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The Ontological Scandal of Corporate Personhood and Speech: A Rhetorical Analysis of Key Supreme Court Decisions

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THE ONTOLOGICAL SCANDAL OF CORPORATE PERSONHOOD AND SPEECH:
A RHETORICAL ANALYSIS OF KEY SUPREME COURT DECISIONS

by

NNEKA LOGAN

Under the Direction of M. Lane Bruner

ABSTRACT

The power of the corporation is pervasive in every aspect of human life. This situation initiates a question: how did the modern corporation become so powerful? To answer this question, as well as to understand the implications of the modern corporate form and its power in contemporary society, this dissertation explores how the corporation's power stems from three historical developments that have had lasting significance: 1) its legal personification under the Fourteenth Amendment; 2) the development of its "voice" in the form of public relations and; 3) the acquisition of First Amendment political speech rights. Independently and collectively, each of these developments contributed to the corporation's rise to dominance within society and to its hegemony in the U.S. and around the world. In addition, the growth and expansion of corporate

power is also connected to several landmark Supreme Court rulings on corporate rights. Thus, this dissertation provides a rhetorical, ideological analysis of Supreme Court rulings that have contributed to the ongoing protection and expansion of corporate rights and power under the law. These rulings include *Santa Clara v. Southern Pacific Railroad* (1886), which endowed the corporation with Constitutional personhood rights; and *Buckley v. Valeo* (1976), *First National Bank v. Boston* (1978), *Nike v. Kasky* (2003) and *Citizens United v. Federal Elections Commission* (2010), which all enabled, granted or protected corporate First Amendment rights. The analysis is guided by a close reading of these judicial texts. In sum, this study aims to uncover the ideological underpinnings of these Supreme Court decisions as it shows what interests are served through these rulings. It also describes how these rulings contribute to the expansion of corporate power and shape the relations between human beings and corporations in our society, in ways that are ontologically controversial.

INDEX WORDS: Corporations, Corporate discourse, Corporate Voice, Public Relations, Rhetoric, Ideology, Artificial Persons, Economic Liberalism, Neoliberalism, Critical Race Theory, Reification

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2013

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2013

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by

NNEKA LOGAN

Committee Chair: M. Lane Bruner

Committee: Greg Lisby

Natalie Tindall

Alessandra Raengo

Steve Olson

Electronic Version Approved:

Office of Graduate Studies

College of Arts and Sciences

Georgia State University

May 2013

DEDICATION

This book is dedicated to my parents, to my ancestors who came before me, and to those generations who will come after. God bless.

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Thank you to Dr. M. Lane Bruner, my advisor, teacher and mentor who has inspired me so much. Thank you to my committee members Dr. Lisby, Dr. Tindall, Dr. Raengo and Dr. Olson. Your guidance throughout this process and throughout my time at Georgia State University is greatly appreciated. Thank you to the Department of Communication administrative and support staff at GSU, to all of my colleagues, and to my wonderful family and friends without whose love, encouragement, and support this would have been impossible. Thank you.

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1. INTRODUCTION

What began as a simple idea to organize and operate business more efficiently and effectively has materialized into one of the most dominant institutions in society.¹ The corporation has insinuated its “self” into every aspect of human life. It influences, and in some cases determines, every aspect of the human experience: the food we eat, the water we drink, the homes in which we live, the education we receive, our modes of transportation, our access to healthcare, and more than could ever be listed here. Since the Supreme Court gave “birth” to the modern corporation in 1886, no aspect of human life has escaped its roaming and increasingly interventionist powers, especially the democratic political process. The goals of this study are to explore how and why the corporation has become one of the most dominant institutions in society, to reveal the mechanisms that reproduce its power, and to discuss the implications of the corporation for human agency. In doing so, I aim to identify key sources of corporate power and explore the ideological, rhetorical relationship between the Supreme Court, corporate rights and corporate power as I also explore the implications of the corporate form as legally configured today.

My curiosity and concerns about the corporation stem from my graduate coursework in communication studies. This education was heavily influenced by rhetorical training that often focused on analyzing the relationship among language, power, institutions and societal organization from a critical standpoint. Time spent in corporate America gave me the kinds of insights that come with significant exposure to the inner-workings of the corporate form – from the lowest to highest levels – and those experiences also inspired my interest in the corporation.

¹ John Mickelwait and Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* (New York: The Modern Library, 2005).

But this is not a dissertation about my personal experiences, although, in the tradition of critical race theory and autoethnography, I touch on a few experiences that are relevant to this study in the conclusion.² This is a dissertation about the evolution of corporate power and its implications for human beings.

A curiosity about the corporation has led me to advance several critical questions including the following: What are some of the primary sources of corporate power? What is the nature of the relationship between the U.S. Supreme Court, the expansion of corporate rights and rise of corporate power? What are the implications of corporate rights and power for the human experience? To address these questions and more fully explicate the evolution of the corporation and its power, I turn to the scholarly pathways of communication studies. In the same ways that political economists believe that in order to get to the truth of an issue one must “follow the money,” I assert, from a communicative perspective, that one must follow the discourse, unravel its textual constructions, and explore them within context, while also examining the relationship between language and power operating in any particular scenario.

To address my critical questions in a way that provides a rich understanding of the nature, functions, and implications of the modern corporate form and its power in contemporary society, it is necessary to consider the historical origins of the corporation to see how the past shapes the present. Therefore, in the following pages, I argue that much of the corporation’s contemporary

² I will draw upon autoethnographic and critical race theory because they both highlight the importance of personal experience as a form of knowledge. See Kimberle Crenshaw et al., eds., *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995). See also Damion Waymer, “Does Public Relations Scholarship Have a Place in Race?” *The SAGE Handbook of Public Relations*, Ed. R. L. Heath (Thousand Oaks, CA: Sage Publications, Inc., 2010) 237-246; Waymer, “Each One, Reach One: An Autobiographic Account of a Black PR Professor’s Mentor-Mentee Relationships with Black Graduate Students,” *Public Relations Inquiry* 1 (2012): 398-414; Stacy Holman Jones, “Autoethnography: Making the Personal Political,” *The Sage Handbook of Qualitative Research*, Eds. Norman K. Denzin and Yvonna S. Lincoln, 3rd ed. (Thousand Oaks, CA: Sage Publications, Inc., 2005) 763-791.

power stems from three historical phases that have had lasting significance: 1) its legal personification under the Fourteenth Amendment; 2) the development of its “voice” in the form of the public relations field; and 3) the acquisition of its First Amendment rights to free speech. Independently and collectively, each of these developments contributed to the corporation’s rise to dominance within modern society and to its institutional, global hegemony in a postmodern world. Some background information about these three central themes of this dissertation will help bring my assertions into clearer view.

Like many scholars, I locate the source of corporate power in corporate personhood as established in the Supreme Court’s ruling in *Santa Clara County v. Southern Pacific Railroad* (1886).³ This ruling was vital because it facilitated the extension of the personhood rights of human beings to corporations under the Fourteenth Amendment. Personification under the Fourteenth Amendment was important because it gave corporations the Constitutional rights of American citizens such as due process and equal treatment under the law. These rights made it much easier for corporations to produce, protect, and leverage their great wealth. Possessing the rights of natural persons, along with the special legal privileges reserved for corporations such as perpetual life and limited liability, translated into huge economic advantages for corporations. These economic advantages led to the vast accumulation of wealth which led to widespread corporate influence that allowed business organizations to emerge as very powerful “people” at the dawn of the twentieth century. Corporations remain powerful today, and their sphere of influence is ever expanding.

³ *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886). See also Natasha Aljalian, “The Fourteenth Amendment and Personhood: Fact or Fiction,” *St. John’s Law Review* 73.2 (1999): 495-540; Ted Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* (San Francisco: Berrett-Koehler Publisher, Inc., 2005); Thom Hartmann, *Unequal Protection: How Corporations Became “People” – And How You Can Fight Back* (San Francisco: Berrett-Koehler Publishers, Inc., 2010).

As I explore the evolution of the modern corporate form through a critical, rhetorical analysis grounded in methods of ideological criticism in my examination of Supreme Court discourse on corporate personhood, I also draw attention to the racialized roots of the corporation using Critical Race Theory (CRT).⁴ I examine the evolution of corporate personhood within the context of race by looking at how the Fourteenth Amendment – a law enacted to protect natural persons (i.e., human beings), specifically the newly freed slaves – was appropriated to protect artificial persons in the form of corporations. I argue that while the evolution of the corporate form flourished, the conditions of some natural persons languished under the Supreme Court’s applications and interpretations of the Fourteenth Amendment at the turn of the century. While this obviously and negatively impacted African Americans, it had broader societal implications. The ruling offers a preview into the Supreme Court’s treatment of natural persons as compared to artificial persons, generally speaking. These tendencies of the Court seemingly functioned to empower artificial corporate persons at the expense of natural persons. The point is that this process of human disenfranchisement through law can happen because of, or regardless of, race. Therefore, I argue that all natural persons should be concerned if there is a judicial tendency to privilege corporate interests above human interests because that would have consequences for humanity in general.

As the corporate person evolved through the Industrial Revolution, the accumulation of profit began to become much less problematic than the securing of favorable public opinion. Therefore, another important aspect of the corporation’s rise to power was the evolution of its “voice” via the development of the public relations field. At the turn of the twentieth century the great fortunes amassed by the industrial titans of business, in combination with questionable

⁴ See Kimberle Crenshaw et al.

labor practices and other abuses, led to public mistrust of corporations. At the same time corporate leaders began to realize there was a direct correlation between profits and positive public perceptions.⁵ Thus, some corporate leaders hired journalists-turned-public relations professionals to develop the corporate “voice.”⁶ The main purpose of the corporate voice was to persuade publics – internal employees and external stakeholders (such as local communities) – that the corporation was a productive and benevolent member of society. Sometimes the corporate voice, articulated through the public relations field, functioned as the ethical conscience of the organization, genuinely concerned for the corporation *and* public welfare. At other times, it functioned as propaganda, manipulating the public for profit. Critical public relations scholars have argued that the field’s practice and scholarship have too long been dominated by corporate mandates and that this tendency should be resisted.⁷ There is little disagreement, however, that the public relations field played a pivotal role in the production of corporate wealth and power. This was accomplished through establishing the corporate voice as a persuasive force within the public sphere. My study contributes a rhetorical, ideological understanding of how these circumstances unfolded and their implications.

⁵ Rowland Marchand, *Creating the Corporate Soul* (Berkeley: The University of California Press, 1998).

⁶ To describe this evolution in detail, literature about public relations history from several scholars is incorporated including Margot Opdycke Lamme and Karen Miller Russell, “Removing the Spin: Toward a New Theory of Public Relations History,” *Journalism Communication Monographs* 11.4 (2010): 281-362; Marvin N. Olasky, *Corporate Public Relations: A New Historical Perspective* (Hillsdale, NJ: Lawrence Erlbaum Associates, Inc., 1995).

⁷ See Bruce K. Berger, “Power Over, Power With, and Power to Public Relations: Critical Reflections on Public Relations, the Dominant Coalition, and Activism,” *Journal of Public Relations Research* 17.1 (2005): 5-28; Derina R. Holtzhausen and Rosina Voto, “Resistance From the Margins: The Postmodern Public Relations Practitioner as Organizational Activist,” *Journal of Public Relations Research* 14.1 (2002): 57-84; Jacquie L’Etang and Magda Pieczka, *Public Relations: Critical Debates and Contemporary Practice*. (New York: Routledge, 2006). See also L’Etang and Pieczka’s earlier volume, *Critical Perspectives in Public Relations* (London: International Thomson Business Press, 1996).

My efforts here also address the uses and implications of the corporate voice as constituted through the public relations field via an analysis of *Nike v. Kasky* (2003), an important Supreme Court case concerning corporate public relations.⁸ In *Kasky*, the corporation sought legal protection for materials from its public relations campaign, such as press releases, even though the materials may have contained falsehoods. Nike cited *First National Bank of Boston v. Bellotti* (1978),⁹ which gave corporations First Amendment speech rights to political expression, to bolster the company's assertions that their communications deserved political speech protections. The case was controversial because it appeared as if Nike wanted the legal right to disseminate falsehoods. This study provides a rhetorical analysis that addresses the ideological aspects of the case in relation to the role and function of public relations as the corporate voice. I will also address the implications of the Supreme Court's decision not to rule.

Kasky is an important case because it offers insights into how corporations may use their voice in misleading ways regarding the nature of their products and services when given First Amendment political speech protections for their communications. *Kasky* is also an important case because of the ways in which it implicates the public relations field by drawing attention to the tension between ethical practice and advocacy at all costs. Should the public relations field operate as the ethical "conscience" of corporations, or should the field prioritize communicating the client's wishes with less regard for the consequences? How can a rhetorical analysis sensitive to the historical origins of the corporate voice and the ideological nature of corporate discourse as constituted via the public relations field provide guidance to answering this and similar

⁸ *Nike v. Kasky*, 539 U.S. 654 (2003).

⁹ *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

questions relevant to the relationship between corporate power and the human experience? My study will address these questions in ways that enhance our understanding of the corporation.

While the corporation had evolved into a “person” with a “voice” during the Industrial Revolution, its speech rights remained limited until a series of Supreme Court cases in the 1970s. These decisions established the idea that corporations had the same rights to free speech as human beings (i.e., American citizens) under the First Amendment. As such, these rulings functioned as the foundation for Nike’s arguments against Kasky nearly twenty years later. More importantly, however, these rulings functioned to redefine the spending of money by artificial corporate persons as political expression commensurate with the physiological speech of natural persons. My study explains how these processes unfolded and addresses their ongoing implications.

Corporate speech rights¹⁰ are a key source of corporate power, especially political power. The Supreme Court’s declaration that money equals speech in several landmark decisions – *Buckley v. Valeo* (1976), *First National Bank of Boston v. Bellotti* (1978), and most recently *Citizens United v. Federal Elections Commission* (2010)¹¹ – dramatically affects the political process by creating conditions that make it easy for corporations to use their massive wealth to “out speak” natural persons in the public sphere.¹² As Robert Kerr notes with a hypothetical

¹⁰The mention of “corporate speech” and “corporate speech rights” refers to “corporate political expression.” Greg Lisby, “Regulating Public Relations,” *Communication and the Law*, Ed. W. Wat Hopkins (Northport, AL: Vision Press, 2010) 181.

¹¹ *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010).

¹² It should be noted that *Buckley* is not a corporate speech rights case in the purest sense. Neither party involved in the litigation was a corporation. However, *Buckley* is often discussed within the context of corporate speech rights cases because its transformation of money into speech paved the way for corporations to more directly influence political elections. In this dissertation, I discuss *Buckley* in the context of corporate speech rights cases and as an enabler or prerequisite for corporate political expression.

example, corporate lobbyists could now tell candidates, “We have got a million we can spend advertising for you or against you – whichever one you want.”¹³ With First Amendment legal protections for their unlimited spending as speech, corporations are well-positioned to use their money as speech to affect the outcome of political elections.

In analyzing the implications of corporate speech rights cases, my point of departure is to look at the very concept of money as speech as an articulation of the ideological principles of economic liberalism, more recently termed “neoliberalism.”¹⁴ These principles encourage the protection of private property, private enterprise, and the expansion of the free market and corporate rights. They also advocate for decreased public oversight and fewer government regulations. My study aims to determine if – and if so, how – these ideological principles are present in several key Supreme Court rulings on corporate rights. I will suggest that forms of these ideological principles of economic liberalism may be present in major landmark rulings on corporate rights from *Santa Clara*, which introduced a new form of corporate personhood, to *Kasky*, which revealed how the corporation sought to use its voice, to all of the corporate speech rights rulings including *Buckley*, *Bellotti*, and *Citizens United*.¹⁵

In order to identify these ideologies of economic liberalism and neoliberalism to determine if they are operating in judicial texts, and to unpack their functions and implications, I

¹³ Robert L. Kerr, “Naturalizing the Artificial Citizen: Repeating *Lochner*’s Error in *Citizens United v. Federal Election Commission*,” *Communication Law and Policy* 15.4 (2010): 312.

¹⁴ The terms “economic liberalism” and “neoliberalism” are sometimes used interchangeably in this study because they share so many common principles. However, I do make a distinction, and the distinction I make between the two is a historical, chronological one. Because the term neoliberalism did not begin to be used until the 1970s, I use “economic liberalism” to discuss economic and political economic relations prior to that time. Analysis and commentary on Supreme Court cases after 1970 use the term “neoliberalism” to reflect that chronological distinction.

¹⁵ *Buckley* is not a corporate speech rights case, but I am discussing it in the context of corporate speech rights cases because it is often discussed with other landmark rulings on corporate rights.

engage in an ideological analysis of each landmark ruling. My analysis includes an examination of majority and dissenting opinions that take into account the context of their emergence.¹⁶ The analyses also contribute to an awareness of how and why ideologies of economic liberalism may appear in and be reproduced through presumably neutral judicial texts. In sum, my analysis focuses on how certain Supreme Court rulings on corporate speech rights may function to promote and legitimate the interests of corporations based on the principles of economic liberalism.¹⁷ These principles have a tendency to privilege profit above people and operate in opposition to human interests.

There are many good reasons to study the corporation. Corporations are important and necessary institutions in society. They are undoubtedly a source of creativity, innovation and jobs. Their wealth provides the economic stability necessary for democratic, capitalist societies to function peacefully. However, their wealth and power are also cause for concern because corporations have too often advanced their interests at the expense of natural human beings through environmental pollution, disregard for product safety regulations, and so on.¹⁸ Of course, this is nothing new.

Skepticism of corporate power is part of our nation's history. In 1816, Thomas Jefferson wrote, "I hope we shall...crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government in a trial of strength, and bid defiance to the laws of

¹⁶ The discussion of Supreme Court decisions is augmented with scholarly and popular literature and/or media coverage in some instances to provide additional historical and contemporary context.

¹⁷ Here I draw primarily from the work of Terry Eagleton, *Ideology: An Introduction* (London: Verso, 2007). See also David Hawkes, *Ideology: The New Critical Idiom* (London: Routledge, 2003). These works are addressed more specifically in the next chapter.

¹⁸ These are defined as externalities. Externalities are the costs of doing business that are not included in the corporation's operational budget and that are displaced on to society.

our country.”¹⁹ A year later James Madison warned, “There is an evil which ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by...corporations. The power of all corporations ought to be limited to this respect. The growing wealth acquired by them never fails to be a source of abuses.”²⁰

The founding fathers did not hate corporations. They knew that the long-term success of the nation depended on the economic strength that business organizations could provide. However, like American citizens today, they were fearful of what could happen when private enterprise gained too much wealth and power. They had not forgotten the colonies’ experiences with the East India Company. The company was known for its brutality toward both the human beings that it forced into slavery (or otherwise compelled to labor) and the smaller businesses that it ousted from the marketplace to stomp out competition.²¹ Despite early concerns about the wealth and power of business organizations, the corporation was certainly not “crushed in its birth” as Jefferson had hoped. By the end of the nineteenth century the exact opposite had come true. The Supreme Court had given legal “birth” to a new corporate person. Since this “personification” took place, corporations have continued to secure more Constitutional rights and expand their sphere of influence.

Today, modern corporations are far more than mere business organizations. As Ted Nace explains, “Because it is so adaptable, the corporation seems on an inexorable course toward

¹⁹ Thomas Jefferson, Letter to George Logan, Lynchburg, VA, 12 Nov. 1816, Rpt. in *The Works of Thomas Jefferson, Federal Edition, vol. 12* (New York and London: G.P. Putnam and Sons, 1904-1905) 1 Aug 2012 <<http://oll.libertyfund.org/title/808/883522009635>>.

²⁰ James Madison, “Document 64, Detached Memoranda,” *The Founders’ Constitution, Volume 5, Amendment I (Religion)*, Eds. Philip B. Kurler and Ralph Lerner (Chicago: University of Chicago Press, 2000) 10 Aug 2012 <http://press-pubs.uchicago.edu/founders/documents/amendI_religions64.html>.

²¹ See Eric Williams, *Capitalism and Slavery* (Chapel Hill, NC: The University of North Carolina Press, 1944); Nace; Hartmann.

permeating every aspect of human life, not just the traditional economic spheres but increasingly...public spheres.”²² Today, corporations are so thoroughly ingrained into every aspect of the human experience that they not only provide products and services, but they also endorse or oppose political candidates, and they even suggest potential friends and mates.²³

Nace elaborates further:

In many ways the corporation is coming to know us better than we know it. It involves itself with us intimately. It participates in our birthing, our education, even our sexuality; it tracks our personal habits, entertains us, imprisons us; it helps us fight off dread diseases, manufactures the food we eat, barter and trades with us in a common economic system, jostles us in the political arena, talks to us in a human voice, sues us if we threaten it.²⁴

As Nace describes, corporate influence has become so pervasive that corporations seem to have become the new ideological state apparatus (ISA). Louis Althusser defines an ISA as “a certain number of realities which present themselves to the immediate observer in the form of distinct and specialized institutions.”²⁵ Like other ISAs, including churches, schools, the family, the law, the political system, trade-union, media and culture, the corporation²⁶ is a significant contributor

²² Nace 226-227.

²³ Examples of this are companies like Facebook, eHarmony and Match.com which specialize in suggesting friends and potential mates.

²⁴ Nace 227.

²⁵ Louis Althusser, “Ideology and Ideological State Apparatuses: Notes Towards an Investigation,” *Lenin and Philosophy and Other Essays*, Ben Brewster, trans. (New York: Monthly Review Press, 1971) 14, Rpt. on Marxists Internet Archive <<http://www.marxists.org/reference/archive/althusser/1970/ideology.htm>> 10 Aug 2012.

²⁶ It should be noted that, in “Ideology and Ideological State Apparatuses,” Althusser did not include corporations on his list of ISAs (see Althusser 15), but corporations seem to meet the criteria for ISAs laid out in his essay.

to the production and reproduction of social relations.²⁷ It inculcates, disciplines, and punishes, but persuades mainly through ideological means.²⁸

Is it fair to say that the corporation has supplanted the authority and influence of the state? Stanley Deetz goes so far as to claim that “the commercial corporation has eclipsed the state, family, residential community, and moral community.... Corporate organizations make most decisions regarding the use of resources, the development of technologies, the products available, and the working relations among people.”²⁹ If Deetz is correct, perhaps we are now living in a new age defined by the ideological *corporate* apparatus.

The sheer speed and magnitude with which the corporation has come to infiltrate nearly every aspect of human life, rising to nearly omnipotent power, is astounding considering that the modern corporation is a relatively new institution compared to the family, church, and state.

Until the late nineteenth century, business in this country was generally handled by sole

²⁷ Althusser 15.

²⁸ History shows that corporations have not been shy about using repressive measures. Corporations have had security teams and police-type forces. Corporations have also launched SLAPP (strategic lawsuit against public participation) lawsuits as a method of repression or punishment. A SLAPP is filed by corporations and designed to suppress or eliminate public criticism or opposition. The SLAPP plaintiff essentially forces its opponent into a war of financial attrition. SLAPP suits are often effective because average members of the public cannot afford to mount a long-term legal defense, so they are ultimately forced to abandon the lawsuit and their criticism of the corporation. Fear of a SLAPP suit can easily intimidate other members of the public from joining the debate. For more on SLAPP lawsuits, see Nace 145-146; Hartmann 204-205. See also “Responding to Strategic Lawsuits Against Public Participation (SLAPPs),” *Citizen Media Law Project*, Berkman Center for Internet & Society at Harvard University, 19 Jul 2012 <<http://www.citmedialaw.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps>>.

²⁹ Stanley A. Deetz, *Democracy in an Age of Corporate Colonization: Developments in the Communication and Politics of Everyday Life* (Albany, NY: State University of New York Press, 1992) 2-3.

proprietorships, partnerships and joint stock companies – not corporations (like the kinds of large corporate business entities that have arisen since the advent of the Industrial Revolution).³⁰

There is no question that the modern corporation would not be what it is today absent certain landmark Supreme Court decisions, especially the ones selected for analysis in this study. These decisions have changed the very idea of the corporation. When we consider the magnitude of these decisions, questions arise: how, why and when did the Supreme Court become so powerful? In many ways, the vast powers of the Court can be conceived of as an outcome of the political struggle between John Adams and the Federalists and Thomas Jefferson and the Republicans that began in the late 1700s. This struggle for political power set the tone for the ongoing battle between economic liberals and political liberals that is discussed in the next chapter. For now, suffice it to say, “The very heart of Federalism was its hatred of democracy,” according to Claude Bowers.³¹ While Federalists favored wealthy interests and big business, Republicans were more sympathetic to the plight of the common man and wanted to ensure that his interests were represented in the democratic process. The Federalists of yesterday have much in common with the neoliberals of today who favor the expansion of private enterprise, the protection of private wealth, and the rise of the free market and corporate rights, as I will argue in the following pages. Now, however, it is important to continue the focus on how the Supreme Court rose to legal omnipotence.

³⁰ John Micklethwait and Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* (New York: The Modern Library, 2005); Gregory A Mark, “The Personification of the Business Corporation in American Law,” *The University of Chicago Law Review* 54 (1987): 1441-1442.

³¹ Claude Bowers, *Jefferson in Power: The Death Struggle of the Federalists* (Boston: Houghton Mifflin, 1964) 168. See also Per Fjelstad, “Legal Judgment and Cultural Motivation: Enthymematic Form in *Marbury v. Madison*,” *The Southern Communication Journal*, 60.1 (1994): 24.

The political acrimony between the Federalists and the Republicans intensified in 1801 as Thomas Jefferson prepared to assume the presidency, wresting power from former President John Adams and the Federalist Party, who also lost control of Congress to the Republicans. Although the Federalists lost the battle for the presidency and their majority in Congress, they had no intention of losing the war for power and control of the country and its future direction. They set their sights on sustaining and expanding their power within the judicial branch.³²

Just before the official transition of presidential power, President Adams appointed John Marshall, a leading member of the Federalist Party, to Chief Justice of the Supreme Court. On his last evening in power, Adams appointed forty-two new judges to the federal circuit court. These new justices were called the “midnight justices” by those suspicious of or in opposition to their appointment.³³ In order for the “midnight justices” to be officially appointed, documents had to be delivered to incoming President Jefferson and signed. James Madison, Jefferson’s new Secretary of State, was responsible for delivering the documents and securing signatures. No official record of exactly what happened next exists, but four of the forty-two documents were apparently never delivered to President Jefferson and never signed. William Marbury’s paperwork was among the missing documents. Marbury decided to file suit against Madison in the Supreme Court.³⁴ In *Marbury v. Madison* (1803), the plaintiff asked that the Secretary of

³² H. L. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park, Pennsylvania: The Pennsylvania State University Press, 1995) 43.

³³ Fjelstad 23. They were called “midnight justices” to imply that they assumed their power surreptitiously and unethically – in a manner that had to be done in the dark, not openly and in the “daylight.”

³⁴ Fjelstad 23.

State show cause why the documents were not or should not be delivered, and the suit requested that Marbury be instated as a justice.³⁵

Given the tumultuous political climate of the time that sharply divided Federalists and Republicans, and given the suspicion surrounding Marshall's appointment and the appointment of the "midnight justices,"³⁶ the Supreme Court in general and Marshall in particular faced a dilemma. If the Court ruled for Marbury, it would appear to be overtly taking part in mere partisan politics, and of course partisan politics is supposed to be beneath a judiciary that prides itself on neutrality, objectivity, and its ability to provide impartial interpretation of legal discourses. If the Court ruled against the plaintiff, the Federalist goal of expanding its power through the judiciary could be compromised, because, numerically, fewer Federalist judges would assume office. Moreover, if the Court ruled against Marbury, it could appear as though Marshall had acquiesced to Jefferson and the Republicans, which could possibly weaken the overall authority of the judiciary.³⁷

Marshall delivered the opinion of the Court, which essentially ruled against Marbury, but firmly established the judicial authority of the Supreme Court. Justice Marshall wrote:

It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition of the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to

³⁵ William Marbury v. James Madison, Secretary of the United States, 5 U.S. 137 (1803).

³⁶ According to Fjelstad, 1994; See also LaRue, 1995.

³⁷ LaRue 54.

the law, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.³⁸

This is considered one of the most brilliant legal maneuvers in history because Marshall compromised neither Federalist power nor Supreme Court authority in this “court-empowering precedent.”³⁹

According to H.L. LaRue, the heart of Marshall’s strategy lay in his interpretation of the Constitution and in his conception of the Supreme Court’s role in society. LaRue wrote,

He reread the statute that was supposedly the basis of the Supreme Court’s jurisdiction over the case and decided that it was unconstitutional. He informed Congress that it could not force the Supreme Court to take this case and dismissed it! Of course, the members of Congress did not want him to take the case, and so there was nothing practical they could do to reverse his ruling. Marshall asserted the power to do nothing, and since nothing is what they wanted him to do, they were powerless to reverse him.⁴⁰

As LaRue’s assertions indicate, Marshall’s decision reinforced the Court’s position as the official interpreter of the Constitution and as the final authority on the law of the land. From this position, the Supreme Court’s judicial discourse has shaped life in this country – from who is considered a person to what laws govern personhood and relations between persons,

³⁸ *Marbury v. James Madison, Secretary of State of the United States*, 5 U.S. 137 (1803) 178.

³⁹ Fjelstad 24; LaRue 54.

⁴⁰ LaRue 54.

organizations, and institutions. This is particularly evident within the context of the “artificial” person and the rise of the modern corporation.⁴¹

The rise of the modern American corporation is a fascinating story, and one that can be told from a number of angles. Many popular accounts of the corporation’s successful ascension to power credit American business ingenuity and the hard work of savvy individuals. Without discounting the work of smart, entrepreneurially-minded business people who made tremendous sacrifices to help corporations attain vast wealth and power, this dissertation approaches the corporation’s evolution from another angle.

I enter the conversation by nuancing our understanding of the corporation by analyzing what I argue are the primary catalysts for the expansion of its power: the personification of the corporation, the development of the corporate voice as represented through the public relations field, and the establishment of corporate speech rights. While other studies have examined each of these aspects of corporate power, these aspects are typically not united in a single study to tell the story of the corporation’s evolution. Few use ideological theory as a critical lens to analyze the Supreme Court decisions featured in this dissertation, and studies have not generally united the eclectic mix of theories displayed here to analyze the corporation, its evolution and power as constituted through Supreme Court discourse.

⁴¹ Ultimately, *Marbury* was not at all about Marbury. Primarily the case was about strengthening both Federalist and judiciary power within the three branches of government. *Marbury* provided the vehicle for the expansion of these powers.

Following this introduction is Chapter Two: a theoretical overview and description of my methodological approach. My critical, theoretical approach to the analysis of the Supreme Court rulings is outlined in detail.⁴² I explicate how I will use the method of ideological criticism to determine if or how statements in Supreme Court rulings on corporate rights promote and legitimate the corporate interest at the expense of human beings by adhering to the ideological principles of economic liberalism that privilege profit above people as a taken for granted norm. Once I lay out my theoretical framework and methodological approach, I turn my attention to the analysis of the first landmark Supreme Court ruling under study.

Chapter Three provides an analysis of *Santa Clara*. I engage in an ideological critique of the judicial discourse constituting the case that is sensitive to the racialized roots of corporate personhood. The chapter explains how the corporation was able to appropriate the Fourteenth Amendment to seize personhood rights, which functioned to contribute to an ongoing ontological conflation between artificial and natural persons. This conflation positioned the corporation to receive more and more rights intended for human beings. I also augment my rhetorical and ideological analysis with critical race theory to show how conceptualizations of race destabilized notions of personhood, paving the way for people to be regarded as things, and things (such as corporations) to be treated as people in American jurisprudence. In addition, I address the ongoing implications of corporate personhood for human beings.

⁴² Note that other scholars such as Kerr, Nace, and Hartmann have used the word “ideology” in their works to imply a belief orientation; none have drawn upon the scholarly history and literature of ideological theory and criticism as this study does. Their discussions are foundational because they are among the first to raise the issue of ideology in the study of corporate rights. My study builds on their foundation by incorporating ideological theory as a critical and analytical tool.

In Chapter Four, I describe the evolution of the corporate voice via the public relations field. I show how the corporate voice and public relations developed together during the Industrial Revolution to help big business persuade the public that it was a benevolent member of society. Then I provide an ideological critique of *Nike v. Kasky* that explores how the corporate voice may be used in ways that are perceived as deceptive. In addition, the critique addresses how the corporate voice sometimes articulates the principles of neoliberalism.⁴³ The chapter also draws upon ideological, rhetorical and public relations theories to address how the Supreme Court's ruling – or lack thereof – functioned to protect corporate rights and power.

Chapter Five expands the exploration of the corporation's rise to power via Supreme Court rulings by focusing on the evolution of corporate speech rights. I engage in an ideological analysis of *Buckley v. Valeo*, *First National Bank v. Bellotti*, and *Citizens United*. I focus on how these key landmark rulings functioned to transform money into speech, making it possible for corporations to outspend natural persons in ways that challenge the effectiveness of natural persons' voices in public debates or political contests. The analysis also describes how Supreme Court rulings on corporate speech rights can function to support the ideological principles of economic liberalism by expanding corporate rights and facilitating the participation of corporations in political elections. Finally, the chapter addresses how the idea of "corporate speech rights," especially as articulated in certain Supreme Court decisions, functions to reinforce the improper ontological conflation of human beings and corporations in ways that advantage corporations.

⁴³ The principles of neoliberalism do not directly or necessarily advocate deception. However, I am asserting that they can have a tendency to privilege profits above people, that Nike's use of the corporate voice appeared to privilege profits above people in ways consistent with the principles of neoliberalism, and that this ideological privileging can inadvertently lead to deception.

I conclude by discussing the broad implications of corporate power as constituted through corporate personhood, voice, and speech rights. I discuss how these three aspects of the modern corporate form are central to the corporation's evolution. In fact, they form a veritable trinity of corporate power. There is solid evidence to suggest that this trinity, or trifecta even, has been enabled by Supreme Court decisions that serve a reifying function by treating people as things and things as people in American jurisprudence. I also address how this reifying function is informed by the ideological principles of economic liberalism, which seek to maintain the power-hold of the power elite and appear in Supreme Court discourse on corporate rights.

It would be far too easy to arrive at the conclusion that corporations are bad and we should simply do away with them. Corporations, however, are fundamental to the nation's economic survival. As Greg Lisby wrote:

The economy – the foundation and fiber of the United States – is based upon the exchange of goods and services and upon the marketing and promotion of those exchanges. In no other country does capitalism exist as such a crucial part of society. As a result, corporate entities have many of the same rights and privileges as natural persons under the Constitution.⁴⁴

Lisby accurately describes the reality of the circumstances under which we live. In doing so, he illuminates the difficulty of accepting arguments that suggest we simply should do away with the corporation altogether.⁴⁵ Instead of attempting to eradicate the corporation, it seems more appropriate to find ways to strike a more sensible balance of power between human beings and

⁴⁴ Greg Lisby, "Regulating Public Relations," *Communication and the Law*, Ed. W. Wat Hopkins (Northport, AL: Vision Press, 2010) 179.

⁴⁵ See Dana L. Cloud, "Corporate Social Responsibility as Oxymoron: Universalization and Exploitation at Boeing," *The Debate over Corporate Social Responsibility*, Eds. Steve May, George Cheney and Juliet Roper (Oxford: University Press, 2007) 219-231.

corporations. Whether or not we like it, in advanced capitalism, the viability of our future has become tied to the viability of corporation's future. As one example, our retirement and investment funds, or the ones that we hope to have or will one day need, are deeply dependent on the financial well-being of corporations, even ones we dislike.

The interests of the common man have become perhaps inextricably intertwined with those of the corporate conglomerates. If it is true that, as the old saying goes, "we're all in this together," then we as in "We the people," the citizens of the United States, must figure out what to do. One important step is to develop a sophisticated understanding of the corporate form and the key components of its power, which is the goal of this dissertation. From that point, we can begin to figure out how to better manage corporations and our relations with them. Analyzing the three key aspects of the modern corporate form – its personification, voice and speech rights – and how they have contributed to its power will provide significant insights. Because corporations are so pervasive and powerful, it is incumbent upon human beings to take up this effort.

2. THEORETICAL OVERVIEW AND METHODOLOGICAL APPROACH

It is impossible to understand the complexity, nature, and functions of the corporation, including the magnitude of its power and influence, without a discussion of the law. This chapter includes such a discussion, and begins with an overview of the theoretical approach that this study will take. The initial overview lays the foundation for the subsequent description of my methodological approach to analyzing the key Supreme Court decisions that I argue are the basis of the modern corporate form and its power.

Many people still believe that the law is unequivocally neutral, impartial, and objective, and why shouldn't we? Most of us grow up under this assumption. The authoritative nature of judicial discourse contributes to the law's perceived legitimacy. As William Lewis explains:

Judicial discourse is predominantly conceived as the application of pre-existing principles to determinate cases. The results of judicial opinions presumably arise from the application of law to facts; except for occasional bad judges, decisions are likely to be correct and reproducible; they are to be judged by the accuracy of their interpretation of the law and by the quality of their deductive inference. The dominant presumption of the legal legitimacy is that, properly applied, the process of adjudication can achieve reasonably just and objective results, restrain individual passions and prejudices, and apply the law fairly among cases and across time.⁴⁶

Here Lewis articulates the dominant paradigm of the law, and most Americans are socialized to accept this perspective. Many are believers until something happens to shake their faith:

⁴⁶ William Lewis, "Of Innocence, Exclusion, and the Burning of Flags: The Romantic Realism of the Law," *The Southern Communication Journal* 60.1 (1994): 5.

a criminal goes unpunished, an innocent person is wrongly convicted, or the law bestows some unfair advantage. Once our faith is shaken, we begin to question. We begin to think more deeply about our fundamental assumptions about the law's inherent objectivity.⁴⁷

My methodological approach emerges from this point of questioning. In contrast to the dominant paradigm of the law, it subscribes to the notion that the law is often partial, with justices influenced by their own attitudes, beliefs, or experiences. This makes the law an ideal place for a rhetorical intervention – the kind that seeks to better understand and explicate the correspondence between language, ideology and social relations, and that seeks to more precisely reveal how judicial discourse functions to support certain aims and reinforce particular power relations. There is scholarly support for this position.

Eileen Scallen, for example, identifies three ways in which rhetorical criticism enriches the study of legal texts. Rhetorical criticism is instructive, which addresses the persuasive effects of legal texts; reconstructive, which means it exposes a text's hidden dimensions and provides alternative interpretations and understandings; and evaluative, which explicates the quality and soundness of legal reasoning and judgment.⁴⁸ Summarizing more of the ways in which rhetorical criticism enriches legal studies, she writes, "Rhetorical criticism is a means to a more complete understanding of legal discourse, an understanding not only of the reasons for its success or failure in a time-bound context, but also its significance for the legal community and society

⁴⁷ The dissertation does not spend much time discussing the dominant paradigm because the dominant paradigm is the taken-for-granted norm. Its values and virtues are well-ingrained as the rules society lives by. More time is spent describing and discussing the lesser-known perspectives on the law – its rhetorical, ideological and critical dimensions – because considering these perspectives can provide unique and different insights.

⁴⁸ Eileen A. Scallen, "Judgment, Justification and Junctions in Rhetorical Criticism of Legal Texts," *The Southern Communication Journal* 60.1 (1994): 69-71.

as a whole.”⁴⁹ In other words, when we confront the law from a rhetorical perspective we are able to make better informed judgments about its meanings, functions, and implications on multiple levels.

Recognizing that the law is often characterized as objective, and therefore in opposition to rhetoric (which is often framed wrongly as linguistic manipulation or deception), Marouf Hasian, Jr. argues that the traditional view of the law and its relationship to rhetoric requires extensive revision.⁵⁰ His theoretical framework is inspired by work from Critical Legal Studies (CLS). In the 1970s, CLS scholars were among the first to challenge the presumed neutrality of the law. In response to the dominant position, CLS scholars claimed the following:

- Legal discourse is often aimed at legitimating structures of power and distributions of wealth that are unjust and illegitimate
- Legal texts can be exposed as riddled with contradictions and deep-level incoherence
- Legal documents are generally indeterminate.⁵¹

Incorporating the fundamental theoretical assumptions of CLS, Hasian introduced the concept of Critical Legal Rhetoric (CLR). His approach unites the theoretical underpinnings of CLS and rhetoric to examine how the discursive fragments of legal discourse function to hide the contradictions and power relations inherent within legal discourse.⁵² Hasian used his CLR

⁴⁹ Scallen 69.

⁵⁰ Marouf Hasian, Jr., “Critical Legal Rhetorics: The Theory and Practice of Law in a Postmodern World,” *The Southern Communication Journal* 60.1 (1994): 44.

⁵¹ See Scallen 69. See also Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA and London: Harvard University Press, 1987).

⁵² Hasian 46.

method to rhetorically analyze *Buck v. Bell* (1927)⁵³ and other Supreme Court decisions limiting or expanding constitutional rights to privacy. His analysis reveals that Supreme Court judicial discourse functions in several ways that are far from neutral. His study found that judicial decisions can function as a sword, separating citizens from their human rights to reproduction; a shield, protecting citizens from governmental intrusion and coercion; and a menace, bringing harm and suffering to citizens.⁵⁴ His rhetorical analysis of judicial opinions shows how the rulings produced and reproduced particular power relationships that, in varying degrees, restrict human agency.

Applying literary and rhetorical theory to the study of legal texts, Lewis has shown how the law has a tendency to be framed as impartial and supreme through judicial decisions that operate as romantic texts. As romantic texts, judicial rulings are perceived to be a “righter of wrongs” in a society where the law supposedly functions as a “heroic character capable of moderating, regulating and directing social action.”⁵⁵ This characterization of the law fits well with the dominant paradigm. In his analysis of the historic First Amendment flag-burning case *Texas v. Johnson* (1989),⁵⁶ Lewis argues that the law is most appropriately understood within a tragic frame because “the tragic sensibility displays us all together in shared, continuing struggles for meaning. Featuring limits as well as possibilities of human action, the tragedy of the law can incorporate continual self-criticism.”⁵⁷ Unlike the romantic frame, which requires no

⁵³ *Buck v. Bell* 274 U.S. 200 (1927).

⁵⁴ Hasian, Jr. 51.

⁵⁵ Lewis 4.

⁵⁶ *Texas v. Johnson* 491 U.S. 397 (1989).

⁵⁷ Lewis 16.

critical reflection because the law is assumed to be an unequivocal hero, a tragic view produces adjudication that is sensitive to the power relations that give all human and organizational relations social meaning. Lewis' conceptualization of the law as tragic provides another way to understand how judicial discourse functions in ways that are not necessarily objective, specifically because it is shaped and influenced by human struggles, limitations, and self-interested predilections.

A self-reflexive approach to the law, sensitive to its tragic nature as Lewis has described, takes us beyond merely evaluating legal texts in terms of their persuasive efficacy (i.e., how and why did argument A win out over argument B).⁵⁸ Instead, this kind of approach helps us to understand complexities such as why good legal arguments fail and why bad arguments succeed.⁵⁹ A tragic view also enables us to see contradictions such as the sense of good in evil and the evil in good that can characterize the authoritative and dynamic nature of judicial texts.⁶⁰ In short, for Lewis, attention to the rhetorical nature of legal discourse allows us to understand that the law is “more a cultural construction than objective description, more a source of social meaning than a force for behavioral control.”⁶¹

James Boyd White's work also challenges the dominant conception of the law as neutral and impartial. White instead emphasizes the cultural aspects of the law. For White, the law is inherently rhetorical. He explains, “It is at once a social activity – a way of acting with a certain set of materials found in the culture. It is always communal, both in the sense that it always takes

⁵⁸ Scallen 71.

⁵⁹ Scallen 71.

⁶⁰ Lewis 16. Scallen also touches on this in her essay. See 69-72.

⁶¹ Lewis 6.

place in a social context, and in the sense that it is always constitutive of the community by which it works.”⁶² Legal discourse within his perspective is a form of constitutive rhetoric, which he defines as the “study of the ways we constitute ourselves as individuals, as communities, and as cultures whenever we speak.”⁶³ White also characterizes constitutive rhetoric as “all language activity that goes into the constitution of actual human cultures and communities.”⁶⁴ When legal discourse is situated as constitutive rhetoric, the close connection between rhetoric, the law, and culture emerges. White summarizes the relationship this way: “The law is an art of persuasion that creates the objects of its persuasion, for it constitutes both the community and the culture it commends.”⁶⁵

Work from these scholars helps us to see how the law can function in a variety of ways – even as the heroic “righter of wrongs,” as Lewis’ romantic frame describes. Rhetorical and critical approaches to analyzing legal discourse are valuable because they show how the law can operate in accordance with the dominant paradigm as an objective righter of wrongs, and they also show how the law can operate in ways that are subjective and ideological. Even if we accept the dominant paradigm of the law as objective, its presumed neutrality still should not insulate it from rhetorical or critical investigation. As Philip Wander has noted, “No credo, however lyrical, authentically expressed or truly believed should escape cross-examination.”⁶⁶ I believe that

⁶² James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, WI: The University of Wisconsin Press, 1985) 35.

⁶³ White 35.

⁶⁴ White 39.

⁶⁵ White 35.

⁶⁶ Philip Wander, “The Ideological Turn in Modern Criticism,” *Central States Speech Journal*, 54 (1983) 1.

Wander's assertion has direct relevance for the study of judicial texts, especially because the work of rhetorical-legal scholars confirms that the law is not necessarily objective, neutral or impartial. In my view, rhetorical and critical approaches to the law illuminate the need for an ideological analysis and understanding of legal discourse. Here it is appropriate to embark upon a more in-depth discussion of ideology.

Historically speaking, the French first used the term "ideology" to describe the critical study of ideas. Ideas are important because as, Ernest J. Wraga points out, "The rhetorical analysis of ideas provides an index to the history of man's values and goals, his hopes and fears, his aspirations and negations, to what he considers expedient or inapplicable."⁶⁷ Ideas are significant because they live on long after the people who introduce them and imbue them into the social fabric. Current ideas continue to shape and organize social relations until they are eclipsed by new ideas that compete and jockey for position and prominence in the public sphere.⁶⁸

After the French, Marx later defined ideology as the dominant ideas of the ruling class. The German philosophers of the Frankfurt School followed with their own conception of ideology as a partiality masking itself as a totality that aims to serve particular interests.⁶⁹ At the most basic level, ideology can be understood as a system of beliefs, values and attitudes that

⁶⁷ Ernest J. Wraga. "Public Address: A Study in Social and Intellectual History." *Quarterly Journal of Speech*, 33 (1947) 451.

⁶⁸ Wraga 453-454.

⁶⁹ See Terry Eagleton, *Ideology: An Introduction* (London: Verso, 2007); Raymie E. McKerrow, "Critical Rhetoric: Theory and Praxis" *Communication Monographs* 56 (1989): 91-111; Wander 107-125; Louis Althusser, "Ideology and Ideological State Apparatuses: Notes Towards an Investigation," *Lenin and Philosophy* and *Other Essays*, Trans. Ben Brewster (New York: Monthly Review Press, 1971), Rpt. on Marxists Internet Archive 10 Aug. 2012 <<http://www.marxists.org/reference/archive/althusser/1970/ideology.htm>>.

form a consistent pattern influencing how its adherents view and act in the world.⁷⁰ Ideologies may reflect and reproduce a group's political, economic, social, and/or cultural interests.⁷¹ Ideologies are also important because they have a material component that takes shape when beliefs are actualized in human interactions. Ideologies become dominant or hegemonic when the particular interests they serve are masked or otherwise become obscured from view, and they enter into the politics of everyday life as taken-for-granted norms, natural occurrences, and universal truths. Hegemonic ideologies instill "the sense that things are as they have to be."⁷² To remain hegemonic, ideologies must be constantly produced, reproduced, articulated, and defended through an array of rhetorical strategies and practices.⁷³ Thus, ideologies come to dominate by processes of normalization. Ideology is the substance of the rhetoric of "the true believer" – meaning that it does not need to be supported by data or facts in order to be believed because its inculcation is so complete that the ideology has become doctrinal, representing the ultimate symbolic and conceptual closure.⁷⁴ It is also important to point out that ideologies are not always bad or negative. Similar to Foucault's conception of a "good" hegemonic power-hold, ideologies always come with rewards in return for submission or adherence.⁷⁵ In addition, some

⁷⁰ See Sonja K. Foss, *Rhetorical Criticism: Exploration and Practice* (Long Grove, IL: Waveland Press, Inc., 2009); Roderick P. Hart and Suzanne Daughton, *Modern Rhetorical Criticism*, 3rd ed. (Boston: Pearson, 2005).

⁷¹ Foss 209-266.

⁷² Foss 210.

⁷³ Foss 210.

⁷⁴ Roderick P. Hart, "The Rhetoric of the True Believer," *Speech Monographs* 38.4 (1971): 256.

⁷⁵ Michel Foucault, "Truth and Power," *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*, Ed. Colin Gordon (New York: Pantheon Books, 1980) 119.

ideologies are qualitatively good, as in life-affirming, such as one that would encourage the kind and gentle treatment of others.

As this discussion suggests, the term “ideology” has several meanings. Most often, ideology is thought of as a form of false consciousness or in terms of the domination thesis, which suggests that power relations emanate from the ruling class.⁷⁶ Terry Eagleton, however, offers several additional understandings of ideology: the production of ideas, beliefs, and values in social life that shape social thought; ideas and beliefs that symbolize the conditions and life experiences of socially significant groups or classes of people; the promotion and legitimation of the interest of these socially significant or dominant groups in opposition to other interests; the promotion of the ideas that function to unify a social formation in ways that are convenient to the ruling class or dominant group; the legitimation of the ideas of the ruling group via “distortion and dissimulation; and false or deceptive beliefs arising not from the dominant class but from the structure of society as a whole.”⁷⁷

Eagleton explains that within the context of ideological studies, the most efficient and effective “oppressor is the one who persuades his underlings to love, desire and identify with his power.”⁷⁸ This means the act of emancipation requires us to divorce ourselves from that part of ourselves which is constituted through and complacent with an ideology that is comfortable, but hindering our liberation. The belief that judicial discourse is inherently objective is a perfect example of what Eagleton describes. In the U.S. we have been socialized into accepting the law’s

⁷⁶ McKerrow, “Critical Rhetoric” 93.

⁷⁷ Eagleton, *Ideology* 26-30.

⁷⁸ Eagleton, *Ideology* xxii.

inherent objectivity and fairness, and that belief provides us with a certain sense of comfort, even if deep down we suspect that it is not always or necessarily true.

Eagleton's conceptualization of effective ideology aligns well with Kenneth Burke's theory of identification. Identification takes place when an individual or a group convinces another that they have shared interests whether they actually do or not. Theories of identification can be applied in a variety of contexts. For example, identification has been taken up in organizational communications studies: George Cheney showed how identification could be used by corporations as a rhetorical strategy to align employee interests with corporate interests.⁷⁹ In political communication studies, Mary Stuckey and Frederick J. Antczak use the theory of identification to analyze how images in political campaigns create particular meanings and can establish a sense of "interpretive dominance."⁸⁰ Considering the role of identification is useful in ideological analysis because it provides a way to understand how individuals come to participate in their own domination and demise, and it also confirms Eagleton's assertion that the best, most effective criticism is that which "makes sense to the mystified subject itself."⁸¹

Rhetorical scholars have taken up the concept of ideology in a variety of ways.⁸² Wander described ideology as the partiality of a world view, body of belief or universe of discourse that

⁷⁹ George Cheney, "The Rhetoric of Identification and the Study of Organizational Communication," *The Quarterly Journal of Speech* 69 (1983): 143-158.

⁸⁰ Mary E. Stuckey and Frederick J. Antczak, "The Battle of Issues and Images: Establishing Interpretive Dominance," *Communication Quarterly* 42.2 (1994): 120-132.

⁸¹ Eagleton, *Ideology* xxii.

⁸² As a sample, see Raymie McKerrow, "Marxism and a Rhetorical Conception of Ideology," *Quarterly Journal of Speech* 69 (1983): 192-205; Terry Eagleton, *Marxism and Literary Criticism* (Berkeley: University of California Press, 1976); James Jasinski, "Ideology, Reflection, and Alienation in Rhetorical and Argumentative Practice," *The Journal of the American Forensic Association* 24.4 (1988): 207-217; V. William Balthrop, "Culture, Myth, and Ideology as Public Argument: An Interpretation of the Ascent and Demise of 'Southern Culture,'" *Communication Monographs* 51.4 (1984): 339-352; Anne Makus, "Stuart Hall's Theory of Ideology: A Frame for Rhetorical Criticism," *Western Journal of Speech*

can only be revealed through careful analysis.⁸³ This is his purpose for criticism, which he argues must go beyond the mere appreciation of texts. Wander responded to the dominance of neo-Aristotelian criticism, including its strong commitment to textual appreciation, by asserting that ideological criticism was necessary because we live in a society that is constantly engaged in political conflicts, social struggles, battles for power, and competition over resources. Under such conditions, it is irresponsible for criticism to purely focus on textual form and beauty. The world cannot afford for criticism to take a politically neutral stance. Criticism must make judgments about discourse in order to help the public make decisions from a more enlightened or informed perspective. For Wander,

Criticism takes an ideological turn when it recognizes the existence of powerful vested interests benefiting from and consistently urging policies and technology that threaten life on this planet, when it realizes we search for alternatives. The situation is being constructed; it will not be averted either by ignoring or placing it beyond our province. An ideological turn in modern criticism reflects the existence of crisis, acknowledges the influence of the established interests and the reality of alternative world-views, and commends rhetorical analyses not only of the actions implied but also of the interests represented.⁸⁴

Communication 54 (1990): 495-514; Maurice Charland, "Constitutive Rhetoric: The Case of the People Quebecois," *Quarterly Journal of Speech* 73.2 (1987): 133-150; William R. Brown, "Ideology as Communication Process," *The Quarterly Journal of Speech* 64.2 (1978): 123-140; Derek T. Buescher and Kent A. Ono, "Civilized Colonialism: Pocahontas as Neocolonial Rhetoric," *Women's Studies in Communication* 19 (1996): 127-153; Kaja Silverman, *The Subject of Semiotics* (New York: Oxford University Press, 1983).

⁸³ Wander 2.

⁸⁴ Wander 18.

My study explores how the powerful interests of corporations may have benefitted from certain Supreme Court landmark decisions on personhood and speech rights. It will also explore some of the ways that these interests benefit at the expense of human life and agency. Exposing these relations of power will be done in an effort to discover how to disrupt and challenge them.

Raymie McKerrow's critical rhetoric approach is also focused on discovering ideological discourses, unmasking them, and identifying ways to resist them to achieve a more just and egalitarian social order. McKerrow draws upon work from critical theorists such as Foucault and Adorno, using their ideas as a theoretical toolbox to enrich his own critical approach, which is dedicated to demystifying discourses of power. For McKerrow, critical rhetoric means many things. First, it is "a perspective on rhetoric that explores, in theoretical and practical terms, the implications of a theory that is divorced from the constraints of a Platonic conception."⁸⁵ Thus McKerrow dismisses the kinds of characterizations of rhetoric that mistake it for mere linguistic artifice disconnected from, and artificial to, the "real world." Instead, he acknowledges that rhetoric is constitutive of the human experience.⁸⁶ According to McKerrow, "The task of a critical rhetoric is to undermine and expose the discourse of power in order to thwart its effects in a social relation."⁸⁷ McKerrow also lays out eight principles of critical praxis:

- 1) *Ideologiekritik*, which infers that ideological critique is a practice and not a method;
- 2) the discourse of power is material, meaning it has more than just abstract, intangible aspects and consequences;
- 3) rhetoric constitutes doxastic rather than epistemic knowledge and therefore critical rhetoric must focus on how knowledge is created

⁸⁵ McKerrow 91.

⁸⁶ Charland 135-150.

⁸⁷ McKerrow 98.

through social and persuasive means, not scientific knowledge; 4) naming is the central symbolic act of a nominalist rhetoric; 5) influence is not causality; 6) absence is as important as presence in understanding and evaluating symbolic action; 7) fragments contain the potential for polysemic rather than monosemic interpretation; and 8) criticism is a performance.⁸⁸

Most importantly for McKerrow, critical rhetoric should serve an emancipatory purpose that eliminates oppression to achieve an improved human experience. In the chapters that follow, several of McKerrow's eight principles of critical praxis are peppered throughout the analyses (where appropriate) to enhance the discussion by illuminating specific points. For example, the sixth principle, "Absence is as important as presence in understanding and evaluating symbolic action" is especially significant to my analysis of the *Santa Clara* ruling. In this ruling, the Supreme Court essentially created corporate personhood even though any mention of the phrase "corporate personhood" was noticeably absent from the opinion.

Work from these ideological theorists and critics supports assertions that judicial discourse is not necessarily neutral and that those discourses that are presumed or assumed to be neutral probably need the most rhetorical intervention. Authoritative judicial discourses such as Supreme Court rulings are an ideal site for a rhetorical analysis based on ideological criticism because this approach exposes the underlying interests inherent in any legal text. Ideological criticism also reveals the many ways that legal texts shape our sense of the social world and the material conditions under which we live.

The methodological approach to the analysis of Supreme Court discourse undertaken in this study draws from the tradition of ideological and rhetorical scholarship presented above.

⁸⁸ McKerrow 102-108.

Eagleton's conceptualization of ideology as the "promotion and legitimation of the interest of socially significant or dominant groups in opposition to other interests"⁸⁹ is particularly central to my work. In the chapters that follow, it will function as a critical lens through which I interpret the judicial discourse under examination. In doing so, I attempt to show if, or how, landmark Supreme Court rulings on corporate rights promote and legitimate corporate interests with corporations being understood clearly to be a socially significant and dominant group. My analysis of these rulings will also attempt to show if or how the corporate interests promoted in the rulings are oppositional to the interests of human beings.⁹⁰

In order to analyze the key Supreme Court rulings on corporate rights, I engage in close textual analyses that look at the myriad ways that these judicial discourses might promote and legitimate the interests of socially significant and dominant groups, which in the context of this discussion are corporations. This close textual analysis, in the tradition of Michael McGee, examines fragments of discourse, including how texts operate within contexts to engender a sense of shared meaning.⁹¹ In this case, the Supreme Court rulings are the texts, the circumstances in which they occurred are the contexts, and this swirl of discourse, including historical and social events, constitute the discursive fragments for my ideological analysis.

Essentially this study aims to show how analyzing a combination of texts within their contexts functions to constitute meaning and shape social relations in ways that can serve the ideological interests of corporations and their owners. With this ideological approach to

⁸⁹ Eagleton, *Ideology* 29.

⁹⁰ I am referring to the "average citizen" Thomas Jefferson was concerned about as well as the common good that John Dewey often advocated.

⁹¹ Michael Calvin McGee, "Text, Context and the Fragmentation of Contemporary Culture," *Western Journal of Speech Communication* 54 (1990): 274-289.

rhetorical criticism, I am not forced to privilege text over context in my analysis. I can read both in tandem, with the text and context reverberating against each other, allowing meaning to emerge from the points of friction as my analysis of Supreme Court discourse unfolds. As the critic, my goal is to identify and comment on what I perceive are the most significant emergent meanings and central themes within these landmark rulings on corporate rights. An ideological critique sensitive to the mutually constitutive nature of text and context is ideal for analyzing something as complex as Supreme Court discourse on corporate rights. Methodologically, ideological critique is ideal because it is flexible and easily accommodates augmentation by the addition of other theories.

Because I argue that the source of modern corporate power corresponds to three historical developments including the personification of the corporation under the Fourteenth Amendment, the development of the corporate voice, and the acquisition of speech rights in the form of political expression protected by the First Amendment, I need to be able to take into account theories central to these three areas of the corporation's development. The purpose is to unite them with my overarching ideological analytical framework in order to make informed judgments about how certain landmark Supreme Court decisions function in the specific instances under study in this dissertation. So, for example, because the first case study on *Santa Clara* deals with the Fourteenth Amendment, I incorporate theories of race into my ideological analysis of the ruling. This means that in addition to examining the opinion to see if and how this judicial text promotes and legitimates the ideological interests of corporations in opposition to

human beings,⁹² I also incorporate critical race theory (CRT) to illustrate how race played an important role in the evolution of corporate personhood.⁹³

Similarly, the next chapter addresses the evolution of the corporate voice through the public relations field and includes an analysis of *Nike v. Kasky* – an important Supreme Court case that involved public relations communications. Because of the focus on public relations here, I incorporate theories from that field, along with rhetorical theories of identification. They augment my overarching methodological approach of ideological criticism by illuminating nuances specific to public relations and other forms of persuasive advocacy. This diverse array of scholarly insights helps me to more fully explicate the role and function of public relations, including the corporate voice, in contributing to the corporation’s rise to power.

Finally, because landmark Supreme Court rulings on corporate speech rights have famously transformed money into speech with *Buckley*, then *Bellotti*, and most recently *Citizens United*, I argue that economic liberalism is an ideological principle foundational to landmark Supreme Court rulings on corporate speech rights, and I incorporate these theories into my analysis of the cases. However, because I also argue that, more broadly conceived, Supreme Court rulings on corporate rights betray principles of economic liberalism and neoliberalism, these theories are woven throughout the study.

David Hawkes’ work, for example, is useful because he explores ideology within the social and material influences of capitalism. According to Hawkes,

While the market exchange is obviously present in and necessary to any civilized society, our postmodern society is historically unique in elevating the mercantile principle to a

⁹² This is the core of my methodology based on Eagleton.

⁹³ Cheryl Harris, “Whiteness as Property,” in *Critical Race Theory: The Key Writings That Formed the Movement*; Crenshaw et al. 276-291.

position of complete dominance over the economy, and I argue, over every area of public and private experience. When it attains this degree of power, the market ceases to fulfill its necessary but subordinate function as a means towards the end of civilized life. It becomes, rather, an end in itself, and in consequence it takes on the aspect of a tyrannous, destructive force, whose impact is felt within each of our minds as well as in our material lives. The market becomes an ideology.⁹⁴

Hawkes' characterization of ideology as a set of market relations inspired by capitalism is useful to my discussions of Supreme Court rulings on corporate speech rights, which literally transformed money into speech. Those rulings contextualize the spending of money by corporations as equivalent to the speech of natural human beings. Within Hawkes' approach to ideology, "Money is not merely a convenient vehicle for exchange; money has significance, it *means* something. In short, money talks, and it speaks the language of ideology."⁹⁵ My dissertation explores how Hawkes' claim that money talks is exemplified in corporate speech rights cases where money became First Amendment-protected speech. I explore how, within this context, money, as well as Supreme Court discourse, speaks the language of economic liberal ideology.

As Hawkes commentary suggests, the ideological principles of economic liberalism are based on the model of Western capitalism. In my view, the overall gist of this model can be summarized with a simple equation: low cost, high efficiency.⁹⁶ The ideological orientation of this model adheres to a few fundamental principles, including free trade, strong private property

⁹⁴ David Hawkes, *Ideology: The New Critical Idiom* (London: Routledge, 2003) 1-2.

⁹⁵ Hawkes 9.

⁹⁶ Slavoj Žižek, "A Permanent Economic Emergency," *New Left Review* 64 (2010): 85-95.

rights, and self-interested competition. Proponents of this position assert that the market, when left to self-oversight (meaning mostly free of governmental regulation and societal accountability), will provide more political stability and more social freedoms than government oversight can attain.⁹⁷ Within this paradigm, the role of the government is to protect the market and ensure that big business can operate with as few restrictions as possible.

Critics of economic liberalism disagree with arguments that self-interested competition, free markets, and minimally restrained capitalism can sufficiently provide the social stability and democratic participation necessary for a healthy society to survive.⁹⁸ As Žižek notes of too many western political systems, “The electoral system is increasingly conceived on the model of market competition. Elections are like commercial exchange where voters ‘buy’ the option that offers to do the job of maintaining social order, prosecuting crime, and so on, most efficiently.”⁹⁹ From this perspective, the principles of economic liberalism are obstacles to democratic processes because they serve the special interests of powerful economic forces at the expense of other, less powerful members of society.

One could say this group of critics is politically liberal yet economically conservative.

Unlike the economic liberals akin to the Federalists of yesteryear, political liberals argue that the

⁹⁷ F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994); Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1982); Friedman, “The Social Responsibility of Business is to Increase its Profits,” *New York Times Magazine* 13 Sept 1970, Rpt. on Campus Libertarians Issues Page n.d., 20 Sept 2012 <<http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>>.

⁹⁸ See M. Lane Bruner, *Democracy’s Debt: The Historical Tensions Between Political and Economic Liberty* (New York: Humanity Books, 2009); David Harvey, *A Brief History of Neo-Liberalism* (New York: Oxford University Press, 2005); Pierre Bourdieu, “The Essence of Neoliberalism,” *LeMonde* 8 Dec 1998, 28 Jan 2012 <<http://mondediplo.com/1998/12/08bourdieu>>; Jürgen Habermas, *The Structural Transformation of the Public Sphere: an Inquiry into a Category of Bourgeois Society*, Trans. T. Burger and F. Lawrence, (Cambridge: Polity Press, 1989); John Dewey, *The Public and Its Problems* (Athens, OH: Swallow Press, 1954).

⁹⁹ Žižek 91.

power of the wealthiest members of society must be kept in check, massive concentrations of wealth can pose a serious threat to just forms of government, and public virtue should be the cornerstone of an ideal public sphere.¹⁰⁰ These are the principles of Jefferson and the anti-Federalists, and they are as old as our nation itself. Though philosophically sound and seemingly practical, political liberalism has failed to achieve the hegemonic strength of economic liberalism in the late twentieth and early twenty-first centuries. The upcoming chapter on corporate speech rights will discuss some of the reasons why this has been the case. The principles of economic liberalism have become dominant, hegemonic even, and currently prevail under the moniker of “neoliberalism.”

Neoliberalism is a political and economic philosophy committed to advancing the interests of big business and private enterprise through policies that encourage privatization, deregulation, and the expansion of corporate rights and power. Identical to economic liberalism, within the neoliberal paradigm, individual freedoms, social stability and widespread prosperity are best guaranteed by the freedom of the market, which must have as few limitations as possible. Neoliberalism began rising to dominance in the 1970s as a response to the Fordist-Keynesian policies of full employment, home ownership and strong government that dominated economic policy from the 1930s to the 1970s.¹⁰¹ As Walter Greene wrote, “Today, the hegemonic form of capitalism is neo-liberal, a rationality that governs the economy by ‘freeing markets’ from regulation. More radically, it calls for the organization of all social life as a

¹⁰⁰ See Bruner; Thomas Frank, *One Market Under God: Extreme Capitalism, Market Populism and the End of Economic Democracy* (New York: Doubleday, 2000).

¹⁰¹ See Joshua Hanan, “Home is Where the Capital Is: The Culture of Real Estate in an Era of Control Societies,” *Communication and Critical/Cultural Studies* 2.2 (2010): 181.

market.”¹⁰² But this transformation of social relations into market relations cannot take place without an aggressive communication strategy, and Greene’s work highlights “how capitalism increasingly relies on the social dimensions of communication – control, deliberation, persuasion, cooperation, competition, creativity – for the accumulation of capital and the appropriation of social wealth.”¹⁰³ This is especially so within the context of public relations and corporate speech rights. In light of these circumstances, I take up Greene’s charge that “we must be sensitive to how capitalism incorporates rhetorical communication into its regime of accumulation and its mode of regulation.”¹⁰⁴

As I conduct my analysis of key Supreme Court decisions on corporate rights, I will explore these judicial discourses to see what sorts of beliefs, values and attitudes – ideologies – emanate from those texts, and what sorts of political, social, cultural and economic interests are reproduced through them. Consistent with Eagleton’s paradigm, I look at “the promotion and legitimation of the interests of these socially significant or dominant groups in opposition to other interests.”¹⁰⁵

The overarching purpose of this study is to find out if or how judicial discourse in the form of key Supreme Court decisions on corporate rights legitimates and promotes the interests of some groups over others in the specific instances under study in this dissertation. As I engage in a close reading of each Supreme Court decision, I will identify statements in these texts that comment on the role of corporations in society, especially when they attempt to persuasively

¹⁰² Walter Greene, “Rhetorical Capital: Communicative Labor, Money/Speech, and Neoliberal Governance,” *Communication and Critical/Cultural Studies* 4.3 (2007): 329.

¹⁰³ Greene 328.

¹⁰⁴ Greene 328.

¹⁰⁵ Eagleton, *Ideology* 26-28.

justify the expansion of corporate rights and contribute to the proliferation of corporate influence. Once these kinds of statements are identified, I will then be in a position to make some determinations about what sorts of ideological positions emerge through, and are reinforced by, the judicial discourses that constitute my objects of study. Once the ideological principles in the decisions are identified, I will then comment on the decisions' implications for society.

Finally, it should be noted that my methodological approach is inherently emic in nature.¹⁰⁶ That is, I do not apply a set of pre-existing theories and methods to uncritically analyze Supreme Court discourse.¹⁰⁷ I do not approach the analysis of a text from the outside. I allow the texts, the actual decisions, to constitute the meanings derived from my analysis. In doing so, I attempt to execute Black's conceptualization of emic criticism as a form of critique that "interprets its object on the object's own terms."¹⁰⁸ Thus, my close reading of key cases will attempt to reveal if, or how, corporate power is constituted through an ideological orientation of economic liberalism operating in Supreme Court rulings. This is done in an effort to provide a well-rounded ideological analysis of key landmark Supreme Court rulings on corporate rights so that some important truths, even if uncomfortable ones, might be revealed about the human experience within the context of corporate personhood and speech.¹⁰⁹

¹⁰⁶ Kenneth Pike, "Etic and Emic Standpoints for the Description of Behavior," *Communication and Culture: Readings in the Codes of Human Interaction*, Ed. Alfred G. Smith (New York: Holt, Rinehart and Winston, 1966) 152-163.

¹⁰⁷ Edwin Black, "A Note on Theory and Practice in Rhetorical Criticism," *The Western Journal of Speech Communication* 44 (1980): 333.

¹⁰⁸ E. Black 334.

¹⁰⁹ E. Black 332.

The journey begins with an analysis of what I believe is the most significant event in the history of the corporate form – its personification by the Supreme Court under the Fourteenth Amendment in *Santa Clara v. Southern Pacific Railroad* (1886).

3. THE SIGNIFICANCE OF SANTA CLARA

*Slavery is the legal fiction that a person is property. Corporate personhood is the legal fiction that property is a person.*¹¹⁰

This chapter focuses on the personification of the corporation by the Supreme Court in their landmark *Santa Clara County v. Southern Pacific Railroad* (1886) decision, because this ruling is a fundamental contributor to modern corporate power.¹¹¹ Several scholars have explored the significance of the corporation's personification by the Supreme Court under the Fourteenth Amendment in *Santa Clara*. This chapter joins these conversations and contributes a rhetorical analysis that is: 1) sensitive to the relationship between judicial text and social context, 2) cognizant of the ways that ideological orientations can slip into presumably neutral texts such as judicial decisions, and 3) keenly aware of the racialized roots of corporate personhood. I accomplish these goals by engaging in a close reading of the *Santa Clara* ruling within the context of the historical events surrounding the case. As I analyze this ruling, especially its ideological aspects, I explore how it contributes to the "promotion and legitimation of the interests of socially significant or dominant groups in opposition to other interests."¹¹² Not all interests warrant the attention and rigor of an ideological critique. As Eagleton notes,

¹¹⁰ Byron DeLear, "Democrats Propose to Quash Supreme Court Ruling on Corporate Election Spending," *The Examiner*, 11 Feb 2010 <<http://www.examiner.com/article/democrats-propose-to-quash-supreme-court-ruling-on-corporate-election-spending>>. See also David C. Korten, *When Corporations Rule the World*, 2nd ed. (San Francisco: Berrett-Koehler Publisher, Inc. 2001).

¹¹¹ *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886).

¹¹² Terry Eagleton, *Ideology: An Introduction* (London: Verso, 2007) 29.

“The interests in question must have some relevance to the sustaining or challenging of a whole political form of life.”¹¹³ In this case, the interests involved are those of corporations – a dominant group that has transformed social and political life in the U.S. and around the world.

To orient this discussion of the rise of corporate power via the legal creation of artificial personhood, this chapter begins with a literature review that presents a variety of theoretical perspectives on corporate personhood and the *Santa Clara* decision. Following that literature review is a discussion of the triangle trade. I argue that it is instructive to interpret the ruling and analyze its implications within the context of the triangle trade because that contributes an important and under-theorized contextual understanding to the emergence of corporate personhood, especially within the context of race. Next, I discuss the Fourteenth Amendment and its original purpose. Then I provide an overview of the *Santa Clara* case, which lays the foundation for my ideological critique of the Supreme Court’s ruling. Finally, I address the implications of the *Santa Clara* ruling for the concept of personhood, both natural and artificial, and examine the implications of artificial corporate personhood for human agency. Essentially, I argue that the *Santa Clara* ruling could not have taken place absent an ideological orientation – which emerged during the triangle trade – that privileged economic aspirations over human rights. I also maintain the transatlantic slave trade (also known as the “triangle trade”) contributed to an ideological orientation that prioritized economic motivations in ways that destabilized traditional notions of personhood and property, paving the way for the Supreme Court’s transformation of property (the corporation) into a constitutional rights-bearing “person.”

¹¹³ Eagleton 29.

In a foundational essay on corporate personhood, Arthur Machen offers an account of the personification of the corporation that explores the debate between those who argue that corporations are “real” persons and those who insist that corporations are fictitious persons only. Realists believe that “when a company is formed by the union of natural persons, a new real person, a real corporate ‘organism’ is brought into being.... The corporate organism is an animal: it possesses organs like a human being. It is endowed with a will and with senses.”¹¹⁴ On the other hand, the supporters of fiction theory hold that “a corporation is a fictitious artificial person, composed of natural persons, created by the state, existing only in contemplation of law, invisible, soulless, immortal.”¹¹⁵

From Machen’s perspective, a corporation is “real” because it was created through human activity. The assertion is based on his claim that something cannot be both “artificial” and “fictitious” at the same time because something that is fictitious is imaginary, not artificial. He argues that “a corporation exists as an objectively real entity, which any well-developed child or normal man must perceive: the law merely recognizes and gives legal effect to the existence of this entity.”¹¹⁶

Machen also identifies the use of the word “person” as a source of confusion. When a person is conceived of as one that is the subject of rights, a corporation fits the definition well. But when a person is defined more narrowly as a living, breathing, human being, a corporation clearly does not fit the bill. Machen concludes that, so far, no definition adequately accounts for the corporate entity. However, until a more suitable definition is achieved, he advocates

¹¹⁴ Arthur W. Machen, “Corporate Personality,” *Harvard Law Review* 24.4 (1911): 256.

¹¹⁵ Machen 257.

¹¹⁶ Machen 261.

understanding the corporation as a real entity and an artificial person, despite consternation over what this concept of “person” really means. To support this point, he presents examples of human collectivities such as families, tribes, and villages, all of which have historically functioned legitimately as artificial persons.

Like Machen, John Dewey also finds the definition of “person” to be a source of contention and confusion.¹¹⁷ He continues Machen’s focus on the legal sense of personhood to explain how common sense notions of the word “person” further complicate matters. Dewey points out that the law does not exist in a vacuum; it is intertwined with and influenced by the philosophical, psychological, and everyday understandings of what it means to be a “person.” After examining the arguments between the realists and the fictionists, he concludes that the debate on the subject of corporate personhood will likely lack nuance and efficacy until a satisfactory notion of person can be determined:

We often go on discussing problems in terms of old ideas when the solution of the problem depends on getting rid of the old ideas, and putting in their place concepts more in accord with the present state of ideas and knowledge. The root difficulty in present controversies about ‘natural’ and associated bodies may be that while we oppose one to the other, or try to find some combining union of the two, what we really need to do is overhaul the doctrine of personality which underlies both of them.¹¹⁸

Here, Dewey is suggesting that instead of trying to reconcile the various differences between natural and artificial persons or conflating the differences, we should rethink these categories entirely. In other words, Dewey suggests that we need a new way to think through the

¹¹⁷ See John Dewey, “The Historic Background of Corporate Legal Personality,” *The Yale Law Journal* 35.6 (1926): 655-673.

¹¹⁸ Dewey, “Corporate Legal Personality” 657-658.

distinctions between human beings and corporations because our existing conceptualizations are inadequate to account for these two ontological forms.

Gregory Mark explores the nature of corporate personhood with an in-depth analysis of personification as a legal precedent and doctrine.¹¹⁹ His essay discusses how the Supreme Court actually personified the corporation twice: first in its 1819 ruling on *Trustees of Dartmouth College v. Woodward*, and again in 1886 when the *Santa Clara* ruling went further to “bring to life” what had hitherto been considered a contractual entity created for business purposes. Mark also describes the differences between *Dartmouth’s* and *Santa Clara’s* personification of the corporation. While *Dartmouth* allowed corporations to become artificial persons for the purpose of helping several individuals to do business collectively and efficiently as one entity, the *Santa Clara* ruling went much further. It used the Fourteenth Amendment to personify the corporation, extending the Amendment’s due process and equal protection clauses to artificial corporate persons. This move dramatically expanded corporate rights by compelling state governments to treat artificial corporate persons as human persons under the law.

Personification of the business organization was a key step in the evolution of the modern corporate form and marks an important milestone in the corporation’s rise to power and dominance in U.S. society. As Mark explains:

In American and economic history, personification has been vital because it 1) implies a single and unitary source of control over the collective property of the corporation’s members, 2) defines, encourages and legitimates the corporation as an autonomous,

¹¹⁹ Gregory A. Mark, “The Personification of the Business Corporation in American Law,” *The University of Chicago Law Review* 54 (1987): 1441-1483.

creative, self-directed economic being, and 3) captures rights, ultimately even constitutional rights, for corporations, thereby giving corporate property unprecedented protections from the state.¹²⁰

These three aspects of personification paved the way for the corporation to be treated less like a contractual business entity and more like a flesh and blood human being within the law and within society at large. Moreover, the third aspect of corporate personification listed by Mark allows corporations to aggregate great sums of money and to protect this money from state and local taxes as the *Santa Clara* ruling demonstrates.

Like Machen and Dewey, Mark maps the real-versus-artificial debates over corporate personhood, declaring in the end that “the protests of modern legists notwithstanding, the business corporation has become the quintessential economic man.”¹²¹ The corporation owes this new status as an economic “man” to its second personification under the Fourteenth Amendment in *Santa Clara*. This second personification of the corporation is often cited as a key source of the modern corporation’s power by legal scholars, sociologists, and others. It is often referenced because of its controversial reliance on the Fourteenth Amendment, which distinguishes *Santa Clara*’s personification of the corporation from the more benign kind of personification that occurred in *Dartmouth*.

Natasha Aljalian’s analysis is inspired by the question, “Is corporate personhood a fact or fiction?”¹²² She critiques the Court’s use of the Fourteenth Amendment in *Santa Clara*, and her essay is developed by comparing the personhood status of a human fetus to the personhood

¹²⁰ Mark 1443.

¹²¹ Mark 1483.

¹²² See Natasha Aljalian, “The Fourteenth Amendment and Personhood: Fact or Fiction,” *St. John’s Law Review* 73.2 (1999): 495-540.

status of a corporation. Aljalian questions the morality and common sense of a society and judicial system in which a contractual legal entity – in the form of a business entity designed for the sole purpose of making money – has more personhood rights than a human being, even if in fetal form. Based on the claim that corporate personhood is nothing more than a creative legal fiction, she argues that a fetus, which is actually a human being, should be given the same personhood rights as a corporation: “The Court must afford the fetus, whether through employment of the legal fiction or the recognition of the fetus as a life from the moment of conception, constitutional protection as a ‘person’ under the Fourteenth Amendment.”¹²³

Like Aljalian and Mark, Nace identifies the Supreme Court’s personification of the corporation under the Fourteenth Amendment in *Santa Clara* as a key source of modern corporate power. To help explain their rise to power in the U.S., Nace draws an analogy between corporations and gangs (i.e., street gangs and/or organized crime families) that leverage their wealth into power and unfair influence. He argues that corporate power must be curtailed because it too often causes harm to human beings. He cites corporate scandals such as Enron and WorldCom, in which corporations misled stockholders, employees, communities, and other stakeholders to the detriment of individual human beings and to society as a whole. “The emergence of a sustained attempt to openly address corporate domination in American society is a significant achievement,” Nace writes; “Its politics reflect our country’s founding values.”¹²⁴ From his perspective, unbridled corporate power hinders the democratic processes and ideals upon which our nation was founded; thus he challenges Americans to fight harder to limit corporate power by curtailing Constitutional rights for corporations.

¹²³ Aljalian 540.

¹²⁴ Ted Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* (San Francisco: Berrett-Koehler Publisher, Inc., 2005) 218.

Thom Hartmann also questions the legitimacy and logic of the Court's personification of the corporation in *Santa Clara*. His work explores how corporations have appropriated Constitutional laws intended to protect human beings. He writes:

In fact, to this day there has been no Supreme Court ruling that explicitly explains why a corporation – with its ability to continue operating forever, its being merely a legal agreement that can't be put in jail and doesn't need fresh water to drink or air to breathe – should be granted the same constitutional rights our Founders fought for, died for, and granted to the very mortal human beings who are citizens of the United States, to protect them against the perils of imprisonment and suppression they had experienced under a despot king.¹²⁵

Hartmann shares Nace's characterization of the modern corporation as an impediment to the type of democracy envisioned by and fought for by our nation's founding fathers. He contends that natural persons should restore democracy by ending corporate personhood, curtailing corporate rights and exploring new and different ways of business organization.

This overview of relevant literature on corporate personhood is not exhaustive, but it does offer a historical perspective of the evolution of corporate personhood. It outlines the range of perspectives and key arguments on the issue, and it also demonstrates how numerous scholars agree that personification was a catalyst for expanding corporate rights and power in the U.S. The *Santa Clara* ruling, in particular, was identified as a key source of corporate power, due to the appropriation of the Fourteenth Amendment to endow the corporation with the Constitutional personhood rights of human beings. Some of the work from these scholars also recognizes the racial component of corporate personhood and its evolution. It acknowledges how the

¹²⁵ Thom Hartmann, *Unequal Protection: How Corporations Became "People" – And How You Can Fight Back* (San Francisco: Berrett-Koehler Publishers, Inc., 2010) 17-18.

corporation usurped the Fourteenth Amendment – a law intended to protect newly freed slaves from racial discrimination – to gain access to the personhood rights promised to human beings, which were the newly freed slaves. Their work inspires my own thinking about the corporation's evolution and leads me to join these ongoing conversations, extending them into a few different theoretical directions guided by rhetorical, ideological and critical race theories, for example. Therefore, this chapter contributes a rhetorical analysis of the *Santa Clara* ruling that takes into account the ideological principles that both influence the ruling and are reproduced through it, while also exploring the role race played in the evolution of the corporate person and its rise to power.

3.1 The Triangle Trade and the Ideological Destabilization of Personhood and Property Rights

It is certainly possible to analyze *Santa Clara* without reference to the triangle trade; however, consideration of this phenomenon adds texture to the discussion by including an important context that has not typically been taken up in the study of the evolution of corporate personhood. The triangle trade was a defining moment in world history that initiated new modes of thought and human organization, culminating in ideological orientations of race, property, and value that have had lasting influence on both social and legal relations. I argue that these influences have contributed to the destabilization of the concept of personhood and have paved the way for things to be treated as people and people to be treated as things in American jurisprudence.

One of the earliest examples of globalization, the triangle trade, was a lucrative exchange based on slaves, money, sugar, wool, cotton, and other commodities, primarily involving Africa,

Europe, the U.S., and the West Indies.¹²⁶ The triangle trade formed the economic backbone of many European empires and gave rise to one of the world's most powerful corporate entities: the East India Company.¹²⁷ In addition to engendering the kind of collective ownership structures and formalized business processes that would eventually characterize modern private enterprise, the triangle trade also assigned a property value to the human body that would prove to be quite durable throughout the history of the Western world.¹²⁸

Ian Baucom offers a rather grisly account of the evolving fusion between the human being/natural person and monetary value in his description of how British officials issued payments to soldiers wounded in service of the crown.

There is something more than a little macabre about this list, something unnerving that exceeds the finicky mince of bureaucratic language, the formulaic translation of the loss of a foot, a thigh, a lung, or a bladder into a misfortune. If such formulations unnerve because of the obvious incommensurability of “misfortune” with “had his left foot shot off,” then it is the imperturbable search for an alternate, alinguistic grammar of commensurability, the casual pursuit of financializing, decorporealizing logic of

¹²⁶ Globalization can be understood as the flow of people, money, goods, ideas, services, and commodities between different nations and via different mechanisms. See Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis and London: University of Minnesota Press, 1996).

¹²⁷ Nace; Eric Williams, *Capitalism and Slavery* (Chapel Hill, NC: The University of North Carolina Press, 1944); Ian Baucom, *Specters of the Atlantic: Finance Capital, Slavery, and the Philosophy of History* (Durham, NC: Duke University Press, 2007).

¹²⁸ Baucom; Williams; Giovanni Arrighi, *The Long Twentieth Century: Money, Power and the Origins of Our Times* (London and New York: Verso, 2010).

equivalence that so confidently translates a lieutenant's foot into 5 shillings a day,
a clerk's eyes into a one-time payment of 40 pounds....¹²⁹

This equation of catastrophic injury with monetary dispensation that Baucom describes shows how a human being or a sacred human quality can be impassively plugged into a formula and assigned a cash value. Similarly, businesspeople, political figures and others who profited from the enslavement of African people assigned an arbitrary and artificial property value to human beings from Africa during the triangle trade.

This conflation of human beings with value and inanimate property produces what Georg Lukács has termed "reification," a phenomenon that occurs when the social relations between human beings become objectified such that individuals are regarded as things.¹³⁰ In other words, "Relations between human beings are crystallized into object-values and themselves take on the character of objects, [and] individuals themselves turn into things."¹³¹ We can consider the British court's finding in *Somerset v. Stewart* (1677) – "that negroes being usually bought and sold among merchants... and being infidels, there might be a property in them"¹³² – as another

¹²⁹ Baucom 6.

¹³⁰ Georg Lukács, *History and Class Consciousness*, 1923, Trans. Rodney Livingstone (London: Merlin Press, 1967), Rpt. on Marxists Internet Archive, 21 July 2012 <<http://marxists.org/archive/lukacs/works/history/index.htm>>.

¹³¹ Leszek Kolakowski, *Main Currents of Marxism: The Founders; the Golden Age; the Breakdown* (New York: W. W Norton & Company, Inc., 2005) 1006.

¹³² Qtd. in Williams 45.

instance of reification. These brief examples from British officials and the *Somerset* court demonstrate some of the ways that the triangle trade destabilized traditional notions of personhood and property through the process of reification.

The nature and consequences of reification are very clearly presented in the story of the *Zong*. In 1781, the *Zong*, a British slave ship, ran into distress while crossing the Atlantic. The ship's captain claimed to fear that there was not enough food or water to last the duration of the voyage, so he decided to toss some of the ship's "cargo" overboard – hundreds of captured African people.¹³³ More disturbing than that act was the fact that throwing human beings overboard was not considered murder or even injurious to either the persons forced off the ship or their families. Rather, it was considered a reasonable loss among the many costs of doing business in the transatlantic slave trade. Furthermore, the loss incurred was credited to slavers and traders. Their "loss" was protected by insurance regulations that placed no value on an African person's human life but only his or her property value as a slave, as Baucom dramatically illustrates:

Four hundred forty slaves. Four hundred forty items of property valued at 30 pounds each. Thirteen thousand two hundred pounds. Four hundred forty human beings. We know almost nothing of them, almost nothing of Captain Collingwood's conduct in "acquiring" them, almost nothing of their entry, as individuals, into the trans-Atlantic slave trade. Not as individuals. As "types" they are at least partially knowable, or imaginable. Indeed what we know of the trans-Atlantic slave trade is that among the

¹³³ Baucom 11.

other violences it inflicted on millions of human beings was the violence of becoming a “type”: a type of person, or terribly, not even that, a type of nonperson, a type of property, a commodity, a type of money.¹³⁴

The story of the Zong is emblematic of this process of reification. Captured African people were discursively and ideologically transformed into property values via the triangle trade, which helped to produce the social norms of property and the corresponding legal rights that defined eighteenth, nineteenth, and twentieth century Western societies. Through a system of exchange that required the African person’s value as a slave to eclipse his or her innate priceless-ness as a natural born human being, black people came to represent monetary values and the black body came to symbolize the property form.¹³⁵

In a recent essay, Alessandra Raengo summarized the relationship between the black body and property that developed during the triangle trade as follows:

In the financial milieu of the Black Atlantic, *race is a form of appearance of capital* because the African slave is a form of money. Just like the cycles of capital accumulation move through the commodity-based and speculative phases, so does the body of the slave function as money differently at different times: in some cases, the living, breathing biological body of the slave performs as currency (as in the West African coast where goods such as rum or firewood could be ‘reckoned’ in terms of a certain number of slaves) and in other cases it is the ‘virtual’ body that signifies money.’¹³⁶

¹³⁴ Baucom 11.

¹³⁵ In *Capitalism and Slavery*, Eric Williams counters popular arguments that supported slavery. These familiar refrains were based on false claims that blacks were innately inferior and/or that a lack of Christian faith justified their enslavement. Instead, he offers a far more plausible explanation: economics.

¹³⁶ Alessandra Raengo, “Reification, Reanimation, and the Money of the Real,” n.d., 1 Nov 2012 <http://www.worldpicturejournal.com/WP_7/PDFs/Raengo.pdf> .

The slaves thrown overboard the *Zong*, whose worth was then determined by an insurance formula that allowed slave traders to be compensated for this loss, is an example of the slave body's virtual worth. This virtual worth was based on the physical, biological body of the African person, reconceived as a form of lost property.

Of course, property rights are hardly neutral. They are an abstraction intended to accomplish a purpose, a method of "subtly imposing personal and moral beliefs."¹³⁷ In the context of the triangle trade, the tension between human rights and property rights came to be resolved with one race declared as "property" and another designated as "owner." Cheryl Harris explains, "The origins of property rights in the United States are rooted in racial domination."¹³⁸ She writes:

The social relations that produced racial identity as a justification for slavery also had implications for the conceptualization of property. This result was predictable, as the institution of slavery, lying at the very core of economic relations, was bound up with the idea of property. Through slavery, race and economic domination were fused.¹³⁹

This property rights discourse led to a pervasive racialized stratification of labor based on the commodification of human beings, conceived of as property, as the scholarly works from Harris, Raengo and Baucom illustrate.

¹³⁷ Derrick A. Bell, "Racial Realism," *Critical Race Theory: The Key Writings That Formed the Movement*, Eds. Kimberle Crenshaw et al. (New York: The New Press, 1995) 303.

¹³⁸ Cheryl Harris, "Whiteness as Property," *Critical Race Theory: The Key Writings That Formed the Movement*, Eds. Kimberle Crenshaw et al. (New York: The New Press, 1995) 277.

¹³⁹ Harris 278.

With slavery thoroughly institutionalized, the property value in the black body/person remained so ingrained that debts could be settled with “money or negroes.”¹⁴⁰ When a slave ran away, the law did not consider this act of flight as a desperate grasp at freedom but as a crime, namely, the theft of labor conceptualized as property. A runaway slave was considered guilty of depriving the master of the property value imbued in his or her body and the labor it could perform. So beloved was the institution of slavery that when it was threatened in the West Indies one slave owner decried, “God forbid that there should be anything like a forcing of the master to abandon his property in the slave!”¹⁴¹

If one is able to set ethics and morals aside for a moment, the slave owner’s horror is perfectly understandable. Why? Simply put, slavery was great business. For slave owners, the return on investment (ROI) on human property was incredible. Slaves could be bought individually or in bulk, forced to labor, and forced to reproduce, even if by rape, making more “property” available either for sale on the market or for labor within one’s own private enterprise. One of the best aspects to this scheme – from the slave owner’s perspective – was that once slaves entered the system, they would likely never see any profit even while they functioned as the embodiment of profit and conduit of its exchange.

The property value arbitrarily assigned to the slave’s body and labor continued to be a key commodity driving much of the wealth of the Western world. Forcing slaves to work in factories, for example, was a common practice. In the U.S., corporate leaders realized that slave labor could be leveraged as effectively in the factory as it was on the plantation. Earnings from slave labor and forced black labor helped to finance the Industrial Revolution in England and

¹⁴⁰ Harris 279.

¹⁴¹ Qtd. in Williams 133.

certainly contributed to the industrialization and subsequent economic strength of the U.S.¹⁴² Decades of the triangle trade had erased notions of black personhood and replaced it with the conception of blacks as profit-generating property. Thus, the profit motive of the triangle trade set in motion an ideological orientation that continually prioritized economic desires above human rights such that blacks should be consistently thought of and treated like profit-generating property. As Raengo puts it, “These desires strike at the heart of capital’s ontological scandals, the collapsed distinction between the artificial and the natural person as well as the one that pertains between person and property.”¹⁴³

According to Harris, “The hyper-exploitation of black labor was accomplished by treating black people themselves as objects of property. Race and property were thus conflated by establishing a form of property contingent on race: only blacks were subjugated as slaves and treated as property.”¹⁴⁴ In fact, the ideological construction of blacks as profit-generating property had become so pervasive, fueling racial inequality throughout society, that it eventually compelled Congress to pass the Fourteenth Amendment.

¹⁴² Several U.S. companies are alleged to have benefited from slave labor or forced black labor, including IBM, Siemens, American International Group (AIG), JP Morgan Chase, FleetBoston, Lehman Brothers, Union Pacific, Gannet, Tribune, U.S. Steel and more according to Nace 74-75. For more on corporations allegedly benefiting from slave labor and convict leasing, see also Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (New York: Anchor Books, 2008) 386-395.

¹⁴³ Raengo 4.

¹⁴⁴ Harris 278.

3.2 The Origins of Corporate Personhood and the Appropriation of the Fourteenth Amendment

Adopted in 1868, the Fourteenth Amendment consisted of five short sections. It outlined a new post-Civil War relationship between federal and state government, established the requirements of citizenship, defined the scope of personhood, settled war debts, and instituted other financial arrangements.¹⁴⁵ Arguably the most controversial part of the Amendment was Section One, which reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁴⁶

On its face, the Amendment seems clear enough. It declares that all persons should be treated equally. There is little disagreement that those words were written to protect human beings — the newly freed slaves — not artificial persons in the form of corporations. Justice Hugo Black makes this point plain in an opinion delivered several decades after the Fourteenth Amendment’s ratification. He wrote:

In 1886, this Court in the case of *Santa Clara County v. Southern Pacific Railroad*, decided for the first time that the word “person” in the amendment did in some instances include corporations. [...] The history of the amendment proves that the people were told

¹⁴⁵ See U.S. Const., amend. XIV.

¹⁴⁶ U.S. Const., amend. XIV, § 1.

that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. [...] The language of the amendment itself does not support the theory that it was passed for the benefit of corporations.¹⁴⁷

As Justice Black indicates, and others have confirmed, the creation of a new kind of artificial person was an unintended function of the Fourteenth Amendment. Rather than establishing a clearly defined legal space in which the question of black personhood could forever be put to rest, the Amendment was used to expand dramatically the rights of business entities. This shift forever complicated traditional notions of personhood in American jurisprudence.

There is no question that the Thirteenth Amendment was intended to abolish slavery and involuntary servitude, and that the Fourteenth Amendment was intended to protect black people from racial discrimination by establishing legal equality among all natural persons. The Fourteenth Amendment marked a reversal of the 1857 *Dred Scott* decision, which declared that no slave or descendent of a slave would ever be a full citizen of the United States.¹⁴⁸ Despite its intended purposes, the Fourteenth Amendment also ended up being put to a much different use, based on a rhetorical reconfiguration of the meaning of personhood in *Santa Clara*, as my study will explore.

Santa Clara is an unlikely case to be credited with the personification of the corporation because technically the corporation had already been declared an artificial person by the Supreme Court under *Trustees of Dartmouth College v. Woodward* (1819). The *Dartmouth* decision read: “A corporation is an artificial being, invisible, intangible, and existing only in

¹⁴⁷ Connecticut General Life Insurance Company v. Johnson, 303 U.S. 77 (1938).

¹⁴⁸ Dred Scott v. John F.A. Sanford, 60 U.S. 393 (1857).

contemplation of law. Being a mere creature of law, it possesses only those properties that the charter of its creation confers on it....”¹⁴⁹ The personification of the corporation established by the *Dartmouth* ruling certainly made it easier for individuals to do business more efficiently by allowing many individuals to function collectively as one distinct corporate entity.¹⁵⁰

The *Dartmouth* decision was an important first step in making it legally easier for a group of individuals to conduct business in the United States, but since charters were given and controlled by the state, corporations were obliged to adhere to state law. Thus, the actions corporations could perform as a collectivity of individuals functioning as an artificial “person” under *Dartmouth* remained tightly controlled by the state. Charles and Mary Beard explain:

Each state by law defined property for itself and determined what should be the limits imposed on the use of its property. The power to charter corporations and control their management also belonged to the states. Therefore capitalists, corporations, and other industrial concerns that had grounds, real or imaginary, for complaining against state laws and the actions of state officials had to resort, as a rule, to state legislatures and state courts for relief. Only in a narrow range of cases could the federal courts accept appeals, intervene on their behalf and afford them protection.¹⁵¹

As the Beards point out, nineteenth-century corporate business leaders and lawyers were displeased by the fact that the states retained so much power over their actions and likely thought that this kind of state oversight was too much like the fox guarding the hen house.

¹⁴⁹ Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) 636.

¹⁵⁰ Stephen Best, *The Fugitives Properties: Law and the Poetics of Possession* (Chicago: University of Chicago Press, 2004) 10-11.

¹⁵¹ Beard and Beard 316.

The ability of different states to levy different taxes on the same company was especially disconcerting to corporate owners doing business in multiple states. They considered such differential regulations “anarchy” and “a dispersion of legal authority to regulate and control the use of property” which “if appropriate for earlier times, was unfitted to the prosecution of industrial enterprise on a national scale.”¹⁵² Corporations sought injunctive relief through their lawyers who “kept appealing to the Supreme Court of the United States for protection against state legislation adversely affecting the property interests of their clients.”¹⁵³ With the passage of the Fourteenth Amendment, corporate lawyers believed they had the perfect solution to their problems, because the Fourteenth Amendment limited the authority of states over persons and prohibited differential treatment of persons by individual states with its equal protection and due process clauses. If corporate lawyers could manage somehow to use the Fourteenth Amendment to create a new Constitutional form of corporate personhood, there would be almost no limit to what these corporate persons could do.

Thus, corporations took up an ongoing legal effort in the courts to pursue personhood under the Fourteenth Amendment.¹⁵⁴ Railroad companies were especially well-positioned to launch a legal assault in pursuit of Fourteenth Amendment personhood rights. As a primary mode of military transportation during the Civil War, railroad companies had emerged from the war years so wealthy and powerful that they could well afford to fight any state regulation they did not like with lawsuits. After the passage of the Fourteenth Amendment, their efforts increased.

¹⁵² Beard and Beard 317.

¹⁵³ Beard and Beard 317.

¹⁵⁴ Hartmann 17.

Corporate lawyers were astute enough to realize that the Fourteenth Amendment did not explicitly spell out that it *only applied to natural persons*, i.e., human beings.¹⁵⁵ This “loophole” led to a popular corporate litigation strategy:

Acting on behalf of railroad barons, attorneys for the railroads repeatedly filed suits against local and state governments that had passed laws regulating railroad corporations. The main tool the railroads’ lawyers tried to use was the fact that corporations had historically been referred to as “artificial persons.” Based on this, they argued, corporations should be considered persons under the free-the-slaves Fourteenth Amendment and enjoy the protections of the Constitution just like living, breathing human persons.¹⁵⁶

Southern Pacific Railroad’s legal tussle with Santa Clara County was just another incident in the long line of ongoing conflicts between corporations and states over money, power and influence.

3.3 *Santa Clara* and the Rise of Corporate Personhood

It is interesting that *Santa Clara* is credited with the personification of the corporation because the substantive issues of the case seemingly had nothing to do with personhood — natural, artificial, or otherwise. *Santa Clara* was essentially a tax case. The situation began when California’s Santa Clara County brought suit against Southern Pacific Railroad, arguing that the railroad company owed county and state taxes.¹⁵⁷ The railroad company refused to pay the taxes and fought Santa Clara County all the way to the Supreme Court.

¹⁵⁵ See Beard and Beard.

¹⁵⁶ Hartmann 112.

¹⁵⁷ *Santa Clara v. Southern Pacific Railroad*, 118 U.S. 394 (1886) 398-399.

According to the Court, Southern Pacific Railroad defended itself in two ways. First, the railroad claimed that it had complied with all federal and state laws. Next, it claimed that

The provisions of the constitution and laws of California, in respect to the assessment for taxation of the property of railway corporations operating railroads in more than one county, are in violation of the Fourteenth Amendment of the Constitution, in so far as they require the assessment of their property at its full money value, without making deduction, as in the case of railroads operated in one county, and of other corporations, and of natural persons, for the value of the mortgages covering the property assessed; thus imposing upon the defendant unequal burdens, and to that extent denying to it the equal protection under the laws.¹⁵⁸

As this passage indicates, Southern Pacific's defense was based on the Fourteenth Amendment, which held that all persons must be treated equally under the law. This was a logical argument for the defense to make given that the *Dartmouth* decision had created artificial corporate personhood back in 1819. However, the *Dartmouth* ruling was quite explicit in its limitations on artificial corporate personhood and in no way equated the artificial personhood of corporations with the natural personhood of human beings.

¹⁵⁸ Santa Clara v. Southern Pacific Railroad, 118 U.S. 394 (1886) 410.

Referring to the Fourteenth Amendment, Hartmann notes, “The clause that grants all ‘persons’ equal protection under the law, in context, seems to apply pretty clearly only to human beings ‘born or naturalized’ in the United States of America.”¹⁵⁹ However, as Dewey and Machen indicated earlier, despite the widespread, common-sense understanding of “person” as human being, the legal definition of “person” had been in flux for some time.

Just as corporate lawyers had done in their previous attempts on behalf of the railroads and other major corporations, in *Santa Clara*, Southern Pacific’s lawyers interpreted the Fourteenth Amendment and the word “person” to rhetorically equate a railroad company with a flesh-and-blood human being and to claim that artificial persons deserve the same equal protections as natural persons. With Dartmouth as precedent, the defense argued that “because a railroad company was a ‘person’ under the Constitution, local governments couldn’t discriminate against it by having different laws and taxes in different places.”¹⁶⁰ This time, the Supreme Court accepted the corporation’s arguments without question and without mentioning corporate personhood in their opinion. The *per curiam*¹⁶¹ decision of the Court read:

It follows that there is no occasion to determine under what circumstances the plaintiffs would be entitled to judgment against a delinquent taxpayer for penalties, interest, or attorney’s fees, for if the plaintiffs are not entitled to judgment for the taxes arising out of the assessments in question, no liability for penalties, interest, or attorney’s fees could result from a refusal or failure to pay such taxes. *Judgment affirmed.*¹⁶²

¹⁵⁹ Hartmann 7.

¹⁶⁰ Hartmann 18.

¹⁶¹ Most simply defined, *per curiam* means “by the court.”

¹⁶² *Santa Clara v. Southern Pacific Railroad*, 118 U.S. 394 (1886) 417.

From beneath a thicket of dry, legal language entangled with details of tax rules, the corporation emerged as a new person – literally and figuratively – gaining the Constitutional Fourteenth Amendment right to personhood with due process and equal protection under the law.

The Court’s opinion produced a sense of presence for the tax issue, which was much more salient in the opinion than the question of corporate personhood. According to Perelman and Olbrechts-Tyteca, presence can be understood as the “preoccupation of the speaker [or writer]...to make present, by verbal magic alone, what is actually absent but what he [sic] considers important to his argument or, by making them more present, to enhance the value of some of the elements of which one has actually been made conscious.”¹⁶³ Now in this case, it is not that the tax issue was distant. The railroad company clearly did not want to pay the taxes, and the county definitely wanted the revenue. Money mattered, and the language of the Court functioned to reinforce its significance, given that most of the Court’s opinion focused on the tax issues. The bigger issue, however, that has made sociologists, historians, legal and business scholars, and others so interested in *Santa Clara* is the issue of corporate personhood under the Fourteenth Amendment, which was noticeably downplayed in the judicial decision.

Raymie McKerrow’s critical rhetoric framework reminds us that “absence is as important as presence in understanding and evaluating symbolic action.”¹⁶⁴ In his discussion of the Iran-Contra hearings, he describes the effects that occur when partial answers are given to questions: because meaning is relational, partial answers still yield a form of knowledge. The issue is that “inferences based on such answers more often than not play directly into the hands of those in

¹⁶³ Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (Notre Dame: University of Notre Dame Press, 1969) 117.

¹⁶⁴ McKerrow 107.

control of both the knowledge and the power that it provides.”¹⁶⁵ This certainly seems true of the Court’s ruling in *Santa Clara*. The ruling serves the ideological interests of the dominant social group in this situation – corporations. With Fourteenth Amendment rights, artificial persons in the corporate form were well-positioned to go after an array of human rights and freedoms that would have not have been permissible under *Dartmouth* with its more stringent charter restrictions.

In *Santa Clara*, the Court most directly addressed the issues of corporate personhood and the Fourteenth Amendment in the headnote, not in its official opinion.¹⁶⁶ A headnote is an abridged summary of the Court’s ruling, including the significant facts in the case, written by the court reporter and without official judicial authority. It is impossible to know why the Court avoided the question of corporate personhood in the opinion while allowing it to be addressed via the headnote. However, the pressing concerns of capitalism, industrialization, and labor that permeated turn-of-the-century American society should be considered. The great political power of railroad corporations, including the close relationships between railroad executives and members of the Court, should be taken into account.¹⁶⁷ They likely contributed to an ontological orientation that prioritized the economic needs of big business.

The *Santa Clara* headnote was authored by court reporter Bancroft Davis, a man with long-term professional and personal ties to the railroad business.¹⁶⁸ Davis’ headnote read:

¹⁶⁵ McKerrow 107.

¹⁶⁶ See C. Peter Magrath’s study, *Morrison R. Waite: The Triumph of Character* (New York: Macmillan) 1963. Since corporate personhood emerged in this *Santa Clara* headnote, it has become accepted as law by society. See Hartmann 17-32. See also Nace 102-109.

¹⁶⁷ See Nace 94-109; Hartmann, 41-48

¹⁶⁸ See Nace; Hartmann.

“The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.”¹⁶⁹

The use of the phrase “any person” functions to obfuscate the Amendment’s original and intended aim to protect specific persons under the Constitution. In addition, the Court’s refusal to hear arguments on the Fourteenth Amendment question reveals that its commitment to the idea that “corporations are people, too”¹⁷⁰ was so strong that it was not necessary to hear arguments pertaining to the subject.

Since headnotes are not authored by the Court, and since the Court made no mention of the Fourteenth Amendment or corporate personhood in the actual ruling, one may reasonably wonder if Davis slipped the mention of corporate personhood under the Fourteenth Amendment into the headnote without the Court’s knowledge. However, before Davis published the headnote, he sought the Court’s review and approval. On May 26, 1886, he sent the headnote to Chief Justice Morrison Waite who was himself a former railroad attorney.¹⁷¹ The following response from Justice Waite was located among Davis’ private correspondence:

¹⁶⁹ *Santa Clara v. Southern Pacific Railroad*, 118 U.S. 394 (1886) 396. For a critical interpretation, see Hartmann 36-48; Nace 104.

¹⁷⁰ James Oliphant, “Romney in Iowa: ‘Corporations are people’ too,” *Los Angeles Times* 11 Aug 2011, 10 Dec 2011 <<http://www.latimes.com>>.

¹⁷¹ Associate Justice Stephen Johnson Field also had deep abiding ties to railroad corporations before and during his tenure on the Supreme Court. Hartmann 113.

I think your mem. in the California Railroad Tax cases expresses with sufficient accuracy what was said before the argument began. I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision.¹⁷²

From a rhetorical perspective, this is a very interesting exchange. Consider the tension between absence and presence that these texts reveal. On the one hand, Waite is admittedly careful to avoid addressing the issue of corporate personhood via the Fourteenth Amendment in the official opinion of the court; on the other hand, he permits it to be addressed via Davis' headnote, which had no legal standing but clearly held symbolic sway. The end result was that corporate personhood under the Fourteenth Amendment became ingrained into U.S. law. The acceptance of corporate personhood as a legal, cultural, and social reality influences both the actions of corporations and the ways in which corporations interact with human beings as equals (or at the least as very near-equals).

This overview and analysis of *Santa Clara* confirms that although the ruling was rendered under the presumption of judicial neutrality, the Supreme Court's decision to extend Fourteenth Amendment personhood rights to corporations can be appropriately understood as a victory for the wealthy, corporate interests who would benefit most from an artificial entity that had perpetual life, could easily transfer assets, was protected by limited liability from the full consequences of its actions, and now had due process and equal protection rights.¹⁷³ In this way, the ruling seems to function to support the promotion and legitimation of the interests of socially

¹⁷² C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* (New York: Macmillan, 1963) 117.

¹⁷³ I am not arguing that the Court nefariously plotted to ensure an outcome favorable to corporations in *Santa Clara*. On the other hand, I am illuminating the implications of their judicial decision.

significant or dominant groups – corporations – in opposition to other interests,¹⁷⁴ those of the human beings who were supposed to benefit most from the Fourteenth Amendment.

3.4 The Racialized Implications of Corporate Personhood and Power

The true irony of the Supreme Court’s decision to grant corporate personhood in *Santa Clara* can only be fully appreciated by examining the Court’s use of the Fourteenth Amendment on behalf of the human beings it was intended to protect as compared to the artificial corporate persons the Amendment was *not* intended to protect. Between 1868 and 1911, only twenty-eight of the 604 Supreme Court rulings involving the Fourteenth Amendment dealt specifically with the protection of the rights of African Americans. In those twenty-eight cases, the Court upheld or protected African Americans’ rights only six times.¹⁷⁵ Aljalian considers a slightly broader time span and finds that “of the cases in the [Supreme] Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent [had] invoked it in protection of the negro race.”¹⁷⁶

The statistics suggest a shift in focus of the Fourteenth Amendment’s application. They also give credence to Charles Collins’ remark that “it is not the negro, but accumulated and organized capital, which now looks to the Fourteenth Amendment for protection from state activity.”¹⁷⁷ These statistics suggest a social and judicial preoccupation with matters of industry and capital, and a deprioritization of human rights consistent with the racialized values and practices of the triangle trade. The prioritization of economic value over human life did not end

¹⁷⁴ Eagleton, *Ideology* 29.

¹⁷⁵ Doug McAdam, *Political Process and the Development of Black Insurgency: 1930-1970* (Chicago: University of Chicago Press, 1982).

¹⁷⁶ Aljalian 498; see also Hartmann 24 for more on the subject.

¹⁷⁷ Charles Wallace Collins, *The Fourteenth Amendment and the States* (Boston: Little, Brown, 1912) 47.

with the triangle trade or with the abolition of slavery; rather, it lived on in politics, culture, law, and almost all areas of Western society. For this reason, the Court's seemingly preferential treatment of artificial persons can be understood as both a symptom of the historical moment in which it occurred and as an example of the kinds of moral failures that can occur when the profit motive is privileged ideologically.

The period between 1868 and 1911 was a particularly tumultuous time in American history. Dewey refers to the turn-of-the-century as an "individualistic" era, mostly preoccupied with the rights of private property, contracts, and other matters of business.¹⁷⁸ These priorities are consistent with the Court's ruling in *Santa Clara* and its tendency to hear more Fourteenth Amendment cases pertaining to corporate rights than to human rights. Existing racial problems were compounded by waves of European immigrants, further complicating notions of what it meant to be an "American" who legitimately deserved rights to full citizenship. It also presented challenges in terms of how new forms of work and labor would be organized.

As the U.S. economy continued its transition from an agricultural to industrial focus, an explosion of economic opportunities arose that would likely not have taken place as quickly or effectively without black labor, slave as well as forced.¹⁷⁹ Nevertheless, even as corporations benefited from the Fourteenth Amendment, they also perpetuated a race-based division of labor that excluded blacks from the higher status, more lucrative positions that emerged with the economic watershed of the Industrial Revolution.¹⁸⁰ Despite the Fourteenth Amendment and its original intent, the racialized implications of the Supreme Court's ruling in *Santa Clara* were

¹⁷⁸ Dewey, "Corporate Legal Personality" 668.

¹⁷⁹ See Blackmon; Sherry Cable and Tamara L. Mix, "Economic Imperatives and Race Relations: The Rise and Fall of the American Apartheid System," *Journal of Black Studies* 34.2 (2003): 183-203.

¹⁸⁰ These would include positions such as public relations, management, and administration, for example.

that a law intended to help African Americans functioned to empower artificial corporate persons that as policy were actively engaged in oppressing African Americans and profiting from their exploitation. In many ways, the modern corporate form was built on, and thrived off of, the socially constructed racial burden of blackness. The following account offered by Harris illustrates some of the ramifications of racial exclusion:

Every day my grandmother rose from her bed in her house in a black enclave on the south side of Chicago, sent her children off to a black school, boarded a bus full of black passengers, and rode to work. No one at her job ever asked if she was black; the question was unthinkable. By virtue of the employment practices of the ‘fine establishment’ in which she worked, she could not have been.¹⁸¹

These conditions of exclusion persisted through the Civil Rights movement, which led to Affirmative Action policies, which led to diversity programs, and the inclusion initiatives continue today. The effectiveness of these efforts remains debatable given the underwhelming number of African Americans employed by corporations today – an entity that their ancestors’ labor directly or indirectly helped build through slavery, forced labor, or other exploitative economic and labor practices.

This contemporary racial inequality in corporate America, stemming from our nation’s history, is exacerbated at corporate leadership levels. As Allison Linn noted, “The boards of directors of Fortune 500 companies still look pretty much how you’d expect: primarily male, and primarily white,” with white men holding approximately 77 percent of the board seats in the

¹⁸¹ Harris 276.

nation's largest companies in 2004.¹⁸² Not until 2009 was the first black woman named CEO of a *Fortune 500* company, bringing the total number of black CEOs in *Fortune 500* companies to four.¹⁸³ Similarly, a recent study has shown how the leadership landscape in the corporate public relations field is more than 90 percent white.¹⁸⁴

Incorporating a critical race theory perspective within this analysis of *Santa Clara* and the evolution of corporate personhood facilitates an understanding of the incipient and ongoing role race has played in the rise of corporate personhood and power. In short, when we consider the role of race, we can see how corporations flourished while human beings languished under the court's adjudication of Fourteenth Amendment personhood cases at the turn of the twentieth century. We also see how these historical happenings have had long-lasting effects.

Considering the triangle trade as context and precursor to the *Santa Clara* ruling also allows us to see how ideology can play a significant role in presumably objective, impartial judicial discourse. In my view, it is unlikely that the Supreme Court could have been able to reasonably conceive of using the Fourteenth Amendment to enfranchise and protect artificial, contractual entities absent an ideological orientation that prioritized economic motives above human needs. A widely accepted ideological orientation that privileges economic desires above human rights makes it entirely conceivable for property and things to be treated as persons, and

¹⁸² Allison Linn, "Minorities lose ground in big corporate boardrooms." *Today.com* 3 May 2011, 3 Dec 2012 <http://lifeinc.today.com/_news/2011/05/03/6570819-updated-minorities-lose-ground-in-big-corporate-boardrooms?lite>.

¹⁸³ See Daryl C. Hannah, "First Black-Woman *Fortune 500* CEO," *Diversity, Inc.* 26 May 2009, 28 Nov 2012 <<http://diversity.nbcuni.com/in-the-news/first-black-woman-fortune-500-ceo.php>>.

¹⁸⁴ Nneka Logan, "The White Leader Prototype: A Critical Analysis of Race in Public Relations," *Journal of Public Relations Research*, 23.4 (2011): 442-447.

for persons to be treated as things and property. This ideological work was performed in large part by the triangle trade, which initiated a particular way of thinking about the relations between human beings, economic aspirations, race, and property.

By destabilizing traditional notions of personhood through the reification of Africans as property, the triangle trade opened the door for various counter-intuitive and non-traditional ideas of personhood to emerge. This made it conceptually possible to transform people into property and therefore property into people. This latter transformation is exactly what happened in *Santa Clara*; this is why I argue that the Supreme Court's landmark ruling can and should be understood as an extension of the same ideological trajectory that emerged in the triangle trade. In fact, like the triangle trade, the *Santa Clara* ruling introduced its own process of reification: while the triangle trade assigned a property value to people, in *Santa Clara*, the Supreme Court assigned human rights to property in the corporate form, giving birth to a new person, "the quintessential economic man," as Mark aptly describes it.

The Court's ruling in *Santa Clara* also lends credence to the arguments of critical legal scholars and rhetoricians who assert that although a law may be intended for one purpose, it may well be used to achieve a different goal altogether.¹⁸⁵ The Supreme Court's rhetorical moves in *Santa Clara* awarded wealthy business owners a tremendous expansion of privileges. Even if that was not the Court's intention, it was the outcome.

¹⁸⁵ See Marouf Hasian, Jr., "Critical Legal Rhetorics: The Theory and Practice of Law in a Postmodern World," *The Southern Communication Journal* 60.1 (1994): 44-56; Eileen A. Scallen, "Judgment, Justification and Junctions in Rhetorical Criticism of Legal Texts," *The Southern Communication Journal* 60.1 (1994): 68-74; William Lewis, "Of Innocence, Exclusion, and the Burning of Flags: The Romantic Realism of the Law," *The Southern Communication Journal* 60.1 (1994): 4-21; James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, WI: The University of Wisconsin Press, 1985); Lewis H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park, PA: The Pennsylvania State University Press, 1995).

This trend of serving the interests of big business continued after *Santa Clara*. Corporations successfully used the Fourteenth Amendment to avoid health and safety regulations¹⁸⁶ and child labor laws as well as other precautions aimed at protecting all American workers because those regulations might have curtailed the ability to maximize productivity and profits.

The pre- and post-*Santa Clara* eras represented a shift in the entire social order, such that contractual relations in the form of corporations would become similar to human beings. According to Mark, “The transformation of the private law of corporations from 1819 to the 1920s is best described as a move from a circumstance in which a corporation could do only those things specifically allowed by its charter to one in which a corporation could do anything not specifically prohibited to it.”¹⁸⁷ Since then, corporations have used their personhood to secure even more Constitutional rights, including the right to free speech, protection from search and seizure, and protection against double jeopardy under the Fifth Amendment. These privileges have directly contributed to the transformation of the business organization into a “super person” that can do pretty much anything that it can afford to do.

3.5 *Santa Clara’s* Implications: The Ontological Conflation of Natural and Artificial Persons

At the broadest level, the Court’s extension of Fourteenth Amendment personhood rights to corporations in *Santa Clara* effectively sanctioned the rhetorical reconstitution of the very concept of personhood. In doing so, the Court introduced an ontological conflation between

¹⁸⁶ Among the most famous of these cases is *Lochner v. New York* (1905), in which the court ruled that limiting the amount of hours bakers could work to ten hours a day and sixty hours a week infringed upon the bakery owner’s Fourteenth Amendment rights. See *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁸⁷ Mark 1455.

natural and artificial persons that continues to this day, suggesting that there are no meaningful distinctions between the two. It is reasonable, however, to acknowledge that corporations and humans share some similarities, which several scholars do – even critics of corporate personhood. Aljalian, for example, lists several commonalities between human beings and corporations, including “the ability to cause death, injury, disease, and severe physical pain, to enter into agreements and transactions and even to pay taxes.”¹⁸⁸ Likewise, Wolgast writes, “In some ways corporations *are* like persons, for they participate in many practical transactions – buying, selling, contracting, and doing numerous other things that humans do.”¹⁸⁹

I argue that while these commonalities should be recognized, they must not be allowed to overshadow the significant differences between human beings and corporations that deserve to be more seriously reckoned with under the law if we are to achieve a truly just society. We have to come to the understanding that it is not actually corporations that buy, sell, etc. It is the human actors employed in a particular role who allow a corporation to act at all. Chief Justice John Marshall offered this kind of differential reckoning when the question of corporate personhood first arose in *Dartmouth* (1819):

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence....It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use.¹⁹⁰

¹⁸⁸ Aljalian 529.

¹⁸⁹ Elizabeth Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (Stanford, CA: Stanford University Press, 1992) 84.

¹⁹⁰ *Trustees of Dartmouth College v. Woodard* 17 U.S. 518 (1819) 636.

The language is chosen carefully here. A corporation is not a person, but it may serve and act as a single individual. A corporation is not “man,” but it provides cover for bodies of men. And while it has a legal existence apart from its human members and affiliates, it cannot exist without them. On the other hand human beings can exist without corporations, which represents an important difference between the two “life forms.”

Nearly two hundred years later, Justice John Paul Stevens reiterated the substantial ontological differences between human beings and corporations by drawing attention to several fundamental human traits not possessed by corporations: “Corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.”¹⁹¹ Similarly, Aljalian itemizes the tangible differences between humans and corporations. Her comments suggest that an awareness of those differences can resolve some of the historical and contemporary confusion surrounding the conception of personhood. She writes:

A person is thought of as one who breathes, grows, and develops. A person has facial attributes, a beating heart, and physical processes. In addition, a person has sensory perceptions, is endowed with reason, and experiences emotions. However creative the legal fiction is drawn, the corporation cannot be said to possess any of these traits.¹⁹²

This is why it is easy to understand why Wolgast insists that “it is implausible to treat a corporation as a member of the human community, a member with a personality (but not a face), intentions (but no feelings), relationships (but no family or friends), responsibility (but no conscience), and susceptibility to punishment (but no capacity for pain).”¹⁹³

¹⁹¹ Citizens United v. Federal Elections Commission, 558 U.S.310 (2010) 446.

¹⁹² Aljalian 529.

¹⁹³ Wolgast 86.

These obvious and important distinctions between human beings and corporations are blurred with the Supreme Court's curious application of the Fourteenth Amendment in *Santa Clara* and later Fourteenth Amendment cases pertaining to the concept of personhood. The Court's equation of natural persons with artificial persons in that decision functions to support the assertion that "'person' signifies what the law makes it signify."¹⁹⁴ Cable and Mix sum up the situation well: "Instead of serving as the constitutional foundation for the protection of Black rights, the Fourteenth Amendment was distorted to consolidate corporate power and aid in the U.S. bid for global dominance."¹⁹⁵

Before global dominance could occur, however, a good bit of "relationship building" work had to first be done at home. Americans during the Industrial Revolution and beyond remained skeptical of corporate power, just as they were during the days of Jefferson and Madison. The reifying, ideological orientation of economic liberalism that had transformed a person into a thing during the triangle trade, and then a thing into a person in *Santa Clara*, had made the corporation a very rich "person" by the end of the nineteenth century. However, even though the Supreme Court had personified the corporation, and the corporation was enormously powerful, human beings would still need to be convinced of its benefits to society. Thus, the corporation needed a voice – not the stark and unfeeling lawyer-speak that typified its early communications – something much warmer and more inviting, friendly, and subtly persuasive in tone. In short, this artificial person – the so-called economic man – needed a human voice. Enter the profession of public relations.

¹⁹⁴ Steven M. Best, *The Fugitive's Properties: Law and the Poetics of Possession* (Chicago: University of Chicago Press, 2004) 13.

¹⁹⁵ Cable and Mix 187.

In the next chapter, I will explore how the evolution of public relations gave the corporate person a voice and how the corporation sought to use that voice in the public sphere through an analysis of *Nike v. Kasky* (2003).

4. PUBLIC RELATIONS AS THE CORPORATE VOICE

*It is the job of public relations to help management find ways of identifying its own interests with the public interests – ways so clear that the profit earned by the company may be viewed as contributing to the progress of everybody...*¹⁹⁶

At the end of the nineteenth century, the corporation had become a person with basically the same rights as human beings. However, just as the Wizard of Oz's Tin Man lacked a heart, this new economic man lacked a voice. "He" had been made quite wealthy by the Industrial Revolution and quite powerful by the Supreme Court, but despite those successes many Americans remained skeptical of big business. Thus, for corporations at the turn of the century, obtaining a voice was not an accessory – it was an absolute necessity.

This chapter chronicles the evolution of the corporate voice through the public relations field, beginning with an overview of literature on public relations history. This overview explains why the corporation needed a voice and provides theoretical and historical context for what comes next: an ideological analysis of *Nike, Inc. v. Kasky* (2003) – a key Supreme Court case involving public relations speech.¹⁹⁷ The analysis is methodologically guided by a close reading of the text – the Supreme Court's decision¹⁹⁸ – within the context of its occurrence. In particular, I am mining the text to see if and how the ideological principles of economic liberalism emerge to legitimate the dominant interest of Nike at the expense of others. Given the complexity of issues surrounding the case, I spend significant time focusing on the context of the

¹⁹⁶ John W. Hill. *Corporate Public Relations: Arm of Modern Management*. (New York: Harper Brothers, 1958) 21.

¹⁹⁷ *Nike, Inc. v. Marc Kasky*, 539 U.S. 654 (2003).

¹⁹⁸ Note that the Court made the decision not to rule in this case, as will be detailed as the chapter unfolds.

evolution of the public relations field and public relations theory to lay a foundation for the subsequent discussion. *Nike v. Kasky* serves as an example of how the corporation sought to use its voice via the practice of public relations. Consideration of this case forces us to reckon with this question: should the public relations field operate as Hill described at the opening of this chapter? I close with a discussion of the implications of the corporate voice for human beings, corporations, and the public relations field.

4.1 The Economic Man's Crisis of Legitimacy: A Historical Overview of Public Relations

When the public relations field began at the turn of the century,¹⁹⁹ Americans were entirely comfortable with the family farm, general store, small family-owned business, and friendly partnership of equals (or relative equals) that had traditionally defined the economic landscape of the U.S. prior to the Industrial Revolution. Compared to these familiar modes of economic organization and business operation, corporations often appeared as impersonal behemoths and, as Roland Marchand has described, *soulless*, meaning driven by a cold,

¹⁹⁹ I am aware of the debate in the public relations field over the origins of public relations, including disagreement about the field's official beginning. Some scholars convincingly argue that public relations began long before corporations, pointing out examples from the early Christian church and the Abolitionists' campaigns. I accept their perspectives and acknowledge that it may be more appropriate to say that the practice of *corporate* public relations emerged during the Industrial Revolution. While public relations practices were certainly employed prior to the existence of corporations, I contend that the rise of the corporate form created a widespread need for the corporate voice, which contributed significantly to public relations' development as a formal, organized discipline. Thus, I adopt the position that corporate public relations began with the Industrial Revolution and that public relations as a formal, organized field of practice and professional discipline emerged at the turn of the century with the rise of the corporation and its need for a voice. This does not contradict the fact that various activities that we now call "public relations" have been occurring for centuries. For more about the debates, see Karen Miller, "U.S. Public Relations History: Knowledge and Limitations," *Communication Yearbook* 23, Ed. Michael E. Roloff (Thousand Oaks, CA: Sage, 2008) 381-420, <<http://www.grady.uga.edu/reports/PRHistory.CommYrbk.pdf>>; Margot Opdycke Lamme and Karen Miller Russell, "Toward a New Theory of Public Relations History," *Journalism Communication Monographs* 11.4 (2010): 281-362. See also Marvin N. Olasky, "The Development of Corporate Public Relations, 1850-1930," *Journalism Monographs* 102 (1987): 1-44; Scott M. Cutlip, *Public Relations History: From the 17th to the 20th Century* (Hillsdale, NJ: Lawrence Erlbaum Associates, 1995).

economic logic that reduces every decision down to a money relation.²⁰⁰ Karla Gower illuminated the issue, writing,

Whether true, the image of the “soulless corporation” took hold as American political thought shifted from the doctrine of laissez-faire, which permitted such business excess on the basis of individualism, to progressivism, which called for practical responses to the problems facing society. And the problem was that corporations had become too big and too powerful, outstripping the ability of an eighteenth-century legal structure to deal with them.²⁰¹

Not only that, but as Marchand explained, “The traditional potency of the family, the church, and the local community suddenly seemed dwarfed by the sway of giant corporations.”²⁰² Beard and Beard sum up the kind of harshness that characterized the industrial era: “The family system of economic and cultural unity was giving way to the factory system which drew even young children into its fold.”²⁰³ As both Marchand and Gower indicate, this was a time of tremendous social and political change marked by unprecedented economic growth that was a catalyst for the rapid growth of big business. This momentous transformation of social, economic, and political forces in the U.S. created a crisis of legitimacy for big business.²⁰⁴

²⁰⁰ Rowland Marchand, *Creating the Corporate Soul* (Berkeley: The University of California Press, 1998) 4.

²⁰¹ Karla Gower, “US Corporate Public Relations in the Progressive Era,” *Journal of Communication Management* 12.4 (2008): 308-309.

²⁰² Marchand 2.

²⁰³ Charles Beard and Mary Beard, *A Basic History of the United States* (Philadelphia: The New Home Library, 1944) 208.

²⁰⁴ Marchand 3.

Whether legitimacy is defined as “a discursively created sense of acceptance in specific discourses or orders of discourse,”²⁰⁵ or as “the justified right to exist,”²⁰⁶ legitimacy is important because it gives a business the informal license to operate in the marketplace and exist in society. Legitimacy equates to acceptance by key stakeholders, and that acceptance translates into authority. Power that is accepted as legitimate is respected, unchallenged, and celebrated, even at times when it should not be.²⁰⁷ Conversely, power that is perceived as illegitimate is never stable or as strong as it could be; it is perpetually contested or resisted in disruptive ways. Thus, the corporation had much to gain or much to lose depending on the outcome of its struggle for legitimacy.

The corporation’s struggle for legitimacy was often jeopardized by its leaders and their actions. There was no shortage of corporate activities that encouraged public skepticism, if not outrage, putting the legitimacy of the corporation further at risk. Statements from some corporate leaders ranged from insensitive to disturbing, and were widely perceived to be indicative of the attitude of big business toward the public. “The public be damned,” William Vanderbilt is said to

²⁰⁵ Ero Vaara, Janne Tienari, and Juha Laurila, “Pulp and Paper Fiction: On the Discursive Legitimation of Global Industrial Restructuring,” *Organization Studies* 27.6 (2006): 793.

²⁰⁶ Arild Wæraas, “On Weber: Legitimacy and Legitimation in Public Relations,” *Public Relations and Social Theory: Key Figures and Concepts*, Eds. Øyvind Ihlen, Betteke van Ruler and Magnus Fredriksson (New York and London: Routledge, 2009) 301. In this chapter, Wæraas provides an extensive overview of the role, function, and importance of legitimation in organizations via his study of Max Weber’s work on the subject of legitimation, and he also incorporates the work of public relations scholars to show how legitimation relates to the practice of public relations.

²⁰⁷ For an overview of the role of power in public relations, see Judy Motion and Shirley Leitch, “On Foucault: A Toolbox for Public Relations,” Ihlen, van Ruler and Fredriksson 87. See also Michel Foucault, *Power/Knowledge: Select Interviews and Other Writings 1972-1977*, Ed. Colin Gordon (New York: Pantheon Books, 1980); Paul Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984).

have declared.²⁰⁸ Against the rising socially-conscious progressive ethos of the time, Vanderbilt made it perfectly clear that the only good he was concerned about doing what was good for his business. Railroad tycoon E.H. Harriman admitted his selfishness, saying, “I don’t want anything on this railroad that I cannot control.”²⁰⁹ Then there was J.P. Morgan’s brush-off: “I owe the public nothing.”²¹⁰ In his essay “Gospel of Wealth,” Andrew Carnegie claimed to have a solution to the poverty problem – something no king, president, union leader, or businessman had ever been able to conquer. Carnegie’s prescription was simple: “The millionaire will be but a trustee for the poor; intrusted...with a great part of the increased wealth of the community, but administering it for the community far better than it could or would have done for itself,” he proclaimed.²¹¹ His point, and the sentiment that seems to underlie each of these business leaders’ comments, was that if the public and the poor would simply stay in their place and let big business handle everything, then all would be well. Their attitudes reflect what Cutlip describes as a sort of “business arrogance toward employee and citizen alike.”²¹²

²⁰⁸ Qtd. in Marchand 9. See also Andrew Dow, ed., *Dow’s Dictionary of Railway Quotations* (Baltimore: Johns Hopkins University Press, 2006) 287-288; Cutlip 188. It is important to point out that later, Vanderbilt denied ever saying this (see Cutlip 188). Whether or not that is true, the phrase stuck because it epitomized the sort of arrogance and disdain many early corporate leaders appeared to hold for the general public.

²⁰⁹ Qtd. in Cutlip 188.

²¹⁰ Qtd. in Marchand 9.

²¹¹ Andrew Carnegie, “The Gospel of Wealth,” *The Gospel of Wealth: Essays and Other Writings*, Ed. David Nasaw (New York: Penguin, 2006) 12. Carnegie’s comments were consistent with social Darwinism: a popular, if not dominant, perspective of animal and human nature based on the belief that the rich were rich because they were better, and because they were rich and better, they were therefore also wise, kind and benevolent, and therefore naturally and divinely ordained to rule over lesser men.

²¹² Cutlip 188.

While such beliefs, attitudes, or ideological orientations may have seemed logical to some business leaders and like-minded others, they were hardly the kinds of comments that would initiate widespread public confidence in the benevolence of big business. The other problem with these statements was that they occurred within a historical context where large corporations often behaved with an insensitive attitude towards the public. Corporations were operating much more like repressive state apparatuses than ideological state apparatuses, winning compliance and submission to the corporate will by way of physical force. At the turn of the century, it was hardly unusual for corporations to rely heavily on coercion to enforce their will. Some examples will illustrate this point.

There was the Homestead Strike of 1892, which involved one of Andrew Carnegie's factories.²¹³ When wages were cut, employees – led by the labor union – went on strike. Eventually, Pinkerton police were brought in, violence erupted, and people were killed. When the conflict was over, the labor union that backed the strike was run out of the town. Reflecting on his professional life in a memoir, Carnegie wrote remorsefully, “No pangs remain of any wound received in my business career save that of Homestead.”²¹⁴ In another conflict involving the railroad industry, soldiers were brought in to get the trains running again after negotiations over declining wages broke down. Once again, violence ensued and several people died in what became known as the Pullman Strike of 1894.²¹⁵ There was no shortage of similar clashes between corporations and people during this time. “Workers were looked upon as chattels and

²¹³ “Andrew Carnegie: The Homestead Strike,” *American Experience*, WGBH Educational Foundation, n.d., 18 Aug 2012 <<http://www.pbs.org/wgbh/amex/carnegie/peopleevents/pande04.html>>, para 14.

²¹⁴ Qtd. in “The Homestead Strike.”

²¹⁵ See Carl Smith, “Pullman Strike,” *Encyclopedia of Chicago*, Chicago Historical Society, n.d., 15 Aug 2012 <<http://encyclopedia.chicagohistory.org/pages/1029.html>>.

the public was considered a private hunting ground for business exploitation.”²¹⁶ Of course, this is not so surprising given the history of labor in the U.S., which was in many ways based on a system of chattel slavery that long encouraged a form of reification that regarded things as people and people as things. It is only logical that the labor history of the past would seep into the labor relations of contemporary times.

Clashes and scandals involving big business at the turn of the century fueled the corporation’s crisis of legitimacy, contributing to public skepticism and justifying the need for a mechanism capable of persuasion without overt, violent, physical force: the corporate voice. Of the various corporate responses to the crisis of legitimacy, public relations would have the most positive and persuasive effect of all.²¹⁷ An example of corporate public relations’ effectiveness was evidenced by the Mohawk Valley Formula employed by the National Association of Manufacturers (NAM) in the 1930s.²¹⁸ To resolve labor disputes on the side of big business, NAM-affiliated public relations practitioners would flood the mass media with a variety of messages designed to sway public opinion to support the belief that employees wanted to break strikes and work, but labor unions were standing in the way and unfairly thwarting their efforts. These tactics were so successful in swaying public opinion in favor of the corporation that the Mohawk Valley Formula, as it was known, became a popular public relations’ propaganda strategy employed in major strikes after its inception.²¹⁹

²¹⁶ Qtd in Gower 308. See original cite in Glenn Griswold and Denny Griswold, *Your Public Relations: The Standard Public Relations Handbook* (New York: Funk & Wagnalls, 1948) 6.

²¹⁷ Robert L. Kerr, *The Rights of Corporate Speech: Mobil Oil and the Legal Development of the Voice of Big Business* (New York: LFB Scholarly Publishing LLC, 2005) 9.

²¹⁸ Alex Carey, *Taking the Risk Out of Democracy: Corporate Propaganda versus Freedom and Liberty* (Urbana and Chicago: University of Illinois Press, 1995) 24-27.

²¹⁹ Carey 26.

The Mohawk Valley Formula represented the propagandistic and unethical side of public relations. A wide variety of public relations tactics and strategies that will be discussed as the chapter develops, however, were incorporated to help corporations take a more rhetorically artful approach to “problem solving” by considering all of the available means of persuasion in a given situation. Describing the relationship between the Industrial Revolution and the evolution of the corporate voice Cutlip explains, “Contemporary public relations, as a practice and as a management concept, was to emerge out of the melee of the opposing forces in this period of the nation’s rapid growth.”²²⁰

This constellation of forces – the rise of big business and the corresponding eclipse of the small, family-owned business and agrarian lifestyle that characterized pre-industrial America – was part of a complex array of factors leading to the emergence of both the corporate voice and the field of public relations. Other important factors included the sheer size, scope, wealth, and resources of big business; increasing literacy rates; a burgeoning national media system; muckraking journalists; and the need for organizational transparency.²²¹ This atmosphere spurred a variety of increasingly sophisticated public relations activities on behalf of big business’ quest for legitimacy.²²² As Galambos and Pratt note:

Public relations grew directly out of the perception on the part of business managers, especially corporate officers, that liberal or progressive political campaigns were generating an intensely negative concept of business and threatening to create an ever more restrictive political economy. Admittedly many of these apprehensions were

²²⁰ Cutlip 187.

²²¹ Richard S. Tedlow, *Keeping the Corporate Image: Public Relations and Business, 1900-1950*, Vol. 3 (Greenwich, CT: JAI Press, 1979) 18.

²²² Marchand 3.

exaggerated, suggesting a threat of radicalism in a nation dedicated to moderate reform. But business actually had good reasons to fear that the business image was suffering among the public during the years of 1900-1916, and their new public relations departments labored hard to alter a negative public concept of the corporation. Public relations departments also began to provide input into corporate decision-making, reporting on public perceptions and advising how business might avoid antagonizing its several publics.²²³

Galambos and Pratt's comments begin to touch on the ideological work often performed by public relations.²²⁴ As we shall see, ideology plays a major role in crafting the corporate voice, including its content, tone, and style. When it comes to public relations, ideology serves a persuasive function that can complicate, distort, or dissimulate information influencing the relationships between organizations and publics. This is evident in the circumstances surrounding the *Nike v. Kasky* case that will be addressed shortly.

To establish credibility, corporations turned to a number of communication strategies. A popular tactic was the family metaphor, in which corporations communicated to their employees in a paternalistic manner, with employees framed as children and the owner or CEO positioned as the benevolent father. David Boje analyzes how Walt Disney personally embraced the family metaphor, casting himself as the father, his employees as "boys" and "girls", and the Disney corporation as "one big happy family," even at times when his organization was wrought

²²³ Louis Galambos and Joseph Pratt, *The Rise of The Corporate Commonwealth: United States Business and Public Policy in the 20th Century* (New York: Basic Books, Inc., 1988) 96.

²²⁴ Miller 395.

with scandals that would suggest Disney was anything but.²²⁵ Family narratives and other forms of paternalistic symbolism were supported by material offerings such as corporate welfare programs, which could include anything from company-supplied housing to reduced work-related transportation costs, adult education programs, socials, dances, child care, and more.²²⁶

These early public relations efforts were framed as authentic examples of the corporation's innate benevolence. They functioned to humanize the corporation and imbue it with a "soul." There was, however, an underlying profit motive to all of these public relations activities. As Marchand points out, "The desire to reduce labor turnover and to thwart unionization spurred most corporate ventures in welfare capitalism."²²⁷ Railroad industry leaders in particular saw public relations tactics as useful ways to stifle criticism and avoid regulation.²²⁸ As early corporate public relations pioneers, railroads sought to influence the public with newspaper and magazine articles, speeches, sermons, lectures, conventions, and congressional investigations, and also hired publicity bureaus to get their message out.²²⁹ Whether supporting corporate welfare activities or facilitating damage control, corporate public relations began to play an increasingly significant role in shaping a persuasive, corporate voice. As the twentieth century unfolded, the corporation and the field of public relations evolved together.

²²⁵ David Boje, "Stories of the Storytelling Organization: A Postmodern Analysis of Disney as 'Tamara-Land,'" *The Academy of Management Journal* 38.4 (1995): 991-1035. See pp. 1013-1015 for specifics.

²²⁶ Marchand offers an extensive review of different companies offering these programs and the types of programs offered.

²²⁷ Marchand 17.

²²⁸ See Cutlip 206. Cutlip also discusses how railroads pioneered early public relations efforts.

²²⁹ See Gower; Marvin N. Olasky, "The Development of Corporate Public Relations, 1850-1930," *Journalism Monographs* 102 (1987): 1-44.

4.2 Key Public Relations Figures Who Shaped the History of the Field

It is beyond the scope of this study to list here all of the “founding fathers” or important pioneers of public relations. However, several of these pioneers are widely considered to be significant, particularly in the development of the corporate voice – the communicative organ of the corporation – and, as such, they are the focus of this section.²³⁰ Although circus promoter P.T. Barnum was not a corporate public relations professional per se, he is considered influential and is often referenced in literature on public relations history.²³¹ He was one of the first to employ press agency and publicity tactics through his work with the circus.²³² Describing how Barnum publicized one of his talent acts, Lamme and Miller write, “Barnum recognized that he could make the public see in Heth what they wanted to see in her, that his creation of desire for her would be more effective than his creation of an identity for her.”²³³ Barnum claimed that Heth was the former slave and nursemaid of President George Washington, more than one hundred years old and grotesquely deformed. He used these “amazing characteristics” to persuade people that Heth was a circus attraction worth paying to see. In their discussion of Barnum’s promotion of Heth, Lamme and Miller point to an important function of public

²³⁰Public relations history has tended to focus on the efforts of “mainstream” practitioners; thus, this list does not reflect the participation of diverse practitioners. However, some scholars have chronicled the public relations activities of non-mainstream practitioners. See Miller 389. See also Marilyn Kern-Foxworth, “Historical Chronicle of People of Color in Public Relations,” *Public Relations Quarterly* 36.1 (1991): 28-30; Robert L. Heath and Damion Waymer, “Activist Public Relations and the Paradox of the Positive: A Case Study of Frederick Douglass’ Fourth of July Address,” *Rhetorical and Critical Approaches to Public Relations II*, Eds. Robert L. Heath, Elizabeth Toth, and Damion Waymer (New York: Routledge, 2009) 195-215; Natalie T.J. Tindall, “The Double Bind of Race and Gender: Understanding the Roles and Perceptions of Black Female Public Relations Faculty,” *Southwestern Mass Communication Journal* (2009) 1-16; Nneka Logan, “The White Leader Prototype: A Critical Analysis of Race in Public Relations,” *Journal of Public Relations Research* 23.4 (2011): 442-457.

²³¹ See works from Gower; Marchand; Lamme and Miller; Olasky.

²³² See Cutlip 170-175.

²³³ Lamme and Miller 327.

relations. They show that, as a practitioner, Barnum was astute enough to give the public (specifically, his audience) what it wanted, not what he thought they might like. Barnum realized that the public's desire for Heth would trump any identity he could create for her and perhaps be more interesting than the real person; thus, he developed his public relations platform accordingly.

Ivy Lee is widely regarded as *the* father of the public relations field and was particularly well-known for his work with railroad and coal companies.²³⁴ Lee practiced at a time when most business leaders held an attitude of “hardened arrogance” towards the public²³⁵ and were committed to the philosophy that the less the public knew the better.²³⁶ He ushered in a new paradigm of public relations by asserting that public relations information should be truthful. He also believed that the press should be provided with accurate information when they requested it.²³⁷ Vehemently defending the noble virtues of public relations as compared to the other persuasive arts, Lee declared: “This is not an advertising agency...our plan is frankly, and openly, on behalf of business concerns and public institutions, to supply the press and public of the United States prompt and accurate information concerning subjects of value and interest to the public to know about.”²³⁸

²³⁴ Kirk Hallahan, “Ivy Lee and the Rockefellers’ Response to the 1913-1914 Colorado Coal Strike,” *Journal of Public Relations Research* 14.4 (2002): 265-315. See also Gower; Olasky, 1987.

²³⁵ See “Public Relations: Rise of the Image Men,” *The Economist*, 16 Dec. 2010, 14 July 2012 <<http://www.economist.com/node/17722733> >.

²³⁶ Cutlip 187-188.

²³⁷ Lee departed from these principles when he issued a press release containing false information about Mother Jones, an elderly union organizer in 1914. During the Ludlow massacre, Lee rather shamefully accused her of being a prostitute. When testifying about the incident before Congress, he flippantly asked, “What is a fact?” and essentially declared the truth to be how he interpreted it in a given situation. For an in-depth scholarly review, see Hallahan. Also see “Rise of the Image Men.”

²³⁸ “Rise of the Image Men” 2.

In 1927, Arthur Page became the first executive-level, corporate public relations professional. As the head of AT&T's Information Department, Page shared Lee's concerns about character in public relations.²³⁹ In a 1938 speech, he stated, "Big business can afford the research and study to do right and in the long run it cannot afford to neglect the professional spirit, which includes relegating 'the money motive' to its proper place."²⁴⁰ Consistent with his beliefs, Page set forth seven guidelines for ethical public relations management: "1) Tell the truth; 2) Prove it with action; 3) Listen to the customer; 4) Manage for tomorrow; 5) Conduct public relations as if the whole company depends on it; 6) Realize a company's true character is expressed by its people; and 7) Remain calm, patient and good-humored."²⁴¹ Known as the Page Principles, these recommendations continue to be respected in academic and professional circles, and their ongoing practice should be encouraged.

At the opposite end of the spectrum, Edward Bernays appeared to display far less interest in using public relations to deliver trustworthy and accurate information, enrich personal and organizational character, or build strong, healthy relationships with the public. His approach was similar to that of Barnum, inasmuch as both men arguably sought to manipulate the public for profit's sake or for other reasons.²⁴² Bernays made a lucrative career of creating handbooks that

²³⁹ Karen Miller Russell, "Character and the Practice of Public Relations: Arthur W. Page and John W. Hill," Heath, Toth, and Waymer 316. See also "The Page Philosophy," *The Arthur W. Page Society*, n.d., 4 Aug 2012 <<http://www.awpagesociety.com/about/the-page-philosophy/>>.

²⁴⁰ Miller Russell 317.

²⁴¹ "The Page Principles," *The Arthur W. Page Society*, n.d., 4 Aug 2012 <<http://www.awpagesociety.com/about/the-page-principles/>>.

²⁴² Edward L. Bernays, "Manipulating Public Opinion: The Why and the How," *American Journal of Sociology*, 33.6 (1928): 958-971.

explained how public relations could be used to “manufacture consent”²⁴³ and advance corporate or political goals.²⁴⁴ His work yielded such insights as, “The public’s first impulse is usually to follow a trusted leader rather than consider the facts for itself.”²⁴⁵ Kerr notes the significant influence that Bernays’ upper-class, aristocratic background had on his worldviews, which aligned with those of the industrial elite. Like Carnegie, Rockefeller, Morgan, and others, he held firmly to the belief that the wealthy should remain in control. “Bernays warned business that it must defend itself against the ‘menace’ of government regulation and taxation and continually take measures to prevent public interference with its operations,” writes Kerr.²⁴⁶

In the 1950s, John W. Hill further defined the mission of public relations. He co-founded Hill and Knowlton, one of the field’s most prolific public relations agencies. The agency became famous for helping tobacco companies frame their products as healthy (and at the very least as non-life-threatening).²⁴⁷ Hill and his firm were also known for employing the Mohawk Valley Formula to solve labor disputes.²⁴⁸ Hill explained that the purpose of public relations was not “to outsmart the American public” in service of the corporate bottom line, but rather to persuade the public that profit earned by the company contributed to

²⁴³ I borrow the phrase “manufacture consent” from the title of Edward S. Herman and Noam Chomsky’s seminal text, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books, 2002).

²⁴⁴ See Kerr, *The Rights of Corporate Speech* 12; “Rise of the Image Men” 4.

²⁴⁵ “Rise of the Image Men” 5.

²⁴⁶ Kerr, *The Rights of Corporate Speech* 12.

²⁴⁷ Miller Russell 322-323.

²⁴⁸ Carey 26.

everyone's progress, not just the corporation's.²⁴⁹ Getting the public to identify their own needs with those of corporations is a process that can only occur through discursive, rhetorical means.

In this way, the perspective Hill articulates is much like Kenneth Burke's theory of identification. It is explained this way: "A is not identical with his colleague, B. But insofar as their interests are joined, A is *identified* with B. Or he may *identify himself* with B even though their interests are not joined if he assumes that they are, or is persuaded to do so."²⁵⁰ Burke goes on to explain:

Identification is compensatory to division. If men were not apart from one another, there would be no need for the rhetorician to proclaim their unity. If men were wholly and truly of one substance, absolute communication would be of man's very essence. It would not be an ideal, as it is now, partly embodied in material conditions and partly frustrated by these same conditions; rather, it would be as natural, spontaneous, and total as with those ideal prototypes of communication, the theologian's angels, or "messengers."²⁵¹

This concept of identification taps into a primary persuasive function of the corporate voice at the turn of the century and arguably beyond: to create a sense of shared purpose, shared destiny, and shared successes, even where there are none.²⁵² The goal of Hill's strategy of identification –

²⁴⁹ Qtd. in Robert L. Heath, "The Rhetorical Tradition: Wrangle in the Marketplace," Heath, Toth, and Waymer 18. See also John W. Hill, *Corporate Public Relations: Arm of Modern Management* (New York: Harper Brothers, 1958) 21.

²⁵⁰ Kenneth Burke, *On Symbols and Society*, Ed. Joseph R. Gusfield (Chicago: University of Chicago Press, 1989) 180.

²⁵¹ Burke 182.

²⁵² For further discussion of the role identification plays in professional communication contexts, see George Cheney, "The Rhetoric of Identification and the Study of Organizational Communication," *Quarterly Journal of Speech* 69 (1983): 143-158.

to get the public to believe that the profits earned by a particular corporation contribute to everyone's progress – is an example of economic liberal ideology in action.

It almost goes without saying that the interests of a particular corporation may not always align with the interests of a particular public or the greater good; they may not always be viewed as contributing to everyone's progress. This is why from the Industrial Revolution onward, the corporation has had to continually rely on public relations practitioners to ameliorate its ongoing crisis of legitimacy by articulating the corporate voice.²⁵³ If the goals of corporations and individual human beings were truly always the same, there would be no need for the corporate voice, at least not as it emerged through the public relations field: as an instrument of persuasion to convince the public of the genuine legitimacy and benevolence of big business. Persuasive strategies would be unnecessary because people would always-already know that their goals were always-already identical to their artificial brethren – the corporations.

4.3 The Development of Corporate Public Relations Theory

The origins of the public relations field are linked to the Industrial Revolution. Corporations were the “engine” that powered this revolution. Early corporate public relations practices led by key pioneers in the field such as Barnum, Lee, Page, Bernays and others contributed to the development of a linear theory of public relations. The theory held that public relations began with the early and “crude” practices of men like Barnum and then evolved to become increasingly ethical and socially responsible. This theory materialized into Grunig and Hunt's influential model of public relations, which divided public relations into four components that, they argued, corresponded to the historical evolution of the field. The models are summarized as follows:

²⁵³ For more on the role of identification in public relations, see Heath, “The Rhetorical Tradition” 37-38.

Press agency/publicity, in which publicity is itself the goal, epitomized by Barnum; *one-way communication* or *public information*, in which the publicist serves as an internal reporter to disseminate information outside the organization, epitomized by Ivy Lee; *two-way asymmetrical*, which is research-based but in the service of better crafting and disseminating messages, epitomized by Bernays; and *two-way symmetrical*, which is research-based in the service of crafting and disseminating messages and in receiving feedback, identified with Arthur W. Page and utilities public relations.²⁵⁴

Though dominant in the field for many years, more recently the Grunig and Hunt model has been critiqued as historically inaccurate. Scholars also argue that the field of public relations emerged long before the Industrial Revolution and well before the rise of the corporation.²⁵⁵ They have claimed that the model naturalizes an artificial division in public relations practice through its neat separation of the field into four sequential, historical moments. This second critique is especially relevant if we consider current events. Thus, I assert that the earliest two strategies and tactics of press agency and public information are still widely practiced today. A recent example of public information or one-way communication would be the press conference Tiger Woods held following allegations of marital infidelity: Woods delivered a prepared speech and then refused questions or comments from reporters. Similarly, Gower's study of magazine, newspaper, and journal articles published on public relations during the turn-of-the-century contradicted the linear model. She found that some railroad companies engaged in the kinds of

²⁵⁴ Lamme and Miller 287. See also James E. Grunig and Todd Hunt's classic text, *Managing Public Relations* (New York: Holt, Rinehart and Winston, 1984). Emphasis added.

²⁵⁵ See Lamme and Miller 284-289.

sophisticated public relations practices such as relationship building and two-way symmetrical communications typically associated with later twentieth and twenty-first century practices.²⁵⁶

Despite vulnerability to criticism, Grunig and Hunt's linear model was an important catalyst for ongoing theorization about the field of public relations.²⁵⁷ For example, in their efforts to move beyond the limitations of the linear model, Lamme and Miller advanced a new theory to account for public relations practice, including the history of the field. They found that there were five motivations for public relations activities, which were neither disparate nor historically chronological and could well function interconnectedly. These included the need or desire to raise money, to recruit others, to establish legitimacy, and to agitate against or to advocate for someone or something.²⁵⁸ "All five entail persuasion and serve as alternatives, or complements, to coercion,"²⁵⁹ they explain. "We find then, that the public relations function emerged when a person or organization sought to secure profit, recruitment, legitimacy, or to participate in the marketplace of ideas through agitation and advocacy."²⁶⁰

²⁵⁶ Gower 315.

²⁵⁷ For example, see Jacquie L'Etang, "Writing PR History: Issues, Methods and Politics," *Journal of Communication Management* 12.4 (2008): 319-335.

²⁵⁸ Lamme and Miller 355.

²⁵⁹ Lamme and Miller 355.

²⁶⁰ Lamme and Miller 355-356.

Because persuasion is a common element of both public relations and rhetorical theory, many scholars (as my previous discussion of Hill in terms of Burke demonstrates) have expanded and enriched their views and analyses of the public relations field by considering rhetorical approaches. As Heath points out:

Rhetoric is employed when matters of various kinds are to be decided, when they are unsettled, when differences of opinion prevail, and when people are uncertain as to which of several decisions is best. It assists management as they decide what strategies are available to promote and publicize a product or service, and even to shape an organization's image. It guides how they engage in an issue, debate, manage risks, and respond during crisis. The rationale for rhetorical theory is that it helps us understand the process of decision making, collective efforts, and the give and take of conversation, debate, advocacy, accommodation, negotiation, and collaborative decision making.²⁶¹

Heath also outlines the value of a rhetorical perspective, writing that “the rhetorical heritage provides an evolving body of strategic and critical insights to help practitioners be effective and ethical as they participate in the process by which society creates meaning – for meaning is created in society.”²⁶²

In addition to rhetorical theory, public relations scholars have incorporated critical theory and social theory in an effort to better understand and account for the complex relationships between the public relations field, organizations, and society. Typically, these scholars are concerned with issues of fairness and access.²⁶³ They are also attuned to how relations of power

²⁶¹ Heath, “The Rhetorical Tradition” 23-24.

²⁶² Heath, “The Rhetorical Tradition” 20.

²⁶³ Heath, “The Rhetorical Tradition” 14.

manifest in communicative exchanges.²⁶⁴ According to Heath, “Critical scholars attempt to unveil hidden powers that alienate and marginalize portions of society.”²⁶⁵ His assertion aligns with those of Ihlen and van Ruler, and McKie and Munshi, who all agree that public relations scholarship can be usefully expanded with the consideration of critical and social theories.

Work from McKie and Munshi describes how a variety of critical theory perspectives can enrich public relations comprehension and practice. For example, they discuss how Frantz Fanon’s views of race, Kristeva’s perspectives on feminism, and queer theory’s impact on the relationship between gender, sexual orientation and knowledge can significantly and usefully expand the scope of public relations scholarship and practice.²⁶⁶ Other scholars have used Critical Race Theory (CRT) to demonstrate how the field of public relations is raced through its practices, which often deny people of color access to or ascension within the field, and its literature, which too often reinforces dominant racial views.²⁶⁷ They also reveal how public relations historiography often omits the public relations experiences of people of color and other traditionally minority populations, simultaneously marginalizing their perspectives and limiting the scope, efficacy, and richness of public relations praxis and conceptualization. These rhetorical and critical approaches are necessary because, as Ihlen and van Ruler note, “Public

²⁶⁴ See Peter M. Smudde and Jeffery L. Courtright, “Public Relations and Power,” *The Sage Handbook of Public Relations*, Ed. Robert L. Heath (New York: Sage, 2010) 177-189. See also Robert L. Heath, Judy Motion, and Shirley Leitch, “Power and Public Relations: Paradoxes and Programmatic Thoughts,” *The Sage Handbook of Public Relations*, 191-204.

²⁶⁵ Heath, “The Rhetorical Tradition” 15.

²⁶⁶ See David McKie and Debashish Munshi, “Theoretical Black Holes: A Partial A to Z of Missing Critical Thought in Public Relations,” Heath, Toth, and Waymer 61-75.

²⁶⁷ See Donnalyn Pompper, “Difference in Public Relations Research: A Case for Introducing Critical Race Theory. *Journal of Public Relations Research*, 17, 139-169, 2005. See also Nneka Logan, “The White Leader Prototype: A Critical Analysis of Race in Public Relations,” *Journal of Public Relations Research*, 23.4 (2011): 442-447.

relations is often studied from a managerial, instrumental perspective. However, to understand its role in building trust or creating mistrust and in developing – or destroying – a company’s license to operate, public relations needs to be studied as a social phenomenon.”²⁶⁸

Interdisciplinary approaches sensitive to rhetorical and critical theory will help achieve the ideals Ihlen and van Ruler put forth above.

Examining the social nature of public relations encourages us to complicate traditional notions of the field and its functions by more directly and explicitly considering the role of ideology and how ideology functions through public relations as the corporate voice to produce a specific set of values, beliefs, and attitudes. These values, beliefs, and attitudes are ideologies. In the corporate public relations field, ideology operates to reinforce any number of pro-corporate positions on particular issues. Public relations, as the corporate voice, plays a significant role in creating and fostering ideological orientations that encourage an economic, political, and social climate supportive of big business.²⁶⁹

Having explored the evolution of the corporate voice via an overview of public relations history and various theoretical perspectives on the field, it is now appropriate to turn attention to the overview and analysis of *Nike v. Kasky* (2003). In the next section of this chapter, we will see if – and if so, how – Nike’s use of the corporate voice aligns with or contradicts some of the theoretical and historical perspectives on public relations just reviewed. By the time the first legal brief was filed in this case, the corporation had become an institution in society, and its voice had long been established as a persuasive force in the public sphere. The economic man had achieved some level of legitimacy, yet he had not fully escaped public skepticism.

²⁶⁸ Øyvind Ihlen and Betteke van Ruler, “Introduction: Applying Social Theory to Public Relations,” Ihlen, van Ruler and Fredriksson 1.

²⁶⁹ Miller 395.

An analysis of *Nike v. Kasky* offers useful insights into the relationship between the corporation, its voice, and society, as it also exposes the ideological nature of Supreme Court discourse pertaining to corporate rights.

4.4 Why Kasky Confronted Nike

Everyone knows Nike: the multi-billion dollar company and global brand with factories all over the world, thousands of employees, and numerous celebrity endorsers. If Nike were a real person – that is, a human being – Nike would be powerful and popular, a force to be reckoned with. Marc Kasky is a real person – a runner who bought Nike shoes. Kasky became troubled when he heard allegations that workers at some of Nike’s overseas factories were being mistreated and underpaid.²⁷⁰ These factories were not owned and operated directly by Nike, but they were contracted by Nike to make some Nike products.²⁷¹ The social conditions of production were an important part of Kasky’s purchasing decisions.²⁷² Until the allegations surfaced, he had thought Nike to be a good company that treated workers well. The company was a pioneer in corporate social responsibility and had a code of ethics in place.²⁷³

From 1995 onward, however, Nike became the subject of “highly negative allegations about the working conditions, compensation, worker safety and atmosphere in various Nike-contracted facilities in Southeast Asia.”²⁷⁴ When the allegations surfaced, Nike became the target

²⁷⁰ Nike, Inc. et al. v. Kasky, 539 U.S. 654 (2003) 656-659.

²⁷¹ Debora L. Spar, “Hitting the Wall: Nike and International Labor Practices.” *Harvard Business School Case Study* (2002) 1-8.

²⁷² Mary Lynn Stoll, “Corporate Rights to Free Speech,” *Journal of Business Ethics* 58 (2005): 263.

²⁷³ Thom Hartmann, *Unequal Protection: How Corporations Became “People” – And How You Can Fight Back* (San Francisco: Berrett-Koehler Publishers, Inc., 2010) 162.

²⁷⁴ Samuel A. Terilli, “Nike v. Kasky and the Running-But-Going-Nowhere Commercial Speech Debate,” *Communication, Law and Policy* 10.4 (2005): 404.

of anti-sweat shop campaigns.²⁷⁵ The company was accused of “greenwashing,” a term used to describe the actions of companies who pretend, claim, or appear to be operating in a socially responsible manner while knowingly engaged in questionable business practices especially in cases where human or environmental safety is at issue.²⁷⁶ Nike was accused of using child labor.²⁷⁷ The company’s labor practices were even likened to slavery. As its public image deteriorated, Nike faced an avalanche of negative news coverage and also became the target of boycotts.²⁷⁸

As a Harvard Business School case study explained, overzealous activists even staged a photo of a child stitching Nike soccer balls that was to be published on the cover of *Life Magazine*.²⁷⁹ According to the Supreme Court, “Nike was besieged with a series of allegations that it was mistreating and underpaying workers at foreign facilities.”²⁸⁰ The company would soon launch a defense. Critics characterized Nike’s response to the accusations as defiant. For example Naomi Klein wrote,

²⁷⁵ Stoll 263.

²⁷⁶ For an explanation of “greenwashing” along with a list of examples of the act and companies who may engage in it, see “Top 10 Greenwashing Companies in America,” *Huffington Post* 3 Apr 2009, 8 July 2012 <http://www.huffingtonpost.com/2009/04/03/top-10-greenwashing-compa_n_182724.html>.

²⁷⁷ Nike v. Kasky, 539 U.S. 654 (2003) Appendix to the Opinion of Justice Breyer, 685

²⁷⁸ For an extensive list of negative media coverage Nike received, see Terilli 404-405, *notes*.

²⁷⁹ See Spar 21. When Nike became aware of the photo, the company argued convincingly that the image was staged and a fake. The controversy over the photo brought to light several concerns. The fact that the photo was staged and passed off as an example of Nike’s labor practices showed that some activists are willing to misrepresent facts and behave in ways incongruent with the ethos activism is supposed to represent. At the same time, Nike also admitted that it had used child labor. So while the picture was not real, the circumstance that it portrayed was very real, highlighting the complexity of the situation.

²⁸⁰ Nike v. Kasky, 539 U.S. 654 (2003) 656.

Nike wasn't really acting all that sorry about it. While Kathie Lee Gifford and the Gap had at least displayed contrition when they got caught with their sweatshops showing, Phil Knight had practically stonewalled: denying responsibility, attacking journalists, blaming rogue contractors and sending out flacks to speak for the company.²⁸¹

The Harvard Business School case study also characterized Nike's initial response to the allegations as dismissive: "Nike's company line on the issue was clear and stubborn: without an inhouse manufacturing facility, the company simply could not be held responsible for the actions of independent contractors."²⁸² Eventually, in response to these allegations, Nike's leaders embarked upon a comprehensive public relations campaign to convince key stakeholders and the American public that the criticisms against it were unwarranted.

The campaign materials included: letters from company executives and officials to university and college leaders, a pamphlet, a web posting, a letter to the editor of the *New York Times*, press releases, and advertisements.²⁸³ The letters to American university and college officials were intended to reassure these leaders, who likely spent (or received) hundreds of

²⁸¹ See Naomi Klein, *No Logo* (New York: Picador, 2002) 368. In addition, although Klein had been critical of Nike, she was one of several journalists invited to participate in the *Dartmouth Professors Speak on Cost of Living Study: Nike* conference call in 1997 attended by Nike officials, Dartmouth professors and select members of the media. Klein participated in the call as a journalist for the *Toronto Star*. The purpose of the *Dartmouth* study was to determine if the wages people were paid in the Southeast Asian factories contracted to make Nike products could meet their basic needs and possibly contribute to their discretionary income. The purpose of the call was to discuss the findings and take questions. The conference call was also an example of how Nike leaders sought to share the company's point of view on the wage controversy with a select audience and this does suggest a willingness on Nike's part to participate in two-way communication, even if in a very controlled setting. Ultimately, the study found that wages were in many cases appropriate and increasing. However, that finding did not necessarily silence critics. For example, Klein remained concerned about what she viewed as Nike's marginalization of its critics. For more see "Dartmouth Professors Speak on Cost of Living Study: Nike." *College of Business – New Mexico State University*, 14 Feb 1998, 3 Mar 2013 <<http://business.nmsu.edu/~dboje/Niktuck1confcall.html> 12>.

²⁸² Spar 5.

²⁸³ *Nike v. Kasky*, 539 U.S. 654 (2003) 665, 672.

thousands of dollars, if not millions, each year on Nike apparel and equipment for their athletic teams, that Nike had done nothing wrong. Nike's overarching message in these communications was that the allegations against the company were false.²⁸⁴ The letter to university leaders opened by saying,

As most of you have probably read, heard or seen, NIKE, Inc. has recently come under attack from the Made in the USA Foundation, and other labor organizers, who claim that child labor is used in the production of its goods. While you may also be aware that NIKE has gone on the record categorically denying these allegations as completely false and irresponsible, I would like to extend the courtesy of providing you with many of the facts that have been absent from the media discourse on this issue: I hope you will find this information useful in discussions with faculty and students who may be equally disturbed by these charges.²⁸⁵

The letter's opening can be interpreted as Nike's attempt to correct misinformation about the company's labor practices circulating within the public sphere. The letter can be interpreted as suggesting that Nike is innocent of the allegations against it and did not engage in wrongdoing. Among the letter's concluding statements was this mention: "We have found over the years that, given the vast area of our operations and the difficulty of policing such a network, some violations occur. However, we have been proud that in all material respects the code of conduct is complied with."²⁸⁶

²⁸⁴ Kathy R. Fitzpatrick, "The Legal Challenge of Integrated Marketing Communication (IMC): Integrating Commercial and Political Speech," *Journal of Advertising* 34.4 (2005): 96-97.

²⁸⁵ Nike v. Kasky, 539 U.S. 654 (2003) Appendix to the Opinion of Justice Breyer, 685.

²⁸⁶ Nike v. Kasky, 539 U.S. 654 (2003) Appendix to the Opinion of Justice Breyer, 686.

Were the concluding statements (referring to violations) intended to be an admission of some level of guilt or responsibility? An audit sponsored by Nike confirmed workplace labor violations had occurred in some foreign factories contracted to manufacture Nike products.²⁸⁷ The contradictory and controversial circumstances surrounding Nike's labor practices led some critics to accuse Nike of lying.²⁸⁸ The controversy led Kasky to sue. "I was outraged that Nike held itself out as the model corporate citizen," said Kasky.²⁸⁹ He decided to sue on the grounds that "he and a lot of people in California were buying Nike products under false assumptions or misrepresentations."²⁹⁰

4.4.1 Lower Court Ruling and Appeals

In his initial lawsuit, Kasky asked that Nike do three things: pay restitution from monies acquired via its false advertising practices, correct the misleading statements and make them accurate, and pay his legal fees.²⁹¹ The San Francisco Superior Court dismissed the case in 1999, because Nike's public relations efforts were viewed by the court to be protected by the First Amendment as political speech; that classification meant that publishing information known to be false was not a legal infraction.²⁹² Kasky appealed the ruling and lost again.²⁹³ Kasky appealed to the California Supreme Court, which ruled in his favor in May 2002. The Court said:

²⁸⁷ This audit was conducted by Former Ambassador to the United Nations Andrew Young and his GoodWorks International firm. See *Nike v. Kasky*, 539 U.S. 654 (2003), 656.

²⁸⁸ In his book, Hartmann dedicates an entire chapter to *Nike v. Kasky*, titled "Protecting Corporate Liars."

²⁸⁹ Hartmann 163.

²⁹⁰ See Hartmann 163 for an elaboration on the cause for litigation from Kasky's perspective.

²⁹¹ Terilli 407.

²⁹² *Kasky v. Nike*, 27 Cal 4th 939 (2002), 949.

The issue here is whether defendant corporation's false statements are commercial or noncommercial speech for purposes of constitutional free speech analysis under the state and federal Constitutions. Resolution of this issue is important because commercial speech receives a lesser degree of constitutional protection than many other forms of expression, and because governments may entirely prohibit commercial speech that is false or misleading. Because the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages. Because the Court of Appeal concluded otherwise, we will reverse its judgment.²⁹⁴

The court essentially agreed that Nike had violated the law.”²⁹⁵ Nike rejected this outcome, setting the stage for one of the most interesting corporate communication-related cases in Supreme Court history.

4.4.2 *Kasky v. Nike Becomes Nike v. Kasky*

When Nike appealed the matter to the U.S. Supreme Court, a key issue for the justices to consider was whether Nike’s public relations communication should be protected as political speech or restricted as commercial speech.²⁹⁶ This categorization was important because political speech was protected broadly by the First Amendment and had few limitations. By contrast,

²⁹³ Nike v. Kasky, 539 U.S. 654 (2003) 656-657.

²⁹⁴ Marc Kasky v. Nike, Inc., et al., 27 Cal. 4th 939 (2002) 946.

²⁹⁵ Hartmann 164.

²⁹⁶ Stoll explains that commercial speech laws require information provided to consumers to be accurate. See 263.

commercial speech, or “what might be termed economic expression was historically unprotected by the First Amendment. The assumption was that economic expression, which includes commercial expression, was not vital to the nation’s well being.”²⁹⁷ First Amendment protections for commercial speech became more firmly outlined with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976).²⁹⁸

In the state of Virginia, a law prohibited pharmacists from publicizing their prices. A citizen sued to gain access to that information. The case went to the Supreme Court. In *Virginia*, the Supreme Court stated, “In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible.”²⁹⁹ One example where commercial speech can be regulated, outlined by the Court, concerns the truthfulness of speech: “Untruthful speech, commercial or otherwise, has never been protected for its own sake.”³⁰⁰ Ultimately, the Court concluded, “What is at issue is whether the State may completely suppress the dissemination of concededly truthful information about entirely lawful activity.... We conclude that the answer to this one is in the negative.”³⁰¹ Thus, *Virginia* established First Amendment protections for certain kinds of commercial speech – and most salient to this study, speech that was truthful about a lawful activity. When Nike appeared before the U.S. Supreme Court, commercial speech

²⁹⁷ Greg Lisby, “Regulating Public Relations,” *Communication and the Law* Ed. W. Wat Hopkins (Northport, AL: Vision Press, 2010) 180.

²⁹⁸ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

²⁹⁹ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 770.

³⁰⁰ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 771.

³⁰¹ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 773.

was still required to be truthful in ways that free speech as political expression was not.³⁰² For these reasons, it was in Nike's best interest for the Court to rule that their corporate communications were political expression, because that form of speech was held to a lesser truth standard than commercial speech.

Although Nike was defending itself against public criticism related to its alleged false or misleading statements, much of its public relations communications were still interpreted as being in service of the profit motive. The communications were thought to be instances of commercial speech (as the California Supreme Court opinion seemed to indicate). Noting this in *Nike v. Kasky*, Justice Breyer wrote,

Marc Kasky has claimed that Nike made false or misleading commercial statements.

And he bases this claim upon statements that Nike made in some specific documents, including press releases and letters to the editor of a newspaper, to institutional customers, and to representatives of nongovernmental organizations.³⁰³

Justice Breyer continued,

The California Supreme Court held that certain specific communications, exemplified by the nine documents upon which Kasky rests his case, fall within that aspect of the Court's commercial speech doctrine that says the First Amendment protects only truthful

³⁰² See Stoll; Hartmann; Fitzgerald; Terilli. For an in-depth analysis, see Robert L. Kerr's essay, "A Justice's Surprise That Has Stood Its Ground: The Enduring Value of the Commercial Speech Doctrine's Powellian Balance," *Journalism and Communication Monographs* 13.4 (2012): 214-284. It is beyond the scope of this dissertation to go too deeply into the topic of commercial speech rights, since my central focus here is on public relations, rhetoric, and ideology.

³⁰³ Justice Breyer dissenting in *Nike v. Kasky* 539 U.S. 654 (2003) 665.

commercial speech; hence, to the extent commercial speech is misleading, it is unprotected.³⁰⁴

Predictably, the Kasky team wanted the U.S. Supreme Court to rule in a way that was consistent with the California Supreme Court's ruling against Nike.

In his analysis of the *Nike v. Kasky*, Terilli argues that Nike was operating appropriately within the parameters of the law. In addition, he identifies three points on which Kasky's arguments could be called into question:

First, all parties agreed not a single statement urged the purchase of any Nike product.

Second, the statements made by Nike were responses to charges made in the media or by labor or other organizations and reported in the news media. Third, the core of Kasky's allegations was that Nike's published statements ignored or omitted specific incidents, articles, reports or other studies that contradicted Nike's point of view.³⁰⁵

However, I would argue that these and similar criticisms of Kasky's position might be productively augmented by the consideration of a critical perspective. Although their points are clearly stated, they may overlook some key factors.

First, although the statements in Nike's public relations campaign materials did not overtly urge the purchase of any Nike product (which would have been a more discernible violation of commercial speech regulations under the First Amendment), the entire campaign served to encourage the ongoing financial support of the Nike brand by reassuring the public that the allegations against the corporation were false.³⁰⁶ The company did not necessarily have to

³⁰⁴ Justice Breyer dissenting in *Nike v. Kasky*, 539 U.S. 654 (2003) 665.

³⁰⁵ Terilli 408.

³⁰⁶ This is until Nike focused more keenly on protecting its public relations campaign communications as political expression, because political expression does not require a robust standard of truthfulness as

admit the economic motive underlying its response to the allegations because the motive was implied. Of course, Nike wanted to maintain its contracts with university officials around the country who bought Nike apparel and products for their sports teams. Nike also wanted to maintain a positive reputation, given the correlation between reputation, profits, and overall organizational health.³⁰⁷ Secondly, the problem is not that Nike responded to allegations leveled against it. The problem is the intent of this response: to persuade consumers, even if through misinformation, to continue to buy Nike products. Because the speech contained in Nike's public relations campaign was predominantly guided by the profit motive, I maintain that it should count as commercial speech and be regulated as such.³⁰⁸

Nike's lawyers contended that the laws against fraud and deception were too broad to apply to the company in this case; therefore, Nike should not be held accountable for the contents of its speech.³⁰⁹ As Nace points out,

Rather than argue that the company's advertisements were factual, the lawyers asserted that factuality was irrelevant in the case because Nike was protected by the First Amendment. Thus, the company could publicize any sort of information it wanted – even “facts” that it knew to be completely false.³¹⁰

compared to commercial expression. If Nike's speech was to be legally categorized as political expression, the truthfulness of the speech would become essentially irrelevant.

³⁰⁷ Tom Watson, “Reputation Models, Drivers, and Measurement,” *Sage Handbook of Public Relations*. Ed. Robert L. Heath (Los Angeles: Sage, 2010): 339-351.

³⁰⁸ It is important to note that not all speech by corporations is necessarily commercial speech motivated by a profit motive. For example, press releases, media alerts or Facebook posts about community volunteerism or organizational personnel announcements are not typically considered commercial speech.

³⁰⁹ *Nike v. Kasky*, 539 U.S. 654 (2003) 658-659. For a critical discussion, see Hartmann 166.

³¹⁰ Nace 175.

In claiming that its public relations campaign communications should be legally protected despite concerns over truthfulness, Nike may have contributed to the perception that the company was attempting to persuade the Supreme Court that the truth is an insignificant criterion for public relations speech.

Writing as though he were a member of Nike's legal team, Hartmann summarizes the corporation's rationale this way: "We're a company, which is the same as a person, and so we have the First Amendment right to say whatever we want just like anybody else. To say that we only have to say things that are accurate violates our First Amendment right of free speech."³¹¹ While such an assertion might be legally true, is it true morally or ethically?

Several corporations filed amicus curiae, or "Friend of the Court" briefs in support of Nike. These included ABC, Inc.; American Society of Newspaper Editors; the Associated Press; Forbes, Inc.; Fox Entertainment Group; Gannett Company; the Hearst Corporation; the McClatchy Company; the National Association of Broadcasters; the National Broadcasting Company; Newsweek, Inc.; National Public Radio; the New York Times Company; *U.S. News & World Report*; the Washington Post Company; and others.³¹² Many of Nike's supporters were media companies, which are reliant on revenue from corporations and other organizations that can afford to regularly advertise in the expensive mass media. Therefore, it is not improbable to consider that some of these Friend of the Court companies supported Nike because they received a portion of Nike's advertising budget each year. Even so, their primary motive for supporting Nike may have had more to do with protecting corporate First Amendment speech rights for political expression than any other motive. A ruling against Nike might put the First Amendment

³¹¹ Hartmann 167.

³¹² Nike v. Kasky, 539 U.S. 654 (2003) 664, 667, 683. See also Hartmann 164-165.

rights for political expression of all corporations at stake.³¹³ The next chapter explains in detail why First Amendment free speech rights are so advantageous for corporations; for now, suffice it to say that they offer corporations more legal protections and fewer restrictions for their communicative activities than commercial speech rights.

If Nike prevailed, it could mean that, as Stoll notes, “Proctor and Gamble, for instance, could issue a press release claiming that it does not test its products on animals, even if this is patently false, and the action would be protected under the First Amendment.”³¹⁴ Pharmaceutical companies could publicize medications curing cancer, but sell the public placebos without penalty or patient recourse. In a world where the corporation has insinuated its “self” into every aspect of human life, determining – or at the very least influencing – every aspect of the human experience, such as our food and water supply, our homes, educational systems, modes of transportation, access to healthcare, and more, granting Constitutional protection for untruths told by corporations is a very scary proposition – whether in commercial or political speech contexts.³¹⁵

³¹³ See Stoll 263-264. See also Brian Knowlton, “Court Won’t Rule on Corporate Free Speech,” *New York Times*, 18 June 2012, 26 June 2003 <<http://www.nytimes.com/2003/06/26/politics/26CND-NIKE.html>>. Knowlton’s article elaborates on how corporations supported Nike because they were concerned that a ruling against Nike could lead to a reversal in corporate speech rights laws, which gave corporations First Amendment protections. In addition, the reasons I have offered are not, of course, the only reasons why a particular organization may have filed an amicus brief with the U.S. Supreme Court in support of Nike. It is also important to note that non-profits, associations and other types of organizations also filed amicus briefs in this case. For example the Public Relations Society of America (PRSA), Institute for Public Relations, the Arthur W. Page Society and the Public Affairs Council jointly filed an amicus brief. PRSA noted on its website that it advocated First Amendment protection for a corporation responding to an allegation of wrongdoing. See PRSA’s website <<http://www.prsa.org/advocacy/background/>>, para 4.

³¹⁴ Stoll 263. See also Stanley Holmes, “Free Speech or False Advertising?” *Business Week* 27 Apr 2003, 29 June 2012 <<http://www.businessweek.com/stories/2003-04-27/free-speech-or-false-advertising>>.

³¹⁵ While it may be important to protect falsehoods in political expression by some standards, falsehoods become particularly problematic in speech situations involving corporate speakers who sell products and services due to the profit motive.

In the end, the Supreme Court dismissed *Nike v. Kasky* by issuing this short statement: “The writ of certiorari is dismissed as improvidently granted.”³¹⁶ The Court explained the non-decision by claiming the Court lacked jurisdiction to hear the case; that both sides – Nike and Kasky – “lacked standing to bring a federal claim”;³¹⁷ and that the issues raised by the case were so novel that it wouldn’t be appropriate for the Supreme Court to rule on them now.³¹⁸ Hartmann offers his own interpretation of the Court’s logic, writing this time as though he were a member of the Court: “When we decided to listen to these arguments and look over this case, granting it legal certification before us, we screwed up. Therefore we’re tossing out the certification and going to pretend we never even heard this case or read its briefs.”³¹⁹

Justice Stephen Breyer dissented in *Nike v. Kasky*. He wrote, “In sum, I can find no good reason for postponing a decision in this case. And given the importance of the First Amendment concerns at stake, there are strong reasons not to do so.... I would not dismiss as improvidently granted the writ issued in this case. I respectfully dissent from the Court’s contrary determination.”³²⁰ As Justice Breyer indicated, the Supreme Court should take on the tough questions, provide sound legal judgment, and set the nation on a solid course.³²¹

³¹⁶ *Nike v. Kasky*, 539 U.S. 654 (2003) 657.

³¹⁷ *Nike v. Kasky*, 2003, 661-663. See also Terilli 413.

³¹⁸ *Nike v. Kasky*, 2003, 663-665. See also Terilli 413.

³¹⁹ Hartmann 169.

³²⁰ See Justice Breyer’s dissent in *Nike v. Kasky*, 539 U.S. 654 (2003) 684. See also Hartmann 169.

³²¹ Justice Breyer was joined in his dissent by Justice O’Connor. Justice Kennedy also dissented. See *Nike v. Kasky*, 539 U.S. 654 (2003) 665.

In his dissent, Justice Breyer also offered a perspective on how the Court might have appropriately ruled in this case. In doing so, he offered a critique of the California court's decision.

If permitted to stand, the state court's decision may well "chill" the exercise of free speech rights.... The upshot is that commercial speakers doing business in California may hesitate to issue significant communications relevant to public debate because they fear potential lawsuits and legal liability.... This concern is not purely theoretical. Nike says without contradiction that because of this lawsuit it has decided "to restrict severely all of its communications on social issues that could reach California consumers, including speech in national and international media." It adds that it has not released its annual Corporate Responsibility Report, has decided not to pursue a listing in the Dow Jones Sustainability Index, and has refused "dozens of invitations...to speak on social responsibility issues."³²²

From a critical perspective, one may wonder if Justice Breyer is supporting the idea that corporate speech should not be held to a high standard of truth because it would curtail corporate communications. If so, such perspective would appear sympathetic to the idea that if corporations are not allowed to communicate anything they want – including things that may not be true and that might mislead the public – then they may not say anything to the public at all. Neither in concurring nor dissenting opinions does the Court appear to encourage the idea that corporations should be more truthful in their speech in general. If Nike had been more transparent and accurate in the beginning, there likely would have been no *Kasky v. Nike*.

³²² Justice Breyer dissenting in *Nike v. Kasky*, 539 U.S. 654 (2003) 682.

Perhaps the brilliance of the Supreme Court's decision in *Nike v. Kasky* was precisely its *decision not to decide*. A non-ruling, by default, can preserve the ability to decide later on. It should not be forgotten that silence is not impotence. Often it makes a statement as a strategic power move because inaction is every bit as significant as what is perceived as action. Recall McKerrow's point that what is absent in communication is every bit as important as what is present in any discourse, and that what is hidden in discourse often functions to reinforce the aims of the powerful. Considering McKerrow here infuses Hartmann's assertion – that the Court's non-ruling also allowed corporate personhood and corporate speech rights to remain untouched – with theoretical strength from the critical rhetorical tradition.

After the Supreme Court chose not to hear the case, Nike eventually settled with Kasky. The corporation also made a \$1.5 million financial donation to the Fair Labor Association (FLA), an organization dedicated to helping sweatshop workers around the world by providing education and economic assistance.³²³ The settlement was “lauded as a success by both sides.”³²⁴ But something about it rang hollow to critics as Spar explained.

While some labor leaders accepted the FLA as the best compromise possible, others decreed it as a sham agreement that simply provided cover for U.S. corporations. A main objection of these critics was that the FLA standards included notification of factories that were supposed to be inspected, a move criticized by some as equivalent to notifying a restaurant when a critic was coming to dine.³²⁵

³²³ Stoll 264.

³²⁴ Stoll 264.

³²⁵ Spar 13.

In addition, the seven-figure settlement from Nike, a multibillion dollar company, could be perceived as a small drop from a very large corporate bucket.

4.4.3 Implications of Nike v. Kasky on Public Relations and the Corporate Voice

What are the implications of *Nike v. Kasky*? The Court's dismissal dissatisfied those who wanted to know definitively whether Nike's public relations activities should be categorized as commercial speech or political expression. Should public relations communications be forced to comply with commercial speech regulations? Does truth matter in corporate communications? Or to what extent should truth matter in corporate communications? These and other questions were left unanswered by the Court. However, the Court's silence on this issue did not squelch the implications of the decision not to rule.

Both critics and supporters of Nike agreed that by not ruling in this case, the Supreme Court unfortunately left the legal scope of the corporate voice and its speech rights unclear and open for ongoing contestation.³²⁶ The circumstances resulting from the Supreme Court's non-ruling have implications for public relations practitioners.³²⁷ For reasons that are by now obvious, corporations may prefer their public relations communications to be classified as First Amendment political expression. Because commercial speech only has limited First Amendment protections, it means that public relations professionals should be very careful in how they use the corporate voice to "speak." Public relations professionals need to be aware of these nuances between political expression and commercial speech so they can advise their clients and employers wisely.³²⁸ For example, public relations practitioners should be aware that if public

³²⁶ For a general discussion see Stoll; Hartmann; Nace; Terilli; Pratt; Fitzpatrick.

³²⁷ Pratt 215.

³²⁸ Pratt 215

relations is considered political expression, it is more likely to receive more First Amendment protection. On the other hand, marketing, advertising, and other persuasive communications aimed at generating or preserving profit, are usually characterized as commercial speech and may receive less legal protection under the First Amendment if they contain falsehoods. Thus, when public relations professionals allow their communications to become too inundated, intermingled, or aligned with marketing or sales messages, they may put the corporation at legal risk. “MarCom,” integrated marketing and communications efforts, may be particularly susceptible to legal exposure (because of the profit-motive directly motivating marketing efforts), while public relations proper may provide more legal latitude and cover for the corporate voice from a practical standpoint. But because the Supreme Court never ruled in *Nike v. Kasky*, all of this remains murky legal territory.

From Terilli’s perspective, *Kasky* “may have serious implications for all forms of expression, including journalism. For example, if businesses or business people cannot, or believe they cannot, speak freely on matters affecting business, the result will be a poorer marketplace and poorer, less informed, news stories.”³²⁹ As a result, Terilli asserts that corporate speech should receive unlimited First Amendment protection as political expression. This seems to support the idea that truth in corporate communications to the public is not necessarily legally relevant. On the other hand, Nace argues that nothing should warrant the corporation’s legal right to mislead the public:

“The right to lie” under the First Amendment as a way of maintaining the “free market of ideas” is wrongly conceived. Indeed, just as laws against fraud and monopoly are needed to maintain the integrity of markets for goods and services, so likewise laws

³²⁹ Terilli 431.

against deliberate corporate deception are actually quite vital to protect the “free market of ideas.”³³⁰

The “right to lie” that Nace references has been an important part of the concept of the marketplace of ideas since its early conceptualizations as described by John Stuart Mill. Mill’s ideas contributed to the development of the marketplace of ideas concept. He argued that falsehoods were necessary because they facilitated an arrival at truth. He wrote:

But the particular evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.³³¹

For Mill, silencing falsehoods does not guarantee truth and in fact may obstruct it. *On Liberty* situates falsehoods as a useful means to discovering the truth. However, Nace is among the critics of this conception of the marketplace of ideas and the Court’s apparent take on the concept in *Nike v. Kasky*.

According to Hopkins, common criticisms of the underlying assumptions of the marketplace of ideas concept are, “(1) that everyone has access to the market, (2) that truth is objective and discoverable rather than subjective and chosen or created, (3) that truth is always among the ideas in the marketplace and always survives, and (4) that people are basically

³³⁰ Nace 177.

³³¹ John Stuart Mill, *On Liberty* (Mineola, NY: Dover Publications, Inc., 2002) 14.

rational and, therefore, are able to perceive truth.”³³² However, if the voices of corporations are able to shape or even create “truth,” what are the implications for the integrity of the marketplace of ideas?

Nike v. Kasky seems to demonstrate that the corporation and its voice need to be regulated in order to protect the integrity of “truth” from the influence of the profit motive. It does not seem unreasonable to suggest that the corporate voice needs to be regulated to help temper the profit motive, because the profit motive can sometimes cause the corporate voice to be used in ways that harm or deceive people, contributing to the corporation’s ongoing crisis of legitimacy.

In light of earlier discussions of the corporate voice, public relations history, and theory, how should *Nike v. Kasky* be understood or contextualized? From a public relations history standpoint, Nike’s strategies and tactics seemed consistent with the practices of Barnum, Bernays, and Hill. Thus, Nike’s public relations campaign can be said to contradict the linear, evolutionary model of public relations by providing an example of how publicity/press agency are still practiced today. Like Barnum, Bernays, and Hill, Nike used the persuasive campaigns of public relations practices to achieve a profit motive. Truth in communication was not necessarily a significant consideration in these instances.

³³² See W. Wat Hopkins, “The Supreme Court Defines the Marketplace of Ideas,” *Journal of Mass Communication Quarterly* 73.1 (1996): 44. In this essay, Hopkins describes how the metaphor of the marketplace of ideas may have initially been conceived of as referring to one, singular all-encompassing marketplace, but more recently the Court may be interpreting the marketplace of ideas concept as several different mini-markets. This disjuncture or misunderstanding between how critics believe the Court is using the metaphor (as a singular reference) and how the Court is actually using the metaphor (as multiple marketplaces, according to Hopkins assertions) may be leading to ongoing criticism of the marketplace of ideas metaphor. For an additional critique of John Stuart Mill in relation to *Nike v. Kasky* see Stoll 264-266.

Nike's public relations efforts may have too heavily relied on press agency, publicity, and one-way information dissemination to communicate with the public. In doing so, their communicative efforts may have functioned to fulfill a neoliberal economic ideological orientation that supports the protection of corporate interests at the expense of human interests. Certainly, the human interests of workers who believed themselves mistreated were compromised. Similarly, the human interests of those people who care about the social conditions of production and see that as an important part of the purchase decision-making process, like Kasky, may have been (or considered themselves to have been) taken advantage of by Nike.³³³ Perhaps to ameliorate these issues, Nike could have taken a different approach such as robustly embracing the Page Principles, which advocate telling the truth and relegating the profit motive to its proper place – somewhere far behind serving the greater public good.

Nike's public relations efforts appear to be indicative of the Platonic view of rhetoric as deception and in contrast to more evolved rhetorical principles that advocate for the "good organization speaking well."³³⁴ Nike's public relations activities in this case may also stand in opposition to critical perspectives that seek to expose and make right relations of exploitation, build community, and lead toward more socially responsible corporate behavior. Instead, Nike's public relations efforts may have conformed to the ideological principles of economic liberalism that puts profits before people. In defending its reputation, Nike's corporate voice was perceived

³³³ It should not be forgotten that most people in the U.S. are probably not like Kasky. Many do not care about the social conditions of production. They may care more about the price, quality or any number of different factors. And some people are not in a financial position to care about anything other than the price of an item and if they can afford it. Thus, while the social conditions of production might be salient to some groups, other factors may be more important to other groups.

³³⁴ Robert L. Heath, "A Rhetorical Enactment Rationale for Public Relations: The Good Organization Communicating Well," *Handbook of Public Relations*, Ed. Robert L. Heath (Thousand Oaks, CA: Sage, 2001) 31-50.

by critics to disregard truth, mislead the public through persuasion, represent the worst of public relations practices, and ultimately confirm the negative stereotypes that have plagued rhetoric, public relations, and the persuasive arts for many years.

Nike's public relations effort could have taken a different approach – an approach more in line with two-way symmetrical communications, the Page Principles, rhetorical approaches, and self-reflexive critical approaches that exemplify public relations at its best. Specifically, the Nike public relations team and the company's leadership team could have started with the truth, and telling the truth did not have to put the company at legal risk. The public relations, executive, legal and human resources teams could have collaborated to develop an approach along the lines of the following: 1) we've been informed that there is a problem; 2) we are working to find out the exact cause, nature, and extent of the problem; 3) once the problem is identified, we will fix it; 4) we will keep you posted regularly as things develop; 5) please post your questions and comments to our company website, and we will respond to you as quickly as possible; and 6) thank you for your patience and support as we work diligently to resolve this. This kind of approach could have positioned the company to work legitimately and collaboratively with independent organizations to create meaningful change that served the public interest, supported employee well-being, and protected the corporation's reputation.³³⁵

The money Nike spent on legal fees and on the \$1.5 million settlement could have gone to support these initiatives. Then the company's next public relations campaign could have been all about how it tells the truth (even in tough circumstances), does the right thing proactively and voluntarily, and is a company or brand of choice for those reasons. I admit, it is *always easier* to

³³⁵ Of course, this is a brief sketch of an approach. A full campaign would have to be built out, but this is a high-level example of how the issue could have been managed, and there are certainly other viable approaches.

make recommendations after a crisis is over. However, I maintain that operating with an awareness of critical, ideological and rhetorical theory in public relations can provide practitioners with useful foresight. This level of foresight can be used to help the corporate voice function as an instrument of communicative benevolence and professional leadership, and not merely as an instrument of persuasion intended to legitimate and promote the interests of corporations at the expense of human well-being.

We have seen how the corporation became a person, developed a voice, and used its voice. In *Nike v. Kasky*, the corporate voice aimed to convince the public that Nike was not engaged in wrongdoing even when that fact was debatable. The aim of the company's public relations campaign was arguably to preserve profits through preserving its reputation. So far, this dissertation has shown how both personhood and voice have contributed significantly to the evolution of the corporate form. One contribution of the corporate voice is that it helped to further reify the corporation by endowing this artificial property form with additional human-like qualities. To become arguably the most dominant institutional power in the U.S., however, the corporation still needed one more thing – First Amendment speech rights for political expression. Those rights could increase the corporation's political influence and facilitate its rise to global hegemony. As Lisby wrote, "Though philosophical questions still exist as to the full extent of the comparative constitutional rights of natural persons and corporations, it is clear that corporations are artificial persons under the Constitution, entitled to the protections of the First Amendment."³³⁶ The next chapter explores the corporate quest for First Amendment free speech rights in greater detail and analyzes the Supreme Court's role in granting corporations these rights, ultimately bringing the trinity of corporate power to fruition.

³³⁶ Lisby 181.

5. CORPORATE SPEECH RIGHTS

*The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons.*³³⁷

5.1 Corporate Speech Rights, the First Amendment, and the Transformation of Money into Speech

Speech has always been the method by which human beings have sought to express themselves. As such, it has been the cornerstone of democratic deliberation and decision making. Interestingly, speech is no longer the special province of natural persons at the very same time that it has more political influence than ever. Thanks to several landmark Supreme Court decisions on corporate speech rights, the voices of corporations play a prominent role in today's public sphere from a political standpoint. These rulings transformed money into First Amendment-protected political speech and paved the way for corporations to play an increasingly influential role in democratic political processes.

Politicians, members of the press, and others have openly criticized corporate involvement in political affairs. President Barack Obama called the Supreme Court's ruling on corporate speech rights in *Citizens United v. Federal Elections Commission* (2010) "a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."³³⁸ In response to the *Citizens United* decision, *Atlanta Journal-Constitution*

³³⁷ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) 343.

³³⁸ Adam Liptak, "Justices, 5-4, Reject Corporate Spending Limit" *The New York Times* 21 Jan 2010, 10 Oct 2010 <<http://www.nytimes.com/2010/01/22/us/politics/22scotus.html>>.

editorial cartoonist Mike Luckovich published a depiction of founding father look-alikes gathered in Independence Hall. The logos of America's top corporations were stamped on their chests. "We the People" was replaced by "We the Corporations," and a sign covering the American flag read "Your Ad Here."³³⁹ The implication is obvious: America is for sale.

Citizens United, and indeed all of the landmark rulings on corporate speech rights including *Buckley v. Valeo* (1976)³⁴⁰ and *First National Bank of Boston v. Bellotti* (1978),³⁴¹ have led to unprecedented and ever-increasing levels of corporate involvement in politics.³⁴² Many scholars have expressed concerns that these rulings are not neutral interpretations of the law, but instead function to support the aims of big business by concentrating tremendous power in the "hands" of corporations.³⁴³ Some of these scholars have also argued that the Supreme Court's transformation of money into speech compromises, if not altogether undermines, the participation of average citizens in democratic political processes. As Gowri writes,

³³⁹ Mike Luckovich, "Constitutional Convention Updated," Cartoon, *Atlanta Journal-Constitution* 26 Jan 2010, 30 Dec 2011 <<http://blogs.ajc.com/mike-luckovich/2010/01/25/jan-26-cartoon/>>.

³⁴⁰ *Buckley et al. v. Valeo, Secretary of the United States Senate, et al.*, 424 U.S. 1 (1976).

³⁴¹ *First National Bank of Boston et al. v. Bellotti, Attorney General of Massachusetts*, 435 U.S. 765 (1978).

³⁴² It is important to note that *Buckley* is not a case about corporate speech rights. However, it is sometimes discussed, as I will do in this study, in the context of corporate speech rights cases because of its transformation of money into speech. For more see Kerr *The Rights of Corporate Speech* 19. See also Stoll 262-263.

³⁴³ See Ted Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* (San Francisco: Berrett-Koehler Publisher, Inc., 2005); Robert L. Kerr, *The Rights of Corporate Speech: Mobil Oil and the Legal Development of the Voice of Big Business* (New York: LFB Scholarly Publishing LLC, 2005); Aditi Gowri, "Speech and Spending: Corporate Political Speech Rights under the First Amendment," *Journal of Business Ethics* 17.16 (1998): 1849-1854; Thom Hartmann, *Unequal Protection: How Corporations Became "People" – And How You Can Fight Back* (San Francisco: Berrett-Koehler Publishers, Inc., 2010).

“The central issue is whether a corporation is the kind of entity that we believe should contribute to formulating a political climate, to making crucial political decisions (such as engaging in war), and ultimately, to building a future social world – and whether it should participate on equal terms with human beings.”³⁴⁴

I join the ongoing conversations about corporate speech rights and contribute an ideological analysis of the landmark Supreme Court decisions, including majority and dissenting opinions, on corporate speech rights. My analysis aims to shed light on the ideological orientations in these judicial texts, and I make the following arguments:

- 1) Supreme Court rulings on corporate speech rights are not merely impartial interpretations of law, but instead are a part of a particular ideological orientation;
- 2) The ideological position undergirding landmark Supreme Court rulings on corporate speech rights is indicative of the principles of neoliberalism, which favors private enterprise, big business, and the ongoing expansion of corporate rights, political power, and social influence;
- 3) *Rhetorically* equating corporations with natural persons hampers human agency in the democratic political process;³⁴⁵
- 4) Money is not speech; and³⁴⁶
- 5) Corporations should have a role in the public sphere, but should not have direct influence in democratic political processes.

³⁴⁴ Gowri 1850.

³⁴⁵ I emphasize rhetorically because that is the only way a human being and a corporation can be equated.

³⁴⁶ The point here is that money and speech are qualitatively and substantively different though both can be used as signs of expression.

My ideological analysis of Supreme Court rulings on corporate speech rights will identify statements by the Court that support the ideological principles of neoliberalism such as the expansion of corporate rights, the protection of private enterprise, and the transformation of social relations into economic relations. This chapter begins with a discussion outlining key perspectives on corporate speech rights. Then I offer a historical overview of the context in which *Buckley* and *Bellotti*, the first two landmark rulings concerning corporate speech rights, emerged. This overview includes an analysis of a controversial memo, “Attack on American Free Enterprise System,” authored by Lewis F. Powell just before he was nominated to the Supreme Court as a justice. The memo articulates many of the principles of neoliberalism, and my analysis of this text calls attention to the relationship between judges and ideology while also serving as a contextual foundation for my subsequent discussion of *Buckley* and *Bellotti*. While *Buckley* was the first ruling to transform money into speech, *Bellotti* was the first to declare “corporate political expression” was an indispensable part of democratic political processes. My analysis shows how these rulings were not impartial interpretations of law but functioned to achieve the ideological aims of neoliberalism as outlined in the Powell memo.

After the analysis of *Buckley* and *Bellotti*, I turn attention to the latest landmark ruling on corporate speech rights and arguably the crown jewel of the corporate rights movement: *Citizens United*.³⁴⁷ In this ruling, the “voice” of big business was granted a broad platform because the ruling removed many of the restrictions on corporate spending in political elections. For example, *Citizens United* facilitated the introduction of the Super PAC – a political action committee allowed to raise and spend unlimited amounts of money from corporations and other

³⁴⁷ For an in-depth discussion of the corporate “free speech rights” movement, see Robert L. Kerr, *The Corporate Free-Speech Movement: Cognitive Feudalism and the Endangered Marketplace of Ideas* (New York: LFB Scholarly Publishing, 2008).

groups such as unions and associations, and in some cases without disclosing the origins of the money.³⁴⁸ This made it easier than ever for all corporations (including those that are foreign-owned) to directly participate in American political elections. The chapter closes with a discussion of the implications of the ongoing expansion of corporate speech rights.

Corporate speech rights are the subject of much scholarly and popular debate – and the focus of this chapter – because without a doubt, they constitute one of the most pressing issues of our time. First Amendment political expression rights for corporate spending, cast as “speech,” significantly hampers human agency for average citizens within the public sphere by creating conditions in which the money of corporations not only competes with, but ultimately drowns out, the voices of natural persons. The ideological analysis set to unfold in this chapter will elaborate these assertions as I engage in a close reading of the landmark rulings in relation to the context in which they occurred.

The average human being simply does not have as much money as the average corporation and is not in the financial position to buy comparable amounts of speech to compete in the marketplace of ideas. This is largely because the rights of human beings, such as personhood and free speech, have been extended to corporations while the rights of corporations, such as limited liability and flexible transfer of wealth, have not been extended to human beings. This arrangement puts corporations in a very powerful position. The corporate speech rights issue is important because how it is resolved will have lasting consequences that will either empower human beings or erode the significance of their voices in democratic political processes for years to come.

³⁴⁸ Tom Murse, “What is a Super PAC? Super PAC Questions and Answers,” *About.com*, 18 Aug 2012 <<http://uspolitics.about.com/od/firstamendment/a/What-Is-A-Super-Pac.htm>>.

5.2 Discussion and Viewpoints on Corporate Speech Rights

There are a range of positions constituting the debate over corporate speech rights. This section provides an overview of some of these positions so that we might observe how these perspectives play out in the landmark Supreme Court rulings on corporate speech rights featured in this chapter. Aditi Gowri opens her essay about corporate speech rights with two critical questions: “To what extent should the expression of corporations on politically or ideologically controversial issues be protected under the First Amendment? Should they have a right to free speech equivalent to that of human persons?”³⁴⁹ Critics of corporate rights such as Thom Hartmann and Ted Nace would answer both questions with a resounding “No!” Gowri belongs with them in the camp of scholars who assert that corporations are not people and cannot engage in the act of speech. These scholars argue that First Amendment protection for corporate speech creates excessive corporate involvement in politics, which contributes to the appearance and occurrence of corruption, and undermines the participation of individual citizens in democratic political processes.

“It is not only that corporations are allowed to speak on political issues,” Gowri observes, “but rather – and most disturbing – that they are provided with a mechanism (limited liability, combined with the understanding that spending is speech) to ensure that their voices will be loudest of all.”³⁵⁰ But the corporate voice does not have to be the loudest of all for the corporation’s information to be made available to the public and to inform the decision-making

³⁴⁹ Gowri 1835.

³⁵⁰ Gowri 1848.

process. It only has to be made available, and availability does not depend on corporations having First Amendment rights for political expression (in the same way that human beings have traditionally enjoyed these rights).

On the other side of the debate, Robert A. Prentice asserts that because the government has an effect on business, “It is natural, proper, and in keeping with our traditions for corporations to react to this governmental influence by entering the political arena through various means such as lobbying, electoral activity, and political advertising.”³⁵¹ Melvin Urofsky is another supporter of corporate speech rights (in the form of political expression), although he admittedly began as a critic of First Amendment speech rights for corporations.³⁵² Urofsky believes that corporations provide information that is useful to public deliberation. He supports the idea that First Amendment protection of corporate speech is good for democracy. Urofsky advances the argument that the rising cost of mass media, the primary mechanism for the dissemination of campaign messages, requires candidates to raise large sums of money from corporations. He uses this combination of factors to justify First Amendment rights for corporations:

I...still feel great sympathy for those who (legitimately) worry about the impact of large wealth on our political system. But as I explain in the Epilogue, not only is money essential to the political system, it is in fact a form of speech, and although the authors of

³⁵¹ Robert A. Prentice, “*Consolidated Edison and Bellotti: First Amendment Protection of Corporate Political Speech*,” *Tulsa Law Journal* 16 (1981): 628. See also Gowri 1850-1852 for more discussion.

³⁵² Melvin I. Urofsky, *Money and Free Speech: Campaign Finance Reform and the Courts* (Lawrence: University of Kansas Press, 2005).

the McCain-Feingold law had idealistic praiseworthy goals, they failed to take into account realities other than abuses – the realities of how U.S. politics is financed, how it has operated for many years....³⁵³

From Urofsky's point of view, distinguishing between what is real and what is ideal is crucial. While it may be ideal to have strong regulations of the campaign financing activities of corporations, it is not realistic because corporate financing of elections has long been a necessary part of our democratic political processes, and should therefore be embraced, not scorned.

Robert Kerr brings a perspective that bridges several differences between supporters and critics of corporate speech rights.³⁵⁴ He joins Prentice and Urofsky in acknowledging the increasing costs of media and accepts that the need for campaign finance cannot be subordinated or ignored. Several of his works recognize that corporations do have perspectives worthy of public consideration and necessary to public deliberation. At the same time, some of Kerr's views are consistent with critics of corporate speech rights. Like Gowri, he is cautious of First Amendment protections for corporations' political expression because the voice of big business is exactly that – big – big enough to potentially drown out the voices of everyday, average Americans.

³⁵³ Urofsky, *Money and Free Speech* xi.

³⁵⁴ See Robert L. Kerr, "A Justice's Surprise that Has Stood Its Ground: The Enduring Value of the Commercial-Speech Doctrine's Powellian Balance," *Journalism and Communication Monographs* 13.4 (2012): 214-284; Kerr, "Naturalizing the Artificial Citizen: Repeating Lochner's Error in Citizens United v. Federal Election Commission," *Communication Law and Policy* 15.4 (2010): 311-363; Kerr, *The Rights of Corporate Speech*.

While critics like Hartmann and Nace blame the Supreme Court for “giving America” to corporations, Kerr’s analysis frames the situation in a different light. His work – particularly on *Citizens United* – shows how the decision can be understood in terms of “Lochner’s Error.”³⁵⁵ Used colloquially, the phrase “Lochner’s error” is used to describe an instance when the court takes an arbitrary, artificial, and discursive (i.e., non-natural) relation and naturalizes it as if were the normal order of things, occurring without discursive, human intervention. Kerr’s analysis also shows how corporate speech rights can be understood as legal constructions produced through judicial writ, sometimes against the social and political pathos of the nation.³⁵⁶

The U.S., for example, was the only country at the turn of the century with regulatory laws designed for the express purpose of reigning in the activities of big business.³⁵⁷ Kerr explains that:

The concerns about big business focused upon the growing perception of the lack of a corporate “soul.” By that expression...citizens of that time could mean many things, but

³⁵⁵ It is beyond the scope of this project to delve too deeply into this case beyond offering a brief description to contextualize the reference above. In *Lochner v. New York* (1905), the Supreme Court ruled that a state law designed to protect bakers by limiting bakers’ working hours to ten hours a day and sixty hours a week, for health and safety reasons, violated the bakery owner’s Fourteenth Amendment rights including due process of law. The bakery owner argued that the state should not be allowed to determine how long his workers worked because that violated the “liberty of contract” aspect of the due process clause, which stated that employers and employees can enter into any contract that they see fit. So for the state to determine a businesses’ or employees’ working hours would be a violation of the liberty of contract. The Supreme Court sided with Lochner. The problem with this ruling was that workers by the nature of being workers were not in an equal position of power with their employers to effectively bargain for appropriate work hours. The liberty of contract clause is ideal in relations of equals, but this was a relation of unequal power. So by siding with the baker, the Court essentially gave the employer/company the power to treat its workers any way that it wanted, under the guise of supposed equality inherent in the liberty of contract clause. The Court’s error here was that it accepted the baker’s regulations as natural rather than man-made and in doing so naturalized an artificial relation of exploitation. See *Lochner v. New York*, 198 U.S. 45 (1905). See also Kerr, “Lochner’s Error” 311-363.

³⁵⁶ This was the case with the issue of corporate personhood in *Santa Clara*, where the Court’s ruling created a new form of personhood on par with that of human beings.

³⁵⁷ Kerr, *The Rights of Corporate Speech* 8.

they worried most about the inability of the giant corporations to maintain a personal relationship with human beings. They feared that Americans were being reduced simply to “units of consumption” by the corporations.³⁵⁸

Reducing America’s citizens to “units of consumption” is entirely contrary to the idea of a nation of civic-minded individuals such as the forefathers had envisioned.

Significant resistance to corporate power continued because many viewed big businesses as encroaching on human rights and freedoms, especially in the realm of politics. The election of President McKinley in 1896 served to highlight this point:

The general concern over corporate power around the turn of the century had been catalyzed into major reform efforts by such revelations as wealthy financier Marcus A. Hanna having raised huge contributions from corporations, including \$250,000 from Standard Oil (the equivalent of some \$5 million today), for William McKinley in his defeat of populist William Jennings Bryan in the presidential campaign of 1896.³⁵⁹

The McKinley-Hanna incident is just one example of how early in our nation’s history there was a clear correlation between contributions from large corporate coffers and campaign wins. Awareness of these correlations influenced the introduction of the Tillman Act of 1907, which prohibited corporations from direct financial involvement in federal elections. The Tillman Act ushered in decades of significant separation between business and political arenas. During the second half of the twentieth century, all of that began to change.

³⁵⁸ Kerr, *The Rights of Corporate Speech* 7.

³⁵⁹ Kerr, *The Rights of Corporate Speech* 18.

5.3 The Powell Memo – A Catalyst for the Corporate Rights Movement

As was the case during the Industrial Revolution, the American business community of the 1960s and 1970s was concerned about its public image. Environmental pollution, civil rights violations, consumer abuses, and other scandals had taken a toll on the public perception of capitalism and corporations at a time when America's political and economic direction was still contestable. In 1971, Lewis F. Powell, Jr., former corporate attorney and head of the American Bar Association, was asked by his friend and associate Eugene B. Syndor, Jr. to share his thoughts on how to provide a more "balanced view" of capitalism in America.³⁶⁰ Powell did far more than that. His pivotal memorandum, "Attack on American Free Enterprise System," helped to strengthen the 1970s corporate rights movement.³⁶¹

In the memo, which was distributed to U.S. Chamber of Commerce members, Powell characterized capitalism as under assault from the left. A smart man by any measure and an astute student of history, he was not totally opposed to criticism of big business, but he feared the destruction of the political/economic system that defined what he saw as the American way of life:

There always have been critics of the system, whose criticism has been wholesome and constructive so long as the objective was to improve rather than destroy. But what now concerns us is quite new in the history of America. We are not dealing with sporadic or

³⁶⁰ This took place the year before his confirmation as a Supreme Court justice.

³⁶¹ Lewis F. Powell, Jr., "Attack on American Free Enterprise System," Memorandum, 1971, Rpt. on *Reclaim Democracy.org*, 15 Dec 2011 <<http://law.wlu.edu/powellarchives/page.asp?pageid=1251>>. The corporate rights movement of the 1970s can be characterized as an organized effort by business leaders to set a political, cultural, and social agenda to improve the public impression of big business, to expand corporate influence, and to shape the political, cultural, and social landscape in the U.S. in ways consistent with the principles of economic liberalism.

isolated attacks from a relatively few extremists or even from the minority socialist cadre. Rather, the assault on the enterprise system is broadly based and consistently pursued. It is gaining momentum and converts.³⁶²

Powell was not so much concerned that there were critics. Rather, he was concerned that popular criticism of big business was gaining so much traction. Powell was also disturbed by the business community's reaction to these attacks, asking his colleagues, "What has been the response of business to this massive assault upon its fundamental economics, upon its philosophy, upon its right to continue to manage its own affairs, and indeed upon its integrity?"³⁶³ His answer was unapologetic:

The painfully sad truth is that business, including the boards of directors and the top executives of corporations great and small and business organizations at all levels, often have responded – if at all – by appeasement, ineptitude and ignoring the problem.... They have shown little stomach for hard-nose contest with their critics and little skill in effective intellectual and philosophical debate.³⁶⁴

Powell chastised the business community as a father would a son who was afraid to "ring the bell" of an opposing player on the gridiron. He nearly mocked his colleagues for what he called "appeasing" their enemies. After all, business people are supposed to be tough. They do not shrink from their problems, they crush them, or they buy them if the price is right.³⁶⁵

³⁶² Powell 1.

³⁶³ Powell 2.

³⁶⁴ Powell 2.

³⁶⁵ I am referring to the stereotypical conception of a businessperson's behavior.

To Powell, an ideological war was being waged against big business from many sectors of society including academia, the media, and the political arena, and it required a serious response. At stake was the very survival of the free enterprise system and the livelihoods of the businesspeople who profited from it. Powell encouraged business leaders to replace the strategy of appeasement with a much more aggressive, proactive counter-attack. “The time has come – indeed, it is long overdue – for the wisdom, ingenuity and resources of American business to be marshalled against those who would destroy it,” he told the business community.³⁶⁶ He then elaborated this macro-position with specific recommendations:

Independent and uncoordinate activity by individual corporations, as important as this is, will not be sufficient. Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in political power available only through united action and national organizations.³⁶⁷

Powell’s assertions are consistent with the ideological principles of neoliberalism, and he states plainly what corporations need to do to set things right: combine their large sums of money with political influence to promote and legitimate the interests of the corporation in ways that lead to less regulation, more rights for corporations, and likely higher profit margins. Powell recognized that business leaders would need to work together because, while an individual corporation was strong, a collectivity of corporations would be unstoppable.

³⁶⁶ Powell 3.

³⁶⁷ Powell 3.

Like the more enlightened business tycoons of the Industrial Revolution, Powell advised that public relations would have to play a key role in shaping more favorable perceptions of big business and capitalism. In addition to incorporating strong public relations strategies, winning this ideological war would require even more modes of outreach. Therefore, a key focus for Powell was acquiring more influence in academia. He suggested several augmentations to correct what he saw as an academic imbalance favorable to the left. His memo advised that the Chamber should consider acquiring a staff of scholars and speakers who could become a part of campus life, and he thought the business community should evaluate textbooks to ensure that business and capitalism were portrayed favorably.³⁶⁸

Perhaps one of his greatest revelations was outlined in the aptly titled section of the memo, “Neglected Opportunity in the Courts.”³⁶⁹ Here, Powell advised the American business community to use the judicial system as a way to shore up its position in society. He wrote, “Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change.”³⁷⁰ Powell seemed to view the courts as under-exploited terrain through which big business could change the laws, enter other sectors of society, influence policy, and otherwise advance its ideological aims. Powell concluded his memo with a simple but urgent warning that “business and the enterprise system are in deep trouble, and the hour is late.”³⁷¹

³⁶⁸ Powell 4-5.

³⁶⁹ Powell 6.

³⁷⁰ Powell 6.

³⁷¹ Powell 7.

“Attack on American Free Enterprise System” was not the only catalyst in the movement toward expanded corporate rights, but it was a significant one. Powell’s memo must have resonated because members of the business community responded with a sense of urgency. The same year that Powell’s memo was distributed, Joseph Coors, head of the multi-million dollar brewery business, donated the first \$250,000 to launch what eventually became the Heritage Foundation, a conservative think tank. The following year, Frederick Borch of General Electric and John Harper of Alcoa launched the Business Roundtable, an influential association comprised of CEOs from the top U.S. corporations who believe that “businesses should play an active role in the formation of public policy.”³⁷² Former Treasury Secretary and corporate speech rights advocate William Simon summed up the movement’s goal: to create a “counter intelligentsia that would help business regain its ideological footing.”³⁷³

The response to Powell’s memo was impressive.³⁷⁴ Perhaps the most dramatic incident occurring in the wake of the memo’s distribution was Powell’s subsequent ascension to the Supreme Court, having been nominated that same year by President Nixon. Interestingly though, Powell’s memo was not made public until after his confirmation. This was perhaps a strategic move intended to protect him from the public perception that his strong views would influence his decisions as a member of the nation’s highest court. As Nace notes, “Powell identified closely with the goals of big business both ideologically and personally.”³⁷⁵

³⁷² Business Roundtable, “About Us,” 1 Nov. 2012 <<http://businessroundtable.org/about-us/>>.

³⁷³ Cited in Nace 143.

³⁷⁴ Powell’s memo was likely not the only catalyst for the apparent renewed energy in the corporate rights movement, but it played an important role.

³⁷⁵ Nace 139.

While it is impossible to say precisely how Powell's ideological principles would influence his decision-making as a Supreme Court justice, one cannot reasonably argue that his ideological principles had no bearing whatsoever on his decisions. Like any other human being, Powell's life experiences must have shaped his world views somehow. As James White explains, "Any judge brings a basic set of values and orientations to his or her work."³⁷⁶ It is important to remain cognizant of the ideologies judges may hold, because ideologies are a central form of action by which our social environments are produced.³⁷⁷ With these considerations in mind, it is appropriate to turn attention toward *Buckley* and *Bellotti* to see what sorts of ideological principles emerge from these Supreme Court rulings.

5.4 *Buckley* Transforms Money into Speech and *Bellotti* Declares Corporate Speech Indispensable

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."³⁷⁸ Just like the Fourteenth Amendment was created to protect human beings from discrimination, the First Amendment was intended to protect their right to speak freely. Both amendments, however, were appropriated by corporations with the help of the Supreme Court. An important step in extending the corporation's right to speech in the form of political expression was the transformation of money into speech that took place with *Buckley v. Valeo* (1976).

³⁷⁶ James B. White, *Heraclides' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, WI: The University of Wisconsin Press, 2005) 47.

³⁷⁷ Gowri 1849.

³⁷⁸ See U.S. Const., amend. I.

In *Buckley*, the Supreme Court upheld that limits on financial contributions to political campaigns were permitted, but concluded that limits on expenditures were unconstitutional under the First Amendment.³⁷⁹ Expenditures and contributions share an important commonality in that both are substantively money; however, the language in the Court's *per curiam* decision rhetorically construed them as substantially different.

To make this rhetorical reconfiguration of the meaning of money work, the majority defined contributions as “gifts” to candidates in which the person giving the money does not express a political viewpoint. Contributions do not count as political expression, according to the Court, because the recipient of the money, not the person who donated it, determines how the financial contribution will be used; thus, following the Court's logic, the gifted money must be regulated because it may *or may not* be used as political expression.³⁸⁰ Contributions were construed as bolstering the overall wealth of the candidate, and not as facilitating political expression in the form of speech. As a result, the Court concluded that supporters could not give, i.e., contribute, as much money as they wanted to political candidates or campaigns, because unlimited contributions could lead to the appearance or reality of corruption and undermine public confidence in the democratic political system.³⁸¹

Unlike contributions, the Court characterized expenditures as political expressions that were understood to represent the viewpoint of the person making the expenditure, not of the candidate who received funds.³⁸² Expenditures were therefore deemed as deserving of First

³⁷⁹ *Buckley v. Valeo*, 424 U.S. 1 (1976) 20-22; 45-47.

³⁸⁰ *Buckley v. Valeo*, 424 U.S. 1 (1976) 19-21; 46-47.

³⁸¹ *Buckley v. Valeo*, 424 U.S. 1 (1976) 143.

³⁸² *Buckley v. Valeo*, 424 U.S. 1 (1976) 20-22; 45-47.

Amendment political expression protection. Walter Greene summarizes, “The Supreme Court draws a distinction between money as a contribution and money as an expenditure and allows contributions to be more regulated than expenditures.”³⁸³

The Court, including Justice Powell, used the following justification to strike down limitations on expenditures:

It is clear that a primary effect of these expenditure limitations is to restrict the quantity of speech by individuals, groups, and candidates. The restrictions, while content neutral as to the ideas expressed, limit political expression “at the core of our electoral process and of the First Amendment freedoms.”³⁸⁴

Everyone would agree that protecting political expression is foundational to the ideals expressed in the First Amendment. But the Court is not simply talking about the traditional understanding of political expression that is based on the physiological speech of human beings. They are also talking about protecting expenditures which are large sums of money from artificial entities like corporations.

To resolve these substantive differences, the Court conflates money with speech and places money alongside speech at the core of our democratic political processes. This conflation is entirely consistent with the ideological principles of neoliberalism, which aim to bring all social relations into the domain of the market. When money counts as political expression, the democratic political process becomes just another marketplace with votes reified as commodities for exchange. This conflation results in what Greene has conceptualized as “money/speech,” defined as “the overdetermined articulation of money and advocacy that can appear in different

³⁸³ Walter Greene, “Rhetorical Capital: Communicative Labor, Money/Speech, and Neoliberal Governance,” *Communication and Critical/Cultural Studies* 4.3 (2007): 329.

³⁸⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976) 39.

rhetorical forms: political advertisements, oratory, lawn signs, lobbying.”³⁸⁵ Thus, the Supreme Court’s ruling in *Buckley* paved the way for the creation of money/speech, arguably the preferred language of the “economic man.”³⁸⁶

After establishing that money was speech – or at least a certain type of money in expenditures – the Court’s was in a position to claim that the government had no right to curtail its flow:

The concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed “to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”³⁸⁷

The judicial desire to include as many voices as possible within public and political discourse is consistent with the values and aims of our nation’s forefathers, and supports the ideals of the Constitution. However, the language of the Court’s majority obscures the fact that the corporation’s innate wealth and power may create conditions where their well-financed voices drown out the expression of natural persons in both volume and frequency.

³⁸⁵ Greene 329.

³⁸⁶ It is important to recognize that political campaigns are expensive. Large sums of money are required to publicize messages in the mass media, contributing to conditions where attracting funding, even corporate funding, is viewed as necessary. There are many discussions on campaign finance and campaign finance reform, however it is beyond the scope of the current study to delve too deeply into those discussions, and necessary to maintain a focus on money/speech and its implication for human agency.

³⁸⁷ *Buckley v. Valeo*, 424 U.S. 1 (1976) 48-49.

Thus, while the *Buckley* decision was rendered in the name of increasing and diversifying expression, it could actually reduce sources of antagonism and interfere with the free exchange of ideas by allowing those with more money to buy more speech, and subsequently, more influence. The implication here is that the perspectives of the moneyed would come to dominate the marketplace of ideas in the same way that big trust companies of the Industrial Revolution crushed or gobbled up their competitors in order to dominate the market resulting in less, not more, choice for consumers. Despite these dangers to democracy, the ruling nevertheless declared, “A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”³⁸⁸

The four justices dissenting from the decision countered the following claims put forth by the majority: 1) that the money of corporations was the same thing as the speech of human beings; and that 2) reducing spending reduced the amount of speech available, including the number and depth of issues discussed. Chief Justice Warren Burger characterized the majority’s reasoning as flawed and suggested that the decision compromised the efficacy of Congress’s campaign finance reform efforts.³⁸⁹ Justice Blackmun summed up the problem succinctly: “I’m not persuaded that the Court makes, or is indeed able to make a principled constitutional distinction between contribution limitations, on the one hand, and the expenditure limitations, on the other, that are involved here.”³⁹⁰ Justice Marshall pointed out that the perception that wealth

³⁸⁸ *Buckley v. Valeo*, 424 U.S. 1 (1976) 19.

³⁸⁹ Justice Burger’s dissent in *Buckley v. Valeo*, 424 U.S. 1 (1976) 235-236.

³⁹⁰ Justice Blackmun’s dissent in *Buckley v. Valeo*, 424 U.S. 1 (1976) 290.

wins elections may “undermine public confidence in the integrity of the electoral process,” and discourage potential candidates without great wealth from participating in the political arena.³⁹¹

Like Blackmun, Justice White’s criticism stemmed from the seemingly impractical nature of the majority’s opinion:

It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf. Yet the Court permits the former while striking down the latter limitation.... As an initial matter, the argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much.³⁹²

These dissenting opinions acknowledge that it is impossible to limit one form of spending as speech, leave another unrestricted, and then remain confident that unrestrained spending of any kind will not compromise democratic political processes. *Buckley’s* dissenting justices clearly see that establishing money as speech, in any way, enables those with great wealth to transform their economic advantages into political power, which compromises the very virtues of the First Amendment that the judiciary is supposed to protect.

There have been no shortages of scholarly critiques of *Buckley* concerned about the Supreme Court’s transformation of money into speech. Dale Herbeck, for example, described *Buckley’s* effects as a “curious scheme”:

³⁹¹ Justice Marshall’s dissent in *Buckley v. Valeo*, 424 U.S. 1 (1976) 288-289.

³⁹² Justice White’s dissent in *Buckley v. Valeo*, 424 U.S. 1 (1976) 261.

Congress could limit contributions to candidates, but not the total amount spent by a campaign. Those who sought to influence the political process soon devised legal ways to circumvent the limits on individual contributions. One easy way to get around the limits on “hard money” (contributions to candidates) was to give “soft money” (contributions for activities such as voter awareness campaigns) to political parties. The law also allowed third parties – citizens groups, unions or corporations – to spend their own money on “issue ads.” These ads were legal as long as they did not instruct voters to “vote for,” “elect,” or “vote against” a particular candidate.³⁹³

While *Buckley* was not a corporate speech rights case in the purest sense, these distinctions between “hard” and “soft” money also ushered in a new wave of corporate advocacy fueled by lobbyists and PACs who could flood electoral processes with soft money contributions more easily than ever before. Essentially, *Buckley* provided a legal pathway for corporate money to infiltrate politics.

Another way to understand the *Buckley* ruling and its implications is offered by Kerr, who provides the following summary:

The Court upheld limits on contributions to candidates but struck down limits on expenditures in support of candidates. The Court reasoned that direct contributions represent a potentially corrupting influence on democratic processes but concluded that independent expenditures did not. The decision didn’t directly address the First Amendment questions on the use of corporate funds in election campaigns, but it did

³⁹³ Dale A. Herbeck, “The High Price of Free Campaign Speech,” *Spectra* 48.2 (2012): 3.

signal a shift in jurisprudence regarding the corporation. *Buckley* altered the relationship between spending and speech and made it constitutional for contributors to corporate segregated funds (political action committees) to participate in election campaigns on a collective as well as individual basis.³⁹⁴

Commentary from Herbeck and Kerr captures the key implications of *Buckley*. The Court's characterization of expenditures as speech in *Buckley* provided a legal pathway for corporations and other organizations to circumvent limitations on political contributions. In doing so, the Supreme Court fundamentally changed the traditional and differential relationship between spending and speech, opening the door for corporate spending to be treated as if it were the political expression of American citizens.

Two years later, in *First National Bank of Boston v. Bellotti* (1978), the Court more directly extended First Amendment protections for corporate political expression or free speech rights. In *Bellotti*, the First National Bank of Boston wanted to publicize its views in opposition to a proposed tax referendum.³⁹⁵ The problem was a Massachusetts statute that prohibited the bank and other businesses from "making contributions or expenditures for the purpose of influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."³⁹⁶ The bank challenged the constitutionality of the statute, arguing that it abridged their First Amendment rights.

³⁹⁴ Kerr, *The Rights of Corporate Speech* 19.

³⁹⁵ *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

³⁹⁶ *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) 767-768.

The state maintained that the statute should be enforced because corporate participation in the political process could introduce undue influence in the debate, improperly shape the outcome of the referendum vote, or destroy the people's confidence in both the democratic process and the government's integrity. Essentially, the central issue in *Bellotti* concerned whether a state could stop corporations and other groups from using their funds to publicize views on issues unrelated (or tangentially related) to their corporate businesses. The Massachusetts Supreme Court upheld the statute, siding with the state over the bank. The bank's lawyers appealed to the Supreme Court. In a tight 5-4 decision, the Supreme Court sided with the bank.

The U.S. Supreme Court claimed that the lower court had sought to address the wrong question: whether and to what extent corporations have First Amendment rights. The majority opinion was authored by Justice Powell. It said, "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether section 8 abridges expression that the First Amendment was meant to protect. We hold that it does."³⁹⁷

Here, the Court reframed the question in a way that allowed them to avoid directly addressing the broader and more controversial issue of corporate speech rights, while rendering a decision with serious implications for that very issue. Gowri points out that shifting the substance of the discussion from corporate speech rights to protecting political expression permits Powell to frame the decision as consistent with the principles of the First Amendment. Gowri writes:

³⁹⁷ First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 776.

The decision in *Bellotti*, per Justice Powell, explicitly disavows any intention to attribute First Amendment speech rights to corporations. The issue, he insists, is not whether corporations *have* First Amendment rights equivalent to those of human beings but rather whether the Massachusetts law being challenged “abridges *expression* that the First Amendment was meant to protect.”³⁹⁸

Thus, the Court appears to use this new question to interpret the First Amendment as always-already intending to encompass corporate speech even though there is no reference to corporations or artificial persons in the First Amendment. Justice Powell went on to clarify the Court’s understanding of the First Amendment:

The First Amendment was to protect the free discussion of governmental affairs. If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporations, association, union, or individual.³⁹⁹

By emphasizing protection for the type of expression (i.e., speech) and minimizing the significance of the speaker, the Court’s majority ignores the inextricable relationship between the message and the speaker who delivers the message. They seemingly disregard rhetorical history and theory as well as go against common-sense understandings that hold that what is said is almost always as important as who said it. To illustrate this assertion with a simple example, the

³⁹⁸ Gowri 1837.

³⁹⁹ First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 776-777.

phrase “You’re fired” carries very different weight when said by your boss than when said by your secretary.

The language of the majority also declares corporate speech “indispensable.” The majority almost constructs an image of corporations as entities in danger of marginalization or oppression. Notice the choice of words in the beginning of the passage: “If the speakers here were not corporations....” This rhetorical volley seems to show a concern that corporations might become voiceless victims were it not for the protection of the Court. What Justice Powell and the majority do not acknowledge is that there is a desire to regulate the speech *precisely because it is speech from a corporation*. Many people believe that the money and power of the corporate form position it to wield unfair amounts of influence and to use its influence in unfair ways. This potential for unfairness is what necessitates the regulation of corporate speech. The majority opinion, however, remains sympathetic to corporations. I argue that the sympathy expressed in the *Bellotti* opinion authored by Justice Powell is similar to that found in his memo to the Chamber of Commerce written years earlier.

If we consider those two texts – “Attack on American Enterprise System” and *Bellotti* – in chronological order, we can see a connection between a judge’s ideological orientation and his rulings from the bench.⁴⁰⁰ Powell’s 1971 memo clearly laid out a plan for expanding corporate influence, with specific mention of using the courts as a means to gain that control. Then, a few years later, he authors a ruling that expands the scope of corporate speech rights, which functions primarily to protect the flow of corporate money into political elections and

⁴⁰⁰ See White 47; Nace 139.

ultimately, to increase corporate influence in democratic political processes. I claim that these events are neither isolated nor disconnected. They are united in their support for the ideological principles of neoliberalism that favors private enterprise and the expansion of corporate rights.

In a dissenting opinion Justice White, joined by Justices Brennan and Marshall, offered an interpretation of the First Amendment that was very different from the one offered by the majority:

An examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principle function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.⁴⁰¹

While Justice Powell and the majority construct an ontological conflation between corporations and human beings, the dissenting justices draw attention to the ontological differences between humans and corporations as a way to explain why their differential treatment under the First Amendment is necessary.

Unlike human beings, corporations are artificial, contractual, legal entities created by people under law to further economic goals. As such, they have been given substantial advantages not available to natural persons such as limited liability, perpetual life, special rules for the efficient accumulation and distribution of wealth, and flexible taxation of assets.

Gowri further clarifies these differences within the context of speech rights:

⁴⁰¹ Justice White's dissent in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) 804-805.

Corporations need not be accorded the same speech rights as human beings because they are just not the kinds of beings that can express themselves in the ways that humans do. Indeed, they have no selves to express. When we act as though there is such a thing as corporate speech or a corporate speech right, we are actually really discussing the extent of expression permissible to some human persons who speak under the corporate aegis and at corporate expense.⁴⁰²

The dissenting justices neither conceal these fundamental facts about the corporate form, nor do they sidestep them. “The special status of corporations has placed them in a position to control vast amounts of economic power, which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process,” remarks Justice White.⁴⁰³

This rhetorical, ideological analysis of *Buckley* and *Bellotti* shows how each landmark ruling functioned to expand corporate rights and the scope of corporate power. The *Buckley* decision expanded it indirectly and *Bellotti* expanded protection for corporate political expression under the First Amendment more directly. The judicial redefinition of money as speech in *Buckley* provided a pathway for increased corporate participation in democratic political processes. Now corporations could spend money to influence the outcome of political elections, and this spending was protected as First Amendment free speech. The characterization of corporate speech as indispensable to the decision-making process in a democracy in *Bellotti* functioned to justify First Amendment protections for corporate spending, and this is entirely consistent with the ideological principles of neoliberalism that advocate the ongoing expansion of corporate rights. Although the language of the Court in both rulings focused on protecting a

⁴⁰² Gowri 1840.

⁴⁰³ First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 809.

type of speech – expenditures vs. contributions – and increasing the public’s access to information (disseminated by corporations), the result was protection for a particular kind of speaker – the corporation – and a particular kind of speech – spending. The conflation of speech and spending functions to efface the inherent and innate differences between human beings and corporations, as well as their communicative needs.

In *Bellotti*, the majority’s opinion gives the impression that individuals and institutions are ontologically identical, or at least identical enough to have similar First Amendment free speech rights. On the surface, this interpretation of the relationship between “persons” (individuals and corporations) and Constitutional rights appears to equalize or democratize access to First Amendment rights among types of “persons.” However, upon closer inspection, it actually privileges corporate speakers by extending to them the rights of individual flesh-and-blood human beings without extending to human beings the legal entitlements of corporations. While the language of the majority appears matter-of-fact and neutral in terms of tone and style, the action performed through its discourse is decidedly pro-corporate. First Amendment rights for corporations most directly benefit corporations because they offer further legal protection for the corporate coffers, which corporations can then use to further their “political expression” to promote and legitimate their interests – even if it means that the voices of individual and average American citizens will be drowned out of the political process. This landmark decision functions to reinforce the ideological principles of economic liberalism, which seek to free corporations from regulations and empower corporations with rights that further their economic, political, and

social interests. As Harvey points out, neoliberalism aims to bring the entirety of the human experience into the domain of the market.⁴⁰⁴ Corporate speech rights that transform money into speech help to fulfill that goal by bringing business and politics closer together in very specific ways – ones that satisfy the ideological aims of neoliberalism.

There is no doubt that *Buckley* and *Bellotti* have changed the very nature of the democratic process in this country by dramatically increasing corporate influence within the political arena. When money becomes speech, the economic advantages of corporations are transformed into political advantage.⁴⁰⁵ Not long after *Buckley* and *Bellotti*, *Citizens United* pushed the issue of corporate speech rights further, seemingly ignoring Justice White’s warning that “the State need not permit its own creation to consume it.”⁴⁰⁶

5.5 *Citizens United*: The Crowning Jewel of the Corporate Rights Movement

If *Buckley* and *Bellotti* laid the foundation for the contemporary corporate speech rights movement, *Citizens United v. Federal Elections Commission* (2010) was its crowning jewel. This decision ushered in the Super PAC and a new age of unprecedented corporate involvement in political elections.⁴⁰⁷ Reaction to the ruling was mixed. For example, a *Wall Street Journal* article published after the decision was celebratory, and its lead paragraph enthusiastically declared:

⁴⁰⁴ David Harvey, *A Brief History of Neo-Liberalism* (New York: Oxford University Press, 2005) 3.

⁴⁰⁵ Kerr, “Lochner’s Error” 324.

⁴⁰⁶ Justice White’s dissent in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) 809.

⁴⁰⁷ *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010).

Freedom has had its best week in many years.... Yesterday the Supreme Court issued a landmark decision supporting free political speech by overturning some of Congress's more intrusive limits on election spending. In a season of marauding government, the Constitution rides to the rescue one more time.⁴⁰⁸

That same day, the *New York Times* ran an editorial that strongly criticized the ruling.

This article's lead read:

With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the robber-baron era of the 19th century. Disingenuously waving the flag of the First Amendment, the court's conservative majority has paved the way for corporations to use their vast treasuries to overwhelm elections and intimidate elected officials into doing their bidding.⁴⁰⁹

Another critic said the decision "wipes out a hundred years of history" during which American laws have sought to tamp down corporate power to influence elections."⁴¹⁰

These polarized reactions indicate that the road to increased corporate speech rights was not without challenges. In fact, opposition at times came from the Court itself, as was the case in *Austin v. Michigan State of Chamber of Commerce* (1990)⁴¹¹ and *McConnell v. Federal*

⁴⁰⁸ "A Free Speech Landmark: Campaign-finance Reform Meets the Constitution," Editorial, *Wall Street Journal* 22 Jan 2010: A18, 28 Jan 2012 <<http://online.wsj.com/article/SB10001424052748703699204575016843479815072.html>>.

⁴⁰⁹ "The Court's Blow to Democracy," Editorial, *New York Times* 22 Jan 2010: A30, 12 Dec 2011 <<http://www.nytimes.com/2010/01/22/opinion/22fri1.html>>.

⁴¹⁰ David D. Kirkpatrick, "Lobbyists Get Potent Weapon in Campaign Finance Ruling," *New York Times* 22 Jan 2010: A1, 12 Feb 2012 <<http://www.nytimes.com/2010/01/22/us/politics/22donate.html>>.

⁴¹¹ *Austin, Michigan Secretary of State, et al. v. Michigan State of Chamber of Commerce*, 490 U.S. 652 (1990).

Elections Commission (2003).⁴¹² Both Supreme Court rulings functioned to limit corporate speech – or perhaps more precisely, to limit the amounts of money corporations could spend on political candidates and campaigns – as well as the ways in which that money could be spent.⁴¹³ In many ways, these rulings functioned to tame the excesses of *Buckley* and *Bellotti*'s expansion of First Amendment rights for corporations. A brief overview of these cases helps to put the Supreme Court's *Citizens United* decision into proper context.

In *Austin*, business corporations were forbidden from using general treasury funds to make independent expenditures in elections.⁴¹⁴ The Court ruled that corporate treasuries are a corrosive threat in elections, not because of the *amount* of their wealth but because that wealth derives from special advantages innate to the corporate form and unavailable to human beings.⁴¹⁵ The central point here was that the Court recognized the significant and specific advantages of the corporate form and restricted political speech precisely because the speaker in question was a corporation. In *McConnell*, the Court ruled to prevent corporations from using their general corporate treasury funds “directly or indirectly to elect legislators who could advance the corporate interest over the public interest.”⁴¹⁶ In essence, *Austin* and *McConnell* functioned to

⁴¹² *Mitch McConnell, United States Senator, et al. v. Federal Elections Commission*, 540 U.S. 93 (2003)

⁴¹³ In his essay “Naturalizing the Artificial Citizen,” Kerr points out that “after the death of Chief Rehnquist and with the retirement of Justice O’Connor, the appointments of Chief Justices John G. Roberts Jr. and Justice Samuel A. Alito Jr. created majority support for expanding protection for corporate media spending” (321).

⁴¹⁴ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); See also Kerr, “Lochner’s Error” 320.

⁴¹⁵ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); Kerr, “Lochner’s Error” 320.

⁴¹⁶ *McConnell v. Federal Elections Commission*, 540 U.S. 93 (2003); See also Kerr, “Lochner’s Error” 321.

limit corporate speech rights and distance the democratic political process from the undue influence of corporate wealth and power. The *Citizens United* ruling essentially removed these safeguards.⁴¹⁷

The situation began when Citizens United, a nonprofit corporation dedicated to advancing a conservative political agenda, wanted to increase promotion and expand distribution of the documentary, *Hillary: the Movie*. The 90-minute film, previously released on DVD, criticized then Senator Clinton and encouraged the public not to vote for her in the 2008 Presidential primary election. To better publicize *Hillary*, Citizens United wanted to broadcast television advertisements and distribute the documentary using a Video-on-Demand (VOD) cable service. That activity – advocating the election or defeat of a candidate by using mass media channels within thirty days of a primary – is called “electioneering.” Electioneering was permissible under federal law if corporations used money from their political action committee (PAC) but not from their general treasury funds. Although Citizens United had a well funded PAC with millions of dollars and could legally use those funds to promote and distribute *Hillary*, the nonprofit instead wanted to use money from its general funds, which violated Federal Election Commission (FEC) laws.

Citizens United’s members had good reason to believe that their plans to publicize *Hillary* would be met with civil and criminal charges. As a remedy, they sought injunctive relief. It was denied and the nonprofit took their case to the Supreme Court. Lawyers for Citizens United argued that *Hillary* was “just a documentary” and that VOD was not a mass distribution

⁴¹⁷ The brief overview of *Austin* and *McConnell* is offered here as context for my study on landmark Supreme Court decisions. It is beyond the scope of this chapter to provide an in-depth analysis of these cases. However, it is in scope to provide the overview that shows how the Supreme Court has not always ruled in the favor of corporations in corporate speech rights cases. In addition, a brief overview of these rulings that limited corporate speech rights allows us to see the magnitude of the Court’s expansion of corporate speech rights in the forthcoming analysis of *Citizens United*.

service, so therefore their promotion plans should not be considered electioneering. The Supreme Court disagreed. Then Citizens United's lawyers asked the Court to make a one-time exception that would temporarily lift the ban that prevented the nonprofit from promoting *Hillary* as intended. The FEC even agreed to a one-time exception in this case. Members of the Supreme Court, however, had a very different solution in mind. They believed that making a one-time exception was too narrow and left too many restrictions in the way of the "indispensable" political expression of corporations.

The Court's approach to this case may be familiar. It is similar to the one seen in *Bellotti*, when the Court was asked one very specific question about corporate speech rights but instead reframed the question, shifting the agenda. In *Citizens United*, the Court again did not address the specific focus of the case: namely, how, in this particular situation, Citizens United should publicize the documentary film. Instead, the Court expanded the scope of their decision beyond protecting the speech of one group, Citizens United, to protecting all corporate speakers in this controversial 5-4 decision. A passage from the majority opinion delivered by Justice Kennedy states,

"We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity.

No sufficient governmental interest justifies limits on the political speech of non-profit or for-profit corporations."⁴¹⁸

⁴¹⁸ *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010) 365.

On the other hand, the dissent thought the speaker's identity mattered:⁴¹⁹

If taken seriously, our colleagues' assumption that the identity of the speaker has no relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protections to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could "enhance the relative voice" of some (i.e., humans over others, i.e., corporations).⁴²⁰

As the dissent points out, if one accepts the majority's logic, it is possible to conclude that the First Amendment was intended to allow any speaker to participate in American democratic political processes, including foreign-owned interests that could possibly be terrorist-owned and operated. This is a consequence of the Court's refusal to acknowledge the significant differences between human beings and business organizations, and to regulate speech according to these differences.

The majority, on the other hand, maintains that there is a need for the Supreme Court to protect corporations from government malfeasance, with malfeasance rhetorically constructed as government regulation and oversight. It is difficult to understand why the Court's majority has a fear of its own government but appears to have no fear that foreign nations and organizations, *as corporations*, might easily use the *Citizens United* ruling to directly (and negatively) influence American politics. The majority's confidence in corporations is exemplified by their statements:

⁴¹⁹ I quote these passages at length and back-to-back to demonstrate the deep philosophical divide over this issue among the Court's justices.

⁴²⁰ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) 424.

“independent expenditures, including those made by corporations, do not give rise to corruption, or the appearance of corruption.”⁴²¹ The comments articulate the neoliberal ideological principles that suggest situating social relations (including political relations) as market relations reduces corruption instead of contributing to it.

There is a familiar theme reoccurring throughout the majority’s opinion. It is the same one that was expressed in the Powell memo and again by the Court in *Bellotti*: that absent, the protection of the Court, corporations would become powerless or voiceless victims of governmental discrimination. But what is the probability or possibility that the modern corporate form could become a voiceless victim? At this stage of advanced capitalism, when corporations have permeated every aspect of the human experience,⁴²² that seems unlikely, yet that fear appears to permeate Supreme Court rulings on corporate speech rights.

This abiding concern for the welfare of the corporation is entirely consistent with the principles of economic liberalism, which presuppose an antagonistic relationship between government and business. Within this framework, advocacy for private enterprise is imperative because otherwise what is perceived as overreaching and arbitrary government policies would unreasonably constrain economic liberties. Consistent with the Powell memo, such advocacy activities would appropriately include the ongoing expansion of corporate legal rights such as the First Amendment right to free speech.

⁴²¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) 314.

⁴²² See Stanley A. Deetz, *Democracy in an Age of Corporate Colonization: Developments in the Communication and Politics of Everyday Life* (Albany, NY: State University of New York Press, 1992).

It is also important to remember that, although the language of the Court's majority admonishes limitations placed on political speech (and the negative consequences that might result if corporate speech were limited), the issue at hand is really about limiting corporate spending. This central issue is spending because, at the most fundamental and practical level, money is not speech. Money can only become speech via discursive and symbolic relations.

The end result of the *Citizens United* decision was that the Court stripped away the last remaining restrictions on corporate political spending and ushered in a new era of "Super PACs," not bound by the old PAC rules, which regulated contributions more stringently.⁴²³ "Because they are not bound by the old contribution limits, these super PACs have the ability to outspend the candidate's official campaigns," which means that a super PAC can directly influence the decision-making of political candidates. I would argue this invites not only the appearance of corruption but the opportunity to corrupt.⁴²⁴ As Hartmann explains, "If a corporation likes a politician, it can ensure he is elected every time; if it becomes upset with a politician, it can carpet-bomb her district with a few million dollars' worth of ads and politically destroy her."⁴²⁵

Some might argue that the re-election of President Obama in 2012 contradicts Hartmann's assertions. Others might argue that it confirms them. To that I would respond that the full ramifications of the 2010 *Citizens United* ruling for federal as well as state elections remain to be seen, and that we have not yet witnessed all of the political magic that corporate money can make. What we know for sure, however, is that *Citizens United* allows corporations and other wealthy organizations to spend money from their general funds in political elections on

⁴²³ The only requirement now is that candidates have to eventually disclose (some of) their funding sources.

⁴²⁴ Herbeck 6.

⁴²⁵ Hartmann 171.

a candidate's behalf without restraint so long as the spending is not coordinated with the candidate, and this will have lasting as well as unanticipated implications for electoral politics for years to come.

Hartmann sums up the *Citizens United* decision as “a naked handoff of raw political power to corporate forces.”⁴²⁶ If we accept his basic premise here, it is reasonable to conclude that the ideological principles of neoliberalism that appeared in *Buckley* and were expanded by *Bellotti* have become canonized by the *Citizens United* ruling: money is speech; the “speaker’s” identity is now “irrelevant;” unlimited corporate political spending is protected by the First Amendment; and the “voices” of corporations are now “indispensible” parts of our democratic process.

Despite the risk of corruption facilitated by *Buckley* and *Bellotti* and now most recently by *Citizens United*, Justice Kennedy justifies the majority's reasoning:

Corporations and other associations, like individuals, contribute to the “discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.” The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons.⁴²⁷

Justice Kennedy puts corporations and other forms of inanimate organization on the same ontological plane as individual human beings. For him and the majority there seems to be no meaningful differences between natural and artificial persons, human beings and corporations.

⁴²⁶ Hartmann 183.

⁴²⁷ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) 343.

The opposite is true for the dissent, whose members seem to have little trouble identifying the significant ontological differences between human beings and corporate entities.

Justice Stevens articulates some of the basic differences:

Unlike natural persons, corporations have “limited liability” for their owners and managers, “perpetual life,” separation of ownership and control, favorable treatment of the accumulation of assets...that enhance their ability to attract capital and to deploy their resources in ways that maximize their return on shareholders’ “investments.” Unlike voters in U.S. elections, corporations may be foreign controlled.⁴²⁸

Justice Stevens also elaborates on these differences even further to drive home the ontological differences between corporations and human beings:

Corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our constitution was established.⁴²⁹

Nevertheless, the language of the majority avoids the clear and present differences between humans and corporations in ways that ultimately function to protect corporate personhood and justify corporate speech rights.

In an opinion concurring with the Court’s majority, Justice Scalia offered this revelation: “Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public

⁴²⁸ Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) 465.

⁴²⁹ Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) 466.

debate.”⁴³⁰ Of course, this statement immediately initiates questions. If corporations are the “principal agents of the modern free economy,” then what are human beings? Has human agency become a tangential, auxiliary afterthought? Returning to Gowri’s earlier point, what kind of social world would we have if corporations were “the primary agents”?

The idea that corporations are “the principal agents” in society and are deserving of human rights could only become an acceptable premise in a society where the principles of economic liberalism have achieved ideological dominance. In fact, the very ideas that money equals speech and that natural and artificial persons are more similar than different are neoliberal fictions in the most fundamental sense.

Justice Stevens’ dissent highlights the strange logic undergirding the majority’s arguments that corporations are people, too, and that money equals speech:

Today’s decision is backwards in many senses. It elevates the majority’s agenda over the litigants’ submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over procedural holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality.⁴³¹

⁴³⁰ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) 393.

⁴³¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) 479.

In this passage, Justice Stevens improperly places rhetoric in opposition to reality, overlooking its constitutive role in the human experience. He accepts the classical, Platonic notion of rhetoric as “grounded in its differentiation from logic.”⁴³² Despite this oversimplification of rhetoric’s multitude of meanings and applications, the main point of Stevens’ argument is still salient: that the majority’s opinion instills a false perception of both the issues surrounding the *Citizens United* case and the intended purposes of the First Amendment.

The analysis offered in this chapter seems to support an observation that others have also identified:

Attempts by corporations (and their lawyers...) to usurp American democracy are nothing new.... Corporatism has always been a threat to democracy. The problem was that corporations were gaining increasing traction in what had become a dire conflict with democracy itself. The rights of “natural” persons were losing ground at an accelerating pace, and in 2010 things got a whole lot worse very, very fast.⁴³³

The *Citizens United* ruling is a key reason why things deteriorated so quickly. Now, a relatively long tradition of limiting corporate power in politics has been all but erased. Despite the Tillman Act of 1907, the FEC Act of 1971, *Austin*, the Bipartisan Campaign Reform Act (BCRA)/McCain Feingold 2002,⁴³⁴ and *McConnell*, corporate free speech rights are now fully ingrained into the American legal system.

⁴³² Ernesto Laclau, *On Populist Reason* (London and New York: Verso 2007) 12.

⁴³³ Hartmann 174.

⁴³⁴ For an in-depth discussion of BCRA, see Kerr’s “Naturalizing the Artificial Citizen” 2010, 321-323.

With *Citizens United*, now more than ever, these assertions from Hawkes ring true: “Money is not merely a convenient vehicle for exchange; money has significance, it means something. In short, money talks, and it speaks the language of ideology. If money has grown more progressively abstract and less material over the course of its historical development, the same might be said of the things people buy with it.”⁴³⁵ I would only add that money speaks the language of a particular ideology, neoliberal ideology, which has shown a tendency to put everything up for sale – even democracy.

The Supreme Court’s latest ruling on the issue of First Amendment speech rights for corporations contributes to the ongoing ontological conflation between natural and artificial persons. Corporate rights are expanding and human agency often contracts under the weight of great institutional power. That is why the political speech of corporations needs to be more appropriately regulated and also why the institutional power of corporations requires the kind of serious and thorough interrogation that ideological criticism can provide.

This chapter shows how statements made by the Supreme Court in landmark rulings on corporate speech rights have expanded corporate rights, protected corporate money, enabled corporate political influence, and helped corporations become one of the most – if not the most – powerful institutions in the U.S. and in the world. This chapter also showed that those rulings were not merely neutral interpretations of the law, but instead represented a particular ideological orientation. The analysis of *Buckley*, *Bellotti*, and *Citizens United* revealed the ideological principles of economic liberalism and neoliberalism operating within these texts as money was transformed into speech; corporate speech was declared indispensable; the speaker deemed irrelevant; and corporations were crowned the principal agents of our modern, free economy. In

⁴³⁵ Hawkes 9.

addition to the principles of economic liberalism being present in the text, they were also reproduced through the rulings, with each ruling advancing the aims of big business such as the protection of private enterprise, the expansion of corporate rights, and the growth of corporate power and influence. Because corporations are such pervasive institutions, they should have a role in the public sphere, but they should not have direct influence in democratic political processes. This is because political processes are not market relations and should not be treated as such. It is important to acknowledge that corporations are not people in the same way that human beings are people. They cannot speak in the same ways that humans can; spending and speech are different. Natural and artificial persons need to be treated differently.

Through an examination of the trinity of corporate power in personhood, voice, and speech, this study has revealed that the modern corporation is an ontological scandal emerging out of the Supreme Court's treatment of property as people from *Santa Clara* in 1886 to *Citizens United* in 2010. Despite these judicial reifications, the significant ontological differences between human beings and corporations mean that corporations should not have the same constitutional rights as natural people. We (as in human beings, and American citizens in particular) should take meaningful steps to address this ontological scandal.

6. CONCLUSIONS: THE ONTOLOGICAL SCANDAL OF CORPORATE PERSONHOOD AND THE TRINITY OF CORPORATE POWER

This study began with three critical questions: What are some of the primary sources of corporate power? What is the ideological, rhetorical relationship between the U.S. Supreme Court, corporate rights, and corporate power? And finally what are the implications of the corporation, as legally configured today, for the human experience? This conclusion addresses each critical question and explains what this study teaches us about rhetoric, ideology, and their functions as critical, analytical tools capable of exploring the evolution of the modern corporate form through key Supreme Court decisions on corporate rights. In addition, I explain how corporate personhood, voice, and speech rights contribute to the ontological conflation of natural and artificial persons – human beings and corporations. In order to provide such explanations, the dissertation embarked upon an analysis of key Supreme Court decisions on corporate rights. The authoritative and influential nature of Supreme Court discourse proved to be useful texts for study. A close reading of these texts showed how the ontological scandal of corporate personhood played out on the terrain of landmark Supreme Court decisions on corporate rights. I will summarize how these processes unfolded and their implications. Ultimately, this dissertation provides a new way to look at the corporation, understand its evolution, and the sources of its power.

6.1 The Primary Sources of Corporate Power

To address the first question, what are some of the primary sources of corporate power, I argued that there are three primary sources of corporate power: its personification under the Fourteenth Amendment, the development of its voice, and finally, its acquisition of First Amendment speech rights for political expression. In the previous chapters, I have tried to show

how each of these developments in the corporation's evolution were also important aspects of corporate power. Individually, each development contributed to the rise of corporate power in the U.S. Collectively, however, they form a trinity of corporate power, with the first element – personification of the corporation under the Fourteenth Amendment – setting the stage for an unfurling of corporate rights that would dramatically change how human beings experience the social world.

The trinity can also be contextualized as a veritable trifecta of corporate power, because trifecta captures both the chronological and speculative nature⁴³⁶ of the evolution of corporate power via the three primary sources I have highlighted in this study – personification under the Fourteenth Amendment, the development of the corporate voice, and the acquisition of First Amendment speech rights for political expression. It also accounts for the fact that if any of these phases of the corporation's evolution or aspects of its power were to be missing or if they had never occurred (and in the order in which they occurred), then it is unlikely that the modern corporation would have developed as it has; its power would have been unable to become so pervasive. All three pieces of this “corporate power puzzle” were prerequisite for the corporation's rise to institutional hegemony. These assertions are strengthened when we take into account a few alternative and hypothetical scenarios that omit a key component of the trinity. It is worth taking a moment to imagine what would have happened if there were no Fourteenth Amendment-based corporate personhood, no corporate voice, or no First Amendment free speech rights for corporations.

The significance of *Santa Clara* – and its role as a primary contributor to the evolution of the corporate form and its power – becomes magnified if we consider what might have

⁴³⁶ Speculative because there was no guarantee that the corporation would have developed as it has, especially during the nascent stages of its evolution.

happened had the ruling gone the opposite way; that is, if the personification of the corporation had remained limited to the *Trustees of Dartmouth College v. Woodward* (1819) rules.⁴³⁷ The corporation still may have been able to develop a voice through the public relations field, but how that voice developed and to what uses it was put would have remained tightly controlled or at least significantly constrained by individual states, which issued and controlled corporate charters. Similarly, the acquisition of corporate speech rights would have probably come to fruition in some way. However, it likely would have been on a much smaller scale because some states may have permitted corporations to have very liberal speech rights while others may not have done so.

If the personification of the corporation under the Fourteenth Amendment had never taken place and if corporations were regulated by *Dartmouth* rules, it is possible that the transformation of money into speech would have occurred, but the reach of that money/speech would have only gone so far, because limiting the geographic reach of corporate speech rights to particular states would have significantly constrained the corporation's ability to influence political policies and electoral outcomes broadly on a national level. Thinking through these alternate scenarios highlights the individual significance of each aspect of the trinity of corporate power as well as illuminates the interdependent nature of the relationship between Fourteenth Amendment personification of the corporation, the corporate voice, and corporate speech rights as key sources of corporate power. I will continue to elaborate this point by imagining the corporation without a voice.

Although corporations were personified under the Fourteenth Amendment and emerged at the end of the nineteenth century as very wealthy persons, without a voice they would have

⁴³⁷ *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

been left with the raw, vulgar power of the corporate police forces that were far too often popular mechanisms of corporate persuasion during labor conflicts. This method of persuasion relegated the corporation to the status of a repressive state apparatus (RSA). Because repression is often met with resistance, the development of the corporate voice was one of the most important aspects of the development of corporate power. As a non-violent form of persuasion, the corporate voice served a transformational function, moving the corporation from an RSA to an Ideological State Apparatus (ISA), because it enabled the corporation to persuade with ideas and words instead of bullets and clubs.⁴³⁸ Public relations as the corporate voice was a key instrument through which pro-corporate attitudes, beliefs, and values were (and still are) disseminated to the public and woven into everyday practices, becoming taken-for-granted norms.

From the Industrial Revolution to the 1970s and beyond, it appears that the corporate voice has played a significant role in establishing a corporate-friendly ideological orientation in society that functions to legitimate the corporation as a worthy and benevolent member of the human community attuned to major social issues, and with its own unique perspective to share.⁴³⁹ This rhetorical positioning of the corporation by the corporate voice functioned as a primer, setting the stage for the forthcoming corporate speech rights movement of the 1970s. Essentially the personification of the corporation in conjunction with the development of its “voice” functioned to make the idea of corporate speech rights a conceptual possibility, and

⁴³⁸ It is possible that violence and the corporate voice did operate together at times and that turn-of-the-nineteenth-century corporations did not stop using violent tactics when public relations and the corporate voice were discovered. However, the corporate voice provided an important alternative form of corporate persuasion, eventually becoming the dominant mode of corporate persuasion, replacing overt violence.

⁴³⁹ Robert L. Kerr, *The Rights of Corporate Speech: Mobil Oil and the Legal Development of the Voice of Big Business* (New York: LFB Scholarly Publishing LLC, 2005).

eventually a legal reality. Noting the significance of an idea for transforming the socio-political arrangement, Ernest J. Wrage wrote, “The study of ideas provides an index to the history of man’s values and goals, his hopes and fears, his aspirations and negations, to what he considers expedient or inapplicable.”⁴⁴⁰ The way that the Supreme Court has ruled on key corporate rights cases is in many ways indicative of what the Court, and what society, finds expedient. The battles fought on the court are emblematic of the battles fought in society.

The achievement of corporate speech rights for political expression was the crowning jewel in the trinity of corporate power. Even if corporations were persons with a voice, without speech rights the contemporary political power corporations hold today would have been nearly impossible to achieve. Without First Amendment free speech rights for political expression, corporate speech would have been restricted to commercial speech, which requires a higher level of truthfulness in communications and did not permit the political expression of corporations. The acquisition of free speech rights are what provided the corporation entry into the political arena. Acquiring speech rights, or perhaps more aptly put, the “fusion of money/speech,”⁴⁴¹ made the corporation a much more powerful political player on the national stage. It enabled the tremendous wealth of corporations to be used to influence the outcome of democratic political elections because, when money counts as speech, corporations are well positioned to use their vast treasuries to out-shout – or rather outspend – average citizens. This means that the corporate person is able to have the loudest voice of all. When the corporate voice is the loudest, the voices of other persons are prevented from entering the marketplace of ideas, while the ideas and policies of the corporation circulate prominently and dominantly in the public sphere.

⁴⁴⁰ Wrage 451.

⁴⁴¹ Walter Greene, “Rhetorical Capital: Communicative Labor, Money/Speech, and Neoliberal Governance,” *Communication and Critical/Cultural Studies* 4.3 (2007): 327-331.

To briefly summarize, my research reveals that personification, voice, and speech are each independently key contributors to rise of the modern corporation and its power. In addition, my study illuminates the less obvious fact that when these three components of corporate power function collectively, as a trinity, they produce what is arguably among the most powerful entities the world has ever known – the modern corporation.

6.2 Supreme Court Rulings and the Value of Rhetorical Analysis

The “red thread,” or unifying device, running through each of these aspects of corporate power – its personification, its voice, and its speech rights – is, of course, the Supreme Court. This leads to the discussion of the second critical question: what is the nature of the relationship between the Supreme Court decisions that compromised the textual objects of study and corporate power?⁴⁴² It would be a dramatic oversimplification to suggest that the Supreme Court has only served as an enabler of corporate power, since many of its rulings have served as a check on corporate power.⁴⁴³ But it is also quite true that several key Supreme Court rulings have functioned to enable, expand, and protect corporate power in ways that have dramatically transformed society. This transformation has tended to further corporate interests, which are predominantly wealthy interests, while too often jeopardizing both the interests and agency of average citizens.⁴⁴⁴ Lax environmental regulations that allow corporations to legally pollute air,

⁴⁴² The phrase “red thread” is a colloquialism for something that connects everything else. It is a metaphor and/or description for a unifying device.

⁴⁴³ I offered two examples of this with *Austin* and *McConnell* as discussed in the previous chapter. The historic Affirmative Action rulings of the Civil Rights movements, in which American businesses were forced to racially integrate their workforces, would be another example.

⁴⁴⁴ The interests of corporations and average citizens are not always at odds. However, because the corporation is such a hegemonic force and often persuasive in its communications, it is often difficult to determine where the interests of natural and artificial persons diverge and converge. Thus this dissertation aimed to explore how some of those interests played out in key Supreme Court decisions on corporate rights.

soil, and water sources are an easy example. Another example would be the predatory lending practices that led to the housing market crash that began in 2008.⁴⁴⁵

My ideological analysis of the Supreme Court rulings in this study reconfirms two important findings about judicial discourse. First, it demonstrates that judicial discourse, including Supreme Court discourse, should not be thought of as always-already neutral and objective. We should reevaluate our acceptance of what William Lewis characterizes as “the dominant presumption of legal legitimacy...that, properly applied, the process of adjudication can achieve reasonably just and objective results, restrain individual passions and prejudices, and apply the law fairly among cases and across time.”⁴⁴⁶ This is not to say that the law does not sometimes operate objectively and neutrally. In some cases, at some points, in some instances, it may.⁴⁴⁷ What my analysis aimed to show is that we can no longer afford to accept taken-for-granted, unquestioned assumptions of the law as objective and impartial – especially when it comes to judicial discourse and Supreme Court decisions concerning corporate rights. Approaching legal discourse from a rhetorical perspective helps to pierce its surface-level meanings. It facilitates complex judgments about the meanings, functions, and implications of judicial decisions.

A rhetorical analysis of legal discourse that takes Philip Wander’s assertion that “no credo, however lyrical, authentically expressed or truly believed should escape cross-

⁴⁴⁵ See *The Debate over Corporate Social Responsibility*, Eds. Steve May, George Cheney and Juliet Roper (Oxford: University Press, 2007) 219-231. See also Josh Hanan’s “Home is Where the Capital Is: The Culture of Real Estate in an Era of Control Societies,” *Communication and Critical/Cultural Studies* 2.2 (2010): 176-201.

⁴⁴⁶ William Lewis, “Of Innocence, Exclusion, and the Burning of Flags: The Romantic Realism of the Law,” *The Southern Communication Journal* 60.1 (1994): 5.

⁴⁴⁷ It is beyond the scope of this particular study to go any deeper with examples. I am merely leaving conceptual room for the possibility.

examination”⁴⁴⁸ seriously, moves us in the right direction because it provides a more multifaceted complex understanding of legal discourse and its societal implications. It helps us to recognize the potential for partiality in the law and identify instances of partiality when we see it. It helps us to accept that authoritative discourses such as Supreme Court rulings can be – and in the case of corporate personhood, voice, and speech rights, actually are – ideological and, as my study has shown, function to promote and legitimate the interests of corporations. Because ideologies are not merely beliefs, but have a material component that emerges when played out in human interactions to produce forms of truth, they become especially salient and influential when articulated through authoritative discourses such as Supreme Court decisions.

6.3 The Role of Economic Liberalism

As my investigation into the three phases of the corporation’s evolution unfolded, in conjunction with my exploration of the key Supreme Court rulings on corporate rights, a particular kind of ideology operating in judicial discourse began to come into clearer view – the ideology of economic liberalism. The ideological principles of economic liberalism, and in the case of its most recent iteration, neoliberalism, hold that private property should be protected, corporate rights should be expanded, and the free market should have as few restrictions as possible because, if left unfettered, it is capable of appropriately regulating economic, social, political and cultural relations. While the principles of economic liberalism are not inherently problematic, they can become problematic when they function ideologically to reproduce inequality in the economic marketplace and in the marketplace of ideas. Inequity prohibits any marketplace from functioning optimally and living up to its ideals. My analysis attempted to extend the conversation on corporate rights and power by showing how the ideological principles

⁴⁴⁸ Philip Wander, “The Ideological Turn in Modern Criticism,” in Ed. Carl R. Burghardt, 2nd ed. (State College, PA: Strata Publishing, Inc., 2000) 108.

of economic liberalism played out in each of the key Supreme Court decisions addressed in this dissertation.

While exploring the origins of corporate power via an analysis of *Santa Clara*, it became apparent that the racial component invoked with *Santa Clara*'s use of the Fourteenth Amendment was not the only aspect distinguishing it from *Dartmouth*. Of equal importance were the economic possibilities for corporations that opened up under the *Santa Clara* ruling's application of Fourteenth Amendment personhood. The Fourteenth Amendment's due process and equal protection clauses, intended to protect human beings from state discrimination, also functioned to insulate the corporation from state taxation and regulation. These legal protections facilitated the rapid amalgamation and protection of corporate wealth during the late nineteenth and early twentieth centuries.⁴⁴⁹ Additionally, aware that lax labor laws positively impacted corporate profits, corporations used the Fourteenth Amendment to avoid laws attempting to limit the number of hours employees could work per day, even though these laws were designed to promote human health, worker well-being, and overall safety. In *Santa Clara*, the ideological principles of economic liberalism not only undergird the Supreme Court's ruling in favor of the corporation, they were also reproduced by it. The ruling dramatically expanded the scope of corporate rights, paved the way for corporations to receive more constitutional rights, and ultimately contributed to the growth of corporate power.

In *Nike v. Kasky*, the ideological pillars of economic liberalism again emerged, this time in Nike's response to the allegations of hazardous labor practices as well as in the Supreme Court's ruling, or rather non-ruling, on the case. Let's first begin with Nike. Company leaders

⁴⁴⁹ Of course I am not advocating that corporations should be taxed wantonly by states. I am merely pointing out how corporations were able to take advantage of the Fourteenth Amendment's protection from an economic standpoint because it reduced the number of taxes they would have to pay.

were likely aware of the less-than-ideal working conditions in factories where some of its products were made, even though its public relations campaign seemingly aimed to persuade key stakeholders (and the public) that laws were not violated. The goal of the campaign was to convince the public and key stakeholders that wrongdoing had not occurred in an effort to preserve the company's reputation, which would serve the additional purpose of preserving corporate profits. The financial motivations arguably made this a case of commercial speech. In addition, Nike's use of the corporate voice also seemed more indicative of the strategies and tactics of Bernays and Hill, because it aimed to promote and legitimate the dominant interests of the corporation in an effort to preserve profits.

Ethical approaches to public relations such as those espoused by Arthur Page, suggesting that the corporate voice be truthful and that the profit motive be relegated to its appropriate place below societal well-being, were not readily evident in Nike's public relations campaign. Similarly, the more recent symmetrical, two-way communication approaches to public relations in which communicative power is shared between parties did not have a strong presence in the campaign. In short, Nike's public relations campaign provides a recent example of how the ideological principles of economic liberalism can emerge through the corporate voice in public relations contexts. In addition, the Court's response was also problematic to critics. By *not* ruling on the case, the Court allowed the issues of corporate personhood and speech rights, including their limits, to remain untouched. Because there was no ruling, the rights of big business were protected, yielding an outcome consistent with the ideological principles of economic liberalism.⁴⁵⁰

⁴⁵⁰ In pointing out the outcome of the non-ruling, I am not attributing intentionality. The outcome is the outcome and its implications persist regardless of the intention.

Perhaps the quintessential example of the ideological principles of economic liberalism evidenced in Supreme Court decisions is found in cases where the Court transformed money into speech. This trajectory of transformation may continue. For example, the Supreme Court recently agreed to hear a case concerning limits on federal campaign contributions that could possibly reduce the overall cap on “contributions made directly to political candidates and some political committees.”⁴⁵¹ According to Liptak, that case, *McCutcheon v. Federal Election Commission*, No. 12-536, “may turn out to be the most important federal campaign finance case since the court’s 2010 decision in *Citizens United*.”⁴⁵² From *Buckley* to *Citizens United*, the Court has frequently ruled in ways that would further the expansion of corporate spending rights redefined as free speech rights. These decisions allow corporate money to directly infiltrate and influence democratic political processes, empowering modern corporations to use their profits to shape a variety of laws and policies that both pertain and do not pertain directly to their business operations.

Taken together, all of these decisions on the rights of corporations show an ideological orientation of economic liberalism dating back to *Santa Clara*. This pattern of economic liberalism interwoven into Supreme Court decisions on corporate rights functioned both directly and indirectly to expand corporate rights and to spread corporate power and influence throughout society, facilitating the corporation’s rise to institutional hegemony. This leaves us with critical question number three: what are the implications of the corporation for the human experience?

⁴⁵¹ Adam Liptak, “Justices Take Case on Overall Limit to Political Donations,” *New York Times*, 13 Feb. 2013 <<http://www.nytimes.com/2013/02/20/us/politics/supreme-court-to-hear-campaign-finance-case.html?pagewanted=all>> para 1.

⁴⁵² Liptak para 1.

6.4 The Racial Implications of the Corporation

The “birth” of the corporation has introduced what I would call a “role reversal,” both literally and metaphorically. In 1885, pre-*Santa Clara*, corporations had to obey people. Today, it seems that it is the people who must obey the corporations. Most of us work when, where, and how corporate policies mandate. We vote under the influence of their politically-sponsored advertisements, and we have essentially come to accept the corporation as an everyday part of our lives, fully imbued into the fibers of the human experience. Our society has fully embraced Mark’s “economic man.” But as my study has shown, this has been no automatic feat. It was part of the long and complicated process of reification that began to unfold during the transatlantic slave trade (also known as the triangle trade).

In the early days, slavery was less about racism and more about money and profit.⁴⁵³ Racism emerged as a fiction to mask the exploitive economic relations of slavery while also allowing its benefactors to reap the financial rewards of the cruel system. As the triangle trade grew, and the logics of capitalism evolved, the black body – or perhaps more accurately stated, the human bodies of people from the continent of Africa – became more and more closely associated with property. As property to be bought, sold, loaned, traded, and shared, an entire system of commodification sprung up all around this body such that the person was no longer even thought of as a person. Through the enduring and reifying logics of capitalism, the black person was only conceivable and visible as a commodified and commodifiable property form. Nowhere was this more evident than in the case of the *Zong*.

The *Zong* incident is so chilling because of its naked display of the logics of capitalism. Aboard the *Zong*, the ideological principles of economic liberalism were so preeminent that the

⁴⁵³ Eric Williams. *Capitalism and Slavery* (Chapel Hill, NC: The University of North Carolina Press, 1944).

human being's innate value as a human being – and in the tradition of Christianity, as a child of God – is completely and thoroughly eclipsed by a man-made, arbitrary property value. This arbitrary property value formed the basis of the insurance value that served as the only evidence of the captured African person's existence.

No matter how many times one hears it, the story of the *Zong* is still shocking. Yet we really should not be surprised at the ways the ideological principles of economic liberalism, in conjunction with the reifying logics of capitalism, function to assign everything, and *everyone*, a price. Recall how, prior to the *Zong*, the British officials tallied payments for people injured in service of the Crown – a few pounds for a damaged leg, a few more for lost eyesight. What both incidents demonstrate – the *Zong* and the payments by the Crown – is that the ideological principles of economic liberalism are transformative in their reconfiguration of humans as things. Nothing is sacred. Everything can be reduced down to a medium of monetary exchange. Under the logics of capitalism that developed during the triangle trade, we see vividly an ontological scandal take place: when human beings from Africa were transformed into property for sale on the world market.

In *Santa Clara*, the same ideology of economic liberalism that operated during the triangle trade continued to operate within the Supreme Court. The Court's ruling in favor of the railroad company can be understood as the logic of reverse reification at work: instead of a person being transformed into a thing/property, the thing/property – the corporation – was treated like a human person by being given the rights of American citizens. When the Court permitted the Fourteenth Amendment to be used to extend the rights of personhood to the corporation, they (knowingly or unknowingly) engaged in another ontological scandal involving artificial and natural persons: they allowed an artificial person to be treated as a natural one.

This subsequent ontological scandal, displaying the reifying logics of capitalism, was facilitated by the prior ontological scandal – the triangle trade. The destabilization of the conceptual categories of “person” and “property” initiated by the triangle trade contributed to the destabilization of the notion of “person” and “property” in *Santa Clara*, where the property of the rich – the corporation – was treated in some instances as equal to, or perhaps better than, actual people by the Supreme Court. Recall that between 1868 and 1911, only twenty-eight of the 604 Supreme Court rulings involving the Fourteenth Amendment dealt specifically with the protection of the rights of African Americans. In those twenty-eight cases, the Court upheld or protected African Americans’ rights only six times.⁴⁵⁴ The Court selected an overwhelming number of Fourteenth Amendment cases concerning corporations and ruled to protect the personhood rights of corporations far more frequently than the personhood rights of the humans the amendment was created to protect. Thus, *Santa Clara* significantly contributed to the ontological scandal between natural and artificial persons by ascribing rights to corporations that were intended for human beings.⁴⁵⁵

⁴⁵⁴ Doug McAdam, *Political Process and the Development of Black Insurgency: 1930-1970* (Chicago: University of Chicago Press, 1982) 71.

⁴⁵⁵ It is true that *Dartmouth* also contributed to the ontological conflation of people and corporations by being the first case to legally personify the corporation in American jurisprudence. However, the language of the Supreme Court in *Dartmouth* identified differences between corporations and people, relegating corporate personhood to a status below the personhood of human beings. In addition, *Dartmouth* also emphasized limitations and regulations for corporations by relegating corporations to state control. I focus mainly on *Santa Clara* because, unlike *Dartmouth*, its ruling emphasized no ontological or philosophical differences between natural and artificial persons, and, in doing so, contributed to their ongoing conflation and confusion.

What made *Santa Clara's* personification of the corporation so scandalous was that a law intended to help poor blacks was appropriated to help rich whites and to protect their property in the corporation.⁴⁵⁶ This point was echoed by Justice Hugo Black many years ago when he wrote:

In 1886, this Court in the case of *Santa Clara County v. Southern Pacific Railroad*, decided for the first time that the word “person” in the amendment did in some instances include corporations. [...] The history of the amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. [...] The language of the amendment itself does not support the theory that it was passed for the benefit of corporations.⁴⁵⁷

Justice Black's assertions here have been addressed more recently. For example, Critical Race Theory, which began as a field of study in the 1980s, focuses on the racial constitution of the law as well as its racial implications. It also exposes the ways in which laws intended to support racial equality sometimes function to reinforce and reproduce racial inequality.⁴⁵⁸ Drawing from Critical Race Theory, my study reveals these racialized roots of the corporation, and it shows that the raced, black body served as the ontological and legal foundation upon which the corporate body was formed in American jurisprudence. This finding supports the theoretical assertions of Critical Race Theory, which hold that when race is placed at the center of the

⁴⁵⁶ Because this study focuses on the role of race in the formation of the corporation, the Fourteenth Amendment in relation to the newly freed slaves, which were poor black people, is emphasized with acknowledgement that the Amendment also had other important functions. See U.S. Const., amend. XIV.

⁴⁵⁷ *Connecticut General Life Insurance Company v. Johnson*, 303 U.S. 77 (1938) 87.

⁴⁵⁸ For a comprehensive overview on Critical Race Theory and its perspectives on the law, see Kimberle Crenshaw et al., eds., *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995). See also Stephen M. Best. *The Fugitive's Properties: Law and the Poetics of Possession*. Chicago: University of Chicago Press, 2004.

discussion (as opposed to the periphery or not considered at all), unique and important insights are revealed that might have otherwise remained invisible.

The reifying logics of capitalism fueled by the ideological pillars of economic liberalism did not end with the personification of the corporation under the Fourteenth Amendment. *Santa Clara* was only the beginning. The development of the corporate voice continued this process of ontological conflation. While *Santa Clara* contributed to the reification of the corporation by assigning it human rights, the public relations field contributed to the reification of the corporation by endowing it with another human feature – a voice. The acquisition of a voice augmented the cold “thingness” of the corporation with, in Marchand’s words, a *soul*. The corporate voice performed not only a legitimating function – justifying the need for business organizations in the corporate form to exist – but also an important humanizing function. It rhetorically constituted the corporation as a well-meaning person with a point of view and something positive to contribute to society. The corporate voice shaped the values, beliefs, and attitudes of American society toward the corporation, encouraging people to accept the idea that corporations are people too.

The ontological scandal of personhood continued with the corporation’s acquisition of First Amendment political expression rights. While the First Amendment was intended to protect freedom of the press, there is no evidence to suggest that the First Amendment was intended to also protect the political expression of artificial persons in the form of corporations. This point was clearly articulated by numerous dissenters on the Court over many years in cases concerning corporate speech rights. Yet the Supreme Court’s extension of First Amendment speech rights to political expression for corporations extended the reifying logics of capitalism further by treating a thing in the corporation as a human person. Conflating the corporation’s ability to spend money

with the physiological capabilities of human beings to produce speech is reification at its best. Not only does it discursively graft a human quality onto an inanimate object, but the act of giving a corporation speech rights also functions to reinforce the ontological confusion between, and conflation of, natural and artificial persons by treating these two very different “life forms” as if they were identical.

From the triangle trade onward, we see that the ideological principles of economic liberalism contribute to the reifying logic of capitalism by first transforming people into things and later treating things as people via Supreme Court rulings on corporate rights. While this process of reification has its roots in the racial subjugation of the triangle trade, it has evolved beyond race, ultimately affecting human beings broadly regardless of race. First Amendment speech rights for corporate political expression affect human agency of all people as does the persuasive “sound” of the corporate voice. These processes of reification have culminated in the formation of arguably the world’s most powerful contemporary institution – the modern corporation: a “person” with a “voice,” “speech rights,” and staggering amounts of wealth at its disposal, and all natural persons should be concerned.

As Gowri put it: “The central issue is whether a corporation is the kind of entity that we believe should contribute to formulating a political climate, to making crucial political decisions (such as engaging in war), and ultimately, to building a future social world – and whether it should participate on equal terms with human beings.”⁴⁵⁹ As the reader might gather, I believe the answer here is “no.” Corporations are not the kind of entity that human beings should want making complex decisions over life and death issues or playing a leading role in building our

⁴⁵⁹ Aditi Gowri, “Speech and Spending: Corporate Political Speech Rights under the First Amendment,” *Journal of Business Ethics* 17.16 (1998): 1850.

social world. This is because while corporations may be legally classified as people, they are not people in the same way that individual human beings are people.

Corporations are contractual entities born of the law, and while the processes leading up to the ink drying on a contract may be long and arduous, they bear absolutely no resemblance to the birth of an actual human being. Even a metaphoric comparison between the two birthing processes seems absurd. Moreover, human persons are born with a soul. Human beings (barring unfortunate circumstances) are born with a voice that acquires language and speech over time. On the other hand, a group of executives and communication professionals create the corporate voice that reinforces the idea that the corporation as an artificial person and legal entity has a soul just like human persons do. In addition, the structural motivations of human beings and corporations are fundamentally different. The corporation is an “*economic man*” as Mark described. The corporation’s focus on profit prevents it from developing the kind of sentience, compassion, and mindfulness necessary for adequately dealing with the kinds of issues that Gowri raised.

Corporations, as legal contractual entities, lack the ability to manage the types of complex issues Gowri raised because “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires,” as Justice Stevens explained so clearly in his *Citizens United* dissent.⁴⁶⁰ If we take Justice Stevens’ comments seriously, then Wolgast’s assertions that “it is implausible to treat a corporation as a member of the human community, a member with a personality (but not a face), intentions (but no feelings), relationships (but no family or friends), responsibility (but no conscience), and susceptibility to punishment (but no capacity for pain)”⁴⁶¹ become even

⁴⁶⁰ *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010) 466.

⁴⁶¹ Elizabeth Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (Stanford, CA: Stanford University Press, 1992) 86.

more significant. When we ignore these observations and warnings, and continually treat corporations as people, we contribute to the ongoing ontological conflation of natural and artificial persons – human beings and corporations – and reproduce the capitalist logic of reification that destabilized traditional notions of what it has meant historically to be a person.

All of this conflation and confusion surrounding the concept of “person” indicates that Dewey’s nineteenth-century argument remains relevant today. The transformation of the corporation into a legal person means the entire concept of the word “person” must be revisited, conceptually and ontologically. We need to think through what kinds of rights, privileges, and responsibilities should be associated with the classification of person. We should take seriously the posing of the question, should “person” be defined as an amalgamation of discursively constituted rights and privileges? Should “personhood” be accounted for in terms of a collectivity of interests? If the answer to either of the last two questions is affirmative, then there is nothing troubling about the way that the corporations are accepted and treated as people. Conversely, if we were to define “person” more narrowly in terms of the natural attributes of human beings, then we would have some work to do. Where should we begin? A good place to start is by taking a closer look at what can and should be done about the trinity of corporate power highlighted in this dissertation.

6.5 Undoing the Trinity

Because the ontological differences between human beings and corporations are so significant, it is uncomfortable to place business organizations, labor unions, and other non-human entities in the same category with human beings under the classification of “person.” Likewise, I am not necessarily comfortable with the concept of “corporate personhood,” and it might be productive to do away with the word “person” in reference to the corporation. We need

a new vocabulary to account for business organizations along with a new or revised set of laws capable of appropriately regulating the unique attributes that constitute the corporate form. This approach to the corporation should begin with the basic premise that corporations are primarily business organizations designed to achieve a profit. That fundamental premise should be the lens through which we view, talk about, and regulate the corporation. The “corporation as a business organization” should be more salient – legally, socially, economically, and culturally – than “the corporation as a person.” Conceptual, and especially legal, space between the idea of “person” and “corporation” should be encouraged until someday the gulf is so wide that the thought of their ontological conflation seems ridiculous.

Creating conceptual distance between people and corporations is admittedly more difficult than it might initially seem. This is because although corporations are not people, ontologically speaking, they are comprised of human beings who perform various individual job functions that allow the corporation to function as a single entity, as a person does. Nevertheless, corporations are not people in the traditional sense of the word. No matter how many rights intended for natural persons that the corporation is given, the corporation will never be a real person in the same way that a human being is. The corporation will always be just a cover for the body of men as Chief Justice Marshall stated in the *Dartmouth* ruling so long ago.⁴⁶²

If doing away with the concept of corporate personhood altogether is impossible or too distant of a possibility, other options should continue to be explored. In the *Dartmouth* ruling, for example, corporate personhood rights existed, but they were stringently regulated by the state, and the scope of appropriate corporate activity was more clearly defined. Now granted, *Santa Clara* occurred precisely because corporate owners and lawyers found *Dartmouth* far too

⁴⁶² Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) 636.

restrictive. But perhaps there is a yet-to-be-explored middle-ground between the strictures of *Dartmouth* and the sweeping freedoms of *Santa Clara* that could help to achieve a more appropriate balance of power between humans and corporations. Perhaps there are ways to improve the way we legally define and regulate corporate personhood. Limiting the scope of corporate personhood might provide one way to limit the scope of corporate power.

Limiting the scope and rights of corporate personhood is important because corporate personhood is the foundation of the trinity. Corporate personhood was the catalyst for the unfurling of corporate rights that functioned to transform the business organization into the most powerful of all persons. The corporate voice and speech rights function to augment the power of personhood. However, if they were limited, then the power associated with corporate personhood would also be limited.

Although some corporate leaders tend to resist limitations and regulations, I propose that the constraints could be rather reasonable. For example, we do not have to do away with the corporate voice, but is there anything wrong with requiring its communications to be true or at the very least not intentionally misleading? Similarly, we do not have to do away with corporate free speech rights, or perhaps more appropriately put, we do not have to eliminate the corporation's ability to disseminate its views to the public. But it seems reasonable to regulate the speech of corporations substantially differently than the speech of human beings, i.e., American citizens. Corporations often have important information to share that the public can use in its decision-making processes. As business organizations, however, do corporations really need First Amendment rights to corporate political expression giving them the ability to directly play an influential role in democratic electoral processes? And if leaders of a corporation are able

to express themselves politically as individual citizens, then why is it also necessary for their corporation, as a separate legal entity, to have its own political voice?

Addressing each of the components of the trinity of corporate power and defining reasonable constraints will provide a path toward limiting not only that particular aspect of corporate power, but also corporate power more broadly. In the same way that a correlation may exist between the expansion of corporate rights and the constraint of human agency, I believe there is likely a correlation between limiting corporate power and enabling human agency in ways that enhance the human experience. In my view, it comes down to achieving an appropriate level of balance in society.

6.6 Are Corporations Bad?

I do not want to leave the impression that I am against corporations. Corporations have an important role to play in society. They provide jobs, innovation, economic stability, and other important societal benefits. Corporate leaders have a vital role in shaping these efforts. Many of them do care about more than profits.

I have seen corporate executives forgo their own bonuses to ensure that employees received theirs.⁴⁶³ There have been times when they continued employee paychecks even when business operations were disrupted. During tough times of layoffs, some corporate leaders deliver the bad news to employees themselves, choosing to personally facing the pain and tears of those who lost jobs when, as corporate leaders, they could simply hire another third-party company to handle everything. The theme of George Clooney's movie *Up in the Air* (which focuses on corporate outsourcing of workforce reductions) can be observed in real life. To

⁴⁶³ For more on the value of autobiographic and autoethnographic studies in communication and public relations contexts, see Damion Waymer, "Each One, Reach One: An Autobiographic Account of a Black PR Professor's Mentor-Mentee Relationships with Black Graduate Students," *Public Relations Inquiry* 1 (2012): 398-414.

advance business goals, but more importantly to provide economic stability for their families, corporate leaders often make great personal sacrifices – children’s birthdays, spousal anniversaries, and time with family and friends. Big jobs often come with big sacrifices. Corporate leaders often struggle personally and professionally over what it means to “do the right thing.” While the corporate form, as a contractual entity does not have a soul, the men and women that make up the *human* resources of the corporation do.

Public relations scholars and professionals are well positioned to help achieve an appropriate balance of power. They can provide valuable counsel to corporate leaders on when, how and to what ends, to use the corporate voice. Public relations practitioners have to be more than “order takers” that communicate the corporate line. This means that they have to ask the tough questions, take a stand and sometimes say “no” to corporate leaders. The public relations function should encourage corporate leaders to think beyond the immediate implications of their actions and take in to account the long-term and far reaching effects as part of their corporate communication processes and as part of doing good business. My experiences in corporate America sustain my optimism that it is possible to achieve an appropriate balance of power between people and corporations.

However, it should also be noted that my optimism does not dull my critical edge. Criticism is important because it shines light on areas that might otherwise be overlooked and it facilitates a focus on areas for improvement. These are tenuous times, in large measure due to the rise of the modern corporate form. The trinity of corporate power contributes to the ontological conflation of natural and artificial persons in ways that can compromise human life and agency. This study took a critical, ideological approach to illuminate these issues in order to light a path toward creating a better social world with a more appropriate balance of power between natural

and artificial persons. In this world, human beings are the principal agents of society; they are the persons of primary concern, and their voices should not be drowned out by a chorus of spending framed as corporate speech rights.

As noted in Chapter Five, following the *Citizens United* ruling, *The Atlanta Journal-Constitution's* Mike Lukovich published an editorial cartoon, *Constitutional Convention Updated*. It featured the images of the founding fathers dressed in period attire. The logos of some of America's most popular and most powerful corporations were stamped on their chests including McDonald's, Google, DuPont and others. The George Washington lookalike stood erect, ironically, with a large Nike symbol on his suit jacket. "We the People" had been replaced with "We the Corporations." Luckovich's "update" to the Constitutional Convention offers some unpleasant hints about the type of world we may one day inhabit if the expansion of corporate rights and power proceeds without sufficient constraints. Under those circumstances, the personhood of corporations could become more important than the personhood of natural persons. The corporate voice could be unaccountable to the public, with corporate misinformation protected as political expression. Money/speech instead of good ideas and sound policies would be the primary political currency. This is not the social world the founding fathers envisioned and it is not the social world most American citizens want to live in – even wealthy ones. This is why it is in everyone's best interest to reign in the trinity of corporate power. Achieving a more appropriate balance of power between people and corporations can eliminate the ontological scandal.

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