

New York Law Journal

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'Citizens United' Should Be Corrected

03-26-2010

John C. Coffee Jr., contends in his article, "[Corporate Governance After 'Citizens United'](#)" (NYLJ, March 18) that, "As a general rule, the least drastic means should be preferred when regulating the behavior of public corporations." But this general rule does not apply when the integrity of both our market system and our political democracy are at stake.

Moderation in the pursuit of liberty is no virtue. In the *Citizens United* case, five members of the U.S. Supreme Court held that corporations, including public business corporations, have a constitutional right to spend unlimited amounts of treasury funds to influence elections, providing that they do not funnel their spending through candidate campaigns.

The decision has no discussion of the applicable corporate law governing how public corporations make the decision to intervene (or not) in American politics. Under our law, public corporations are managed by directors serving as fiduciaries for the corporation, and those directors are obliged to set aside their own personal morals, political values and interests in order to use their best business judgment to act in the interests of the corporation.

A moment's reflection will show that this means that corporate "free" speech is in fact expensive coercion. Corporate law requires managers to spend corporate assets to promote the corporate interests regardless of the views, values or even interests, of the human beings affiliated with the corporation.

If First Amendment law permits managers to spend corporate money to influence elections, they must do so whenever it is in the corporate interest to do so. That way leads to the death of the market in favor of crony capitalism. If, for example, it is cheaper to use the threat of negative advertising to lobby for laws subverting the free market by creating monopolies, by extending the reach of governmentally granted patent or copyright monopolies, or by subsidizing incumbent businesses, or to reduce the threat of competition in other ways, such as by discriminatory procedures in distributing government contracts, etc., corporate decisionmakers are obliged by law to use corporate funds to lobby for special privileges.

Even if the decisionmakers understand that this form of legalized bribery is not good for shareholders, customers, employees or Americans. The U.S. Supreme Court has

demonstrated that it does not understand how corporate law works. It has mistaken two slogans—corporation as "associations" and the "free market" of speech—for legal analysis and has turned Freedom of Speech law on its head.

No citizen's freedom is furthered when fiduciaries are required by law to subvert the foundations of market capitalism, by corrupting political institutions into distorting the law. The Court's mistake must be corrected. Litigators should attempt to convince the Court, or at least one more of its members, that coerced spending of other people's money is not "freedom of speech" any more than law based on campaign contributions is conducive to a free market.

But in the meantime, state and federal legislatures should work within corporate law to fix the Supreme Court-caused problem. The Court granted corporations "speech" rights to spend corporate money to influence politics. Only corporate law can determine how corporations decide to exercise this new found privilege. If the Court's misguided First Amendment jurisprudence means that business corporations are to be forced to act like associations of citizens, then corporate law must adapt as well. Business corporations should be offered the choice: stay out of politics and make internal decisions by the rules we have adopted and adapted for business decisions; or, if the institution chooses to enter politics, then it should be required to adopt political decision-making rules.

All those affected by the decision, meaning the employees, customers and investors who have created the corporate wealth and who will be most directly affected by changes in the law, should have a vote on the corporation's position, using the democratic system of one citizen, one vote. That will make the corporation into an association of citizens, and therefore a legitimate participant in the political system. Sensible businesses will note that it will make the corporation a less effective business, and they will opt, instead, to stick to their business and leave politics to citizens.

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