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Rational Coercion: Citizens United and a Modern Day Prisoner's Dilemma

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RATIONAL COERCION: *CITIZENS UNITED* AND A MODERN DAY PRISONER'S DILEMMA

Anne Tucker[*]

I. INTRODUCTION

This paper proposes neither a critique nor a review of the 2010 Supreme Court decision in *Citizens United v. Federal Election Commission*. Rather, this paper acknowledges that the Supreme Court has spoken on the issue of corporate First Amendment rights in the context of independent expenditures and asks the question: What happens next? While there are undoubtedly First Amendment and election law implications from the case, there are also important consequences for corporate law and for citizen shareholders.[1] Instead of debating the merits of the case, this article asks if a corporation spends to influence political messages, what is the effect on shareholders? In answering that question, this article describes the "rational coercion"[2] created in the prisoner's dilemma and applies it to the issue of corporate political expenditures in an attempt to identify the effects of the *Citizens United* decision.

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1. This article uses the phrase "citizen shareholder" to discuss the questions of corporate political participation raised in *Citizens United* because the case implicates the participatory rights of citizens as well as their economic interests as shareholders. The phrase was first introduced by Jamie Raskin in a 2003 book review of *Voting with Dollars: A New Paradigm for Corporate Finance* by Bruce Ackerman and Ian Ayers, and in Jamie Raskin, *The Campaign-Finance Crucible: Is Laissez Fair?*, 101 MICH. L. REV. 1532, 1549 (2003) ("What is at stake is not just the rights of 'dissenting shareholders,' for this phrase trivializes the structural transgression. Dissenting or not, ***citizen-shareholders*** in democratically chartered corporations have a right not to have their money put to the management's partisan political uses.") (emphasis added). The comprehensive category of shareholders of publically traded companies in the United States certainly includes other groups such as non-citizen shareholders (i.e., those living and working here with a visa or a green card) as well as foreign nationals who neither live nor work in this country.

2. *See infra* Section III.

The prisoner's dilemma demonstrates the pressure on corporations to participate in politics via their checkbooks. That pressure existed before *Citizens United* (i.e., political action committees and affiliated non-profit foundations, and charitable contributions), but was exacerbated with the expansion of corporate political speech through independent expenditures. Increased corporate political spending impacts both the participatory rights and the economic interests of citizen shareholders. The individually rational choice of corporations to make political expenditures creates irrational results, which will impact the price and efficiency of political messages as well as promote the inefficient allocation of corporate resources. An additional by-product of increased corporate political speech is the threat of shareholder-funded speech that is politically objectionable to some shareholders. Future debates of *Citizens United* must address these consequences of the decision. This article attempts to address both questions—the economic and the political—in part, by applying the prisoner's dilemma to analyze the choice to be made by each corporation and the likely consequence. The intuitive outcome post-*Citizens United* is that more corporations will spend via independent expenditures. By utilizing the prisoner's dilemma, this paper suggests a framework to understand why.

As more corporations enter the political arena through expenditures, the actual cost of influence increases as does the overall costs of campaigns. Viewing the escalation of corporate political expenditures through the logical lens of simple game theory techniques like the classic prisoner's dilemma suggests that the greater dedication of corporate resources to political communications will not improve the position of citizen shareholders,[3] and may even harm shareholders by promoting an inefficient allocation of corporate resources. The conclusion is that the individually rational choice of corporations to make political expenditures leads to irrational results where our democratic structure may be harmed, where corporate resources are allocated to politics instead of production, and where shareholder wealth is comprised.

3. *See supra* note 2.

A. The Issue of Corporate Political Expenditures

The Supreme Court, in *Citizens United*, overturned restrictions on corporate independent campaign expenditures that were codified in the Bi-Partisan Campaign Reform Act in 2002.[4] After a rare re-argument and revived facial challenge to 2 U.S.C. § 441b,[5] the Court—in a 5–4 opinion—overturned § 441b's restriction on corporate independent expenditures and overruled *Austin v. Michigan Chamber of Commerce*,[6] a prior decision upholding such restrictions. In overturning the restrictions, the Court in *Citizens United* argued that independent expenditures—any expenditure made by corporations and labor unions but which are not coordinated[7] with a

4. 2 U.S.C. §§ 434(f)(3)(A)(i), 441(b)(2) (2006). "Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election." Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 897 (2010).

5. *Citizens United*, 130 S. Ct. at 889–96; *see also* Adam Liptak, *High Court Poised to Rewrite Spending Rules*, N.Y. TIMES, June 30, 2009, at A12, *available at* http://www.nytimes.com/2009/06/30/us/politics/30movie.html. Justice Stevens' dissent highlights that *Citizens United* expressly abandoned its facial challenge in its motion for summary judgment at the District Court. *Citizens United*, 130 S.Ct. at 931–32 (Stevens, J., dissenting); Plaintiff's Memorandum Opposing FEC's Summary Judgment Motion & Replying on Its Own Summary Judgment Motion, Citizens United v. Fed. Election Comm'n, 530 F. Supp. 2d 274 (D.D.C. 2008) (No. 07-2240), 2008 WL 2675855.

6. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990). *Citizens United* also overruled parts of *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 257–58 (2003); *Citizens United*, 130 S. Ct. at 913.

7. The Federal Election Commission ("FEC") utilizes a three-prong test to determine whether an expenditure is coordinated by examining the payment source, the content of communication, and the conduct of the communication's funder and creator. FEDERAL ELECTION COMMISSION, COORDINATED COMMUNICATIONS AND INDEPENDENT EXPENDITURES BROCHURES, Feb. 2011, *available at* http://www.fec.gov/pages/brochures/indexp.shtml#CC. Any communication paid for in whole or part by a party or individual other than the candidate or the campaign satisfies the payment prong. *Id.* To establish coordinated content, the FEC evaluates whether the communication is (1) express advocacy for the election or defeat of the candidate, (2) an electioneering communication, (3) contains campaign materials or images, or (4) clearly identifies a federal candidate and is distributed within the voting jurisdiction before a general election or primary. *Id.* Any one of the five following conditions satisfies the coordinated conduct prong: (1) the communication was made at the request or suggestion of the candidate or committee, (2) the candidate or committee were materially involved in the creation of the communication, (3) the communication was created after a substantial conversation with the candidate or the committee, (4) the communication was created by a vendor working with the candidate and that vendor shared information regarding the campaign's needs or messages, or (5) the creator or funder of the communication was a former employee or independent contractor for the candidate or the committee. *Id.* An independent expenditure on the other hand is an *uncoordinated* communication that expressly advocates for the defeat or election of a federal candidate that is clearly identified. *Id.* (citing 11 C.F.R. § 100.16(a) (2010)).

candidate or the candidate's committee or party—do not raise corruption concerns, the only recognized compelling justification for restricting political speech under the current First Amendment jurisprudence.[8]

Before the 2010 decision in *Citizens United*, individuals were limited to $2,000 direct candidate contributions and were allowed to make independent expenditures.[9] Corporations, however, were prevented from making direct candidate contributions in any amount or from making any independent expenditures that expressly advocated for the support of or opposition to a candidate for federal office thirty days before a primary and sixty days before a general election.[10] The contribution restrictions for both individuals and corporations were untouched by *Citizens United*, therefore the impact of the case rests upon the new, unlimited right of corporations to make independent political expenditures.[11] Eliminating restrictions on corporate independent expenditures solidified certain First Amendment rights of corporations by disallowing distinctions between the political speech of individuals and that of corporations.[12]

8. "[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909. Reasoning that uncoordinated expenditures decrease the value of such speech to a candidate and the candidate's campaign, the Court concluded that the uncoordinated nature therefore also decreases the potential for corruption or the appearance of corruption because there is less of a possibility of quid pro quo reciprocation. *Id.* at 908. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id*. (emphasis in the original) (citing Buckley v. Valeo, 424 U.S. 1, 47 (1976)).

9. 2 U.S.C. § 441a(a)(1) (2006) ("[N]o person shall make contributions . . . to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000 . . . .").

10. 2 U.S.C. § 441b(a) (2006), *invalidated by Citizens United*, 130 S. Ct. 876 (2010)).

11. Unions, subject to contribution and expenditure regulations similar to corporations, were also the subject of the *Citizens United* opinion. *Citizens United*, 130 S. Ct. at 886. This article, however, focuses exclusively on the impact of the decision on corporations. Additionally, qualifying non-profit corporations organized under 26 U.S.C. §§ 501(c)(3) and 527, as well as corporations qualifying for the MCFL (Massachusetts Citizens for Life) exceptions were exempted from the prohibitions on corporate campaign expenditures under § 441b and are therefore outside of the scope of the *Citizens United* holding and the issues addressed in this paper. *See* Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) (establishing the MCFL exception).

12. *Citizens United*, 130 S. Ct. at 909, 913; *see also* Buckley v. Valeo, 424 U.S. 1, 39 (1976) (noting that independent expenditures constitute expression "at the core of our electoral process and of the First Amendment freedoms") (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)); Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 493 (1985) (observing that independent

The Court struck down limitations on corporate independent political expenditures[13] and abandoned prior justifications for the distinction based upon the "unique" threat of influence posed by corporate political speech.[14]

The questions left after *Citizens United* are how will the new ability of corporations to make unlimited independent political expenditures affect political campaigns, citizens' participatory rights, and shareholders' return on investments. This paper utilizes the classic prisoner's dilemma—a philosophical game about rational choice where two prisoners must independently decide whether to confess in exchange for a reduced sentence or remain silent in reliance upon the silence of the other prisoner—to analyze the

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expenditures "produce speech at the core of the First Amendment"). It is important to note that many states did not ban or restrict independent expenditures in state elections prior to *Citizens United*. *See, e.g.*, GA. ATTY GEN. OP. 95-26 (May 30, 1995), *available at* http://www.georgia.gov/00/opinion/detail/0,2668,87670814_90679019_108989073,00.html (determining that independent expenditures are not regulated by state campaign contribution limits described in O.C.G.A. § 21-5-41). Thus, the phenomenon described in this article (an projected increase in political spending by corporations) may have existed on the state level. The contrast between the scopes of national issues increases the incentive for companies to invest in shaping the message, public opinion, and voting as compared to the incentives to do the same on a state level. *Cf.*, CA. FAIR POLITICAL PRACTICES COMM.'S, INDEPENDENT EXPENDITURES: THE GIANT GORILLA IN CAMPAIGN FINANCE, May 2008, *available at* www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/IEREPORT%20MAY%202008.pdf (reporting nearly $30 million spent in the form of independent expenditures in statewide elections in California in 2005-2006).

13. Under § 441(b), which was invalidated by *Citizens United*, corporations were prohibited from making independent expenditures which were defined as "using general treasury funds . . . [to] expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections." *Citizens United*, 130 S. Ct. at 887. Expenditures exclude "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i) (2006). The following types of corporate speech are excluded from the definition of an expenditure or contribution: (1) corporate communications to its stockholders and/or personnel on any subject, (2) corporate get-out-the-vote campaigns that are nonpartisan and aimed at stockholders and/or employees, and (3) the establishment of and solicitation of funds for a corporate-sponsored PAC. *See* 11 C.F.R. § 100.29 (2009).

14. *Citizens United*, 130 S. Ct. at 941–43. Corporations, as legal persons created through state charter, have powers different from those of individuals, including perpetual life and the ability to amass great wealth in corporate treasuries. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 661 (1990), *overruled by Citizens United*, 130 S. Ct. 876; *see also* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1033 (1998) (arguing that corporations are also different from individuals in that they are "legally required to represent . . . a legally defined set of interests—the interests of a fictional creature called a shareholder that has no associations, economic incentives or political views other than a desire to profit from its connection with this particular corporation").

corporate decision to make expenditures or not. In the prisoner's dilemma the rational choice for each individual prisoner is to confess; however, the best result for both prisoners is for neither one to confess. The rational choice (confession) leads to an imperfect result, thus creating a situation that I have termed "rational coercion."[15]

Coercion, a concept that is typically disfavored in the law and sought to be mitigated,[16] has been exacerbated by the *Citizens United* opinion.[17] Coercion has several different iterations and meanings depending upon the context in which it is used.[18] For those not steeped in corporate law, it is important to highlight that coercion has a specially recognized meaning within the field. In the corporate context, the phrase "coercion" is used to describe influences that promote a behavior that does not advance the best interests of the actor or which reflects interests held by those other than the actor. A recognized example of coercion in corporate law is the coercion[19]

15. This article uses the phrase "rational coercion" to describe the phenomenon when the individually rational choice yields an imperfect result for the actor. *See infra* Section III.

16. *See, e.g.*, Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987); Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (addressing the structural coercion of two-tiered tender offers); *see also* Stephen M. Bainbridge, Unocal *at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 832 (2006) ("Indeed, when structural coercion was the identified threat, proportionality review usually was perfunctory at best."). In response to coercion concerns, the law has developed several protections against structurally coercive offers such as the Williams Act and the rules promulgated thereunder by the SEC. *See* Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f) (2006) (reducing an acquirer's ability to structure a coercive offer)); *see also* 17 C.F.R. §§ 240.14e-1, 240.14d-8, 240.14d-10 (2006) (establishing twenty day offer periods, pro-rata purchase requirements, and the "all-holders" rules that prevent discriminatory or coercive tender offers).

17. Prior to *Citizens United*, corporations had limited avenues of political participation, such as lobbying and political action committee (PAC) contributions; therefore, corporations were already under some pressure to participate.

18. *See, e.g.*, Kathleen Kim, *The Coercion of the Trafficked Workers*, 96 IOWA L. REV. 409, 411 (2011) (advancing a view of coercion in the criminal context that exculpates the acts of the coercee and places the legal responsibility on the coercer); Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much*?, 22 BERKELEY J. GENDER L. & JUST. 2, 2 (2007) (discussing the role of coercion in domestic violence situations); Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1197 (2008) (examining the role of coercion in legal theory).

19. Two of the three recognized threats to a corporation that justify the adoption of defensive measures by a board of directors are (1) "structural coercion (the risk that disparate treatment of non-tendering holders might distort shareholders' decisions on whether to tender)," and (2) "substantive coercion (the risk that shareholders will mistakenly accept an underpriced offer because they do not believe management's representation of intrinsic value)." Meredith M. Brown et al., *Contests for*

present in hostile take-over situations such as with two-tiered tender offers.[20] The coercion inherent in two-tiered tender offers where the fear of being in the "back end" of the offer encourages a shareholder to tender his or her shares regardless of whether the offered tender price is value maximizing or even adequate. Like with the prisoner's dilemma, the rational, self-interested choice promotes a result that is not necessarily in the actor's best interest. The rational coercion at play with two-tiered tender offers and prisoner's dilemmas is similar to the pressure on a corporation to make a political expenditure,[21] even though it too may create an imperfect result. The landscape of corporate political speech post-*Citizens United* is that such speech may not be unduly restricted under the Constitution, but such speech, in the form of expenditures, now may be rationally coerced as a result of the choices left to corporations.

B. The Short Road Home

This article analyzes the impact of *Citizens United* on corporate political participation and how the likely consequence of increased spending will in turn affect citizen shareholders. In Section II, this article introduces the concept of the citizen shareholders and their dual allegiances to democratic and economic interests. Section III presents the prisoner's dilemma and explains how the individually rational choice of each actor leads to an imperfect result for all actors, thus establishing the concept of rational coercion. Section III also applies the reasoning derived from the classic prisoner's dilemma to

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Corporate Control 2009: Current Offensive & Defensive Strategies in M&A Transactions, 1717 PLI/CORP 719, 738 (2009).

20. Wrongful coercion in corporate transactions, such as with two-tiered tender offers, has been described as occurring whenever "stockholders . . . vote in favor of the proposed transaction for some reason other than the merits of that transaction." Williams v. Geier, 671 A.2d 1368, 1382–83 (Del. 1996); *see also* Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621, 631 (2003) ("The coercion problem is well-understood and well-accepted by practitioners and academic commentators on all sides of the defenses debate."). For a discussion of other coercive techniques, such as those utilized to prevent holdouts in restructuring transactions, see Andrew Laurance Bab, *Debt Tender Offer Techniques and the Problem of Coercion*, 91 COLUM. L. REV. 846, 850 (1991) (arguing that one coercive technique utilized to prevent holdouts is the threat of bankruptcy and liquidation value used to force bond holders to accept a conversion at a lower value).

21. *See infra* Section III.

the question of corporate political expenditures. Section III concludes that more corporations will make political expenditures after the decision in *Citizens United*, and increased participation will increase the overall costs of elections, but will not necessarily increase corporate influence over elections or legislative policy. This conclusion is further advanced in Section III with assertions that increased expenditures coupled with a potential for decreased efficacy raises concerns regarding corporate waste and the inefficient allocation of resources.

II. THE CONUNDRUM OF THE CITIZEN SHAREHOLDER

The rights of corporations are intimately tied to the rights of individuals, as nearly half of all American adults are citizen shareholders.[22] The impact of *Citizens United* on citizen shareholders is of significant concern, especially with the reality that 401K and employer-sponsored stock ownership plans are the predominant form of retirement savings in this country.[23] For many, stock ownership is

22. In 1989, when equity ownership in America was first calculated, 32% of American households owned stocks or bonds. INVESTMENT COMPANY INSTITUTE & SECURITIES INDUSTRY AND FINANCIAL MARKETS ASS'N, EQUITY AND BOND OWNERSHIP IN AMERICA, 2008, at 9 (2008), *available at* www.ici.org/pdf/rpt_08_equity_owners.pdf [hereinafter ICI & SIFMA]. As of the first quarter of 2008, 47% of households in America (approximately 54.5 million citizens) own stocks or bonds, falling from a peak of 53% in 2001. *Id.*

> There are four primary means by which individuals may own stock. Thirty-four million directly own shares in publicly traded companies. Twenty-seven million own shares in equity mutual funds outside of retirement saving plans and pension accounts; some of these individuals also own stock directly. Nearly 34 million own equity through self-directed retirement plans such as Individual Retirement Accounts, Keogh plans or 401(k) plans, and 48 million own equity through defined contribution pension plans. There is substantial overlap among these four methods of share ownership. When this overlap is accounted for, a total of 84 million shareowners hold stock through at least one of these channels, and three million hold stock through all four channels.

J. WILLIAM HICKS, INTERNATIONAL DIMENSIONS OF U.S. SECURITIES LAW § 2.30 (2011). Forty-three percent hold bond-based mutual funds and forty-five percent hold hybrid mutual funds. ICI & SIFMA, *supra*, at 32.

23. "Ownership inside tax-deferred accounts accounted for most of the increase in the 1989 to 2001 period and has since remained steady, which implies that most of the decline since 2001 occurred outside tax-deferred account. Tax-deferred accounts include employer-sponsored retirement plans and Individual Retirement Accounts (IRAs)." ICI & SIFMA, *supra* note 23, at 15; *see also Mark Klock, What Will It Take to Label Participation in a Deceptive Scheme to Defraud Buyers of Securities a Violation of Section 10(b)? The Disastrous Result and Reasoning of Stoneridge*, 58 U. KAN. L. REV. 309, 352 (2010) ("At one time, a relatively small segment of the public invested in publicly-traded

practically compulsory as the only viable option for retirement savings. The breadth and, often, involuntariness of stock ownership highlights the importance of the dual questions of participatory rights and economic gain as they are irrevocably intertwined for a large segment of the American society. The overlap and potentially competing interests of the citizen shareholder elevate the import of *Citizens United* from a single-issue free speech case to one that dominates public discourse[24] because the case highlighted the need to reexamine the question of how can our law best serve and preserve both participatory rights and economic interests of citizen shareholders; interests that are often at tension with one another.

Indicating an intuitive understanding of the import of this case, the public's response to *Citizens United* was automatic and visceral, with instant supporters and detractors, sparking debates about the role of democracy and the participatory rights of corporations, associations, and individuals.[25] Unions were split in their response,[26] while the

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securities. Now a significant proportion of the U.S. population owns publicly-traded stocks, either directly or indirectly. A major trend in the investment world has been the remarkable growth of stock ownership through defined-contribution retirement plans. Additionally, there has been even more remarkable growth in mutual funds." (footnote call numbers omitted)).

24. For a sampling of "pro" *Citizens United* reactions, see *After Nearly 20 years, U.S. Supreme Court Finally Recognizes Corporate Free Speech Rights, Michigan Chamber of Commerce Reports*, UNITED BUSINESS MEDIA PR NEWSIRE, Jan. 21, 2010, *available at* http://www.prnewswire.com/news-releases/after-nearly-20-years-us-supreme-court-finally-recognizes-corporate-free-speech-rights-michigan-chamber-of-commerce-reports-82301527.html; Bruce Kesler, Maggie's Farm, *Obama BS vs. Free Speech*, Jan. 24, 2010, http://maggiesfarm.anotherdotcom.com/archives/13447-Obama-BS-Vs.-Free-Speech.html; Howard Wasserman, PrawfsBlawg, *Further Thoughts on Citizens United*, Jan. 22, 2010, http://prawfsblawg.blogs.com/prawfsblawg/2010/01/further-thoughts-on-citizens-united.html. For a sample of "anti" *Citizens United* reactions, see David Kairys, *Money Isn't Speech and Corporations Aren't People: The Misguided Theories Behind the Supreme Court's Ruling on Campaign Finance Reform*, SLATE, Jan. 22, 2010, http://www.slate.com/id/2242210; Brian J.M. Quinn, M&A Law Prof Blog, *Corporate Free Speech*, Jan. 22, 2010, http://lawprofessors.typepad.com/mergers/2010/01/corporate-free-speech.html; Manuel Garcia Jr., *Corporate Personhood and Political Free Speech (Tin Man K.O.'s Straw Man)*, Jan. 22, 2010, http://dissidentvoice.org/2010/01/corporate-personhood-and-political-free-speech-tin-man-k-o-s-straw-man.

25. Public opinion polls following the issuance of the *Citizens United* opinion demonstrated strong voter opposition to the decision: "This antipathy leaves voters staunchly opposed to anything that makes it easier for special interests to influence the outcome of elections, and by a two-to-one margin they oppose the recent Supreme Court decision on Citizens United." STAN GREENBERG ET AL., STRONG CAMPAIGN FINANCE REFORM: GOOD POLICY, GOOD POLITICS 1 (Feb. 8, 2010), http://www.gqrr.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf; *see also* ABC News/Washington Post Poll, http://abcnews.go.com/images/PollingUnit/1102a6Trend.pdf (last visited Mar. 10, 2011). Compare these results to a response poll released by a conservative group, Campaign Freedom, http://www.campaignfreedom.org/docLib/20100304_CCPpoll03042010.pdf (last visited Mar.

ACLU maintained its unwavering support of *Citizens United*.[27] Murray Hill, a public relations company, announced its candidacy for Congress in the 2010 mid-term elections under the slogan, "Corporations are people too."[28] Election watchdog groups decried the prospect of a rising tidal wave of corporate money and influence into the election cycle[29] that they claimed would pervert the process and drown out the voice of the individual.[30] Academics predicted that

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10, 2011), that claimed the first set of polls were biased and thereby focused this poll's questions on whether the government should have power to "restrict speech." A third poll, conducted by Gallup, showed that Americans believed that money is speech and that campaign spending should be restricted. "Fifty-seven percent of Americans consider campaign donations to be a protected form of free speech, and 55% say corporate and union donations should be treated the same way under the law as donations from individuals." Lydia Saad, *Public Agrees With Court: Campaign Money Is "Free Speech"*, GALLUP, Jan. 22, 2010, http://www.gallup.com/poll/125333/public-agrees-court-campaign-money-free-speech.aspx. For a sampling of the written response articles published in the wake of the *Citizens United* opinion, see Paul Sherman, Citizens United *Decision Means More Free Speech*, NATIONAL REVIEW, Jan. 21, 2010, http://www.nationalreview.com/bench-memos/49332/citizens-united-decision-means-more-free-speech/paul-sherman (supporting *Citizens United*); Steve Simpson, Citizens United *and The Battle For Free Speech in America*, THE OBJECTIVE STANDARD, Spring 2010, http://www.theobjectivestandard.com/issues/2010-spring/citizens-united.asp (supporting *Citizens United*). *But cf.* Joseph A. Palermo, "Citizens United*" for More Corporate Power*, THE HUFFINGTON POST, Jan. 24, 2010, http://www.huffingtonpost.com/joseph-apalermo/citizens-united-for-more_b_434641.html (criticizing *Citizens United*).

26. The AFL-CIO and National Nurses United filed amicus briefs in support of *Citizens United*. Brief for AFL-CIO as Amicus Curiae Supporting Appellant, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (No. 08-205); *see also* Michael Whitney, *Is* Citizens United *Decision Bad for Unions?*, WORK IN PROGRESS, Jan. 25, 2010, http://workinprogress.firedoglake.com/2010/01/25/is-citizens-united-decision-bad-for-unions; Lindsay Beyerstein, *Will* Citizens United *Ruling Erode Labor's Political Edge?*, IN THESE TIMES, Jan. 28, 2010, http://www.inthesetimes.com/working/entry/5481/will_citizens_united_ruling_erode_labors_political_edge. The SEIU (Service Employees International Union), which did not file an amicus brief in the case, issued a statement through Secretary-Treasurer Anna Burger arguing that "unleashing corporate spending will only serve to distort and ultimately delegitimize the electoral process." *Id.*

27. The ACLU filed an amicus brief in support of Citizens United. Brief for ACLU as Amicus Curiae Supporting Appellant, Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876 (2010) (No. 08-205), http://www.aclu.org/free-speech/citizens-united-v-federal-election-commission-aclu-amicus-brief; *see also* Stephen C. Webster, *ACLU: Bill Aimed at Toppling* Citizens United *Decision Would "Compromise Free Speech"*, RAW STORY, July 26, 2010, http://www.rawstory.com/rs/2010/07/26/aclu-bill-aimed-toppling-citizens-united-decision-compromise-free-speech.

28. John Wagner, *Campaign Stunt Launches a Corporate 'Candidate' for Congress*, WASH. POST, Mar.13, 2010, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/12/AR2010031204127.html; *see also* Murray Hill for Congress, http://murrayhillincforcongress.com.

29. Raymond J. La Raja, *Will* Citizens United v. FEC *Give More Political Power to Corporations?* 8, 10 (Working Paper Series 2010), *available at* http://ssrn.com/abstract=1642175; *see also* Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217 (2010).

30. Lisa Graves, Citizens United *Is a Radical Rewriting of the Constitution by Pro-Corporate Supreme Court*, CTR. FOR MEDIA AND DEMOCRACY, Jan. 21, 2010, http://www.prwatch.org/CitizensUnitedWronglyDecided.

elections and electability would become increasingly focused on fund raising, reducing the time and attention that elected officials could devote to legislating.[31]

Essentially, the collective fears following *Citizens United* can be distilled into the following categories: (1) increased cost of elections generally, (2) unfair advantage to one political party,[32] (3) dominance of corporate interests as a decisive factor in voter decisions because of the amount of speech that these entities can generate,[33] and (4) pursuit of pro-business policies even at the expense of the rights and welfare of individuals.[34] The criticisms largely ignore the unique perspective of the citizen shareholder who has interests in preserving the democratic integrity of both our election cycles and our elected officials as well as in maximizing the return, or potential for return, on her investment in corporations. If corporations are spending money in the political arena, the corporate law question that must be asked is how the expanded participatory rights of corporations affect the owners of the corporations, the citizen shareholders.[35] Divorcing the economic questions from the participatory questions raised by *Citizens United* ignores the overlapping interests of citizen shareholders and therefore a large portion of the context and consequences of this decision. This article attempts to address both questions, in part, by applying the prisoner's dilemma to analyze both

31. Levitt, *supra* note 30, at 233.

32. La Raja, *supra* note 30, at 3.

33. Levitt, *supra* note 30, at 224–25.

34. If volume of speech is a proxy for breadth of support, then the increase in corporate speech funded by increased treasuries of corporations becomes a perverting influence in democratic participation. *See* La Raja, *supra* note 30, at 3 ("[If] [t]he breadth of support for a given proposition . . . [is a heuristic] . . . for majoritarian merit . . . [that] factor[s] into voters' election choices . . . [and] if voters employ a heuristic equating quantity of speech with breadth of support, [then] great volumes of corporate speech might cause voters rationally seeking a bandwagon to follow a bandwagon that does not exist."); Levitt, *supra* note 30, at 225–26.

35. *See* Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265, 288 (1988). Shareholder wealth maximization as a principle of corporate law is a mechanism to align the interests of corporate managers (directors and officers) with the interests of the shareholder owners. *See, e.g.*, Hector Rocha, *People, Firms and Society: Three Proposals for Aligning Personal Motives, Firm's Goals and Societal Needs* (June 30–July 2, 2008), *available at* http://ssrn.com/abstract=1295193. *Cf.* M. Todd Henderson, *Everything Old is New Again: Lessons from* Dodge v. Ford Motor Company (The Chicago Working Paper Series Index, Working Paper No. 373, Dec. 2007), *available at* http://ssrn.com/abstract=1070284 (arguing that the shareholder wealth maximization rationale of *Dodge v. Ford* is overemphasized and mistaught).

the choice to be made by each corporation and the likely consequences.

III. RATIONAL CHOICES AND IRRATIONAL RESULTS CREATE RATIONAL COERCION

The expanded right of corporations to make political expenditures raises certain questions such as whether this will (a) increase the cost of elections, (b) influence policy decisions, and (c) benefit corporations and their shareholders from an economic perspective. Before these consequences can be dissected, the basic question facing corporations must first be addressed: to spend or not to spend? Whether or not to make independent political expenditures[36] is a choice that each corporation must make, and that choice can be analyzed utilizing the classic prisoner's dilemma to determine the rational outcome and the likely consequences of such actions.

A. *The Classic Prisoner's Dilemma*

To predict an outcome in the expenditure dilemma facing each corporation we turn to a classic philosophy puzzle, the prisoner's dilemma, used to forecast and discuss rational behavior. There are many variations on the prisoner's dilemma, a popular game theory tool used to assess risk aversion and decision making with imperfect information and a selfish motivation.[37] Regardless of the variation of the game, the basic elements[38] are similar. Two suspects are taken

36. *Citizens United* did not alter corporations' right to participate in political speech through existing avenues such as (1) contributions to political action committees (PACs), (2) expenditures on direct lobbying efforts, and (3) utilizing corporate funds to encourage employees to support or oppose a particular candidate or issue. *See* KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 302 (7th ed. 2011) ("Profit-making corporations . . . may support PACs and engage in partisan communication—including advocating the election of specific candidates—provided the communications are directed only to the corporate . . . 'family.' A corporation may use corporate funds to urge management, shareholders, and their families to vote for a specific candidate . . . .").

37. *See generally* WILLIAM POUNDSTONE, PRISONER'S DILEMMA (1992) (discussing the historical developments and developers of the prisoner's dilemma); *see also* PARADOXES OF RATIONALITY AND COOPERATION, PRISONER'S DILEMMA AND NEWCOMB'S PROBLEM (Raymond Campbell & Lanning Sowden eds. 1985) (discussing the historical developments and developers of the prisoner's dilemma).

38. *See, e.g.*, POUNDSTONE, *supra* note 37 at 117; *see also* Stanford Encyclopedia of Philosophy, *Prisoner's Dilemma* (2007), http://plato.stanford.edu/entries/prisoner-dilemma.

into custody and neither is able to speak to the other. The police admit that they have insufficient evidence to convict the suspects on the principal charges without a confession of one or more parties. Each prisoner is then presented the option to confess or stay silent. If prisoner *A* confesses but prisoner *B* does not, then *A* faces the minimum sentence (or depending upon the scenario no jail time at all), but if prisoner *B* confesses and *A* does not, *A* faces the maximum sentence on the principal charge. The other choice, not explicitly presented by the police, is that if neither confesses they will both walk on the principal charge and face fines or minimum sentences on the lesser charge. Additionally, if both confess then they will both receive a reduced, but not the minimum, sentence on the principal charge. Both Prisoner *A* and *B* are presumed to be entirely self-motivated in that each is only concerned with minimizing his or her own prison sentence.[39] The choices and consequences of the prisoners are charted below.

39. Hazel Rose Marcus & Shinobu Kitayama, *Culture and the Self--Implications for Cognition, Emotion, and Motivation*, 98 PSYCH. REV. 224 (1991) (arguing that the “western” view of the self as an independent individual who should act in its own interest and in expression of one’s uniqueness differs from other cultural views of self, such as the “eastern” view of interdependence which shapes behavior in reference to the common good), *available at* http://faculty.washington.edu/mdj3/MGMT580/Readings/Week%205/Markus.pdf.

Table 1. Classic Prisoner's Dilemma

	B Is Silent	**B Confesses**
A Is Silent	***A*** 0 years on principal charge ***B*** 0 years on principal charge	***A*** max. sentence on principal charge ***B*** minimum sentence on principal charge
A Confesses	***A*** minimum sentence on principal charge ***B*** max. sentence	***A*** reduced sentence on principal charge ***B*** reduced sentence on principal charge

In the classic prisoner's dilemma scenario, there is always an incentive to confess because it always reduces the maximum sentence that either prisoner could face. Without information as to what the other party is doing, the risk averse or rational person more likely than not chooses to confess and takes the known but limited punishment.[40] Confession is always a better solution for the individual actor over silence when the other party's position is unknown and thus it is the strictly dominant solution.[41] Players are presumed not only to play the dominant strategy, but to predict that

40. A. Parkhe, E.C. Rosenthal & R. Chandran, *Prisoner's Dilemma Payoff Structure in Interfirm Strategic Alliances: An Empirical Test*, 21 OMEGA INT. J. OF MGMT SCI. 531, 532 (1993); John H. Miller, *The Coevolution of Automata in the Repeated Prisoner's Dilemma*, 29 J. OF ECON. BEHAVIOR & ORG. 87, 90 (1996); *see also supra* note 38; DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW, 10 (Harvard University Press 1994) ("If a player knows the strategies available to it and the other players but what they do not know is what strategy the other player actually chooses . . . this is a game of complete but imperfect information. If a player were unaware of something other than the strategy choice of another player, such as the payoffs the other player receives it would be a game of incomplete information. If a player knows everything and can observe what the other player chooses, then it is a game with complete and perfect information.").

41. If there is a choice for an actor that is better for the motorist no matter what the other player chooses it is a strictly dominant strategy. "A dominant strategy is a best choice for a player for every possible choice by the other player. One strategy is 'dominated by' another strategy when it is never better than that strategy and is sometimes worse. When one strategy is always worse than other, it is 'strictly dominated.'" *Id.* at 11. It is assumed that players choose the strictly dominant solution. *Id.*

the other player will also choose a dominant strategy.[42] The rational decision to confess, therefore, is the same decision that the other prisoner should make, thus leaving both prisoners facing a reduced, but substantial, sentence on the principal charge. The interesting observation from the prisoner's dilemma is that it illustrates the inherent conflict between individual and group rationality.[43] Rational self-interest (confess) in this game scenario leads to a result that leaves all members of the group worse off than if they had pursued the interest of the group (coordinated silence).[44] The pursuit of rational self-interest is coercive: in order to protect their individual position, the actors are forced to make choices that do not produce the best outcome for the individual while simultaneously weakening the position of the group.

B. A Modern Day Prisoner's Dilemma: Corporate Political Expenditures

Parallels can be drawn between the classic prisoner's dilemma and a corporation's decision to make political expenditures.[45] Borrowing from the outcome in the prisoner's dilemma, one can make assumptions about how self-interested, rational (and risk averse)[46] corporations will act in the face of limited information[47] about the

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42. *Id.*

43. "Thus, PD is a game where individually rational actions produce a collectively suboptimal outcome, called a social trap . . . ." Parkhe et al., *supra* note 40, at 532–33.

44. Stanford Encyclopedia of Philosophy, *supra* note 38.

45. Expenditures create a unique scenario for analyzing corporate political activity. Direct contributions are both capped (a known risk) and disclosed (complete information) that eliminates essential elements of unknown risk and imperfect information inherent in the classic prisoner's dilemma scenario. Independent expenditures are subject to some reporting requirements, but often after the point where it could spur a counteractive response and the there is no ceiling for the amount of the expenditures thus creating incomplete information. *See infra* note 48.

46. "[R]isk aversion entails that the utility of participation in the given rent-seeking contest is lower than the utility of the expected value of taking part in the rent-seeking contest. Risk attraction would correspond to the opposite opinion, while indifference is called risk neutrality." Tina Søreide, *Too Risk Averse to Stay Honest? Business Corruption, Uncertainty and Attitudes Toward Risk*, 29 INT'L REV. OF L. & ECON. 388, 391 (Dec. 2009); *see also* POUNDSTONE, *supra* note 37, at 44 ("Game theory is about *perfectly logical players interested only in winning*.").

47. It should be noted that once a campaign is launched by one industry group or corporation and the information as to the existence of the campaign is known, the question then would be how will opposing corporations/industry groups respond. The lack of information addressed above is largely confined to the questions of the initial decision to engage in a campaign, and within existing debates it is not whether

level of expenditures made by competitors or opposing industries.[48] Without knowing what competitors or industry opponents are doing, the risk averse choice is to make expenditures that are believed to expose a corporation to the least amount of risk and also serve the interest of the corporation.[49] A rational choice by the corporation

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there will be spending, but how much and in what form. Additionally, independent expenditures are not exempt from FEC reporting requirements. For example, a Political Action Committee or political committee must disclose independent expenditures in excess of $200 in an annual report. Individuals contributing more than $250 to independent expenditures must also file an annual report. Support of independent expenditures in excess of $10,000 must be reported in a 48-hour report filed with the FEC. FEDERAL ELECTION COMMISSION, *supra* note 8 (independent expenditure reports filed with the FEC can be searched utilizing this FEC database: http://www.fec.gov/finance/disclosure/ie_reports.shtml).

48. "It does not take much to create a prisoner's dilemma. The main ingredient is a temptation to better one's own interests in a way that would be ruinous if *everyone* did it." POUNDSTONE, *supra* note 37, at 125–29. The same analogy can be applied to questions of corporate advertising, especially with regard to comparative advertising where Company A is pushing its version of product X over Company B's version of product X, and Company B is engaged in the opposite message campaign. The questions raised in this article, such as (a) does the rational self-interest promote increased corporate spending, and (b) does such spending benefit shareholders, are the same in the context of corporate advertising. The answer to question (a) for advertising is, generally, yes, at least in the short term. The analysis, however, changes with regard to question (b) where the spending is intended to grow or maintain market share for a particular company. Corporate spending on advertising can be distinguished from resources allocated to political messages because (i) messages to influence voting behavior at the consumer/citizen level is a zero sum game with only votes to be cast for each election, whereas consumer product consumption is not necessarily a zero sum game (i.e., the ability to expand the market to new audiences or generally increase consumption); (ii) advertising dollars have a more direct correlation to the intended outcome than do political messages; (iii) advertising dollars and the effect of advertising are measurable outcomes and therefore are more likely to be monitored by and weighed-in on post hoc by (institutional) shareholders; (iv) the intended result of advertising dollars (grow or maintain market shares) relates directly to shareholder return and the value of the firm; and (v) companies advertising their products are in the best position to educate consumers regarding such products, which may not be the case for company-sponsored political messages. There are counter-arguments to this last point, specifically with regard to industry-specific campaigns related to questions directly affecting the industry such as energy. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 907 (2010) ("The purpose and effect of this law [ban on independent expenditures] is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public.").

49. Pursuant to *Dodge v. Ford*, corporations owe their shareholders a singular fidelity to maximizing shareholder wealth in the form of corporate returns. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 682 (Mich. 1919); *see also* Wolfson, *supra* note 35, at 288. The issue of information could be addressed through increased disclosure requirements of corporations, such as those proposed in the Shareholder Protection Act of 2010, H.R. 4790, 111th Congress (2010), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h111-4790. Complete information, however, would not remove the basic incentive to make expenditure. For example, if Corporation *A* knows that Corporation *B* will not be making expenditure, there is greater incentive for Corporation *A* to make the expenditure and thus gain an advantage over *B*. Additionally, if Corporation *A* knows that Corporation *B* is making expenditure, then there is an incentive for Corporation *A*, assuming it is an opponent or adversely interested to *B*, to make an expenditure and not lose ground to Corporation *B*. Additionally, the assumptions regarding information addressed in this paragraph and the those regarding self-interest addressed in the following paragraph do not take into account the complex and often inter-related

should in theory benefit the corporation, but at a minimum, those actions should not put a company in a worse position relative to competitors or opposing industry members.

In order to apply the question of corporate political expenditures to the prisoner's dilemma, the same constraints that exist in the classic dilemma must be present, or at least assumed. Therefore, in this analysis, one must suppose that corporations will act only in self-interest,[50] which seems perhaps an easier assumption than the one that people will always act only in their self-interest.[51] The corporations are also assumed to have imperfect information about what the other corporation is doing, just like there is imperfect information in the prisoner's dilemma.[52] Corporations are also presumed to choose a dominant strategy, when available, over a dominated strategy.[53]

Additionally, one must assume that the potential reward sought by and consequences to be avoided by corporations are roughly equal.

organization of large corporations that utilize a web of affiliates and subsidiaries to supplement, augment, or diversify the holdings, production, or distribution of the parent company. *See* Philip L, Blumberg et al., 1 BLUMBERG ON CORPORATE GROUPS § 1.03 (Supp. 2009) (stating that in 2002, the 100 largest American corporations had an average of 187 subsidiaries, of which an average of 179 were 95% or more owned by the parent corporation). In these cases the assumptions about incomplete information self-interest may not be true where there is overlap between officers, members of the board of directors, and missions between the companies.

50. The self-interest in the classic dilemma means that neither prisoner cares about decreasing the sentence of the other prisoner, only about decreasing or eliminating his or her own sentence. With corporations as our substitute actors, the self-interest requires a fidelity to shareholder wealth maximization through things such as protected market share, favorable regulatory environment, decreased taxes, etc. Additionally, we must assume that Corporations *A* and *B* have opposite, or at least inconsistent, positions for the game to work. If Corporations *A* and *B* were both advancing the same message, the outcome of the game, as indicated by the rewards, punishments, etc., would be significantly altered.

51. *Dodge*, 170 N.W. at 682; *see also* Greenwood, *supra* note 15, at 1009.

52. The structure of the police interrogation ensures that the hypothetical prisoners have imperfect information: neither prisoner knows what the other has or will decide with regard to the confession. While there is no structural element preventing corporations from providing information about future political expenditures, that information is not routinely made public as a part of either SEC filings or annual reports—both of which report historical spending, not projected spending—at least with regard to expenditures and other forms of political speech. Information sharing that would inform the decision would have to occur before the expenditure is made (or at least at a time that still allows for a counter expenditures to be made) in order to influence the outcome in the prisoner's dilemma. Because this analysis assumes that Corporations *A* and *B* are opposing actors, there is little incentive for either side to disclose its intentions to the other.

53. "A player will choose a strictly dominant strategy whenever possible and will not choose any strategy that is strictly dominated." *See* BAIRD ET AL., *supra* note 40, at 11.

The resources of the acting corporations must be assumed to also be relatively equal so that the decision to make expenditures requires the same level of resource prioritization and risk ratio within each firm. Resource prioritization reflects the finite number of resources within a firm so that a decision to pursue option A either eliminates or reduces the ability to pursue option B.[54] Risk ratio reflects the percentage of firm resources that are being dedicated to a given policy with the goal of achieving a certain objective. If Company *A* has $100 million in assets and Company *B* has $1 million in assets, a $500,000 expenditure by both companies to influence clean coal technology represents a 50% risk ratio for Company *B* and a 0.5% risk ratio for Company *A*. The greater the risk ratio for a company, the more that is at stake in the outcome of the prisoner's dilemma. Assuming that these elements are equal is necessary so that the corporations are facing equal risks and consequences just like the equal risks and consequences faced by the hypothetical prisoners in the original game. The reward sought by the hypothetical companies in our modern day prisoner's dilemma is more complex and nuanced than the reduced or no sentence reward sought in the prisoner's dilemma. However, we can assume that there is a reward being sought by corporate political spending whether it is gaining advantage over a competitor or opposing industry, shaping favorable policy, exerting influence over politics, or molding a compatible regulatory environment. Regardless of the exact reward sought by each corporation, we must also assume that the rewards are of comparable value to each company so that the risk/reward ratio are roughly the same for the two companies locked in the prisoner's dilemma.

Finally, one must assume that the acting corporations are the only ones spending on any given issue or candidate so as to avoid the

54. *See* BARRY H. POTTER & JACK DIAMOND, GUIDELINES FOR PUBLIC EXPENDITURE MANAGEMENT 1–4 (2000). I originally coined this the "risk/reward ratio" attempting to reflect the resources at stake in independent expenditures to achieve a certain result, however "risk ratio" is the better comparative term because each company's hoped-for-gain will be different making both quantification and comparison difficult of the actual reward difficult. For simplicity in analysis, I leave in only the phrase "risk ratio" to compare the allocation and therefore implicit prioritization of the company resources invested in independent expenditures.

complicating problem of combining support or opposition for a candidate or an issue among several like-interested entities or association.[55] If Corporations *A* and *B* were making expenditures to advance a similar message, the reward, punishment, temptation, and deception outcomes would be significantly altered.[56]

These assumptions are obvious limitations to the analysis. They do not, however, remove the question of corporate political expenditures from the rational coercion demonstrated in the classic prisoner's dilemma.[57] A corporation's decision to make political expenditures presents the same options (and consequences) as does the choice between confessing and silence in the traditional prisoner's dilemma. If Corporation *A* makes political expenditures, it presents the opportunity to gain the most if the opponent is silent or, to minimize

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55. *See* Stanford Encyclopedia of Philosophy, *supra* note 38 ("Unlike the more straightforward generalization, this matrix does reflect common social choices—between depleting and conserving a scarce resource, between using polluting and non-polluting means of manufacture or disposal, and between participating and not participating in a group effort towards some common goal."). For example, consider ten companies that invest in and produce biodiesel decide to pool their resources together to create issue advertisements for more stringent emissions standards and requirements of higher gas mileage in an effort to boost popularity and sales of alternative fuel vehicles. The collaborative nature of the expenditure removes the decision from the classic prisoner's dilemma matrix. The pooled resources may also substantially alter the assumptions about equal resources and equal benefit/consequences that are necessary for the rational coercion to produce the consistent result of encouraging corporate spending on political expenditures. *See, e.g.*, POUNDSTONE, *supra* note 37, at 125–28 (describing the problem of free-riders, which occurs when there is a classic prisoner's dilemma but with more than one player). The limitation of the prisoner's dilemma in the context of corporate political spending is not unique to this new application. In an earlier critique of the prisoner's dilemma game theory, one author wrote:

> [It] is implausible in the extreme for any real-life analogues of the Prisoner's Dilemma. . . .
>
> . . . [However] [d]espite the implausibility . . . there is some point to considering its implications in Prisoner's Dilemma and other contexts. It is needed for speculations a la Hobbes or Rawls as to what ideally rational agents would do in a "state of nature" or other "original position." . . . But mere knowledge of the theoretical result should . . . be beneficial . . . .

Lawrence H. Davis, *Prisoners Paradox, and Rationality*, 14 AM. PHIL. Q. 319, 326–27 (1977).

56. While there will surely be coordination of spending through vehicles such as political action committees, there is value in understanding the fundamental rational choices presented in this simple equation of Corporation *A* opposing Corporation *B*, the results of which can be extrapolated to more complicated scenarios.

57. Michael A. Rabkin, *Tactical Interdependence and Institutionalized Trust: The Unrecognized Risks of Joint Ventures Among Competitors*, 7 DEPAUL BUS. & COM. L.J. 63, 78–79 (2008) (applying the prisoner's dilemma to analyze the risks of joint ventures between multinational corporations); Robert Allen, Comment, *Securities Litigation as a Coordination Problem*, 11 U. PA. J. BUS. L. 475, 487 (2009) (applying the prisoner's dilemma to shareholder derivative suits).

risk exposure, if Corporation *B* also makes a comparable expenditure. In both scenarios, the choice to make the expenditure is the rational choice for Corporation *A* because, like confession for the prisoner, expenditures always provide some benefit to Corporation *A*. Thus, there is rational coercion to make expenditures, the dominant strategy. Like with the classic prisoner's dilemma scenario, Corporation *B* will reach the same conclusion as does Corporation *A*, and both will predict that the other corporation choose the dominant strategy (make an expenditure), thus promoting the conclusion that both corporations will make expenditures. In the context of corporate expenditures, when both actors choose to spend, the intended result (influence) is diminished by the counteracting expenditure from the other corporation so that neither achieves the maximum benefit when both participate.

While expenditures always produce a positive result for Corporation *A* (some gain achieved or harm avoided), the decision to remain silent only benefits Corporation *A* if *B* also remains silent. Of course, if both corporations choose silence, it produces an efficient result because there is no relative advantage or harm to either company (similar to the outcome if both companies make expenditures) *and* the resources that would otherwise be spent on the expenditure are retained by the firm (a different result than if both companies make expenditures). Silence from Corporation *A*, however, will always benefit Corporation *B* because either *B* will get the undiluted effect of its expenditure or no company contributes and neither company is worse off. Conversely, if Corporation *A* is silent, but Corporation *B*, a competitor or corporation in an opposing industry (e.g., an oil company versus an electric car manufacturer),[58] makes significant expenditures, then *A* is potentially harmed by remaining silent. The rational conclusion for Corporation *A* is that,

58. This prisoner's dilemma only works between entities with opposing positions: for example, a tobacco company (as Corporation *A*) versus a smoking cessation aid company (as Corporation *B*) or a fuel company (as Corporation *A*) versus a green energy biotech (as Corporation *B*). The analogy breaks down when applied to competitors in the same industry that could foreseeably benefit from the contributions of others (i.e., for issue support), although would be excluded from "pork" barrel support (i.e., a specific tax break, new road to the factory, exemption, etc.).

between silence and expenditures, making an expenditure is the rational choice (even though coercive) because silence poses the greatest risk.

Like with the classic prisoner's dilemma scenario, everyone may benefit if no one confesses, or in this case, makes expenditures. Without the ability to guarantee adherence to the individually irrational choice (silence), then each corporation is coerced into taking the action with a known, protective benefit, but which may not produce the *most* efficient result (i.e., everyone staying silent, or everyone not making expenditures). The inability to ensure abstinence from expenditures keeps it from being the rational choice for either Corporation *A* or *B* and promotes the decision to make an expenditure.

Table 2. Classic Prisoner's Dilemma
Applied to Corporate Political Expenditures

	B Is Silent	**B Makes Expenditures**
A Is Silent	***A*** no gain or loss relative to ***B*** & value retained ***B*** no gain or loss relative to ***A*** & value retained	***A*** is disadvantaged relative to ***B*** ***B*** benefits from rent seeking behavior & undiluted message
A Makes Expenditures	***A*** benefits from rent seeking behavior & undiluted message ***B*** is disadvantaged relative to ***A***.	***A*** no gain or loss relative to ***B*** & value lost ***B*** no gain or loss relative to ***A*** & value lost

The consequences of choosing to or refraining from engaging in corporate political expenditures differ in several respects from the consequences in the traditional prisoner's dilemma. However, the ultimate outcome should remain the same. First, in the classic prisoner's dilemma example, what is at stake is imprisonment, which is a consequence whose severity is not dependent upon whether it is shared or not by the other actor. Both actors can, in theory, serve the maximum sentence or walk away completely. With corporate political expenditures what is being sought by the actors is not the lowest jail sentence, but the greatest relative advantage over the other actor. An advantage sought by the corporate actors can only be gained by harming the position of the other corporate actor, thus making the corporate political expenditure scenario a zero sum game.[59]

Additionally, with the question of expenditures there is a resource that must be either expended or retained by the firm and it creates a secondary consequence. For example, in the situation where both Corporation *A* and *B* abstain from expenditures and where they both engage in expenditures, neither company is harmed nor able to gain a relative advantage over the other, but because the cash resources are retained in the scenario where both actors abstain, it is a more efficient result than when both actors engage. The outcome under the matrix is still the same, though, because the resulting reward that occurs if both corporations cooperate (remain silent) outweighs the results if both corporations defect (make expenditures) in terms of resources retained by the corporation.

The rational coercion at play with expenditures can best be understood as a series of rewards (R), punishments (P), temptations (T), and deceptions (D). The reward (no harm and no lost resources) occurs when both actors remain silent; the punishment (no advantage but lost resources) occurs when both make expenditures; and the temptation (advantage gained as sole expender) and the resulting

59. JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR, 46–47 (Princeton Univ. Press 1953) (1944). A zero sum situation means that as one actor gains another actor loses. If all advantages and all disadvantages were added up then the result sum is zero. *Id.*

deception (disadvantage of silence) occur when only one corporation makes expenditures.

Table 3. Corporate Expenditure Dilemma and the Payoff Analysis

	B Is Silent	**B Makes Expenditures**
A Is Silent	***A*** = R ***B*** = R	***A*** = D ***B*** = T
A Makes Expenditures	***A*** = T ***B*** = D	***A*** = P ***B*** = P

From either corporation's perspective T > R > P > D; therefore, the rational choice for either corporation is to make expenditures. Similar to the classic model, the end result if both corporations remain silent is the production of (R), which is a better outcome than if both corporations participate (P). The individually rational choice produces an imperfect result, thus demonstrating that *Citizens United* has established an environment that exacerbates the pressure on corporations to participate politically through independent expenditures.

C. Consequences of Rational Coercion in Corporate Political Expenditures

Borrowing from the reasoning in the classic prisoner's dilemma, one can analyze the strong incentive that corporations will have to make expenditures when they are acting independently, with incomplete knowledge, and in their own self-interest. Under the classic prisoner's dilemma matrix, which includes the threat of being disadvantaged by silence and the controlled (i.e., known) risks associated with spending, one can hypothesize that some corporate political expenditures may be made as a result of the coercion exacerbated by *Citizens United* rather than as an independent, business decision that would have been reached before *Citizens United*.

1. Increased Costs of Participation and Decreased Effectiveness

As more corporations reach the rationally coercive decision to make expenditures, it raises the costs of elections. Not only will other special interest groups be motivated to engage (spend), so too will candidates who want to control campaign messages and frame the debate regarding hot topic issues. As the total pool of money increases, it creates additional pressure on elected officials to raise comparable sums to contain, frame, and combat third party messages that may impact the campaign. Increased participation therefore ratchets up the cost of influence as between businesses as well as for all political participants.

Additionally, if more corporations are rationally coerced into making expenditures, the potential utility of that expenditure is likely to decrease. With increased participation there is a greater likelihood that the message disseminated through the expenditure will be counterbalanced by a competing message or drowned out in the increasing political noise generated by the other corporations. When Corporations *A* and *B* both make expenditures, the result is the stalemate solution "P" where there is no relative advantage gained or lost and where the corporate resources have been expended by the firm.[60] This analysis looks at the risks and rewards of silence or expenditures as between two competitive or opposing industry corporations. The value of expenditures is modified when analyzed as between corporations and individuals. For example, if a group of corporations advocated for pro-business policies such as a favorable regulatory environment or decreased taxes, the increased expenditures on this particular message would not be canceled out or mitigated by collective, coordinated increased participation.

60. The article examines the effect of increased spending on corporate returns. The presence of coordinated action and the absence of equally matched opponents erode the conclusions of the prisoner's dilemma that increased spending will create a P for participating companies. This scenario is outside of the assumptions relied upon herein.

Additionally, increased participation would yield better results for each individual corporation and could be an effective tool of influencing elections or the resulting policy.

Applying the classic prisoner's dilemma to the corporate political expenditures authorized in *Citizens United*, there is reason to conclude that the concern regarding the increased cost of elections is valid. In the 2010 midterm election, for example, the increase in outside spending (i.e., independent expenditures) dramatically outpaced overall spending increases in the election cycle. The total cost of the 2010 midterm election was over $4 billion, which represents a 71.25% increase over the $2.85 billion price tag of the 2006 midterm election.[61] Outside spending, in comparison, increased 565% in the 2010 election with $210 million spent compared to $37 million in 2006.[62] The theory and the evidence both support the conclusion that eliminating restrictions on corporate political expenditures will increase the overall cost of elections. The prisoner's dilemma also demonstrates that, while corporate political spending will increase, benefits from such increases are likely to be diluted because of the cancelling effect of increased expenditures by other competing or adverse corporations.[63]

61. Dana Bash, *Cash Flows in 2010 Cycle*, CNN POLITICS, Oct. 27, 2010, http://politicalticker.blogs.cnn.com/2010/10/27/cash-flows-in-2010-cycle; *The Money Behind the Elections*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/bigpicture/index.php.

62. *Outside Spending*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/outsidespending/index.php. One should note, however, that outside spending increased to $157 million in the 2008 election, which was a presidential election, and thus not as strong of a comparison as the 2006 midterm elections. *Id.* The increase between 2006 and 2008, which was before the *Citizens United* opinion when corporations were restricted with regard to independent expenditures, was 420% whereas the increase between the 2008 and the 2010 election was 134%. *Id.* To get a complete picture of the impact of *Citizens United* with regard to outside spending between both midterm election and presidential election cycles, further data will have to be gathered and analyzed after the 2012 and other future elections. The author intends to do further research in this area after the 2012 presidential election.

63. This observation is a general one and is not applicable to individual situations where a political expenditure is used as a threat or as a reward for certain legislative action upon the request of a constituent corporation.

2. *Inefficient Allocation of Resources and Impact on Shareholder Wealth*

As more corporations are rationally coerced to make political expenditures based upon the relaxed regulatory landscape after *Citizens United*, more firm resources will be dedicated to the creation and dissemination of political messages.[64] Increased participation increases the likelihood that such messages will be canceled out or reduced to political noise for both the voters and the elected officials.[65] Even with this knowledge, the threat of being disadvantaged (Corporation *A* makes an expenditure, but opponent Corporation *B* does not) should motivate the corporation to make the expenditure, evidencing the rational coercion that is at play. Firm resources that are dedicated to such political noise raise the question of inefficient allocation of resources.[66]

Initial research demonstrates a negative correlation between shareholder-friendly regulations and political activity (meaning pro-shareholder regulations decreased the political activity of firms) and that political activity was negatively correlated with value of the firm (meaning that the more political activity engaged in the less value of the firm).[67] Extrapolating from the prisoner's dilemma analysis and

64. Samuel Issacharoff & Pamela *S.* Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (discussing the "hydraulic" nature of campaign donations in that "political money, like water, has to go somewhere"); Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 134, 149 (2005) (discussing how the "hydraulics of campaign finance are most often just a subset category of the hydraulics of party regulation" and that "[l]imiting contributions leads not to a reduction in total campaign spending, but instead shifts funds from contributions to the unregulated opportunities of independent expenditures").

65. *See, e.g.*, Larry M. Bartels, *Messages Received: The Political Impact of Media Exposure*, 87 AM. POL. SCI. REV 267, 267–85 (1993); *see also* David Brooks, *Don't Follow the Money*, N.Y. TIMES, Oct. 18, 2010, at A31, *available at* http://www.nytimes.com/2010/10/19/opinion/19brooks.html.

66. *See, e.g.*, N. GREGORY MANKIW, ESSENTIALS OF ECONOMICS 227 (4th ed. 2007).

67. John C. Coates, IV, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?* 16 (Harvard John M. Olin Ctr. for L., Econ., and Bus., Discussion Paper No. 684), *available at* http://ssrn.com/abstract=1680861 ("[C]orporate political activity correlate[s] with weak corporate governance, it also correlates (negatively) with firm value. Firms with corporate governance provisions giving shareholders more power to engage in less political activity. Corporations that engage in political activity generate lower value for their shareholders relative to the value of the assets they control."). Corporate political activity (CPA) can only be monitored to the extent that it is disclosed in terms of compliance with FEC or SEC regulations. Therefore it is difficult to draw an accurate empirical picture of CPA. To the extent that research shows a negative correlation between CPA and firm value, that correlation is likely to be even stronger than is observable because

this early body of research, the prediction that *Citizens United* will rationally coerce increased corporate political expenditures produces a secondary question: whether increased political activity will benefit shareholder citizens or not.

Applying the prisoner's dilemma rational analysis to the question of corporate political expenditures demonstrates that corporations are likely to be encouraged to make expenditures, the results of which will be to increase the cost of elections, decrease the effectiveness of political messages, and potentially contribute to the inefficient allocation of corporate resources in a way that harms shareholder value.

IV. CONCLUSION

Citizen shareholders are implicated by the decision in *Citizens United* on two fronts: (1) as participants in our democracy, and (2) as shareholders of corporations who have been granted expanded First Amendment rights to make independent political expenditures. The consequences of *Citizens United*—a case that implicates election law, First Amendment rights, and corporate law questions—for citizen shareholders can be predicted utilizing the analysis in the classic prisoner's dilemma. The rational coercion created in the prisoner's dilemma to confess, even though silence produces the best result, is similar to the rational coercion exerted on corporations after *Citizens United* to make political expenditures. The coercion creates a perverse incentive for each corporation to make expenditures because it is the rational choice even though it may not produce the best outcome for the corporation or the group. As more corporations are "coerced" into making expenditures it produces a series of other consequences, such as increased cost of influence, increased political noise where messages cancel each other out, and increased cost of the elections in general. Additionally, *Citizens United* is likely to generate an increase in the amount of corporate resources dedicated

"managers will be more likely to engage in non-shareholder-wealth related CPA that is not observable, and more likely to engage in CPA that will create wealth for shareholders if it is observable." *Id.* at 7.

to political expenditures, which raises the question of firm value for citizen shareholders. If corporations are coerced into dedicating resources to political expenditures, which may have diminished value due to the cancelling and diluting effect of other messages, citizen shareholders must question whether that is an efficient allocation of resources. These issues of coercion and efficient allocation of resources reframe the impact of *Citizens United* not in a First Amendment context, but in a corporate law context and perhaps provide a lens through which to evaluate the merit and legacy of *Citizens United* that is removed from the political and ideological debate which has dominated much of the public discourse on this case.

After *Citizens United* the focus of corporate campaign finance regulation shifted from government legislation to the private sector, placing the burden on the corporations and the shareholders—most likely the institutional shareholders (e.g., TIAA-CREF and state pension funds) that have the resources to monitor corporate political contributions and the sway to influence corporate policies. The future focus of corporate campaign finance regulation, thus, must come from the corporations and the shareholders themselves. For corporations this means creating or strengthening corporate political spending policies and voluntary disclosures. For shareholders this means increased monitoring, reporting, and analyzing corporate political expenditures in order to educate shareholders and to draft successful shareholder resolutions[68] that limit corporate spending policies and encourage internal corporate governance mechanisms.

68. For example, NorthStar Asset Management Funded Pension Plan proposed a shareholder resolution to Home Depot, to be voted upon at 2011 annual shareholders' meeting, recommending that the Board of Directors submit for shareholder approval a proposed political expenditures list for the following year. *See* The Home Depot Corp., SEC No-Action Letter, (Mar. 25, 2011), *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf.