entity should not be able to spend money to elect those government officials.

My central point is that there is much that can be done to lessen the ill effects of *Citizens United*. Too many people have been willing to uncritically assume that nothing can be done or have turned to the possibility of a constitutional amendment. But much can be accomplished legislatively at all levels of government and that should be the focus of reform efforts before the next election.

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