HOW TRADITIONAL LEGAL RHETORIC'S MYTH OF NEUTRALITY SUSTAINS CAPITALISM

ELIZABETH E. BERENGUER[†]

ABSTRACT

Through the lens of critical and comparative rhetoric, this Article examines how traditional legal rhetoric—the dominant analytical framework employed in the United States legal system—sustains capitalism and preserves inequities, such as financial precarity. This Article identifies the features that traditional legal rhetoric shares with the free capitalist market and then uses those features as an analytical framework to examine two cases that align with the theme of this Symposium on financial precarity and late capitalism: Bank of America v. Caulkett and Citizens United v. FEC. Comparing these two cases, the Court uses the same analytical tools of traditional legal rhetoric, albeit in contradictory ways, to reach outcomes that align with market values at the expense of the individual. More importantly, in both cases, the Court presents traditional legal reasoning as an objective, rational, unbiased, and neutral analytical framework, even though it is not actually objective, rational, unbiased, or neutral.

This myth that traditional legal reasoning is objective, rational, unbiased, and neutral aligns with the near-identical myth that the market is an objective, rational, unbiased, and neutral place where transactions occur between individuals and entities who share similar bargaining power and play on a level field. Through these aligned myths, traditional legal rhetoric is essential to sustaining the free-market capitalism experiment. More importantly, traditional legal rhetoric cannot ever satisfactorily address the inequities of the marketplace like financial precarity because traditional legal rhetoric was never intended to be egalitarian. Thus, in order to truly begin solving the problems of capitalism, advocates must understand how traditional legal rhetoric creates inequities and challenge the form and substance of traditional legal rhetoric using other rhetorics, such as African Diasporic, Asian Diasporic, Indigenous, and Latine rhetorics. These insurrectionary rhetorics establish frameworks for challenging dominant imperialist/colonialist power, centering community, and solving the real problems of inequity created by traditional legal rhetoric.

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†. Elizabeth E. Berenguer is a professor of law and the director of the Institute for the Advancement of Legal Communication at Stetson University College of Law. Many thanks to Professor Michael D. Sousa for the invitation to be a part of this symposium and to Linda Coco, Teri A. McMurtry-Chubb, and Lucille A. Jewel, without whom this Article would have never been possible.

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INTRODUCTION

Capitalist societies condition us from an early age to accept competition, scarcity, and exclusion as a true and unchangeable societal condition. Just think of the game musical chairs. In this game, X number of children gather around X-1 chairs. Music plays while the children walk around the chairs, and when the music stops, the children all scramble for a chair. The child left out is kicked out of the game, and when the children stand up, another chair is removed for the next round. This goes on until there is only one chair left.

This game demonstrates exactly how capitalism works in an unregulated market. Wealth funnels to the dominant or most powerful player in the same way that the more powerful, dominant child always secures a chair. There is an artificiality to scarcity in both reality and in the game—there are enough chairs in the room, but they just do not count for the game, just like there is enough food and money and water and other resources in our first-world society, but they just do not count in a way that is accessible to everyone. One obvious difference is that in the game, the extra chairs are usually just placed somewhere else in the room—they are not within the control of any particular dominant person or group, instead they are visible to everyone. In the real world, however, as resources become scarcer for the masses, they are usually captured and hoarded by the dominant person or group, becoming invisible to everyone else. Eventually, if the market is left unchecked, then it busts because there are not enough resources to sustain the masses, just like the game cannot be played with just one person left standing. Once there is only one person left, the game/market resets itself and begins again.

This Article accepts the premise that financial precarity is a feature, not a bug, of late capitalism. This Article argues that the inherent injustice in unfettered, free-market capitalism can never be resolved within the

existing legal system using the currently accepted analytical framework: traditional legal rhetoric. In Part II, this Article argues that traditional legal rhetoric and the free market share certain features that are essential to sustaining capitalism, and in Part III, this Article demonstrates the mechanics of how this analytical framework functions by examining two cases: *Bank of America v. Caulkett*[1] and *Citizens United v. FEC*.[2] This Article concludes by previewing how the field of critical and comparative rhetoric—which draws from Indigenous rhetoric, African diasporic rhetoric, Asian diasporic rhetoric, and Latine rhetoric—can offer alternative reasoning paradigms to disrupt and dismantle those traditional apparatuses that have historically preserved the status quo.[3] The critical and comparative rhetoric field interrogates traditional legal rhetoric to expose its myths of neutrality, objectivity, and rationality.[4] It argues that true justice and equity cannot be achieved through traditional legal rhetoric because traditional legal rhetoric is designed to preserve the status quo, which, in capitalist societies, aligns with capitalist ideals that prioritize the marketplace and elevate the elite, wealthy class.

At least one leading constitutional law scholar has asserted that, in the Fourth Amendment context, cases turn on whether the Supreme Court justices can see the search or seizure happening to themselves.[5] If they can, the search or seizure is unreasonable, and if they cannot, the search or seizure is reasonable.[6] This Article takes this observation a step further and posits that the Court's decisions turn on how the Court imagines the result aligns with market values. Whichever party's position elevates the marketplace and benefits dominant market players will prevail. This phenomenon cannot be changed using traditional legal rhetoric—it would be like trying to dismantle the master's house using the master's own tools.[7] Instead, new tools are needed, and those tools come from critical and comparative rhetoric.

I. TRADITIONAL LEGAL RHETORIC

French philosopher Pierre Bordieu observed that "[t]he law is the quintessential form of 'active' discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the

1. 575 U.S. 790 (2015).
2. 558 U.S. 310 (2010).
3. *See generally* ELIZABETH BERENGUER, LUCY JEWEL, & TERI A. MCMURTRY-CHUBB, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE AND EQUITY (2023).
4. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 1–8.
5. Erwin Chemerinsky, Opinion, *The Court and the Fourth Amendment; The Justices Tend to Find a Violation if They Can Imagine the Search Applying to Them Personally*, NAT'L L.J., May 7, 2012, at 50.
6. *Id.*
7. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 98, 100 (Cherríe Moraga & Gloria Anzaldua eds., 1983).

law."[8] Traditional legal rhetoric—the form of legal reasoning employed by U.S. courts—is the framework courts and other legal actors use to create and interpret law.[9] It is epistemological because it both describes and creates legal realities.[10] In its descriptive mode, the speaker's perspective, which is inherently influenced by the speaker's identity and life experience, dictates what is memorialized as reality.[11] In its creative mode, it infuses the speaker's perspective within the legal meaning itself, immortalizing that perspective within the legal reality.[12] In this way, the form of reasoning cannot truly be extricated from the resultant legal meanings.[13] Thus, although it is often presented as and presumed to be objective, rational, and neutral,[14] traditional legal rhetoric is not a neutral[15] apparatus.[16]

A. Foundations of Traditional Legal Rhetoric

Traditional legal rhetoric is rooted in classical Greek rhetoric; in fact, the form of modern legal argumentation has remained virtually unchanged for thousands of years.[17] The Greeks—who are credited with inventing classical rhetoric—espoused the belief that "it is the nature of things that the few must lead and the many follow."[18] They also "believed that social hierarchy was both natural and good."[19] Classical rhetoric was used as a means to elevate the elite by providing them a platform and opportunity to speak, while excluding other marginalized people, like women and slaves, within Greek society.[20] This structure infused classical rhetoric with elite, male-dominated values, both in form and substance, because elite males were the only people allowed to engage in the process.[21] Simultaneously,

8. Pierre Bordieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 839 (1987).

9. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 9.

10. Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 SCHOLAR 255, 259–60 (2019).

11. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 9; Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMMC'N & RHETORIC: JALWD 39, 43 (2016) [hereinafter *Logocentric Categories*]; Lucy A. Jewel, *Does the Reasonable Man Have Obsessive Compulsive Disorder?*, 54 WAKE FOREST L. REV. 1049, 1055 (2019).

12. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 26.

13. *Id.*

14. McMurtry-Chubb, *supra* note 10, at 259.

15. *Logocentric Categories*, *supra* note 11, at 58–59; McMurtry-Chubb, *supra* note 10, at 259. *See generally* Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 813–14 (1992).

16. McMurtry-Chubb, *supra* note 10, at 259.

17. "Since the time of the ancient Greeks, lawyers have been presenting arguments in the same basic format." *Logocentric Categories*, *supra* note 11, at 39.

18. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 12.

19. *Id.* at 13.

20. *Id.*

21. *Id.* at 14.

minoritized people's voices[22] were intentionally and systematically excluded wholesale.[23]

Because rhetoric is epistemological, the ancient Greeks were both describing and creating realities as they developed the tenets of classical rhetoric.[24] They deployed rhetoric to capture their elitist, classist, and hierarchical worldview; in so doing, they naturally proclaimed their way of reasoning to be objective, reasonable, and neutral.[25] Moreover, they excluded anyone opposing this worldview from engaging in the meaning-making process, effectively dismissing the opposition as subjective, unreasonable, and biased.[26] In this way, the very structure of classical rhetoric created a system to elevate the elite-male worldview while excluding all others; its purpose was to preserve the position and power of the dominant elite class over the non-dominant members of society.[27]

This is the same system that endures in traditional legal rhetoric to this day, and it shares the features of exclusivity, transactionality, and binaries with the capital market.[28] In the market, "good" choices align with economic notions of rationality, which are also aligned with elite, white male values.[29] Transactions are neutral activities involving parties who are presumed to possess equal bargaining power.[30] The market is shrouded in a "veil of obviousness" that presumes participants make calculated decisions and act rationally in evaluating risks, even though most consumers are not equal players or rational actors in the marketplace.[31] The system itself "masks class difference, as well as racial and sexual inequality," among other salient issues, and it characterizes success exclusively in monetary terms.[32] In the market, there is no room for nuance; any issue that cannot be reduced to a transaction solvable with a simple mathematical equation does not have a place within the market.

In a capitalist society, this analytical framework is the ideal form of reasoning because the very structure of traditional legal rhetoric elevates elite perspectives and dismisses marginalized people's worldviews; it cannot accomplish inclusion, equity, or social justice because it was designed

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22. The term "minoritized people" acknowledges the active exclusion of certain groups by a dominant group. Collectively, minoritized people form a group larger than the dominant group, but the passive label "minority" implies that the dominant group is a majority. The term "minoritized people" more accurately spotlights the active exclusion of others by the dominant group while rejecting the implication that the dominant group constitutes a majority consensus. *See id.* at 39.

23. *Id.* at 14.

24. *Id.* at 10–11.

25. *Id.* at 14.

26. *Id.*

27. *Id.*

28. *Id.* at 12.

29. Renata Salecl, *The Nature of the Event in Late Capitalism*, 29 CARDOZO L. REV. 2333, 2341 (2008).

30. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 23.

31. Salecl, *supra* note 29, at 2337. "No matter how much we think we choose our direction in our lives rationally, it is our unconscious desires and drives which usually lead us into one direction or another." *Id.* at 2342.

32. *Id.* at 2344.

to do just the opposite.[33] That is why traditional legal rhetoric is essential to the capitalist project—the market is inherently exclusive just like traditional legal rhetoric, and it uses traditional legal rhetoric to funnel wealth away from the masses and into the hands of the wealthy elite.[34] In capitalist societies, the elite class extracts wealth at a rate that society cannot sustain in the long-term, and those outside of the elite class eventually revolt.[35] During the revolution and for some time thereafter, the non-elite class enjoys improved conditions and wealth until the dominant elite class leverages legal systems to redirect wealth from the masses into their hands.[36]

Significantly, modern capitalist hierarchies in the U.S. are more malleable than ancient Greek hierarchies were, and their composition can more easily shift over time.[37] Even so, in a modern capitalist system, an exclusive elite group will always wield power over a mass of people who are excluded from meaningful participation within the system; in late capitalism, the excluded class can be identified by their financial precarity and social insecurity.[38] Fundamentally, the market depends on an excluded class to provide both the labor and consumption necessary to sustain the market.[39] In fact, capitalism cannot work without a subjugated working class, which is why dominant market players use the legal system to advance the myth of equality amongst players while simultaneously exploiting the marketplace to mine wealth away from the masses into the hands of the few.[40]

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33. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 11.

34. Elites grew concerned when too much "wealth was flowing into the hands of ordinary people . . . ." DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS, 308–09 (2011).

35. *Id.* at 309, 310, 312–13.

36. *Id.* at 345.

37. Historically, even when elite dominance has waned, the elite class has been able to reclaim its power through the marketplace by dissolving the "economic basis in popular prosperity." *Id.* at 309.

38. In *Debt: The First 5,000 Years*, David Graeber illustrates how this has worked since the dawn of capitalism. During the 1400s, the rise in "modern science, capitalism, humanism, [and] the nation-state" ushered in "materialist philosophies, a new burst of scientific and philosophical creativity—even the return of chattel slavery." For a time, the elite class's dominance waned due to "endless catastrophe" related to the Black Death and the associated economic downturn. Meanwhile, ordinary farmers and laborers enjoyed increased wealth, which gave them power to resist elitist efforts to control them through freezing wages and "t[ying] free peasants back to the land again." This newly gained power evaporated, however, once the elite class figured out it could dominate by not only controlling access to financial resources, but also by controlling behavior within the market. For example, the masses were forbidden from wearing luxurious textiles like silk and ermine, and their feasts and festivals were limited. These limitations not only created obvious class distinctions, but they conditioned the masses to accept that their behavioral choices would be controlled by the dominant elite. *Id.* at 308.

39. *Id.* at 345.

40. At the founding of the United States, the subjugated working class was largely comprised of slave labor. Even after slavery was abolished, the working class remained subjugated through features like poor and dangerous working conditions, low wages, and limited political voice. The effect was to convey to the working class that they were embedded in their conditions and must resign themselves to a perpetually meager existence with no real hope for upward mobility. In the mid-century, and especially after the Depression, control over the subjugated working class weakened for a variety of reasons, and the Myth of the American Dream was deployed to convince consumers that they are "capable of freely changing the very conditions of [their] existence." Salecl, *supra* note 29, at 2336–37.

B. Features of Traditional Legal Rhetoric

Returning to argument structure, like classical rhetoric, traditional legal rhetoric is comprised of five canons: "*Inventio* (invention or discovery), *Dispositio* (arrangement or organization), *Elocutio* (style), *Memoria* (memory), and *Pronuntiatio* (delivery)."[41] In both classical and traditional legal rhetoric, the acceptable form of argument includes an introduction, identification of the question, statement of facts, summary of the argument, argument, and conclusion.[42] Presenting arguments in this form seems natural and relieves the cognitive load from the listener, which has the effect of inducing agreement with the argument.[43] The listener simply takes for granted that the infrastructure of the expressed argument is objectively true and reasonable.[44]

The canon operates through Aristotle's persuasive appeals of "*logos* (using evidence and Western-based epistemology to persuade), *pathos* (using acceptable Western-based modes of emotion to persuade), and *ethos* (using Western-based conceptions of character to persuade)."[45] *Logos* is considered the *sine qua non* of legal reasoning, as expressed through the legal syllogism.[46] The syllogism is a deductive reasoning structure that purports to articulate objective truths through categories.[47] In ancient times, Aristotle and Plato disagreed about whether categories were identified or created: "[w]hereas Aristotle believed that essences were pre-existing and fixed, Plato believed that essences were ideas constructed in the mind."[48] In modern times, this disagreement persists with some scholars and jurists arguing that categories are created,[49] while others argue that wise legal minds simply identify and articulate categories that objectively exist in the world.[50] The former view is supported by cognitive

41. McMurtry-Chubb, *supra* note 10, at 258–59 (citing EDWARD P.J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 17–22 (4th ed. 1999)).

42. *Logocentric Categories*, *supra* note 11, at 41.

43. JAMES A. GARDNER, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY 5–6 (2d ed. 2007); STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A WRITER: A LAWYER'S GUIDE TO EFFECTIVE WRITING AND EDITING 4 (3d ed. 2009); KRISTEN KONRAD ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION 150 (2009); *see also* BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 48.

44. GARDNER, *supra* note 43, at 5–6 ("When presented with the properly framed major and minor premises of a syllogism, the human mind seems to produce the conclusion without any additional prompting. Moreover, the mind recognizes the conclusion to be of such compelling force that the conclusion simply cannot be denied. . . . [E]very good legal argument is cast in the form of a syllogism."); *Logocentric Categories*, *supra* note 11, at 41–42, 61; BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 48.

45. McMurtry-Chubb, *supra* note 10, at 259 (citing SHARON CROWLEY & DEBRA HAWHEE, ANCIENT RHETORICS FOR CONTEMPORARY STUDENTS 12, 118, 170 (5th ed. 2012)).

46. ROBBINS-TISCIONE, *supra* note 43, at 150.

47. GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 6 (1987); *Logocentric Categories*, *supra* note 11, at 42–44.

48. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 12.

49. *Logocentric Categories*, *supra* note 11, at 43; ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 86–87 (2000).

50. Originalism is one example of how the judiciary objectively identifies and articulates existing categories by "fix[ing] a constitutional provision's meaning at the moment of its framing or ratification." Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 330 (2013).

science and aligns more closely with how the brain works.[51] The latter argument obfuscates the power wielded by those who define categories by pretending categorization is a passive activity of mere classification instead of the active creation of reality.

Within the syllogism, major and minor premises express categories which then saliently connect to one another in the conclusion.[52] A common example of the syllogism is "All men are mortal, Socrates is a man, Socrates is mortal."[53] Within this framework, the principles of bivalence and transitivity are deployed to ratify categories, their relationships to one another, and the ultimate conclusions they support.[54] Bivalence supports dichotomous thinking and mutual exclusivity within the law.[55] It is associated with a "winner takes all" mentality where something either belongs or does not and there are clear rights and wrongs.[56] Transitivity suggests that to belong, things within categories must be equal to each other and similarly situated within the category.[57] Transitivity lends seeming mathematical precision to legal reasoning by asserting that if two things are equal to a third thing, then they must also be equal to each other.[58]

Returning to the common syllogism, transitivity can be reduced to the following equation:

Men = Mortal

Socrates = Man

Socrates = Mortal

The principle of transitivity is satisfied here because "men/man" is equivalent to both "mortal" and "Socrates," so "mortal" and "Socrates" must also be equivalent to each other.

The principle of stare decisis is another vital feature of legal rhetoric, purporting to lend predictability to judicial decision-making.[59] Ideally, stare decisis holds courts accountable and restrains judicial activism by demanding that future courts adhere to the prior courts' decisions; it "is a doctrine of preservation, not transformation [that] counsels deference to

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51. *Logocentric Categories*, *supra* note 11, at 44.
52. GARDNER, *supra* note 43, at 5–6.
53. *Logocentric Categories*, *supra* note 11, at 43; *see also* BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 12.
54. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 12.
55. *Id.*
56. *Id.*
57. *Id.* at 13.
58. *Id.*
59. McMurtry-Chubb, *supra* note 10, at 271 ("By elevating the study of appellate cases, narrowly drawn legal narratives framed to serve the interests of *stare decisis* (precedent) and maintain Western canons of rhetoric, legal education became prescriptive. In its current incarnation, it acts to transmit the values of U.S. society through knowledge as constructed through its curriculum. Paradoxically, legal education became prescriptive (pedagogically and curricularly) in its embrace of free market ideals.").

past mistakes."[60] But any lawyer who has practiced for any length of time knows that the law is not inherently predictable and courts routinely depart from precedent when expedient.[61] In this way, traditional legal rhetoric is out of sync with reality; yet, despite this fact, it continues to portray itself as objectively true and reasonable.[62] When courts do adhere to precedent, even when precedent is harmful or destructive,[63] stare decisis is deployed as if this principle neutrally governs the court's power to make just and equitable decisions.[64] Under traditional legal rhetoric, adhering to past mistakes is often preferable to departing from an erroneous decision.[65]

Stare decisis is essential to preserve traditional legal rhetoric's validity as an objective and neutral form of reasoning, especially for those who espouse the belief that categories are found, not created.[66] Precedent operates as a database of existing legal categories, and the act of identifying these preexisting categories suggests a scientific, observational approach that can be proven by external data.[67] Stare decisis reinforces precedential legal categories by ratifying their correctness, even if the preexisting category does not lead to the correct outcome,[68] and without interrogating any biases or experiences that may have influenced the category creation to begin with.[69]

The principle of stare decisis creates a certain catch-22: on the one hand, to depart from precedent implies that the prior court lacked intelligence and wisdom in identifying the salient categories,[70] while on the other, departing from precedent invites an opportunity to question the very form of legal reasoning as well as the decision makers themselves. After all: Why is a court sitting today inherently wiser than the original court?[71]

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60. Citizens United v. FEC, 558 U.S. 310, 384 (2010) (Roberts, J., concurring).

61. *See infra* Part III (comparing *Citizens United* and *Caulkett*).

62. *Citizens United*, 558 U.S. at 384.

63. "[A] decision to overrule should rest on some special reason *over and above the belief that a prior case was wrongly decided*." *Citizens United*, 558 U.S. at 408–09 (Scalia, J., concurring) (emphasis added) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992)).

64. *E.g.*, Bank of Am. v. Caulkett, 575 U.S. 790, 793–94 (2015).

65. As more fully developed *infra* Part III, *Caulkett*'s cited precedent, established in Dewsnup v. Timm, 502 U.S. 410 (1992), was flawed at its inception. Nevertheless, the Supreme Court unanimously adhered to it out of principle rather than correct the erroneous precedent. *Caulkett*, 575 U.S. at 793–94.

66. *See* BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 49; *see also* AMSTERDAM & BRUNER, *supra* note 49, at 11–12, 40, 49.

67. *See* BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 49–51.

68. *See Caulkett*, 575 U.S. at 796.

69. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 50–51.

70. *E.g.*, *Caulkett*, 575 U.S. at 794. To justify continued adherence to *Dewsnup*, the Court simply describes what occurred in *Dewsnup* without interrogating the wisdom, correctness, or workability of that decision.

71. This is the question at the heart of Justice Stevens's dissenting opinion in *Citizens United*. Citizens United v. FEC, 558 U.S. 310, 401–02, 408–09 (2010) (Stevens, J., concurring in part and dissenting in part).

Not to mention, the departing court must embrace a certain hubris in order to substitute its judgment for that of the prior court.[72]

The Court has said that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision."[73] That is why a web of principles and standards has been created to determine which precedents must be followed and which ones must not.[74] For example, only the holdings of precedent cases are subject to stare decisis; dicta is not.[75] A rule or standard that is difficult for the court to apply (i.e., not workable) is not subject to stare decisis.[76] More recent precedents do not have as much protection under stare decisis as older precedents.[77] Stare decisis does not demand adherence to a precedent when there is little or no evidence of a reliance interest.[78] A decision that the deciding court determines was not "well-reasoned" is also not subject to stare decisis.[79] In reality, it is nearly impossible to predict when the Court will adhere to stare decisis and when it will not.

All of these rhetorical features—categorization, simplistic binaries, transitivity, and stare decisis—are controlled by the elite dominant class, who has the power to define the acceptable parameters of these features.[80] Historically, these features have enshrined the elite dominant class's values into U.S. laws and legal standards, which tend to align with market values.[81] In the free market, life itself is a "consumer object"[82] in which success is determined by individuals' personal choices and individuals are held accountable.[83] Individual choice and accountability are also important values in the legal system which emphasizes a punishment/reward paradigm, as opposed to a problem/solution paradigm. In the punishment/reward paradigm, practical solutions to problems and disputes are de-emphasized in favor of punishing whatever is categorized as "bad"

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72. The majority in *Citizens United* scoffed at the notion that *Buckley* and *Bellotti* should be preserved as supporting *Austin* because "*Bellotti*'s dictum is . . . supported only by a law review student comment, which misinterpreted *Buckley*." *Id.* at 358. It also rejected *Austin*'s antidistortion rationale simply because they personally "found this interest unconvincing and insufficient." *Id.* at 366.

73. Helvering v. Hallock, 309 U.S. 106, 119 (1940).

74. "Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error." *Citizens United*, 558 U.S. at 362.

75. *See id.* at 357–58.

76. *Id.* at 362–63. The dissent pointed out that the majority "[gave] no reason to think that *Austin* and *McConnell* are unworkable." *Id.* at 413 (Stevens, J., concurring in part and dissenting in part).

77. *Id.* at 412 (Stevens, J., concurring in part and dissenting in part). The dissent mentions that although *McConnell* was a newer case, *Austin* had been the law for decades.

78. *Id.* at 363.

79. *Id.* at 362–63 (punctuation added) (quoting Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009)).

80. McMurtry-Chubb, *supra* note 10, at 273–74 (Because "[f]ormalistic and abstract legal reasoning are situated in the West[,] . . . canonizing rhetorical processes of argumentation is an exercise in exclusion and reification. Each time a court makes a choice to accept some legal arguments over others, some histories over others, it makes a choice about which values it wishes to protect and which it denigrates.").

81. *See id.* at 270–71.

82. Salecl, *supra* note 29, at 2336–37.

83. *See id.*

behavior.[84] The paradigm aligns with the mathematical precision that traditional legal rhetoric seeks to produce. As long as the wrongdoer can be identified, punishment can be exacted as prescribed by law. For example, in criminal law, there are sentencing guidelines that require a type and length of punishment for the crime committed,[85] and in the worker's compensation field, the value of certain injuries and physical losses is established by statute.[86] The punishment/reward paradigm also prefers simplicity and form over substance, often failing to appreciate the inherent complexity in most litigation. For example, traditional legal rhetoric would prefer to leave an innocent person incarcerated because the finality of judgment is more important than the reality of the person's innocence.[87] Similarly, traditional legal rhetoric endorses the application of an incorrect

84. For example, in the context of bankruptcy, individual debtors should be punished "for the moral failing of not honoring his or her obligations even though it might make good economic sense" (internal quotes omitted). Linda E. Coco, *Swords, Shields, and Shackles: Human and Corporate "Persons" Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 83 MISS. L.J. 293, 295 (2014). Similarly, criminal law is primarily concerned with retribution, even though restorative justice leads to lower recidivism rates. Carter Budwell, *Full Circle: Incorporating Aspects of Restorative Justice Principles from Germany into America's Juvenile Justice System*, 4 J. GLOB. JUST. & PUB. POL'Y 1, 3, 16 (2018). Related to deportations, even though the Court has repeatedly stated that a deportation is not a punishment, the practical effect of a deportation is indeed to punish. Victor S. Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 213 (1958). In the civil context, punitive damages exist for the sole purpose of punishing the perceived wrongdoer in a civil action. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 375–76 (1994). In many jurisdictions, a litigant may pursue attorney's fees against an opposing party or their attorney to punish frivolous or stubborn litigious behavior or other abusive litigation tactics. *E.g.*, 42 U.S.C. § 11113. The law is replete with other examples of the punishment/reward paradigm in virtually every field. This is not to say that the punishment/reward paradigm is the only paradigm that exists in the U.S. legal system, but it is the predominant paradigm.

85. U.S. SENT'G COMM'N, GUIDELINES MANUAL 2021 (2021), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf.

86. *E.g.*, 77 PA. STAT. AND CONS. STAT. ANN. § 513 (West 2023); MICH. COMP. LAWS ANN. § 418.361 (West 2024).

87. The case of Kevin Strickland is emblematic of the procedural hurdles that many innocent prisoners face when challenging their convictions and sentences. Strickland v. State, 512 S.W.3d 858, 859 (Mo. Ct. App. 2017). Since 1979, Mr. Strickland has maintained his innocence. The two other individuals convicted of the murders admitted to their roles and both testified that Mr. Strickland was not involved. They served just ten years in prison, while Mr. Strickland served 42 years. Linsey Davis, Ashley Schwartz-Lavares, Gabriella Abdul-Hakim, Allie Yang, Andrea Amiel, Meredith Frost, & Seni Tienabeso, *Prosecutor Says Man Was Wrongfully Imprisoned for Decades, Yet He Remains Behind Bars*, ABC7 NEWS (June 12, 2021), https://abc7news.com/wrongly-accused-man-still-in-prison-kevin-strickland-innocent-missouri-governor-mike-parson-kansas-city/10780751/. Yet, in 2017, after serving nearly four decades in prison, the Missouri Court of Appeals for the Western District denied his fifth appeal and attempt at freedom, admonishing him for filing a successive motion in violation of Missouri procedural law, and advising future courts that "should Strickland attempt to assert yet another successive PCR motion in the future, the circuit court should not entertain it and, instead, note that the motion is 'denied because it is a successive motion pursuant to Rule 29.15(l).'" *Strickland*, 512 S.W.3d at 860 (quoting Johnson v. State, 470 S.W.3d 1, 6 n.6 (Mo. Ct. App. 2015). In November 2021, Mr. Strickland was finally set free after a prosecutor filed a motion on his behalf pursuant to a new Missouri law that permitted prosecutors to petition for the release of individuals they believe to be innocent. *Kevin Strickland Exonerated 42 Years After Wrongful Capital Murder Conviction in Missouri*, DEATH PENALTY INFO. CTR. (Nov. 24, 2021), https://deathpenaltyinfo.org/news/kevin-strickland-exonerated-42-years-after-wrongful-capital-murder-conviction-in-missouri. *See generally* Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549 (2008).

precedent instead of overruling the precedent because predictability is more important than making a correct decision.[88]

All of these values are rationalized as objectively "right."

C. The Myth of Objective Judicial Decision-Making

Judicial decision-making is an inherently value-driven endeavor.[89] The very fact that the judicial appointment process is so hotly contested demonstrates that it matters who is in charge of making judicial decisions. It is a myth that "conservative" judges are more objective and neutral; they are just more aligned with elitist worldviews which have been portrayed as objective and neutral for thousands of years.[90] But there is nothing about the elitist worldview that is inherently objective and neutral.

Elitism gains its dominance from the fact that it is exclusive and has developed systems to dominate those who are excluded.[91] Traditional legal rhetoric is one of those essential systems because it is a rhetoric of exclusion designed to elevate the dominant elite while excluding the masses.[92] To have a winner, there must be losers. To be in, something must be out. To show what belongs, we must show what does not belong. Historically, the categories of acceptability align with an elite white, male, cisgender, Christian perspective.[93] For example, in *Johnson v. M'Intosh*,[94] "Justice Marshall categorized the indigenous people as 'heathens' and 'savages' who lived off the land but who did not cultivate the land, thus justifying their inferior property rights with respect to the agriculturist Europeans."[95] In *Dred Scott v. Sandford*,[96] people of African descent were categorized as non-citizens to justify a finding that they were not entitled to constitutional rights.[97] In *Plessy v. Ferguson*,[98] decided after the Civil War and the adoption of the Thirteenth and Fourteenth Amendments to the Constitution, the Court deployed a similar rationale to hold "that legal segregation did not offend the Constitution, which only prohibited the category of political distinctions."[99] By comparison, corporations have never had to fight for their civil rights; since 1809, the Court has unquestionably recognized that

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88. *See, e.g.*, Bank of Am. v. Caulkett, 575 U.S. 790, 796–97 (2015); Citizens United v. FEC, 558 U.S. 310, 377 (2010).

89. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 50–51.

90. *See id.* at 23, 25.

91. *See id.* at 26.

92. *See id.* at 27.

93. *Id.* at 21.

94. 21 U.S. 543 (1823).

95. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 21 (quoting *M'Intosh*, 21 U.S. at 577, 590).

96. 60 U.S. 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

97. *Id.* at 406.

98. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 349 U.S. 483 (1954).

99. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 21 (citing *Plessy*, 163 U.S. at 545–48).

corporations have constitutional rights by reasoning that corporations are merely associations of people.[100]

These examples are particularly egregious, but this sort of value-based reasoning appears even in seemingly benign contexts:

> Outside of [*M'Intosh*, *Dred Scott*, and *Plessy*], which most consider to be embarrassing and unfortunate examples within U.S. jurisprudence, the categorical legal method nonetheless appears again and again. Sometimes the method seems harmless, such as when Justice Potter Stewart declared that he could not define obscene, illegal pornography other than to say "I know it when I see it." However, a closer look at this style of legal analysis stems from a straight male view of what obscene pornography is and is not; it does not consider other viewpoints. It also may have been innocuous when Justice Oliver Wendell Holmes declared that a vehicle is not an airplane because, in his mental interior, an airplane does not "call . . . up the picture of a thing moving on land." While Justice Holmes did little harm in categorizing the airplane as not a vehicle, the results were far worse when he categorized Carrie Buck as an imbecile, based on sparse and tenuous testimony advocating that she was the daughter of a "feeble-minded" woman who had given birth to a "feeble-minded" child. By virtue of what he saw in "his own view," Justice Holmes condoned Ms. Buck's eugenic sterilization, unable to resist another categorical pronouncement, that "[t]hree generations of imbeciles are enough."[101]

Although "acceptable" values shift over time—which can lead to changes in the dominant elite's composition—traditional legal rhetoric is not suited to inclusivity; for new values to be recognized, old values must be rejected. Simply put, the values underlying judicial opinions will always inure to the benefit of a dominant elite, however that dominant elite is comprised.

There are numerous examples of this phenomenon in the law. For example, the values identified in *Dred Scott* (people of African descent were not citizens)[102] evolved to the values identified in *Plessy* (people of African descent were entitled only to political equality under the Constitution),[103] which evolved to the values identified in *Brown v. Board of Education*[104] (people of African descent were entitled to unqualified equality

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100. ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESS WON THEIR CIVIL RIGHTS, at xviii, 35–70 (2018) ("In 1809, the Supreme Court decided the first case on the constitutional rights of corporations, decades before the first comparable cases for women or racial minorities. And unlike women and minorities, who lost nearly all of their early cases, corporations won that first case—and have compiled an impressive list of victories in the years since.").

101. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 21.

102. Dred Scott v. Sandford, 60 U.S. 393, 587 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

103. Plessy v. Ferguson, 163 U.S. 537, 563–64 (1896).

104. 347 U.S. 483 (1954).

under the Constitution).[105] The values identified in *Betts v. Brady*[106] (criminal defendants are capable of representing themselves absent some special circumstance)[107] evolved to the values identified in *Gideon v. Wainwright*[108] (criminal defendants are not capable of representing themselves when charged with a serious crime).[109]

Of course, most would agree that the old values underlying *Dred Scott*, *Plessy*, and *Betts* were correctly rejected, but even the "new" values continue to create exclusions and privilege a dominant elite class. For example, at first glance, it may seem like *Gideon*'s promise of representation for indigent defendants who are charged with a serious crime has no relation to protecting an elite class. Upon closer examination, however, the privilege to the dominant elite reveals itself by solidifying the lawyer's necessary role in the courtroom, thereby ensuring that lawyers—who are members of the elite class—not only have a steady stream of clients but also a steady stream of income guaranteed by the State.[110]

While initially it might seem that *Gideon* benevolently created new protections for vulnerable citizens accused of crimes, that view cannot be reconciled with the fact that the quality of representation has never mattered and defendants whose lawyers are woefully inadequate have no recourse or remedy to escape the consequences of ineffective representation.[111] At the end of the day, lawyers still get paid no matter the quality of their representation, while innocent people often remain incarcerated with no procedural path to exoneration and release, even if their attorneys did not represent them well.[112]

Of course, judicial decisions that adhere to precedent can indefinitely perpetuate harmful values and categories. For example, *M'Intosh* has never been overruled, and only three of the 369 cases (the most recent[113]

105. *Id.* at 495. Consider that at the time *Dred Scott* was decided, a slave was worth about $350 as property and facilitated the slaveholder's wealth acquisition through slave labor. *Missouri State Archives: Missouri's Dred Scott Case, 1846–1857*, MO. SEC'Y OF ST., https://www.sos.mo.gov/archives/resources/africanamerican/scott/scott.asp (last visited May 31, 2024). Given the power of wealthy slaveholders in the South, it is no wonder that the Supreme Court refused to acknowledge Black citizenship in the United States; this decision aligned with prevailing market norms. As the Civil War approached and wealthy southern slaveholders lost their power, the Court began to recognize Black citizenship, even though Black citizens were still treated as an inferior class. *See Plessy*, 163 U.S. at 543–44, 548–49. Like *Dred Scott*, *Plessy* was a decision that aligned with the prevailing market norms. Over time, the standards established in *Plessy* were overruled in *Brown* as Black citizens gained agency within the U.S.'s free-market society. At the time, *Brown* also aligned with prevailing market norms. These shifts, sometimes subtle, continually occur.

106. 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

107. *Id.* at 471–72.

108. 372 U.S. 335 (1963).

109. *Id.* at 345.

110. *Id.* at 343–45.

111. Strickland v. Washington, 466 U.S. 668, 687–90 (1984).

112. "[A] criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills . . . ." United States v. Cronic, 466 U.S. 648, 657 (1984) (quoting United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (1975)).

113. Eagle Bear, Inc. v. Indep. Bank, No. CV-22-93-GF-BMM, 2023 WL 8529145, at *1, *3 (D. Mont. Dec. 8, 2023).

of which was decided in 2023) that have cited to it have treated it negatively by distinguishing it.[114] The values identified in *M'Intosh* endure, as recognized by the United States District Court for the District of Montana: "[t]he federal government derives its duties as a matter of law from early treaties, statutes, and decisions of the United States Supreme Court."[115] In a similar vein, *Korematsu v. United States*[116] was not abrogated until 2018 when the Court, in its majority opinion, stated "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[117] Even though it denounced the *Korematsu* decision, the Supreme Court never confronted the precedent to deconstruct and condemn the harmful values it established, and it wholly sidestepped the entire question of stare decisis.[118]

"Acceptable" underlying values consistently tend to align with market values; they evolve when necessary to ensure proper functioning of the marketplace, and they remain stagnant when it would not improve the marketplace to recognize new values.[119] The Court's jurisprudence aligns with market values to ensure the marketplace functions properly, which requires privileging the elite class's interests to ensure it can extract wealth from the lower classes that it dominates.

The free market is capitalism's lifeblood, which is why the Court's decisions must align with free market values—if the market is alive and well, then capitalism is alive and well.[120] Judicial decisions oxygenate this lifeblood by consistently promoting market ideals to facilitate growth and market performance because a successful capitalist society demands a continuously expanding, evergreen economy.[121] Notably, the Court has traditionally been careful not to conflate the market with corporations. Its jurisprudence acknowledges that corporations are actors within the market, just like individuals, but the Justices do not always agree on how

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114. This information comes from the Westlaw annotation for Johnson v. M'Intosh, 21 U.S. 543 (1823) (Choose "Citing References" and then "Cases"; then, choose to "Filter" by "Treatment Status," and choose "View Negative Only").

115. *Eagle Bear*, 2023 WL 8529145, at *3 (citing Johnson v. M'Intosh, 21 U.S. 543 (1823)).

116. 323 U.S. 214 (1944).

117. Trump v. Hawaii, 585 U.S. 667, 710 (2018) (citing *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

118. *Id.*

119. *See supra* note 105 and accompanying text.

120. "[C]apitalism transforms the proletarian slave into a free consumer . . . if the proletarian seemed to be embedded into his or her conditions and constrained by them, the free consumer seems to be capable of freely changing the very conditions of his or her existence." Salecl, *supra* note 29, at 2336.

121. The Federal Reserve Act requires the Federal Reserve to "maintain long run growth of the monetary and credit aggregates . . . so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates." STEPHEN H. AXILROD, INSIDE THE FED: MONETARY POLICY AND ITS MANAGEMENT, MARTIN THROUGH GREENSPAN TO BERNANKE 14 (2011). *See generally* Tayyab Mahmud, *Precarious Existence and Capitalism: A Permanent State of Exception*, 44 SW. L. REV. 699, 704–05 (2015).

corporations should participate in the market.[122] Although corporations often dominate the marketplace, there are still historic examples of individual interests prevailing over corporate interests.[123] Thus, prioritizing market values does not necessarily equate to corporate domination when that domination interferes with a properly functioning marketplace.

Prioritizing the marketplace, however, is obvious in most of the Court's jurisprudence as the Court does not shy away from referring to capitalist ideals in its opinions. The opinion in *M'Intosh* cited John Locke to support the conclusion "that White European Christians, by virtue of their 'discovery' of the land, held the exclusive title to the land."[124] The Court in *Plessy* "[c]hannel[ed] both Enlightenment and classical thinking about natural categories, [when it held that] legal categories 'must always exist so long as White men are distinguished from the other race by color.'"[125]

Capitalist ideals are not only evidenced in the word choices of the Court, but they are advanced by the very form of reasoning that traditional legal rhetoric produces. In this regard, it is helpful to examine traditional legal rhetoric in action to reveal how its mechanisms—especially the myth that stare decisis is a neutral principle—privilege the dominant elite and exclude outsider perspectives. The following Part examines *Caulkett* and *Citizens United*, two cases in which the Court's privileging of the market and elite class are especially obvious.[126]

II. COMPARING *CITIZENS UNITED* AND *CAULKETT*

This Part comparing and contrasting traditional legal rhetoric in the context of *Caulkett* and *Citizens United* does not critique or analyze these decisions substantively, though countless other scholars have.[127] Rather, the purpose of this analysis is to examine the deployment of traditional

122. Writing for the majority, Justice Kennedy observed that, at the founding, "there were no limits on the sources of speech and knowledge." Citizens United v. FEC, 558 U.S. 310, 353 (2010). The dissent, on the other hand, observed that:

> [T]here is not a scintilla of evidence to support the notion that anyone believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position.

Id. at 426 (Stevens, J., concurring in part and dissenting in part). Based on historical data, it appears that the Framers indeed disagreed about the role of corporations within society, although they all agreed that capitalism was the appropriate model for the nascent government of the United States. WINKLER, *supra* note 100, at 3–31.

123. *Citizens United*, 558 U.S. at 394–95 (Stevens, J., concurring in part and dissenting in part).

124. BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3, at 21 (citing Johnson v. M'Intosh, 21 U.S. 543, 571–79 (1823)).

125. *Id.* (quoting Plessy v. Ferguson, 163 U.S. 537, 543 (1896)).

126. Bank of Am. v. Caulkett, 575 U.S. 790 (2015); Citizens United v. FEC, 558 U.S. 310 (2010).

127. *E.g.*, Timothy K. Kuhner, *The Democracy to Which We Are Entitled: Human Rights and the Problem of Money in Politics*, 26 HARV. HUM. RTS. J. 39 (2013); Michael Megaris, *The SEC and Mandatory Disclosure of Corporate Spending by Publicly Traded Companies*, 22 KAN. J.L. & PUB. POL'Y 432 (2013); John P. Gustafson, *A Precedential Debate*, 34 AM. BANKR. INST. J. 14 (2015); Lawrence Ponoroff, *The Last Dance: Righting the Supreme Court's Greatest Bankruptcy Apostasy*, 96 AM. BANKR. L.J. 199 (2022).

legal rhetoric to elevate a particular worldview under the guise of objective neutrality. Sections III(A) and (B) provide a summary of *Caulkett* and *Citizens United*, respectively. Section III(C) examines traditional legal rhetoric in action.

A. Summary of Caulkett

Caulkett involved a consolidated appeal of two Chapter 7 bankruptcy cases from the Eleventh Circuit Court of Appeals.[128] The debtors in each of the underlying cases owned homes encumbered by junior mortgage liens, and neither of their homes' values were sufficient to satisfy the senior mortgages in full, meaning the junior mortgages were "wholly underwater."[129] Pursuant to § 506(d) of the Bankruptcy Code, the District Court had stripped off the underwater junior mortgages, and the Eleventh Circuit Court of Appeals affirmed.[130] Section 506(d) provides that "[t]o the extent that a lien secures a claim against the debtor that is not an *allowed secured claim*, such lien is void."[131] Section 506(a)(1) "provides that '[a]n allowed claim of a creditor secured by a lien on property . . . is a *secured claim* to the extent of the value of such creditor's interest in . . . such property,' and 'an *unsecured claim* to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.'"[132] Interpreting § 506(a)(1) and (d) *en pari materia*, the Supreme Court reversed the Eleventh Circuit and held that, although this was "a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning,"[133] the plain meaning of the words would not be recognized because the Supreme Court "ha[d] already adopted a construction of the term 'secured claim' in § 506(d) that foreclose[d] this textual analysis."[134] Notably, Justices Thomas, Scalia, Ginsburg, Alito, Kagan, Kennedy, Breyer, Sotomayor, and Chief Justice Roberts all unanimously agreed with the result.[135] With the exception of Justice Kagan, who replaced Justice Stevens

128. *Caulkett*, 575 U.S. at 792.
129. *Id.*
130. *Id.*
131. *Id.* at 793 (emphasis in original).
132. *Id.* (emphasis in original).
133. *Id.* at 793–94 (quoting Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003)).
134. *Id.* at 794.
135. *Id.* at 791. Justices Kennedy, Breyer, and Sotomayor joined in the Opinion "except as to the footnote," which reads:

> From its inception, Dewsnup v. Timm, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992), has been the target of criticism. *See, e.g.*, *id.*, at 420–436, 112 S. Ct. 773 (Scalia, J., dissenting); *In re* Woolsey, 696 F.3d 1266, 1273–1274, 1278 (10th Cir. 2012); *In re* Dever, 164 B.R. 132, 138, 145 (Bkrtcy. C.D. Cal. 1994); Carlson, *Bifurcation of Undersecured Claims in Bankruptcy*, 70 AM. BANKR. L.J. 1, 12–20 (1996); Ponoroff & Knippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy*, 95 MICH. L. REV. 2234, 2305–2307 (1997); *see also* Bank of Am. Nat. Trust and Sav. Ass'n. v. 203 North LaSalle Street Partnership, 526 U.S. 434, 463, and n.3, 119 S. Ct. 1411, 143 L. Ed. 2d 607 (1999) (Thomas, J., concurring in judgment) (collecting cases and observing that '[t]he methodological confusion created by *Dewsnup* has enshrouded both the Courts of Appeals and . . . Bankruptcy

just five months after *Citizens United* was decided, these are the same justices who decided *Citizens United*.[136]

B. Summary of Citizens United

Citizens United involved a lawsuit filed by a nonprofit corporation that professed to be "dedicated to restoring our government to citizens' control"[137] against the Federal Elections Commission.[138] In 2008, Citizens United produced and released a 90-minute documentary entitled "Hillary: The Movie" which criticized "then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections."[139] Citizens United sought to air the documentary through video-on-demand during the thirty days leading up to the 2008 primary elections.[140] Fearing that it would run afoul of existing law "ban[ning] . . . corporate-funded independent expenditures" like these, it sought declaratory and injunctive relief to release the documentary in the format and at the time it desired.[141]

In a plurality decision, the U.S. Supreme Court ultimately held that corporations enjoy free speech rights under the First Amendment to the Constitution, and the law "ban[ning] . . . corporate-funded independent expenditures"[142] of this sort was unconstitutional.[143] Four Justices, Kennedy, Roberts, Scalia, and Alito, joined together in the majority opinion.[144] Justice Thomas joined the majority as to the first three sections that culminated in overruling *Austin v. Michigan Chamber of Commerce*[145] and part of *McConnell v. FEC*,[146] dissenting as to the last section because he disagreed with "the Court's conclusion that [d]isclaimer and disclosure requirements . . . impose no ceiling on campaign-related activities, and do not prevent anyone from speaking."[147] Justices Stevens, Ginsburg, Breyer, and Sotomayor joined together dissenting to the first three sections of the majority opinion and concurring to the last part that left intact some regulations on campaign-related activities.[148] The dissenting justices would not

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Courts'). Despite this criticism, the debtors have repeatedly insisted that they are not asking us to overrule *Dewsnup*.

Id. at 795 n.† (minor formatting updates made to quotation).

136. Citizens United v. FEC, 558 U.S. 310, 317 (2010).

137. CITIZENS UNITED, https://www.citizensunited.org/ (last visited Dec. 12, 2023).

138. *Citizens United*, 558 U.S. at 310.

139. *Id.* at 319.

140. *Id.* at 323.

141. *Id.* at 321.

142. *Id.*

143. The Court overruled *Austin* and invalidated 2 U.S.C. § 441b when it held "that the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id.* at 365. This holding also "overrule[d] the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on corporate independent expenditures" because it relied on the antidistortion interest that *Austin* had upheld. *Id.*

144. *Citizens United*, 558 U.S. at 317.

145. Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990).

146. *Id.* at 480–85 (Thomas, J., concurring in part and dissenting in part).

147. *Id.*

148. *Id.* at 393.

have overruled *Austin* or *McConnell* at all, while Justice Thomas would have overruled both cases in their entirety.[149] Justices Roberts and Scalia each wrote concurring opinions as well.[150]

C. Traditional Legal Rhetoric in Action

The following subsections examine the specific mechanisms of traditional legal rhetoric in the context of *Caulkett* and *Citizens United*. The section on stare decisis compares and contrasts the Court's approach in the two cases, critiquing its near-holy reverence for the doctrine in *Caulkett* and its eagerness to discard it in *Citizens United*. It concludes that the different treatment of the two cases aligned with the prevailing market values in each. The section on the legal syllogism explores bivalence, transitivity, and category construction to demonstrate how the Court prioritizes market values at the expense of individual interests.

The key takeaways from this Part are that traditional legal rhetoric is not neutral, even though the judiciary pretends that it is, and exclusion of the non-dominant class is an essential feature of traditional legal rhetoric. Thus, in a capitalist system, deifying this form of reasoning as the only "logical" and "persuasive" form ensures that minoritized voices can never truly achieve justice and equity.[151]

1. Stare Decisis

Comparing *Citizens United* with *Caulkett*, the difference in how the Court treats precedent is stark. In *Caulkett*, the Court candidly admitted that the issue would normally be resolved using a plain meaning reading of the statute, and that "[u]nder that straightforward reading of the statute, the debtors would be able to void the Bank's claim."[152] In other words, the codified legal standard unquestionably supported the debtors' arguments, and the debtors should have prevailed under the traditional rules of statutory construction.[153]

Nevertheless, the Court managed to find a way to rule in favor of the Bank by rejecting the plain meaning of the words enacted by Congress and substituting them with a definition the Court had adopted in another case that interpreted the term "secured claim."[154] Justice Thomas, for the Court, wrote, "Unfortunately for the debtors, this Court [in *Dewsnup v. Timm*[155]] has already adopted a construction of the term 'secured claim' in § 506(d) that forecloses this textual analysis."[156] The Court adhered to this precedent even though *Dewsnup,* "[f]rom its inception, . . . has been the target

149. *Id.* at 479, 485.
150. *Id.* at 372, 385.
151. McMurtry-Chubb, *supra* note 10, at 259–60.
152. Bank of Am. v. Caulkett, 575 U.S. 790, 794 (2015).
153. *Id.* at 793–94.
154. *Id.* at 794–95.
155. Dewsnup v. Timm, 502 U.S. 410 (1992).
156. *Caulkett*, 575 U.S. at 794 (citing *Dewsnup*, 502 U.S. at 415–16, 420).

of criticism."[157] It justified this decision by saying that the debtors did not ask the Court to overrule *Dewsnup*, and in fact, "repeatedly insisted that they [were] not asking [the Court] to overrule *Dewsnup*."[158] The Court invoked stare decisis to support a holding that inured to the benefit of the Bank at the expense of the debtor and that was contrary to the express statutory language enacted by Congress.

In contrast, the Court in *Citizens United* deployed stare decisis in almost the opposite way. In the second paragraph, Justice Kennedy wrote, "[i]n this case we are asked to reconsider *Austin*[159] and, in effect, *McConnell*,"[160] yet Citizens United did not expressly preserve this issue for appeal.[161] In fact, similar to the debtors in *Caulkett*, Citizens United never expressly asked the Court to overrule *Austin* and *McConnell*.[162] Although, Citizens United originally raised a facial challenge to § 441b, which may have required the Court to consider overturning *Austin* and *McConnell*, it voluntarily dismissed that count of its complaint.[163] Its only remaining allegation was an as-applied challenge, which did not demand overruling precedent as simply distinguishing *Citizens United* from precedent would have sufficed.[164] In fact, the Government raised the issue that Citizens United had not preserved the argument for appeal and urged the Court to find "that Citizens United waived its challenge to *Austin* by dismissing" that count.[165] Nevertheless, and despite its recent decision in *Caulkett* finding a fatal flaw where the debtors failed to expressly request the Court overrule precedent, the Court found no issue with the fact that Citizens United never expressly asked that precedent be overruled, and the Court ultimately overruled *Austin* entirely and *McConnell* in part.[166] Importantly, neither *Austin* nor *McConnell* had been subjected to the deep criticism that *Dewsnup* received.

The Court rationalized rejecting the Government's argument by declaring, *ipso facto*, that "even if a party could somehow waive a facial challenge while preserving an as-applied challenge, that would not prevent the Court from reconsidering *Austin* or addressing the facial validity of § 441b in this case."[167] This reasoning is purportedly supported by *Lebron v. National Railroad Passenger Corporation*,[168] which held that the Court's "practice 'permit[s] review of an issue not pressed [below] so long

157. *Id.* at 795 n.†.
158. *Id.*
159. Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990).
160. Citizens United v. FEC, 558 U.S. 310, 319 (2010).
161. *Id.* at 329–31.
162. *Id.* at 329.
163. *Id.* at 329–30.
164. *Id.* at 329.
165. *Id.*
166. *Id.* at 331–32.
167. *Id.* at 330.
168. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995) (quoting United States v. Williams, 504 U.S. 36, 41 (1992) (first alteration in original)).

as it has been passed upon . . . .'"[169] Despite the fact that the District Court "did not provide much analysis regarding the facial challenge,"[170] the Court reasoned that the trial court had "pass[ed] upon" the issue, thereby preserving it for appeal despite *Citizens United*'s explicit abandonment of the claim.[171] Notably, the dissenting Justices did not contest this rationale; rather, they focused on the flawed reasoning in the application of the five factors to be considered when overruling precedent.[172]

The Court also offered a secondary justification for reconsidering *Austin*: Citizens United's consistent claim that its First Amendment right to free speech was infringed.[173] Even though Citizens United had never before argued that *Austin* should be overruled, the Court reasoned that it was merely "a new argument to support what has been [a] consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment."[174]

The Court even explored a third reason for reconsidering *Austin*:

> [T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.[175]

In essence, the Court was suggesting that in order to provide a remedy, it had to overrule *Austin*, despite whatever stipulation the Parties may have had and regardless of the fact that *Citizens United* merely "implicate[d] the validity of *Austin* [and] . . . the facial validity of § 441b" in its claim.[176]

The Court's painstaking efforts to justify reconsideration of *Austin* and *McConnell* underscore a noticeable absence of foundational support for departing from stare decisis—"[t]he [Court] doth protest too much, methinks."[177] Next to *Caulkett*, the deficiencies are even more apparent. When the debtors did not make the "right" argument in *Caulkett*, the Court unanimously declared that it was bound by a precedent that did not directly control the outcome.[178] The Court could have easily distinguished *Dewsnup*—a controversial opinion that had been called into question numerous times—and issued an opinion that conforms with the plain meaning of the statute. In contrast, *Austin* had not been called into question in

169. *Citizens United*, 558 U.S. at 330.
170. *Id.*
171. *Id.*
172. *Id.* at 393–479.
173. *Id.* at 330.
174. *Id.* at 331 (quoting Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995)).
175. *Citizens United*, 558 U.S. at 331.
176. *Id.*
177. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 2, l. 2155.
178. Bank of Am. v. Caulkett, 575 U.S. 790, 795–97 (2015). *Dewsnup* involved over-collateralized/undersecured property, not property that was wholly underwater like in *Caulkett*.

the same way; in fact, it had been ratified after thorough consideration in *McConnell*,[179] *FEC v. Beaumont*,[180] and *FEC v. Wisconsin Right to Life, Inc*.[181]

In other words, when it was individual debtors who did not make the "right" argument, the Court said its hands were tied because it was bound by stare decisis. But when a wealthy corporate power did not make the "right" argument, the Court found multiple reasons why it was free to consider the issue and depart from precedent. The characterization of arguments as "right" and "wrong" is addressed in more detail in the section below on bivalence.

The justification for adhering to or departing from stare decisis is presented as inevitable in both cases, and it is this presumption of inevitability that makes the result seem "logical" and "objective." The myth of neutrality that surrounds stare decisis validates the authority of traditional legal rhetoric by creating the illusion of logic and objectivity. But, for the reasons set forth above, it is obvious that the decision to adhere to stare decisis in *Caulkett* was not inevitable—it was a choice made to accomplish a particular outcome. The same is true of the decision to depart from stare decisis in *Citizens United*.

As to the actual methodology employed, the Court applies the following factors when considering whether to depart from precedent: the "workability, . . . the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned," and "whether experience has pointed up the precedent's shortcomings."[182] This test professes to be objective and neutral, yet it provides no actual predictability for when the Court will choose to adhere to stare decisis or not. For example, the dissent in *Citizens United* uses the very same test to reach a conclusion contrary to the prevailing opinion.[183] As to the well-reasoned factor, the majority asserts that *Austin* and parts of *McConnell* are not well-reasoned while the dissent, unsurprisingly, say they are.[184] As to whether *Austin* has been undermined by experience, the dissent accuses the majority of failing "to specify in what sense *Austin* has been 'undermined'" and of inadequately justifying its position with a "string of non sequiturs" and "ruminations" that could not possibly "weaken[] the force of *stare decisis* . . . ."[185] The dissent walks through similar attacks as to the other facets of the test, but it does little to question the framework of the test itself.

179. McConnell v. FEC, 540 U.S. 93 (2003).
180. FEC v. Beaumont, 539 U.S. 146 (2003).
181. FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).
182. Citizens United v. FEC, 558 U.S. 310, 362–63 (2010) (internal quotes omitted).
183. *Id.* at 411–479.
184. *Id.* at 363, 409.
185. *Id.* at 409.

Notably, this test was not even mentioned in *Caulkett*, but had the Court considered it, these factors would have warranted overruling *Dewsnup*, which it admitted was not well-reasoned.[186] Since it was decided, courts have disagreed with or declined to extend *Dewsnup* 114 times.[187] The case obviously has not been relied upon in a way that would warrant continued adherence to a decision because the Court admitted it was incorrect.[188] The precedent has observable flaws, the main ones being that it was not well-reasoned to begin with and it departed from basic canons of statutory interpretation requiring the application of words' plain meaning.[189] Even though the *Caulkett* Court admitted that *Dewsnup* departed from the statute and explained that the Court must "faithfully . . . interpret the law" when balancing "judicial restraint and judicial abdication,"[190] it refused to consider overruling errant precedent. This is contrary to the principle expressed by Chief Justice Roberts that the Court should embrace narrow grounds supporting its decisions when those narrow grounds are right.[191] As to workability, the plain language of § 506(d) is imminently workable and in fact had been (and continues to be)[192] applied by the bankruptcy courts.

In *Citizens United*, the Court emphasized that while stare decisis is essential to preserving integrity in judicial decision-making, it is "neither an 'inexorable command' . . . nor 'a mechanical formula of adherence to the latest decision.'"[193] Rather, it preserves the constitutional ideal that the law "will develop in a principled and intelligible fashion."[194] Chief Justice Roberts counseled that "when fidelity to any particular precedent does more damage to this constitutional ideal than to advance it, [the Court] must be more willing to depart from that precedent."[195] In *Caulkett*, adherence to *Dewsnup* damaged this ideal by preserving precedent that made no sense in light of the plain words of the statute; *Dewsnup* was wrong, the Court admitted it was wrong, and it still remains controlling precedent that is now amplified by its ratification in *Caulkett*. Even though the dissenting

186. Bank of Am. v. Caulkett, 575 U.S. 790, 795 n.† (2015).

187. *See generally* Dewsnup v. Timm, 502 U.S. 410 (1992).

188. "Under that straightforward reading of the statute, the debtors would be able to void the Bank's claims." *Caulkett*, 575 U.S. at 794.

189. *Id.* at 793–94.

190. Citizens United v. FEC, 558 U.S. 310, 375 (2010).

191. *Id.* at 375.

192. Courts have declined to extend the holding in *Caulkett* to Chapter 13 cases, even though the exact same statutory provision is involved. The effect is that *allowed secured claim* means something different for Chapter 7 debtors than it does for Chapter 13 debtors. The statute itself does not make this distinction, and in the marketplace, the creation of secured debt does not have any similar distinction. *In re* Travers, 541 B.R. 639, 642–43 (Bankr. E.D. Ky. 2015); Larson v. Nationstar Mortg. LLC., 544 B.R. 883, 885–86 (Bankr. W.D. Wis. 2016); *In re* Spidle, No. BK14–80339, 2016 WL 3134832, at *2 n.1 (Bankr. D. Neb. May 26, 2016); *In re* Turman, No. BK14–80062, 2015 WL 3745304, at *1 n.1 (Bankr. D. Neb. June 12, 2015); *In re* Grossman Rivera, No. 13-07968, 2015 WL 3932381, at *2 (Bankr. D.P.R. June 25, 2015); *In re* Kresl, No. BK12–80557, 2015 WL 5667069, at *1–2 (Bankr. D. Neb. Sept. 24, 2015).

193. *Citizens United*, 558 U.S. at 377.

194. *Id.* at 378 (Roberts, C.J., concurring).

195. *Id.*

Justices in *Citizens United* represented that they were "perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irreconcilable with the rest of our doctrine, there would be a compelling basis for revisiting it,"[196] not a single Justice dissented in *Caulkett*.[197] None of the Justices were willing to reconsider *Dewsnup*.[198] In contrast, departing from *Austin and McConnell* damaged the constitutional ideal because those decisions were historically well-reasoned, workable, and significantly relied upon—at least in the dissenting Justices' view. The Court could have ruled in favor of *Citizens United* on narrower grounds.

The foregoing analysis reveals that adherence to stare decisis as principled is just not genuine. The choice to adhere to or depart from the doctrine of stare decisis is arbitrary and based on the proclivities of the prevailing majority on the Court. Any talk of "order of operations"[199] or other principles simply manufactures the illusion of objectivity and rationality that obfuscates the bias inherent in the U.S. legal system.

2. The Legal Syllogism

As introduced in Part II, the legal syllogism functions as the framework for legal reasoning.[200] When legal reasoning is cast in the form of a syllogism, its truth and correctness cannot be denied. The syllogism creates the illusion of neutrality and objectivity that conceals the biases and personal preferences of the court.

The syllogism is constructed around categories whose membership is usually determined by the bivalence principle. Either something belongs, or it does not. The syllogism also operates on the transitivity principle, the idea that if one thing is equal to a second thing, and the second thing is equal to a third thing, then the first and third thing must also be equal. Typically, a case will include a number of syllogisms to justify the reasoning.

Some of the syllogisms in *Caulkett* include:

> Textual analysis of a term is not appropriate if the Court has already adopted a particular construction.
>
> The "Court . . . adopted a [particular] construction of the term 'secured claim'"[201] in *Dewsnup*.
>
> Therefore, textual analysis of "secured claim" is not appropriate.

***

196. *Id.* at 409 (Stevens, J., concurring in part and dissenting in part).
197. *See* Bank of Am. v. Caulkett, 575 U. S. 790, 791 (2015).
198. *See id.*
199. *Citizens United*, 558 U.S. at 374 (Roberts, C.J., concurring).
200. *See infra* Part II.
201. *Caulkett*, 575 U.S. at 794.

The Court cannot overrule binding precedent unless one of the Parties asks for it to be overruled.

The debtors "d[id] not ask [the Court] to overrule *Dewsnup*."[202]

Therefore, the Court cannot overrule *Dewsnup*.

***

A secured claim allowed under § 502 cannot be voided under § 506(d).

"[T]he Bank's claims [were] both secured by liens and allowed under § 502 . . . ."[203]

Therefore, the Bank's claims cannot be voided.

The theory of transitivity makes the reasoning seem precise and correct, lulling the reader into agreement with the logical operation. The logic seems to just make sense. The bivalence principle is also implicated with regard to category membership. In the first syllogism, the categories are textual analysis, particular construction, and secured claim. Bivalence informs that a thing cannot both belong and not belong in a category. As to the first syllogism, the debtors' unsecured claims belonged in the category of "secured claim" by virtue of the definition established in *Dewsnup*, and that membership prevented further analysis of the text. As to the second, *Dewsnup* belonged in the category of binding precedent, which could not be overruled without an explicit request by the parties. As to the third, the bank's claims belonged in the category of "secured claim," so they could not be voided.

Bivalence also appears in how the Court characterizes the debtor's argument for a narrow construction in *Dewsnup*'s holding as wrong. The Court on numerous occasions has said that it must resolve cases on the narrowest ground possible.[204] Furthermore, the Court categorically declined to consider overruling *Dewsnup* because the debtors had not explicitly requested that the Court overrule it.[205]

Transitivity and bivalence rely on the categories constructed for the syllogism; without categories, there is nothing to create or exclude. In *Caulkett*, category construction is terribly problematic. The Court included the bank's liens in the category of "secured claim" even though as a matter of fact, the bank's liens were not secured by any collateral because the debtors' homes were overleveraged and underwater.[206] Similarly, *Dewsnup* was decided on distinguishable facts, so it was not inherently binding precedent. Nevertheless, the Court placed the case into a category

202. *Id.* at 795.
203. *Id.*
204. *E.g.*, *Citizens United*, 558 U.S. at 374–75 (Roberts, C.J., concurring).
205. *Caulkett*, 575 U.S. at 795.
206. *Id.* at 792, 797.

labeled binding precedent.[207] The net effect of this categorization was to reach a decision in favor of the banks, the dominant market actor vis-à-vis the debtors.

The creation of these categories, like the creation of all categories, was epistemological. It documented the reality of the Court's elite perspective that prioritizes market values over all else, and it simultaneously created law to promulgate that worldview. The market values in *Caulkett* include allowing banks to freely lend while ensuring repayment of loans, even risky ones, and holding consumers accountable for taking on consumer debt, no matter how impossible it might be for the debtor to repay the debt. In this scenario, the banks are not held accountable for their decisions to assume the risks inherent in issuing loans secured by overleveraged collateral. All the consequences of the risk shift to the debtors, despite explicit statutory language designed to protect debtors who find themselves in the position of owing more than their assets are worth.

In contrast, the Court in *Citizens United* deployed bivalence to simplify its review of precedent and justify overruling *Austin* and part of *McConnell*. It reasoned that "[t]he Court [was] confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them."[208] As the dissent ably pointed out, however, this false binary oversimplified the question by reducing a complex question to a simple either/or matter. It also attempted to draw an either/or line between acceptable and unacceptable corruption, the latter of which the government has an important interest in preventing.[209]

By way of further example, consider the following procedural syllogisms:

> Before deciding whether precedent must be overruled, the Court must consider whether the issue can be resolved on narrower grounds.
>
> The Court cannot resolve *Citizens United* on a narrower ground without chilling political speech.
>
> Therefore, *Austin* must be overruled in order to avoid chilling political speech.
>
> ***
>
> The Court may consider overruling a case when a party's claim implicates the validity of the precedent, even if the party did not explicitly argue for the case to be overruled.

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207. *Id.* at 794–95.

208. *Citizens United*, 558 U.S. at 348.

209. "*Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, [as] that interest was limited to *quid pro quo* corruption." *Id.* at 359.

"*Citizens United*'s claim implicates the validity of *Austin*" even though it has not argued that issue explicitly.[210]

Therefore, the Court can consider overruling *Austin*.

***

"By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[211]

Austin and *McConnell* take the right to speak from corporations like *Citizens United*.

Therefore, *Citizens United*, and other corporations like it, are disadvantaged in their right to use speech to establish worth, standing, and respect.

These procedural syllogisms rely on categories and reasoning antithetical to *Caulkett*'s reasoning. Where the Court in *Caulkett* said its hands were tied because the debtors did not explicitly request that *Dewsnup* be overruled, the Court in *Citizens United* said it could not possibly grant relief without overruling *Austin*, even though *Citizens United* had not asked it to do so.[212] By the same token, in *Caulkett*, the Court claimed it was duty-bound to follow *Dewsnup*[213] even though it had been decided incorrectly and promulgated a rule completely detached from the actual meaning of the words used in the statute. In *Citizens United*, on the other hand, the Court gave myriad reasons why *Austin* and parts of *McConnell* had to be overruled even though those decisions' constitutionality had previously been affirmed.[214] Where the Court in *Caulkett* accused the debtors of making the "wrong" argument because they asked the Court to enter a narrow ruling distinguishing *Dewsnup* instead of overruling it, the Court in *Citizens United* wrote fourteen pages of argument examining the narrower grounds and explaining why relief could not be afforded on those narrower grounds before ultimately overruling *Austin* and parts of *McConnell*.[215]

The simplest explanation for the different categories and syllogisms is the desire for a particular outcome aligned with marketplace ideals. In *Citizens United*, overruling precedent to permit corporations to speak aligns with the market ideal of elevating elite, dominant voices in the political decision-making process. In *Caulkett*, preserving precedent to require debtors to repay unsecured loans aligns with the market ideals of

210. *Id.* at 331.
211. *Id.* at 340–41.
212. *Caulkett*, 575 U.S. at 797; *Citizens United*, 558 U.S. at 363.
213. *Caulkett*, 575 U.S. at 797.
214. *Citizens United*, 558 U.S. at 330–32.
215. *Id.* at 323–36.

punishing the individual's "bad" decision to take on too much debt and protecting banks by ensuring repayment of debts, even unsecured ones.

Additionally, the rhetoric of marketplace ideals is even more explicit in *Citizens United* than it was in *Caulkett*. The opinion is replete with references to the marketplace of ideas,[216] political marketplace,[217] electoral marketplace,[218] and economic marketplace.[219] The imprimatur of the market pervades every aspect of the Court's reasoning throughout the various opinions, either implicitly or explicitly.

Overall, the prioritization of marketplace ideals is expressed more explicitly in *Citizens United* than *Caulkett*.[220] Even though the Justices disagree about how best to protect those ideals, they all agree that those ideals are the foremost value governing the outcome of the case. In *Citizens United*, the Court repeatedly expressed concern over the potential for campaign finance laws to chill political speech and outright rejected the antidistortion rationale, which asserts that corporate speech has greater political resonance because it is organized in a way that can communicate more effectively with state actors and is backed by funding that can generate sustained media campaigns in a way that individuals simply cannot.[221] Thus, the free flow of ideas in the political marketplace aligns with marketplace ideals.[222] In the opinion, the majority presumes corporations and individuals are on the same playing field[223] when it comes to speech and its impact and that laws regulating corporate political speech work to generally chill speech.[224] The presumption is that corporations and individuals are aligned with a common interest to counteract "brooding

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216. *Id.* at 335, 380, 463, 474.

217. *Id.* at 350, 367, 369, 437 n.61.

218. *Id.* at 345, 350, 455, 462, 467.

219. *Id.* at 350–51.

220. Even the word choice belies these ideals. When the majority writes, "The censorship we now confront is vast in its reach. The Government has 'muffle[d] the voices that best represent the most significant segments of the economy,'" *Citizens United*, 558 U.S. at 354 (quoting McConnell v. FEC, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)), the use of the word "censorship" brings authoritarian communist regimes like China and Russia to mind.

221. "*Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining 'an unfair advantage in the political marketplace' by using 'resources amassed in the economic marketplace.'" *Id.* at 350 (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).

222. "[S]ociety as a whole [is harmed when it] is deprived of an uninhibited marketplace of ideas." *Id.* at 335 (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)). "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Id.* at 339.

223. Although the majority recognized that "[t]he First Amendment's protections do not depend on the speaker's 'financial ability to engage in public discussion,'" it wholly fails to recognize how few individuals have the financial resources of corporations. *Id.* at 350 (quoting Buckley v. Valeo, 424 U.S. 1, 49 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003)). It completely glosses over the fact that numerous individuals cannot dream of having the financial resources to truly engage in public discussion.

224. *Id.* at 324, 327, 329, 333, 334, 336, 351, 357, 370, 371, 400 n.5, 402, 402 n.8, 471, 482, 484.

governmental power" and promote "confidence and stability in civic discourse that the First Amendment must secure."[225]

To the majority, "[i]t is irrelevant for purposes of the First Amendment that corporate funds may have little or no correlation to the public's support for the corporation's political ideas."[226] Inherent in this premise is the idea that "political speech cannot be limited based on a speaker's wealth [because] the First Amendment [does not] generally prohibit[] the suppression of political speech based on the speaker's identity."[227] This premise, of course, ignores the reality that individuals are regularly excluded because they do not have the wealth necessary to compete on this playing field; it fails to account for access to the playing field, which *Austin* and *McConnell* at least attempted to address.[228]

The majority rationalized that "[b]y taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[229] This statement presumes that the corporation is the disadvantaged party in this equation, and it ignores the dissent's legitimate arguments in favor of the antidistortion rationale that corporate speech overpowers, chills, and stifles individual speech.[230] This distortion is why, the dissent argued, regulations on corporate speech are necessary to ensure that individual political speech is not drowned out.[231] The majority outright rejected the idea that corporations harness more political power than individuals when it reasoned that:

> [t]he fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials[, which is] inconsistent with any suggestion that the electorate will refuse to take part in democratic governance because of additional political speech made by a corporation or any other speaker.[232]

The majority's reasoning begs the question: If corporate speech has no impact, why are Political Action Committees (PACs) and Super PACs so invested in ensuring corporate speech? There is no question that the

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225. *Citizens United*, 558 U.S at 349.

226. *Id.* at 351 (internal quotation marks omitted).

227. *Id.* at 350.

228. *Id.* at 350–51 (Scalia, J., dissenting) (citation omitted) (quoting Austin v. Mich. Chamber of Com., 494 U.S. 652, 658–59, 680 (1990) ("[T]he *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." This does not suffice, however, to allow laws prohibiting speech. "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."), *overruled by Citizens United*, 558 U.S. at 365.

229. *Id.* at 340–41.

230. *Citizens United*, 558 U.S at 402, 470–71 (Stevens, J., concurring in part and dissenting in part); *id.* at 484 (Thomas, J., concurring in part and dissenting in part).

231. *Id.*

232. *Id.* at 360 (internal quotation marks omitted).

corporate form amplifies political speech in ways that influence legislators and drown out individual voices.

The majority admitted that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."[233] Nevertheless, the majority points out that it is reasonable to regulate the speech of certain non-dominant groups like students and prisoners.[234] Implicitly, the majority expressed that these voices are not valuable in the marketplace, and their opinion as to the value of these voices is presented as neutral, objective, and rational.[235] And true to its form over substance priorities, the majority was completely comfortable with the fact that "[f]actions will necessarily form in our Republic, but the remedy of destroying the liberty of some factions is worse than the disease."[236] When factions form amongst the elite class, the market framework endures, and the Court is interested in ensuring this very outcome. The majority also readily accepted that favoritism and influence are just part of the way the marketplace works, and the Court's decisions should not interfere with that.[237] In fact, it reasoned that "[r]eliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.'"[238]

The majority readily bought into the myth that corporations and individuals are equal players in the market, while the dissent recognized that corporations enjoy inherent advantages.[239] The majority also bolstered its position by conflating corporate speech with freedom of the press.[240] The majority's idea was that the press, in modern times, generally expresses itself through corporate structures.[241] If corporations do not inherently have the right to free speech, then corporations, naturally, would not have the right to freedom of the press either.[242]

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233. *Id.* at 340. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.* at 347 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784–85 (1978)).

234. *Id.* at 341.

235. *Id.* It also offers no protections to these and other vulnerable, non-dominant groups because it "entrust[s] the people to judge what is true and what is false." *Id.* at 355. Never mind the reality that, especially in this modern day and age of digital distortion, it is difficult, and sometimes impossible, to discern what is true and what is false.

236. *Id.* at 354–55 (internal quotes omitted).

237. *Id.* at 359 (Kennedy, J., concurring in part and dissenting in part) (quoting McConnell v. FEC, 540 U.S. 93, 297 (2003)) ("Favoritism and influence are not . . . avoidable in representative politics. [Why not? Unquestioned assumption.] It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.").

238. *Id.* at 359 (quoting *McConnell*, 540 U.S. at 296).

239. *See generally id.*

240. *Id.* at 352–53.

241. *See generally Citizens United*, 558 U.S at 318–72.

242. "[U]nder the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment." *Id.* at 352.

In *Citizens United*, for example, the majority emphasized that most donations received by *Citizens United* came from individuals while only a small portion came from for-profit corporations.[243] This conclusion justified the majority's reasoning that PACs do not allow corporations to speak,[244] but it completely ignored the fact that the PAC itself is a corporation. The implication is that *Citizens United* is just organizing the voices of individuals, so it does not enjoy any more power or advantages than individuals.[245] This is the same rationale that justifies characterizing corporations as merely associations of individuals. The Court used this rationale to argue that the First Amendment was never meant to exclude corporations.[246] The syllogism goes like this:

> The First Amendment protects a person's right to free speech, both individually and collectively.
>
> Corporations are merely collective associations of individuals.
>
> Therefore, the First Amendment applies to corporations.

In this syllogism, the category of person broadly includes individuals as well as associations of individuals. Because associations of people are categorized as "persons" for First Amendment purposes, the theory of transitivity is satisfied by equating associations with corporations. Because members of the group are presumed to be similarly situated and belong equally, corporations must be afforded the same protections and rights as individuals.

The argument that corporations are fictitious persons entitled to protection under the First Amendment does not gain as much traction as the association-of-individuals argument,[247] likely because the Framers disagreed with how much power and privilege corporations should have at all.[248] Yet, in its opinion, the Court personified corporations, presuming that corporations possess valuable expertise.[249] And, even though it recognized that corporations may not have monolithic views, it presumed that

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243. *Id.* at 319.

244. *Id.* at 337.

245. *Id.* at 392–93. The Court cites to a slew of cases for the proposition that "[t]he Court has [long] recognized that First Amendment Protection extends to corporations." *Id.* at 342. Neither the dissent nor the majority question this conclusion.

246. *Citizens United*, 558 U.S. at 392–93.

247. *Id.* at 343 ("The Court has . . . 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.'").

248. *Id.* at 353 (internal quotes and cites omitted) ("There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations. The Framers may not have anticipated modern business and media corporations. Yet television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the Colonies."); *see also id.* at 361–62.

249. *Id.* at 364.

individuals associated with a given corporation do.[250] It also presumed that the dissenting or minority shareholder perspective within a corporation does not need protection.[251]

By comparison, however, it is striking just how reticent the Court has been, both historically and even now, to recognize the rights of nondominant groups, like persons of African descent, women, and members of the LGBTQIA+ community, to name just a few. For people of African descent to be recognized as having protection under the Bill of Rights, the Constitution had to be amended,[252] and even after it was amended, the battles for Civil Rights have been hard-fought.[253] In contrast, corporations have not had to fight in the same way to claim constitutional rights, and the Court generally treats it as a given that corporations are protected by the Bill of Rights.[254]

D. Summary

The rhetorical analysis in this Part revealed how the traditional legal rhetoric analytical framework is presented as a rational, unbiased, and neutral form of reasoning that is objectively fair. If it were truly rational, unbiased, neutral, and objectively fair, however, the analytical framework would have resulted in similar outcomes in both *Citizens United* and *Caulkett*—either stare decisis would have demanded deference to precedent in both cases or the principles permitting precedent to be overruled would have demanded overruling precedent in both cases.

The myth that traditional legal reasoning is objective, rational, unbiased, and neutral aligns with the near-identical myth that the market is an objective, rational, unbiased, and neutral place where transactions occur between individuals and entities who share similar bargaining power and play on a level field. Through these aligned myths, traditional legal rhetoric is essential to sustaining the free-market capitalism experiment. More importantly, traditional legal rhetoric cannot ever satisfactorily address the inequities of the marketplace—such as financial precarity—because traditional legal rhetoric was never intended to be egalitarian.

Because traditional legal rhetoric is designed to perpetuate the status quo through syllogistic reasoning and stare decisis, it will never be capable of adequately resolving the issues of late capitalism, like financial precarity. We see this happen repeatedly with certain countermovements like counterstory, critical race theory, critical feminist theory, and other critical

250. *Id.* at 364.
251. *Id.* at 362.
252. U.S. CONST. amend. XIV.
253. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 349 U.S. 294 (1955); Obergefell v. Hodges, 576 U.S. 644 (2015).
254. *See generally* WINKLER, *supra* note 100.

theories and countermovements.[255] While these movements are well-intentioned, they operate within the same reasoning apparatus as capitalism, which is good at advancing the status quo, but not so good at creating change. Even when certain gains are made, they tend to be inadequate and suffer from the same illusions of neutrality and objectivity that infected the original issue. Not to mention, exclusion remains a central feature of traditional legal rhetoric, meaning that, like with musical chairs, there will continue to be a dwindling dominant group fighting over increasingly scarce resources. In other words, the only thing that these countermovements can hope to gain in relying on traditional legal rhetoric is a position within the dominant elite group. They will never be able to create a truly inclusive solution while using the master's tool: traditional legal rhetoric.

CONCLUSION

To truly begin solving the problems of late capitalism, advocates must understand how traditional legal rhetoric creates inequities and challenge traditional legal rhetoric's substance and form using other rhetorics, such as African Diasporic, Asian Diasporic, Indigenous, and Latine rhetorics. These insurrectionary rhetorics establish frameworks for challenging dominant imperialist/colonialist power, centering community, and solving the real problems of inequity created by traditional legal rhetoric.

In *Critical and Comparative Rhetoric: Unmasking Privilege and Power in Law and Legal Advocacy to Achieve Truth, Justice, and Equity*, my co-authors and I demonstrate how other rhetorics, like Indigenous, African diasporic, Asian diasporic, and Latine, can be harnessed to dismantle harmful systems of oppression deeply embedded in U.S. jurisprudence.[256] These resistance rhetorics prioritize community and inclusion while rebelling against dominance and colonial control paradigms.

For example, Indigenous rhetoric is characterized by:

> survivance (survival + resistance). Coined by writer and scholar Gerald Vizenor, 'Native survivance stories are renunciations of dominance, tragedy, and victimry. Survivance is resisting those marginalizing, colonial narratives and policies so Indigenous knowledge and lifeways may come into the present with new life and new commitment to that survival.' Survivance is expressed through recognizing the existence of Indigenous rhetorics, identifying Indigenous peoples' strategic use of Western rhetorical forms, and the epistemic nature of Indigenous communication.[257]

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255. *See generally* BERENGUER, JEWEL, & MCMURTRY-CHUBB, *supra* note 3 (discussing the shortcomings of critical theories and countermovements that operate with the traditional legal rhetoric paradigm).

256. *Id.*

257. *Id.* at 104 (quoting LISA KING, ROSE GUBELE, & JOYCE RAIN ANDERSON, SURVIVANCE, SOVEREIGNTY, AND STORY: TEACHING AMERICAN INDIAN RHETORICS 7 (2015)).

In African diasporic rhetoric, "Maat, or 'rightness in the world' has seven principles: 'truth, justice, propriety, harmony, balance, reciprocity, and order,' truth being the most important. Maat also affirms the value of all people, regardless of race, class, gender, or sexuality and stresses the partnership between rhetor and audience in community building."[258]

Latinx rhetoric engages in border disruption that:

> requires us to jettison oppressive analytic frames as sites for the operation of justice—aspirationally, theoretically, and actually. It forces us to first recognize, then to cross the borders of race, culture, gender, class, and sexuality—real and imagined—to capture something new beyond. Latine rhetoric is a challenge to the law to recognize itself as a series of borders that restrict how we can proceed to resolve disputes equitably.[259]

Asian diasporic rhetoric uses language to decenter Western knowledge and "moves beyond categorization as a means of persuasion. In this context, the 'because therefore' or 'frame-main' reasoning style can be employed to resituate Asian American experiences with[in] imperialism, capitalism, White supremacy, and patriarchy in the United States as sources of authority to resolve legal problems."[260] Asian diasporic rhetoric is interested in real solutions to problems, especially those problems experienced by immigrants and other outsider groups.

Through these resistance rhetorics, advocates can begin the paradigm shift that is necessary to create genuine and lasting solutions to the complex issues inherent in late capitalism. This work first begins, however, with unmasking traditional legal rhetoric to reveal that it is not neutral, rational, unbiased, or objectively correct.

258. *Id.* at 109.
259. *Id.* at 123.
260. *Id.* at 117–18.