THE PENNSYLVANIA STATE UNIVERSITY
SCHREYER HONORS COLLEGE

DEPARTMENT OF COMMUNICATION ARTS & SCIENCES

Citizens United: Judicial Rhetoric and Corporate Constitutional Rights

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SPRING 2021

A thesis
submitted in partial fulfillment
of the requirements
for a baccalaureate degree
in Communication Arts & Sciences;
with honors in Communication Arts & Sciences

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ABSTRACT

On January 21, 2010, the United States Supreme Court issued its decision in *Citizens United v. Federal Election Commission*, ruling that limitations on corporate funding for communications in political campaigns was unconstitutional, as it infringed on a corporation's freedom of speech. The decision caused an uproar in America for people who were angered that corporations were given the same sacred constitutional right that natural citizens possess. However, what these Americans did not realize was that *Citizens United* was the culmination of a two-century civil rights movement conducted by corporationalists in which corporations incrementally earned basic civil liberties intended for natural citizens.

This thesis will trace that two-century civil rights movement by first delving into the history of corporations in America and their strong, but little known or appreciated foothold in American democracy from its infancy. Since corporations were never explicitly included in the Constitution, corporate executives utilized constitutional challenges to laws that regulated their business, and leveraged the U.S. Supreme Court to use its power of judicial review to strike down these laws and create corporate rights. An analysis of the intervening years before *Citizens United* will establish a pattern of reasoning in Supreme Court decisions for and against the expansion of corporate rights. This thesis will use constitutive rhetoric as a conceptual framework for understanding the duty and power of the Supreme Court and the impact of their rhetorical choices. By examining the judicial rhetoric in majority and dissenting opinions, this analysis will shed insight into the building blocks the Justices used in deciding *Citizens United* and how that decision influenced the further expansion of corporate rights under the Constitution.

At the conclusion of this thesis, the reader will see the legal and societal implications of the expansion of corporate constitutional rights, with specific evidence from *Burwell v. Hobby Lobby Stores* (2014), which extended *Citizens United* and granted corporations the freedom of religion. The evolution of corporate constitutional rights is an interesting and significant progression in American constitutional law. This careful examination of the influential Supreme Court decisions that shaped this evolution will explain how corporations earned the same constitutional rights as natural American citizens.

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ACKNOWLEDGEMENTS

This entire thesis would not be possible without the constant support of my thesis supervisor, Margaret Michels. It has been so much fun to work with you these past three years and share opinions on the content of the issues in this thesis. Thank you for all of your insight and suggestions, especially the idea to look into *Citizens United*. Because of you, this incredibly interesting and engaging project was born. Thank you for all your support beyond my thesis and the professional advice, insight, and encouragement you have provided me over the past three years.

To my honors advisers, past and present, Lori Bedell and Mary High. You both have given me encouragement and reassurance when I felt like I was staring up at the mountain I am now standing upon. Thank you for supporting this fusion of my professional interests beyond graduation with my CAS studies in rhetoric and for allowing me to try something unconventional with this project. It has been so incredibly rewarding.

Thank you to my family for constantly supporting my dreams and aspirations, especially this grueling three-year process. My parents have done everything in their power to support my academic and personal goals and nothing I have achieved up until this point would be possible without them. From late night calls to driving four hours from home to help me at school, my parents are my rocks.

To my mom, thank you for nudging me during freshman orientation to tell me to sign up for Honors CAS and aspire to be a Paterno Fellow. How could either of us have known the immense impact that program would have on my Penn State experience. You always believed in my abilities, even when I doubted them myself. Thank you for always checking in on how things were coming along and encouraging me when I felt like it was impossible at times. You kept me grounded and constantly reminded me to check in on my mental and physical health whenever I found myself biting off more than I could chew.

To my dad, thank you for always being a sounding board to send rough drafts to and bounce ideas off of. Your constructive criticism on my ability to turn a sentence into a paragraph has helped me to ensure I didn't do the same with this thesis… despite its length. You have helped me improve my writing over the years in ways I know will help me excel in legal writing in law school and beyond. Thank you for being the best mentor, teacher, and role model I could ask for. Your drive and success have motivated my desire to enter law school and take advantage of every opportunity, as soon as I get my foot in the door. Your advice and insight have gotten me to the position I am in today, entering your alma mater, Villanova University, as a law student!

I could not have completed this thesis without the help and support of so many individuals and organizations here at Penn State. I am so excited for the future that lays beyond graduation and to utilize the skills and acquired knowledge I have from completing this thesis and graduating with Honors in Communication Arts and Sciences!

Chapter I:

The Early History of Corporations in America

When the Founding Fathers drafted the United States Constitution, their opening line, “We the People,” indicated that the newly formed nation would derive its power, not from a King, but from the people themselves. The Constitution and its amendments seek to give power to the people and protect their rights under the law. Not once in the Constitution is the word “corporation” used. Despite this, modern day corporations have come to enjoy the same civil liberties as natural citizens. This thesis will examine the historical evolution of corporate constitutional rights in America and the rhetorical strategies that helped establish these rights through a two-century battle in the courts.

Before its conception as a sovereign nation, America was comprised of corporations. From the Virginia Company of London, to the East India Company, corporations have played a critical role in the development of our country, warranting critical inquiry into their evolving rights. Can corporations claim the same rights granted to natural citizens? Should corporations be treated as “persons” in our legal system? What authority has established these rights if they are not outlined in the Constitution or any piece of legislation? Did our Founding Fathers intend to implicitly protect corporations? These are all questions the United States Supreme Court has critically examined since the creation of our founding documents. The answers to these questions have been debated since the first corporate rights case in 1809, *Bank of the United States v. Deveaux*.

For two centuries, corporations fought for, lost, and gained various rights without alarming the general public. It wasn’t until the landmark 2010 decision, *Citizens United v. Federal Election Commission*, that the corporate rights movement became publicized. Corporations now had the right to free speech, among other protections, which opened the door to further legal challenges like *Burwell v. Hobby Lobby Stores*, giving corporations freedom of religion. Because the nature of these rights has only grown more controversial, an examination into the historical context of critical rulings and legislation is necessary to thoroughly understand the legal precedents that have shaped corporate constitutional rights and allowed controversial cases like *Citizens United* and *Hobby Lobby* to succeed.

Corporations in the New World

Since the first settlement in Jamestown, Virginia, corporations were an integral part of American history. Thirteen years before the arrival of Pilgrims on the Mayflower, the Virginia Company of London sent colonists to establish the first permanent New World colony in Jamestown. These colonists were not seeking to escape the monarchy or establish a new world order. The purpose of their journey was to make money for themselves, their stockholders, and the King (Winkler, 2018, pp. 6). The Virginia Company operated in Jamestown like a modern-day government. Under the leadership of Sir Edwin Sandys in 1619, the Virginia Company allowed settlers autonomy over their personal affairs through the creation of a "General Assembly." The Assembly consisted of representatives from various plantations that would govern the colony democratically. The emergence of self-government in the colonies was not a product of Sandys's liberal ideologies, but was instead essential to enticing men to move to the New World and work for the Virginia Company. As a result of these reforms, the Virginia Company recruited nearly 4,000 colonists to come to the New World, including the Pilgrims (Winkler, 2018, pp. 16).

The Virginia Company's influence on American history and holidays is often overlooked. According to Winkler, the Pilgrims celebrated their first successful harvest with a Thanksgiving Day in 1621. However, the first "official" Thanksgiving in America happened two years prior as a corporate initiative. The Virginia Company had ordered a group of settlers to move to Plymouth and establish an annual holiday to "thank the almighty upon landing" (Winkler, 2018, pp. 17). The Virginia Company not only brought democracy and Thanksgiving to America, but they also brought unethical and immoral practices like the human trafficking of women, even before the first African slaves arrived in the New World. Since the majority of settlers in the New World were single men, the Virginia Company funded and recruited at least 90 women from Europe, dubbed "maids," to travel to the colonies and marry the Virginia Company settlers (Cook, 1942, pp. 311-312). However, these practices didn't last for long, as The Virginia Company was dissolved and turned over to the British Crown in 1622.

The demise of the Virginia Company started just a few years after Sir Sandys took control of the company in the New World. Sandys found himself entrenched in an issue that continues to task corporations and their executives to this day: executive compensation. When the colonists learned that Sandys was collecting large compensation for managing the Virginia Company's tobacco trades, colonists and investors alike were outraged. Morale among the colonists was at an all-time low, and when the indigenous people launched the Virginia Massacre in 1622, over 80% of the original settlers were killed (Winkler, 2018, pp. 17-18). Following the Massacre, factions arose between the remaining settlers, creating further instability in the New World and uncertainty among shareholders.

Although the profitability of the Virginia Company failed, it nevertheless provided a blueprint for future English corporations and colonies. The several English colonies that formed after the demise of Jamestown were also corporations. Many of these colonies, operating under corporate charters, settled in present day New England and established the first states in the U.S. The Massachusetts Bay Company settled in present day Boston and, what we now know as, Massachusetts. When Puritan leaders forced Roger Williams to leave Massachusetts for his radical religious and political ideologies, he obtained a corporate charter and established the Providence Plantations and the Colony of Rhode Island in present day Rhode Island. Colonists from Massachusetts also received a charter, modeled after the corporate charter of the Massachusetts Bay Company, to settle in present day Connecticut, creating the Connecticut Colony (Kaufman, 2008, pp. 406-408). These corporate charters and their contents show that, before the idea of the "United States" was ever conceived, corporations have been engrained in and inspired our political structure.

The contents of these corporate charters gave the colonists the fundamental right to self-government. Colonists organized and established the first democratic assemblies and legislation in the New World, creating an air of independence. At the same time, King Charles II regained the throne and resisted any dissent from his subjects domestically and in the colonies. He revoked the Massachusetts Bay Company charter and many other corporate charters in the colonies about 50 years after their creation.

This was in an effort to convert them into royal colonies governed by the throne, rather than the corporation's members. Nevertheless, colonists still looked to their colonial charters as legal documents and maintained the corporate structure, reforms, and limitations that were established by the Massachusetts Bay Company a half century earlier. Resentment brewed among colonists who felt the British Parliament was attacking the rights of their charters by unfairly taxing them on all imported goods. Colonists like Samuel Adams and Patrick Henry organized boycotts of British goods, citing that the lack of colonist representation in Parliament infringed on their charters, which established their ability to self-govern. The manifestation of the colonists' ardent protests occurred on the fateful night in December of 1773, later known as the Boston Tea Party. Colonists in Boston threw over three million dollars (in today's currency) worth of East India Company tea into the Boston Harbor (Winkler, 2018, pp. 24-27).

Well before the American colonies were established, the idea of democracy and constitutionalism were closely intertwined with corporations. "America was founded by the Virginia Company, fundamentally shaped by the colonists' experience with the Massachusetts Bay Company, and inspired to Independence by the East India Company" (Winkler, 2018, pp. 31). So, while the Founding Fathers did not consciously utilize the corporate model at the Constitutional Convention, the Constitution inherently adapted elements of it that were already engrained in American society. Ultimately, the Constitution was designed to do what these corporate chartered colonies were doing for hundreds of years: establish government offices, set out procedures for lawmaking, and impose limits on what the government could do (Kupperman, 2007, pp. 2-3). Although the Founding Fathers never considered whether corporations should be granted individual rights, the constitutional system they established was influenced heavily by the idea of corporations. When the Constitution was officially ratified in 1788, it wouldn't take long before corporations would attempt to utilize and construe it in a way to secure their own rights and freedom, not from an oppressive regime, but from regulation (Winkler, 2018, pp. 30-31).

Populists v. Corporationalists

Although corporations had a strong foothold in American democracy from its infancy, it took almost 20 years before the Supreme Court would consider their constitutional rights in a court of law. The plaintiff behind the first corporate rights case was the first great corporation in America, The Bank of the United States. The Bank of the United States was the brainchild of Alexander Hamilton, who argued that there was a need for a federal bank that could create a uniform currency and provide a space to securely place federal deposits. However, when Hamilton attempted to obtain a charter from Congress for the Bank, he was met with strong backlash. Thomas Jefferson would be his biggest opponent, arguing that the Bank threatened his vision of the country and infringed on state's rights. Jefferson and his supporters, dubbed "Jeffersonians," believed that the states should have the ability to broadly regulate business within their borders. If a Federal Bank was chartered, it would be protected by the supremacy clause in the Constitution, allowing it to ignore states' rights. Jefferson saw a need to decentralize the power of the Bank, believing it bred unaccountability. This contentious debate between Hamilton and Jefferson over the potential economic and political power of the Bank, gave birth to our country's two-party system. On one side stood the Hamiltonians, who were corporationalists, supporting corporate enterprise and the expansion of constitutional rights for corporations. On the other side was the Jeffersonians, who were populists, opposing corporate power and supporting the limitation of corporate rights to protect the people (Winkler, 2018, pp. 35- 38). To this day, these competing views among corporationalists and populists directs debates on corporate rights.

Interestingly enough, the debate surrounding corporate personhood played a minimal role in the advancement of corporate rights. While the Supreme Court has wrestled with the interpretation of corporations as people, they often opt to provide other reasons for the development of their rights. Contrary to common sense, it was populists who argued for corporate personhood as a way to limit the rights of corporations. Many of the most influential Supreme Court decisions that granted corporations

constitutional rights completely ignored the consideration of corporate personhood. Instead, they would rely on the argument that corporations can claim the rights of its members (Winkler, 2018, pp. 35-37). The origination of this argument can be traced back to England in 1758, when English lawyer and Oxford professor William Blackstone published, *Commentaries on the Law of England*. Blackstone sought to thoroughly explain the justification of English law, and his opinion of corporations influenced his commentary on their legal status. The *Commentaries* wildly influenced American law when it made its way to the colonies. Before the Revolution, it was endorsed by leaders like Jefferson and, later, Abraham Lincoln. To this day, the *Commentaries* are still cited in the Supreme Court, appearing in arguments and opinions at least ten times a year (Winkler, 2018, pp. 47). Blackstone used the *Commentaries* to describe the legal rights and duties of a corporation, specifically claiming that they are an "artificial person." Under his interpretation, Blackstone asserted that corporations are independent, legal entities that are separate from the people who formed it. As such, he claims that they also have certain legally enforceable rights similar to that of a natural person. An important consideration to Blackstone's *Commentaries* was the role in which corporations played in England at the time. At the time, corporations were only erected for public interest, but were funded and managed by private parties. This ambiguity caused British corporations to be both public and private. Royal charters, at the time, heavily regulated these businesses but also provided them certain rights. Upon its charter and creation as a separate legal entity, they were guaranteed the right to own property, form contracts, and both to sue and be sued- all under the corporate name. Blackstone's *Commentaries* would prove vital to the arguments made in the first corporate rights case and would often reappear when the Court would revisit questions on corporate rights (Winkler, 2018, pp. 46-52).

Before entertaining Hamilton's Bank, Congress had to figure out whether the Constitution gave Congress the power to charter a corporation. James Madison, a primary author of the Constitution, recalled that he proposed to give Congress the power to charter corporations, but that this idea was vehemently struck down. Fortunately for Hamilton, members of Congress at the time had not yet adopted

the view that issues of constitutionality should be decided using the "framer's intent." Instead, with the support of northern commercial interests, Hamilton was able to pass his bill and incorporate The Bank of the United States. While the Bank operated in a federal function, it became a private, for-profit business that was managed by the interests of its shareholders. It became the first national enterprise and most influential corporation in America at the time, with headquarters in Philadelphia and branches that stretched from Boston all the way down to New Orleans. Despite the controversy surrounding the Bank, it stabilized the nation's economy and, within five years of its creation, attributed to the United States gaining the highest credit rating in the world (Winkler, 2018, pp. 35-39).

The First Corporate Right's Case

Despite the later success of the Bank, Jefferson's fear that the Bank would have too much power over the states' ability to regulate them soon came to fruition. When the Bank opened a branch in Savannah, Georgia, the state passed a law to limit their influence. Frustrated by their lack of control, Georgia imposed a tax on their locally held capital and bank notes in an attempt to drive the Bank out of the state. Instead of paying the state tax, the Bank chose to ignore it with the intention that their act of protest would bring the question of corporate rights in front of the Supreme Court. Georgia tax collector Peter Deveaux attempted to force the Bank to pay its taxes. Believing what he thought was the right thing to do, Deveaux used "'force and arms'" to barge into the Bank and collect two boxes of silver coins (Winkler, 2018, pp. 41). This gave the Bank the opportunity to take their issue to court, both to collect their money from Deveaux and to strike down what they believed was an oppressive law in Georgia.

It is important to note that the Chief Justice of the Supreme Court at the time was John Marshall, a Federalist and staunch supporter of the Bank. Chief Justice Marshall was responsible for the enhancement of federal rights and the minimization of states' rights through his opinions and leadership during his time on the Court. It was imperative to the Bank that its case be heard in federal court, as they

felt that if the case were tried in Georgia the court would be biased towards their home state and local residents. However, in order to get this case to the federal court, the Bank had to prove Article III Section II of the Constitution, diversity of citizenship. Diversity of citizenship jurisdiction for the federal courts was codified with the establishment of the Judiciary Act of 1789, which established the lower federal courts and provided specific language on where and how courts can hear cases from citizens of different states. Since Deveaux was from Georgia and the Bank was headquartered in Pennsylvania, the question now became, does a corporation count as a "citizen" under the Judiciary Act and Article III. This question would test whether or not corporations had the constitutional right to sue in federal court (Winkler, 2018, pp. 39-42).

When the federal circuit court dismissed *Bank of the United States v. Deveaux* due to lack of jurisdiction, the Banks' counsel, Horace Binney, appealed the case to the Supreme Court. Binney's biggest challenge in this case would be the task of convincing the Court that corporations, like the Bank, had the same rights as "citizens" to sue in federal court. Binney, a student of rhetoric and persuasion, was aware that "even the most compelling logic falters if it defies common sense" (Winkler, 2018, pp. 54). For this reason, instead of opting to persuade the judges that corporations possess the same characteristics of a citizen, he believed he would be more successful if he tried to convince them that this case wasn't about corporations at all. Instead, he focused on the rights of the corporation's members. Through this argument, he attempted to make the corporation itself invisible, claiming that, while the name of the corporation is the plaintiff, its members were collectively exerting their right to sue as citizens. Today, this argument in litigation is referred to as "piercing the corporate veil." The common rule, since Blackstone's days, was that there is a strict separation between corporations and the people behind them, whether that be shareholders, employees, or executives. This places liability on the corporation, not its individual shareholders, when issues such as product liability arise. In modern business law, "piercing the corporate veil" happens only in rare instances of fraud or wrongdoing where the court will place liability on individuals within a corporation, rather than the corporation itself. Looking at this case in a historical

context, it was extremely unusual for Binney to use the corporate veil argument as justification for the Bank's diversity of citizenship. Normally this argument is used to extend the liability of the corporation to its members. However, Binney's version would seek to do the opposite, impose the rights of the corporation's members to the corporation itself. Binney's core argument was that corporations and the people behind them "were not separate and distinct entities [under] the Constitution…. Instead, [they are] associations of individuals, and… should be able to assert the same rights as the people who come together within them" (Winkler, 2018, pp. 52-56). Counsel for Peter Deveaux, Philip Barton Key, chose not to reject this point, but to argue its irrelevance. Key contended that because the Bank chose to enter into the case under their corporate name, they affirmed their intent to be referenced as a corporate body and to sue in that capacity. He maintained that a corporation and its members should be "separate and distinct under the law" and that the question for the Court should remain whether or not a corporation is a citizen, not its members (Winkler, 2018, pp. 59-61). While Binney may have been the first of his time to use this ambiguous justification of corporate rights, his way of thinking would be repeated throughout history by corporationalists seeking to expand the constitutional rights of corporations.

Bank of the U.S. v. Deveaux in Context

Fortunately for Binney, he was not alone in this uphill battle. At the same time the Supreme Court was scheduled to hear *Bank of the United States v. Deveaux*, future president John Quincy Adams was arguing one of his last few cases in front of the Supreme Court, *Hope Insurance v. Boardman*. Adams was representing two Boston men in their case against a Rhode Island insurance company. Like the Bank, the men thought the Rhode Island courts would favor the corporation in that state, so they appealed to the federal courts. Adams knew that the case would be contingent on the issue of corporate citizenship and the right of corporations to be sued in federal court (Winkler, 2018, pp. 56-59). While Adams and Binney

were arguing cases on two separate sides, they were relying on the same argument: the right of corporations to sue and be sued.

Consideration for the circumstances and brief history of American corporations leading up to both 1809 cases is necessary to understanding their historical context. During the American colonial era, similar to the demise of the East India Company, stocks in the South Sea Company soared in a speculative buying spree only to crash shortly after in what would later be known as the South Sea Bubble of 1720. This was the first international stock market collapse and led to British Parliament adopting the Bubble Act, which placed significant restriction on corporate charters, corporate expansion, and corporate transferrable shares (Winkler, 2018, pp. 43). This hostile treatment of corporations in England lasted long into the industrial revolution and left American corporations with no real guidance on their expected rights in government.

It is important to recall this history in order to determine that the Framers likely never paused to consider corporations when drafting and ratifying the Constitution and the rights of citizens in the newly formed United States. When independence was gained, the founding generation embraced the corporate form. In the decade following the ratification of the Constitution, over 300 business corporations were chartered in the United States. These corporations produced products, operated insurance companies, oversaw public projects, and constructed, quite literally, the foundation of our country by stitching together the colonies into a single nation through newly constructed turnpikes, bridges, and canals (Winkler, 2018, pp. 43-44). While this growth was exciting, it was nerve-racking for populists who saw the lack of regulation and guidance on how to treat corporations legally as a challenge. It would be up to the courts to decide how corporations should be treated under the law, as the Founders provided no guidance during the Constitutional Convention. Binney would find further trouble proving the Framers' intent to protect corporations with the use of the word "citizens" in Article III in the Constitution. Citizens are typically thought to be natural people who belong by law and allegiance to one country. This wording, paired with the absence of the Framers' intent to protect corporations, presented extreme challenges for

both Binney and Adams. Absent these rights, the Bank would find itself regulated to its demise by Jeffersonian opponents (Winkler, 2018, pp. 43-44). This probable outcome paired with the loyalty of the Federalist Chief Justice would be the saving grace of the Bank.

The Ambiguity of the Supreme Court Decision in *Bank*

In the case of *Bank of the United States v. Deveaux*, Binney would argue the importance for the Supreme Court to exercise their power of judicial review, previously established in *Marbury v. Madison*, to strike down the Georgia tax law. Since the Supreme Court was undergoing renovations to their original meeting room in the Capitol building, they heard the *Bank* case in Long's Tavern, across the street from the Capitol and, interestingly enough, on the grounds where the Supreme Court building sits today. Chief Justice John Marshall delivered the opinion for the Court, providing no separate opinion for *Hope*. Instead, he directed counsel for *Hope* to reference the *Bank* opinion, since both cases asked the Court the same question (Winkler, 2018, pp. 62-64). In Chief Justice Marshall's opinion, he concluded that there was no evidence or guidance in the Bank's charter that showed Congress' intention to allow the Bank to sue in federal court. This required the Court to turn to the Constitution for guidance. The Court, again, found no evidence that Article III's distinction of "citizens" included corporations in that definition. However, Chief Justice Marshall used his opinion to point out the fact that the Constitution is intended to be read broadly, with the purpose of the law in mind. When applying this standard to Article III of the Constitution, the purpose of diversity of citizenship is to protect citizens from biased state courts. In Chief Justice Marshall's opinion, this same consideration should be given to corporations by allowing them to sue in federal court rather than a potentially bias state court. Chief Justice Marshall reiterated in his opinion that corporations are "invisible, intangible, and artificial beings," arguing against corporate personhood by affirming that the corporation is a stand-in legal entity for a group of natural citizens asserting their personal right to sue (*Bank of the United States v. Deveaux,* 1809). By piercing the

corporate veil in this way, Marshall took an unconventional path to define corporations as a composition of their individual members with a collective right to sue.

Chief Justice Marshall's opinion would set a dangerous precedent. When justifying corporate rights based on a corporation's members, the Court never clarified exactly who counts as a member of a corporation. Did they intend to include shareholders in this definition? Did they mean employees? Directors? Maybe all of the above? *Bank of the United States v. Deveaux* gives us no definitive answer to those questions. A later Supreme Court decision would establish strict diversity of citizenship: all plaintiffs must be from completely different states from all defendants. Had this precedent been established prior to the 1809 *Bank* case, the defense may have implored Binney further to establish the complete diversity of the Bank's members, which likely could have resulted in a dismissal of the case (Winkler, 2018, pp. 67-70). Either way, the Supreme Court decision in this case only further complicated the legal definition of corporations and how they should be treated under American law.

The influence of *Bank of the United States v. Deveaux* may not be as evident in modern constitutional law, but it is often still cited for establishing the business law doctrine of veil piercing. While piercing the corporate veil is the exception, not the rule, the *Bank* case created a new tradition in constitutional law. In the two centuries that followed the first corporate right's case, Binney and Chief Justice Marshall's strategy of piercing the veil in a way that allowed corporations to claim the rights of its members would become a common "conceptual tool" that the Court would often use to justify the extension of corporate constitutional rights (Winkler, 2018, pp. 68). It is important to note, not just what is in Chief Justice Marshall's opinion in this case, but also what is not. It is unclear if the choice to skip over the distinction of a corporation's members was strategic for corporationalist John Marshall. Either way, the lack of a distinction and ambiguity has proved helpful for corporations seeking rights through judicial review. Through this opinion, Chief Justice Marshall declares that the rights of a corporation's members are principal, while maintaining the actual membership to be "abstract, undefined, and unexamined" (Winkler, 2018, pp. 68-70). This created a dangerous theme in corporate rights cases where

constitutional protections are based on the rights of a corporation's members, without ever questioning or defining who the members of that corporation are.

The Aftermath and Implications of the *Bank* Decision

The Bank of the United States would be saved by the Court's decision in *Bank of the U.S. v. Deveaux*, but its win would be short lived. When Alexander Hamilton chartered the Bank, he only gave it a 20-year term in order to compromise with Jeffersonian and populist opponents. The charter was to expire in 1811, only two short years after the Bank won its Supreme Court case. This caused the bitter debate between Hamiltonian corporationalists and Jeffersonian populists to resume. Truthfully, the Bank of the United States should have succeeded. Not only did Hamilton garner support among members of Congress who saw how the Bank stabilized the nation's finances in those first few decades, but the Supreme Court validated the corporation by ruling in their favor (Winkler, 2018, pp. 68).

Chief Justice John Marshall ensured that his time on the Court resulted in a continued expansion of corporate rights, consistent with his Federalist support. In the years following, he would reiterate the same sentiments he echoed in *Bank* in an effort to secure expanded corporate rights. This wouldn't prove easy as his judgement in the *Bank* case would be questioned in the 1819 *McCulloch v. Maryland* case. The important question that was left unanswered by the Court in *Bank* would be asked again in this case: did the Constitution permit states to tax federal corporations? (Winkler, 2018, pp. 68-69). Once again, Chief Justice Marshall avoided answering this question by returning the case to the lower courts for consideration. This was no mistake; by avoiding delivering an opinion, Marshall was protecting the corporation. Marshall's choice to refuse giving an opinion avoided angering populists while they were in the midst of voting to reissue the Bank's charter. But even after garnering support from the Bank's harshest critics, Thomas Jefferson and James Madison, the Bank still lost its charter by one vote (Winkler, 2018, pp. 68-70).

The Importance of Political Players in the Evolution of Corporate Rights

While the First Bank of the United States met its demise in 1811, the 1809 Supreme Court decision that ruled in its favor would prove paramount to proponents of expansive corporate constitutional rights. Later decisions would prove more useful and concrete in their rulings, but the *Bank* case laid the foundation for the debate over corporate rights. This case and the circumstances that surrounded its ruling also provide interesting insight into the evolution of the corporate rights debate. Something that has remained constant over the past two centuries in the fight for corporate rights is the political influence and leverage of the players involved. Whether the reader believes Chief Justice Marshall provided an accurate and useful decision on corporate rights, it is important to remember his allegiance and beliefs. In many of the cases that this thesis will examine, the players involved, including citizens, attorneys, and judges, all play a crucial role in the outcome of the decision. Whether it be personal biases and beliefs, or skillful rhetorical strategies, the players in these cases exert extreme influence over the outcome and precedent. Often, the more skillful argument will win, regardless of what is deemed "right" or "just" by the public. As it occurred in the *Bank* case, personal bias may have motivated the opinion of the Court and the precedent that it established. Regardless, the historical context behind *Bank of the U.S. v. Deveaux* gives constitutional scholars two ways to conceptualize corporations. William Blackstone's rationalization that a corporation is a legal person with rights of its own, or Horace Binney and Chief Justice Marshall's opinion that corporations are an association of people whose rights are derived from its members (Winkler, 2018, pp. 69-70). As scholars continue to examine the evolution of corporate constitutional rights and corporate personhood, these two definitions provide a starting point for the courts to consider.

Chapter II:

The Fourteenth Amendment Conspiracy

When the Union prevailed over the Confederacy in the Civil War, it was essential that legislation be passed to protect the rights of all United States citizens as well as extend those same rights to formerly enslaved people. The Fourteenth Amendment to the Constitution was intended to do just that. In 1866, Congress formed the Joint Committee on Reconstruction. Their primary purpose was to draft a Fourteenth Amendment that would grant equal protections and rights to newly freed slaves. The Amendment passed in the Senate in 1866 and was ratified two years later in 1868 ("Landmark Legislation," 2020). It was not until two decades later, in 1888, when the language of the Amendment would be called into question. However, this case had nothing to do with the rights of former enslaved persons. Instead, it would be an effort by the largest, most politically powerful corporation of the late nineteenth century, the Southern Pacific Railroad. The Railroad would attempt to leverage the wording of the Fourteenth Amendment in order to secure their own constitutional rights (Winkler, 2018, pp. 122).

One member of Congress' Joint Committee on Reconstruction who assisted in drafting the Amendment was skilled attorney and master orator, Roscoe Conkling. Conkling was a leader among Republicans in Congress for over two decades, provoking rumors of his potential bid to the presidency. Twice nominated to the Supreme Court and once nominated to be Chief Justice, Conkling was forced to turn the nominations down because he was poor and the esteemed position paid too little. At the time, attorneys made much more money working in the private sector, despite the prestige that came with working for the highest court in the land. In 1888, when he was approached to represent Southern Pacific Railroad in their case against San Mateo County, the massive pay day promised by the corporation likely enticed him. Knowing that the case would rely on the question of corporate constitutional rights, specifically whether they were protected by the Fourteenth Amendment, there was no one better to represent the corporation than Conkling. By 1888, he was the last surviving member of the Joint Committee that drafted the Fourteenth Amendment (Winkler, 2018, pp. 113-117). As one of the biggest contributors and the only surviving member of the Joint Committee, Conkling was the only person who could recall the intentions of the Fourteenth Amendment drafters. Conkling was renowned in his field for

his persuasive rhetoric and skillful presentation of the facts. His legal acumen paired with his first-hand recollection of the drafting of the Fourteenth Amendment would shed a new perspective on the drafter's intent. He argued that the rights intended for freed slaves were also meant to apply to corporations.

The biggest piece of evidence Conkling used to show the drafter's intent was his personal journal that contained extensive notes on what transpired among the Joint Committee while writing the Fourteenth Amendment. Conkling claimed that the drafting committee fielded many complaints from businesses over the years regarding state laws they felt were discriminatory. It was because of this, he claimed, that they intended to protect corporations as well as freedmen. The primary evidence Conkling used to assert this claim was the careful language of Fourteenth Amendment that distinguishes "persons" as those protected, rather than "citizens." Section One of the Fourteenth Amendment reads, in part: "No state shall… deprive any *person* of life, liberty, or property without due process of law, nor deny to any *person*… the equal protection of the laws" (U.S. Const. amend. XIV, § 1). What Conkling's notes claimed was that an earlier version of the amendment used the word "citizens," but was later replaced with "persons." Conkling insisted that this change was deliberate and, by using the word "persons," the drafters showed intent to protect "artificial persons" in addition to natural citizens (Winkler, 2018, pp. 113-117).

Uncovering the Drafters True Intentions

By giving a detailed recollection of the conversations that took place at the Joint Committee drafting, Conkling inadvertedly implied that all amendment drafters were conspiring to use the rights of freed slaves as a chess piece in their pursuit to secure corporate rights quietly. Since Conkling was the only drafter still alive and since his notes are the only record we have of the conversations that took place, historians have found it hard to uncover the truth behind this potential conspiracy. It is important to take Conkling's claims with a grain of salt, as the monetary incentive behind the Southern Pacific Railroad

case likely enticed the impoverished attorney to use every persuasive tactic he had in his repertoire. While earlier versions of the amendment verify the change from "citizens" to "persons," no other members of the Joint Committee ever mentioned or discussed with anyone the purpose of their word choice. On top of this, not one person mentioned business corporations during the public debate over ratifying the Amendment, casting further doubt on Conkling's claims (Winkler, 2018, pp. 128-134).

By the twentieth century, historians were able to verify parts of Conkling's claim by studying the usage and distinction between the word "persons" and "citizens." Historian B.B. Kendrick believed, had this modification been made, the slight word change would show intent to apply the rights of natural humans to artificial persons as well. He concluded this by examining a historical pattern that emerged among the word choice. Kendricks found that throughout the Constitution and in various legal documents, "persons" typically referred to property rights, whereas "citizens" referred to political and liberty rights (Graham, 1938, pp. 372). This historical evidence only fueled the conspiracy that maybe the Joint Committee intended to include corporations after all.

The Four Players Behind the Conspiracy

While Kendricks' research provides compelling evidence in Conkling's favor, a brief look into the political climate and players involved in the *San Mateo County v. Southern Pacific Railroad* case sheds light onto the outside influences potentially at play in this decision. Examining these players does not discount a potential conspiracy behind the amendment. Instead, it suggests that if there was in fact a conspiracy, it did not occur during the drafting of the amendment. Instead, it happened two decades later when corporationalists made it a priority to extend the protections outlined in the Fourteenth Amendment to corporations and implicitly establish their rights under the Constitution (Winkler, 2018, pp. 115-117).

The first big player was Roscoe Conkling himself. His financial woes potentially influenced his bold claims and suggest that he may have been motivated to fabricate or exaggerate aspects of his story,

as no one was alive to defend or challenge his claims. The second major player was the Southern Pacific Railroad. With the expansion of their company throughout the United States, the Railroad struggled to fight state laws and taxes that discriminated against their business. To combat this discrimination, the corporation used strategic litigation to test, in over sixty cases, what rights corporations had in comparison to natural humans. The Railroad had the money and resources to ensure their legal team for these "test cases" were stacked with experts in their field, such as Roscoe Conkling. They hoped that these strategic test cases would help them acquire the same rights to equal protection and due process as natural people. Their case against San Mateo County was just the first of sixty to make it to the Supreme Court (Winkler, 2018, pp. 119-120).

The third major player was Justice Stephen Field. An influential corporationalist and pro-business jurist, Justice Field was known for his fondness towards corporations and their rights. Additionally, Justice Field had suspicious ties to Leland Stanford- the president of the Southern Pacific Railroad. It was believed that Stanford was behind Justice Field's nomination to the Court. To show his presumptive gratitude, Field consistently ruled in favor of railroads and Stanford's companies in particular. Even when he was not assigned to cases, he would petition his colleagues to rule in Stanford and his railroads' favor (Winkler, 2018, pp. 140).

The last major player who influenced how the public viewed Supreme Court opinions and the precedent they established was not an attorney or judge, but JC Bancroft Davis, the Supreme Court's Reporter of Decisions. Davis' role was to publish the Justices' official opinions. Viewed as a prestigious and lucrative position, Davis' ego would often affect his interpretation of the opinions. Davis' primary role was to develop the headnotes and a syllabus with a brief description for every case. While one would view this work as straightforward today, Davis had a convoluted way of developing these syllabi. He would often let his own interpretation of the law overshadow the actual language the Justices used in their opinions. Another suspicious factor to Davis' role in this "conspiracy" was the fact that he served as president for the Newburgh and New York Railway Company for a time. Davis showed clear bias in the

official legal documents he produced. This would consistently mislead lawyers conducting legal research who utilized the syllabi from the *Southern Pacific Railroad* test cases as precedent for all the wrong reasons (Winkler, 2018, pp. 149-153).

While the Fourteenth Amendment was intended to grant and protect the rights of former slaves who had no protection or representation in the American judiciary and legislative systems, it became a weapon for businesses who wanted to suppress state regulation. Charles Wallace Collins, a law librarian for Congress and the Supreme Court, did extensive research on the use of the Fourteenth Amendment in the Supreme Court in the first half century after it was ratified. He found that out of the 605 Fourteenth Amendment related cases in the Supreme Court between 1868-1912, only 28 of those, approximately 5%, of total cases involved African Americans. And in nearly all cases, they lost (Winkler, 2018, pp. 157-158). Collins' research sheds light onto the fact that the Fourteenth Amendment, while developed to protect the rights of freedmen with little protection in American legislation, instead benefitted an unintentional third party, corporations (Winkler, 2018, pp. 157-160).

Evidence of a Conspiracy

In the decades following Roscoe Conkling's oral argument in *San Mateo County v. Southern Pacific Railroad,* historians have sought to discern the validity of conspiracy claims surrounding the Fourteenth Amendment. Charles Beard, a Columbia University professor and constitutional historian, was among the first to suggest that there was a conspiracy behind the Fourteenth Amendment's ratification. Beard believed the Founding Fathers were motivated by their economic interests when drafting the Constitution. In fact, Beard made the bold claim that almost all political actors are motivated "not by high principle, but economic and class concerns" (Winkler, 2018, pp. 134-135).

Another influential historian and lead expert on the Fourteenth Amendment was librarian, Howard Jay Graham. In the mid-twentieth century, Graham uncovered a conflicting story from Beard.

His careful examination of the historical precedent of the Amendment as well as his reconstruction of Conkling's journal and Joint Committee notes revealed that there was no purposeful conspiracy among the Fourteenth Amendment drafters to apply the Amendment to corporations. Graham also found no evidence in Conkling's journal of the language change from "citizens" to "persons" like Conkling described in the *San Mateo* case. Graham concluded that Conkling misrepresented facts and "took advantage of the good faith of listeners." In Graham's opinion, there was no conspiracy among the drafters but instead a conspiracy among the attorneys and players in the *Railroad* test cases to mislead the judge, jury, and people (Winkler, 2018, pp. 134-136).

The *Railroad* Test Cases

San Mateo County v. Southern Pacific Railroad was the first test case brought by the Southern Pacific Railroad that made it to the Supreme Court. The Southern Pacific Railroad intended to use the nation's only surviving Fourteenth Amendment drafter as their representation in a case against San Mateo County that would test whether the Fourteenth Amendment's equal protection and due process clause extended to corporations.

The tax law that sparked this Supreme Court case was in San Mateo County where people, but not railroads, could deduct their mortgage when calculating land value for tax purposes. This law was passed in an attempt by San Mateo County, similar to many counties across the country, to limit the influence and overall economic and, therefore, political power of large national corporations like railroads, who owned large portions of the country's land. San Mateo County defended their laws by stating that railroads, in particular, own large portions of land that is mostly mortgaged for more than market real estate. Thus, if railroads like Southern Pacific and their sister line, Central Pacific, were allowed to make the same deductions as individuals, they would pay no real estate taxes. This tax law, in

the eyes of San Mateo County and the state, was crucial to preventing unfair economic and financial benefits for corporations over people (Winkler, 2018, pp. 118-119).

The railroads viewed these attempts by the states to limit their power through taxes and laws as "discriminatory." In the case of *San Mateo County v. Southern Pacific Railroad*, the issue rose all the way to the Supreme Court. The case presented the nation's highest court with the ultimate question of whether corporations were protected by the Fourteenth Amendment and had the right to equal protection and due process. (Winkler, 2018, pp. 118-120). Conkling's primary argument on behalf of the Railroad was that the corporation as well as its creditors and stockholders are among those "persons" protected by the Fourteenth Amendment. Conkling utilized historical precedent in the courts to show a long pattern of judicial opinions using the word "persons" to encompass artificial as well as natural persons. Conkling relied on the drafting history of the Amendment as proof that the change from "citizens" to "persons" was deliberate in order to provide broader protections for artificial persons like corporations (Winkler, 2018, pp. 130).

The *San Mateo* case was not the only test case Southern Pacific Railroad was trying in the courts. The second test case the Railroad would try in order to open the door for extended protections for corporations was in Santa Clara County. The only difference between *San Mateo v. Southern Pacific Railroad* and *Santa Clara County v. Southern Pacific Railroad* was the absence of Roscoe Conkling's testimony on behalf of the Railroad (Winkler, 2018, pp. 144). Both test cases sought to establish precedent that the Fourteenth Amendment protected artificial persons, like business corporations. The Railroad's test cases and their opinions successfully sought a means for deregulation by judicial review.

The *Railroad* Test Case Decisions

The culmination of various players as well as Conkling's calculated conspiracy resulted in the Supreme Court ruling in favor of Southern Pacific Railroad in both test cases by striking down the local

tax laws in question. They based their reasoning in an improper estimation of the Railroad's taxes. Since the decision was based on improper calculations, the Court decided it was "not necessary to consider any other questions, including the grave questions of constitutional law" (Winkler, 2018, pp. 148). The majority opinion in *Santa Clara* specifically points this out: "there will be no occasion to consider the grave questions of constitutional law upon which the case was determined" (*Santa Clara County v. Southern Pacific Railroad*, 1886). Justice Field wrote a concurring opinion justifying his decision in favor of the Railroad by comparing discrimination based on racial identity to that of discrimination based on corporate identity. Justice Field used his concurring opinion to express displeasure with the Court's choice to ignore questions of constitutional law in the majority opinion (Winkler, 2018, pp. 144-149).

Despite the clear distinction the Court made to not decide on the constitutional issues presented in these cases, the decisions were perceived as a success for Conkling and his argument for corporate rights. By ruling in the Railroad's favor, many believed the Court affirmed Conkling's claim that "corporations were 'persons' within the meaning of the equal protection clause" (Graham, 1938, pp. 371).

Implications of the *Railroad* Test Cases

The influence and impact of *San Mateo* and *Santa Clara* doesn't only come from the majority, concurring, or even dissenting opinions in each case. The political players in these cases were equally influential in shaping the influence of the case and perception of its precedent. JC Bancroft Davis, the Supreme Court Reporter of Decisions, exerted his own influence on the *Santa Clara* case while writing the syllabus on the opinion for legal research use. Anyone who only read Davis' syllabus of the case would think that the Court ruled that corporations are "persons" under the Fourteenth Amendment. The official case syllabus for *Santa Clara* states: "The main—almost the only—questions discussed by counsel in the elaborate arguments related to the constitutionality of the taxes… One of the points made… was that 'corporations are persons within the meaning of the Fourteenth Amendment to the Constitution'"

(*Santa Clara County v. Southern Pacific Railroad*, 1886). In reality, this question was ignored by the Court. The syllabus continues to reference this constitutional question by stating: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment… applies to these corporations. We are all of opinion that it does" (*Santa Clara County v. Southern Pacific Railroad*, 1886). In reality, Chief Justice Morrison Waite called Davis before the publication of his syllabus to remind him to include whatever he wanted, so long as it reminded the public that the Court did not decide on the constitutional questions presented. For whatever reason, whether it be personal allegiances or investments, Davis chose to make it appear as though the Court decided on and granted corporations constitutional rights in the *Santa Clara* case. Davis' careful rhetorical choices in the official case syllabus continues to mislead attorneys conducting legal research today. His misrepresentation of the facts and holding in this case has impacted the precedent and inadvertent influence of these cases (Winkler, 2018, pp. 149-153). Despite his anger at the Court's inability to include a decision on constitutional facts in their majority opinion, Justice Field saw a great opportunity through Davis' syllabus. Field would go on to use this syllabus as evidence for ruling in favor of expanding corporate rights in cases like *Minneapolis & St. Louis Railway Company v. Beckwith*. The use of this syllabus would create a precedent that granted corporations the right to due process and equal protection, despite the content of the actual opinion (Winkler, 2018, pp. 153-157).

While the *Railroad* test cases were used as a precedent for granting corporations constitutional protections under the Fourteenth Amendment, it is important to consider the political players and context surrounding the perception of these decisions. Corporate constitutional rights have been a question in American democracy for centuries, before our founding documents were ever conceived. Whether there was a conspiracy to grant corporations rights through a constitutional amendment or not, the gravity of the evidence in favor of this reality is intriguing. The *Railroad* test cases and the "conspiracy" surrounding the intentions of the Fourteenth Amendment provide an interesting layer to the history and evolution of corporate constitutional rights in early American history.

Chapter III:

The Intervening Years

When examining the historical evolution of corporate constitutional rights, landmark cases like *Deveaux v. Bank of the United States* and the *Southern Pacific Railroad* test cases stand out as defining cases in the first century of American history. While the decisions in these cases weren't popular, the results didn't have nearly as much impact as the 2010 landmark case, *Citizens United v. Federal Election Commission,* which found sections of the Bipartisan Campaign Reform Act unconstitutional for infringing on a corporation's right to free speech. The decision ultimately allowed corporations to spend unlimited general treasury funds on electioneering communications in political campaigns. While the decision was unprecedented, *Citizens United* wasn't an anomaly. In fact, looking at the two centuries leading up to this decision, it is clear that there was a movement to gain constitutional rights for corporations, premeditated or not. This chapter will examine the progression of corporate rights in the twentieth century, following the cases between the intervening years from the *Railroad* test cases and prior to *Citizens United*. Looking at the cases that transpired in this era, corporate rights progressed and regressed as the courts and legislature determined the limit on these rights.

The *Lochner* Era

The decades between 1897 and 1937 in the Supreme Court would later be defined as "The *Lochner* Era," receiving its name from the landmark and controversial decision, *Lochner v. New York.* Many of the Justices on the Supreme Court during this era were originalists who felt as though "individual liberty was being threatened by the unprecedented growth of the regulatory state" in the late nineteenth and early twentieth century (Winkler, 2018, pp. 183). During this era, the Court utilized the doctrine of substantive due process to strike down progressive business regulations in favor of laissez-faire economic policies. Despite the business-friendly reputation of the Court at that time, they did place some new limits on the scope of corporate rights, but not without simultaneously granting them additional protections. One of the biggest distinctions the Court held during this era was that corporations have

property rights, *not* liberty rights. Since as early as Blackstone's *Commentaries* in medieval England, corporations have always had the right to property, it is something they cannot function without. During the *Lochner* era, the Court would limit corporate rights to property and held that they did not have liberty rights. While liberty rights tend to involve personal and spiritual freedom, which a corporation cannot have, the Court never defined liberty rights (Winkler, 2018, pp. 183). This vague standard would follow the Court into the decades following the end of the *Lochner* era, ushering in a new wave of cases in the twenty-first century that would eventually test corporation's liberty rights. The *Lochner* era Court would long be criticized for their use of judicial advocacy in striking down laws they simply disagreed with, essentially rewriting the law in favor of corporations. This made it nearly impossible for the government to regulate business and labor relations. In his confirmation hearing, Chief Justice John Roberts would point out the Court's discrepancies in this era when he stated: "read [the *Lochner* case] today and it's quite clear that they're not interpreting the law, they're making the law" (U.S. Congress, 2005). It is unclear if the *Lochner* era Court conspired to grant certain rights to corporations over the decades. Regardless, the era itself would be transformative to corporate constitutional rights and would set precedent for future cases that would both limit and expand the rights of businesses.

While the era gets its name from the *Lochner v. New York* case of 1905, the era is thought to begin with the 1897 case, *Allgeyer v. Louisiana*. This case didn't deal with a corporation, but instead a partnership that insisted they had the ability to do business across state lines. They claimed that the Fourteenth Amendment due process clause applied to their case and the Court ruled in their favor. The Court held that "unduly protectionist state laws violated the 'liberty of contract'" (Winkler, 2018, pp. 181). Justice Peckham's opinion in this case was extremely influential in establishing "liberty of contract" as an unwritten right in the due process clause of the Fourteenth Amendment. While this concept is not explicitly stated in the Fourteenth Amendment, Justice Peckham encouraged readers to interpret the protections of the Amendment broadly. Long after the *Lochner* era ended, the Supreme Court continued to read the due process clause broadly to protect unwritten rights such as the right to same-sex marriage

and the right to privacy. *Allgeyer* not only kickstarted the *Lochner* era, but Justice Peckham's opinion is widely viewed as one of the most influential opinions from the Court, as it allowed the Court to protect rights not necessarily defined in the Constitution (Winkler, 2018, pp. 181-184).

Lochner v. New York, which defined the era, was a dispute over the Bakeshop Act of 1897 that placed limits on bakers' hours and wages, among other things. Joseph Lochner, who was indicted twice for violating the Act, lost his civil suit against the state twice before it reached the Supreme Court. Lochner successfully argued that the Act itself was unconstitutional as it infringed on the Fourteenth Amendment's unwritten right to freedom to contract, a precedent recently established in *Allgeyer.* The Court ultimately ruled in favor of Lochner and struck down the clauses in the Bakeshop Act attempting to regulate employee hours or wages. While Lochner was the individual named in this case, he represented his family's bakery business. Thus, this case gave businesses, like Lochner's, the ability to determine employee compensation and working conditions without government interference (*Lochner v. New York*, 1905). Justice Holmes didn't author the main dissent in this case, but his short and comprehensive opinion was extremely influential. Justice Holmes states in his opinion: "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States" (*Lochner v. New York*, Holmes, O., dissenting, 1905). Justice Holmes uses this statement to emphasize that whether a law or policy is "familiar" or "shocking" does not determine if it is constitutional. Both dissenting opinions give reference the Court's lack of authority to decide on economic policies and health concerns, making it clear the Court had overstepped its role in this decision. Following the *Lochner* era, legislation like the Bakeshop Act were viewed as fair and not unduly burdensome, acknowledging the validity of the dissenting Justices' opinions.

From the time it was decided, *Lochner v. New York* was extremely controversial. Regardless of public opinion, the Supreme Court would continue to strike down labor laws, citing them as

unconstitutional under the Fourteenth Amendment. This would frustrate progressive President Theodore Roosevelt, who saw the majority of his New Deal legislation overturned by the conservative Court. Despite overwhelming public support for policies that directly benefitted the American people like the National Recovery Administration and the Agricultural Adjustment Administration, the *Lochner* Court struck them down under extremely narrow interpretations of the interstate commerce clause. The decisions drew criticism from inside the Court as well, with Justice Harlan Stone calling the Justices' opinions a "'tortured construction of the Constitution'" (Leuchtenburg, 2005). Roosevelt did not hide his anger towards the Court's decision to strike down his policies, and threatened to pack the Court with as many as six new appointees in response. During his New Nationalism speech, Roosevelt called for the Court to be "deprived of the power" to strike down progressive legislation (NCC Staff, 2017). The Court would soon reverse course and, in the 1937 case of *West Coast Hotel v. Parrish,* the Court upheld labor regulations for the first time. Since this case, the Court continues to hold that states have the ability to "regulate terms of employment without violating the Fourteenth Amendment, so long as such regulation is rational and procedurally fair" (McBride, 2006). *West Coast Hotel* paired with the landslide reelection of progressive President Roosevelt brought the *Lochner* era to its end. As the country adjusted to new technologies and industries in the early twentieth century, it was important for the Court to recognize the need to interpret the law more broadly and for the benefit of the public. The end of the *Lochner* era allowed for that progress to happen, though extremely slowly and not without appeasing corporations with small victories along the way.

The Expansion of Corporate Rights

During and following the *Lochner* era and prior to the 2010 *Citizens United* case, a series of Supreme Court cases successfully gained and expanded the rights of corporations under the Constitution. The first case, *Hale v. Henkel,* dealt with two constitutional rights (1906). The Court found that while

corporations do not have the Fifth Amendment right to self-incrimination, they do have the Fourth Amendment protection from unlawful search and seizures. Two short years later, corporations would get the Sixth Amendment right to a jury in a criminal case (*Armour Packing Co. v. US*, 1908). Corporations then gained their Fifth Amendment right to the "taking clause," which prohibits the government from taking private property for public use without just compensation (*Pennsylvania Coal Co. v. Mahon*, 1922). It wasn't until 1936, around the end of the *Lochner* era, that corporations saw their first protection under the First Amendment. *Grosjean v. American Press Co., Inc*. dealt with an advertising tax on corporations (1936). The Court ultimately ruled that the First Amendment right to freedom of the press applied to newspaper corporations. The Seventh Amendment right to a jury in a civil case was granted to corporations in *Ross v. Bernhard* (1970). The Fifth Amendment protection against double jeopardy was granted to corporations in *United States v. Martin Linen Supply Co*. (1977). The last major case that ushered in new rights for corporations was *First National Bank of Boston v. Bellotti*, which overturned a longstanding policy of denying non-media corporations the right to use corporate funds to influence ballot measure campaigns (1978). Paired with the precedent set in *Buckley v. Valeo* which equated political spending to free speech, *Bellotti* reversed all restrictions on corporate spending in political campaigns, citing their infringement on First Amendment protections (Winkler, 2018, pp. 401-403). While this decision would be challenged just a few years later, the rapid and significant expansion of corporate rights to this level is striking. It is important to analyze the expansion of corporate rights in the twentieth century in order to understand how a landmark decision like *Citizens United* came to fruition.

Limitations on Corporate Rights

It is fair to say that corporations saw many more wins in the Court than losses during the intervening years. Corporate lawyers were constantly trying new avenues to pursue litigation expanding rights, especially while the Court continued to favor the corporationalist mentality. The Tillman Act of

1907 was one of the first pieces of modern campaign finance legislation. It banned corporations from making contributions to political campaigns, a response to the Great Wall Street Scandal. While this Act would be challenged throughout the decades, the purpose behind the legislation was to protect citizens from oversaturated campaign communications influenced by corporate money. It would be the first of many attempts to thwart corporations from participating in American politics in the same capacity as natural citizens. *Valentine v. Chrestensen* attempted to put further restrictions on corporations, holding that commercial speech is not protected under the First Amendment (1937). This case would later be overturned by *Va. Pharmacy Bd. v. Va. Consumer Council*, which ruled that commercial speech is free speech, thus making advertising a protected form of free speech (1942). Besides legislation similar to the Tillman Act, few limitations were placed on corporations and their rights during the intervening years before *Citizens United* (Winkler, 2018, pp. 401-403).

The two cases that made the most progress in limiting corporate rights were later overturned by the controversial *Citizens United* opinion. *Austin v. Michigan Chamber of Commerce* asked the Court the same questions brought in *Bellotti*, but instead of ballot measure campaigns, *Austin* referred to candidate races. *Austin* specified that corporations had "unique legal and economic characteristics" with "special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." These qualities gave corporations "an unfair advantage in the political marketplace" (*Austin v. Michigan Chamber of Commerce*, 1990). The *Austin* Court upheld limitations on corporate funding for political campaign communications and established that the First Amendment can be infringed on if the state has a compelling government interest. The compelling government interest in *Austin* was to preserve the integrity of political discourse by keeping corporate money out of American elections. *McConnell v. Federal Election Commission* dealt with similar questions (2003). The case was Senator Mitch McConnell's legal challenge against the Bipartisan Campaign Reform Act just days after it was signed into law. *McConnell* affirmed the decision in *Austin* and upheld the BCRA's ban on corporate funding of "electioneering communications." These cases were influential in establishing limits on

corporate involvement in political elections. The opinions established in these cases held precedent for the remainder of the twentieth century. The decisions in *Austin* and *McConnell* relied heavily on the definition of a corporation and the qualities that make them distinct from humans. By pointing out the advantages that corporations have over humans, the majority presents a strong argument based in policy implications. These decisions were crucial for progressives looking to diminish the influence large corporations had in American politics. However, as the following chapter will detail, this precedent would later be overruled in the controversial 2010 case, *Citizens United v. Federal Election Commission.*

Chapter IV:

Citizens United v. FEC Analysis in Context

After examining the intervening years following the first corporate rights case, the outcome of the landmark 2010 Supreme Court decision, *Citizens United v. Federal Election Commission*, is far from surprising. The controversial decision in *Citizens United* was the result of a long-overlooked movement: the corporate rights movement. However, when the case was first tried in 2004, no one foresaw the small nonprofit as the corporate behemoth that would finally secure sacred constitutional rights for corporations.

Citizens United is a conservative, nonprofit political advocacy group based in Washington, D.C. Their primary purpose is to educate and, according to their website, "restore our government to citizens' control." Citizens United funded and produced a variety of political advertisements, one of which was a feature-length documentary entitled "Hillary: The Movie." The Movie expressed opinions on whether Senator Hillary Clinton was fit for the presidency, as she was the presumptive front-runner for the 2008 presidential election. The documentary portrayed Clinton as a power hungry, deceitful politician who was unfit for office. Citizens United planned to broadcast the film through video-on-demand and intended for it to be available within 30 days of the 2008 primary election. The problem with this was that Citizens United used corporate money to fund the project (*Citizens United v. Federal Election Commission*, 2010).

Under the Bipartisan Campaign Reform Act (BCRA) of 2002, corporate money cannot be used for "electioneering communication." An electioneering communication is generally defined as "any broadcast, cable or satellite communication" that is "publicly distributed" and refers to a clearly identified political candidate ("*Citizens United v. FEC*", 2010). The BCRA amended the Federal Election Campaign Act to forbid corporations from funding any broadcast essentially expressing advocacy for a candidate 30 days before a primary election and 60 days before a general election. While the BCRA was adopted in an attempt to regulate big money campaigns, it did allow for Political Action Committees (PACs) to fund electioneering communications. Citizens United received some PAC money to fund their film but they also received general treasury funds from corporations, which is the primary source of funding prohibited under the BCRA (Winkler, 2018, 326-329).

President of Citizens United, David Bossie, feared the documentary would be banned by the Federal Election Commission (FEC) due to the BCRA's prohibition of corporate-funded electioneering communications. In preparation, he sought declaratory and injunctive relief against the FEC in the U.S. District Court. Citizen United's argument was that the ban on corporate funding for electioneering communications in 2 U.S.C. §441b was unconstitutional when applied to their film ("*Citizens United v. FEC*", 2010). When Bossie sought out a legal team to try the case in the District Court, he had trouble finding someone passionate about their cause. Almost all prominent attorneys, like Supreme Court bar member Ted Olsen, viewed the case as lost cause with little chance to succeed, let alone make it to the Supreme Court. The courts had been consistently ruling that corporations should be subject to special restrictions in public office campaign funding. In fact, it had only been four short years since the Court upheld the Bipartisan Campaign Reform Act in *McConnell v. Federal Election Commission*. While almost all attorneys saw little chance for the Court to change precedent it had set only a few short years prior, Jim Bopp Jr. would be the only attorney who saw the case's potential. Bopp felt that since the makeup of the Court changed in the years since *McConnell* (Justice O'Connor and Justice Rehnquist were replaced by Justice Alito and Justice Roberts), there might be a chance they would reconsider the decisions in *Austin* and *McConnell* (Winkler, 2018, pp. 324-326).

Jim Bopp Jr. is the attorney who set *Citizens United* on its path to become a landmark decision, but his contributions are often forgotten and overshadowed by his predecessor's fame. *Citizens United* was the type of case that Bopp loved to take. His Tea Party & Libertarian views propelled his efforts to limit government restriction on abortion and campaign finance laws. Bopp's passion for protecting Citizens United's First Amendment right was why Bossie hired him. Bopp did a lot of the heavy lifting by guiding this case through the early stages of litigation. After being denied the preliminary injunction by the District Court, Bopp drafted the initial complaint to the Supreme Court. When the Court chose to hear the *Citizens United* case, Bossie sought out Ted Olsen (one of the lawyers who initially turned down the case) to lead the case in the Supreme Court after watching him win the Republican Lawyer of the Year.

Refusing to serve second to Olsen on a case he oversaw from infancy, Jim Bopp Jr. resigned from Bossie's team (Winkler, 2018, pp. 324-326, 327-348).

Following the pattern of previously discussed cases, the makeup of the Supreme Court was a major factor in the landmark decision. The Roberts Court consisted of four Justices who were named among the Top 10 most business-friendly Justices in the last 75 years, with Justice John Roberts placing at number two. This Court was arguably the most pro-business in decades, something Bopp recognized when choosing to take on Citizens United's case. While Justice Roberts made a strong commitment to a "minimalist, consensus building approach" during his Supreme Court confirmation, *Citizens United* would be the case to test his allegiance to that claim (Winkler, 2018, pp. 350). When it became clear which side of the case each Justice fell on, work began on developing the opinions for the case.

At first, Chief Justice Roberts chose to write the majority opinion, ensuring that it would be narrowly tailored to Olsen's argument about the unusual features of the case and Movie, allowing the law to move incrementally like he promised. Justice Anthony Kennedy would go on to write another opinion along with Justice Scalia, Justice Alito, and Justice Thomas that was much broader in its interpretation, claiming the unconstitutionality of the BCRA. Justice David Souter saw the path the Court was taking in Kennedy's opinion and wrote a scathing dissent on the break from tradition the majority opinion was about to take. Justice Souter claimed that the Justices were attempting to include questions not briefed and argued by the parties. Justice Roberts, unable to convince the other four Justices in the majority to join his opinion, scheduled the case to be reargued. He directed both parties to address the constitutionality of the BCRA and whether limits on corporate funding of electioneering communications violated the First Amendment right to freedom of speech. Unfortunately, Justice Souter retired before re-argument of the case began. This prevented Justice Souter's dissenting opinion from being published and potentially ruining the credibility of the Court. (Winkler, 2018, pp. 355-358).

On January 21, 2010, *Citizens United v. Federal Election Commission* was decided in a 5-4 majority opinion written by Justice Kennedy. The Court overruled *Austin v. Michigan Chamber of*

Commerce, which held that corporations had special advantages (limited liability, perpetual life, accumulated assets, etc.) that warranted their regulation under the BCRA. The Court also overruled part of *McConnell v. Federal Election Commission* that held that corporations could be banned from funding electioneering communication, as defined in BCRA. An interesting aspect of Justice Kennedy's opinion was that it completely ignored the question of corporate personhood. Instead, the majority adopted the same justification that Horace Binney argued in the first corporate rights case, *Bank of the United States v. Deveaux*. The majority ruled that it was the rights of the corporation's members that had priority. Following historical precedent, they pierced the corporate veil and applied the rights of the people within the corporation to the corporation itself. Referencing precedent established in *Pacific Gas & Electric Co. v. Public Utility Commission of Cal.*, the majority states: "…identity of the speaker is not decisive in determining whether speech is protected… Corporations… like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (*Citizens United v. Federal Elections Commission*, 2010). Justice Stevens was joined in his dissenting opinion by Justice Ginsberg, Justice Sotomayor, and Justice Breyer. They argued that the majority were partaking in judicial activism by deciding on questions that neither side argued or raised. Justice Stevens repurposed much of the content and arguments in Justice Souter's unpublished dissent for his own dissenting opinion. Justice Stevens, just like Justice Souter, argued this was a break from long-standing judicial tradition to only decide on necessary issues presented and argued by both sides and to never go further than what was necessary. After all, nothing major had changed in those intervening years, beside the makeup of the Supreme Court bench (Winkler, 2018, pp. 363-370).

In order to better understand the decision in *Citizens United v. Federal Election Commission*, a deep dive into the rhetorical strategies and arguments used in both the majority and dissenting opinions is necessary. Examining the judicial rhetoric utilized will provide insight into the compelling arguments that have driven the acquisition of corporate rights and may even depict a historical pattern among arguments for or against corporate rights.

Rhetorical Analysis of the Majority Opinion in *Citizens United*

The majority opinion in *Citizens United v. Federal Election Commission* as noted was written by Justice Kennedy who was joined by Justice Alito, Justice Scalia, Justice Roberts, and Justice Thomas. Considering the drastic change in precedent this opinion created, a closer look into the rhetorical arguments and strategies will shed light on how the Justices arrived at their decision.

Two of the most compelling and frequent judicial arguments utilized by the Court are textual arguments and intent-based arguments. Both of these rhetorical strategies utilize the plain meaning of words or grammatical choices as well as historical evidence to examine text as it was written and prove intent. As identified by Huhn, an analysis of textual arguments requires a look into the specific language and three major methods of interpretation: plain meaning, intratextual meaning, and canons of construction. Each of these methods of analysis rely on looking at the text based on its plain meaning as well as its meaning in context. (Huhn, 2014). Huhn also describes intent-based arguments as arguments that rely on the intent of the original drafters, the most common being intent of the Framers of the Constitution. Intent-based arguments can also include the "regulatory intent" of legislators when identifying the intended effect of major legislation (Huhn, 2014). Justices who often rely on determining the original intent, most commonly the Framers' intent, are referred to as "originalists." The Roberts Court had a few originalists, Justice Scalia being one of the biggest proponents of following the Framers' intent. Interestingly enough, when analyzing the majority opinion in this case, it is extremely hard to identify strong intent-based or textual arguments. The only textual argument easily identified is the majority opinion's description of a corporation as merely an "association of citizens" (*Citizens United v. Federal Election Commission*, 2010). All of the originalists on Roberts Court were in the majority, yet none of them prioritized the legal principle they were committed too. The only argument the majority made that relied on intent was that of the Framers' intention to protect all types of speakers. The majority argues that just because the Framers could not have foreseen modern business corporations, "does not

mean that those speakers and media are entitled to less First Amendment protection" (*Citizens United v. Federal Election Commission*, 2010). The lack of reliance on textual and intent-based arguments in a majority opinion provided by originalist Justices provokes skepticism towards their motive for diverging from their beliefs.

As anticipated, arguments based in precedent tend to drive many opinions. The concept of stare decisis relies on previous rulings within the Court to drive future decisions. The credibility of the Court is often tied to the principle of stare decisis, since it promotes preserving the decision of previous Supreme Court rulings. This allows for continuity in the law and in the Justices' interpretation of the law. Contrary to the standard use of precedent, Justice Kennedy utilized precedent in this case that dated back to the seventies and didn't rely on the most recent ruling precedent in the case at hand. In a break from tradition, the majority cites *Buckley v. Valeo* and *First National Bank of Boston v. Bellotti*, both of which conflicted with more recent and relevant precedent set in *Austin*. *Buckley* ruled that the First Amendment protection of free speech could not be compromised due to the identity of the speaker. It was this precedent that Justice Kennedy cited over thirty times in his opinion. In order to justify their decision to ignore recent precedent and revisit these earlier cases, the majority states: "When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through stare decisis is diminished" (*Citizens United v. Federal Election Commission*, 2010). Other precedent relied on included cases involving independent expenditures like *United States v. Automobile Workers*, but in all of these cases the constitutional question was ignored. The dissenting opinions in these cases argued that any limit on corporate expenditures were unconstitutional and ultimately disagreed with the majority's choice to ignore whether these limits infringed on First Amendment protections. The majority relied on excerpts from these opinions in order to argue against the independent expenditures ban in the BCRA. Justice Kennedy even recognized the "conflicting lines of precedent" that the majority opinion relied on (*Citizens United v. Federal Election Commission*, 2010). His opinion acknowledged that a post-*Austin* era permitted restrictions based on corporate identity, whereas before *Austin* that was forbidden. The majority

claims that since no case before *Austin* prohibited independent expenditures, that this pre-*Austin* precedent is what we should follow (*Citizens United v. Federal Election Commission,* 2010).

The majority in this case relied heavily on the evaluation of implications, good or bad, that may result from a certain decision. The infringement on First Amendment rights was the prime concern of the majority. In one of many reasons given to decide constitutional questions in this case and not on narrower grounds, the Court claimed a potential "chilling [of] political speech, speech that is central to the meaning and purpose of the First Amendment" (*Citizens United v. Federal Election Commission,* 2010). In claiming that the consequences of limiting speech in this case is too dire, the majority opinion creates urgency as it attempts to create a new precedent. The majority also claims that independent expenditures, through their calculated prearrangement and coordination, actually prevent the dangers of quid pro quo political spending. The rapid changes in technology and media were another reason the majority gave to limit the ban on electioneering communications due to newly emerging platforms for political discourse. This is where the majority makes their only intent-based argument by claiming that just because the Framers "may have been unaware of certain types of speakers or forms of communication," those new speakers and platforms should still be protected (*Citizens United v. Federal Election Commission,* 2010). In order to develop a new precedent, Justice Kennedy relied heavily on the rhetorical strategy of evaluating policy consequences and implications. This strategy gave the majority the ability to list the reasons, beyond legal or textual analysis, as to why they saw government interference in political spending as a danger to democracy.

Another argument that the majority makes in this opinion is the priority of preserving the tradition of free speech, despite the speaker's identity. The rhetorical strategy of preserving the tradition of common law is rooted in a "social custom rather than the imposition of judicial will… the common law implements the customs of the people; it does not impose the judgement of any sovereign body" (Huhn, 2014). The preservation of free speech is something that Americans value, the tradition is rooted in our governing documents. The majority spends a good portion of their opinion weighing the consequences of

ruling against Citizens United and, thus, going against this American tradition. The majority uses condemnatory language when describing government institutions like the FEC as a "regime" that decides "what political speech is safe for public consumption by applying ambiguous tests" (*Citizens United v. Federal Election Commission, 2010*). Oxford's dictionary defines a regime as a government system that "has not been elected in a fair way." Oxford uses the example of a "brutal/oppressive regime" or a "fascist/totalitarian regime," referring to a non-democratic government. The majority's choice to use a word like "regime" to describe a government institution like the FEC, tasked with eliminating corruption, shows their disdain for the current state of political spending laws. This is one of many ways in which the majority uses language to shape the reader's view of the laws at question (*Citizens United v. Federal Election Commission*, 2010). The majority condemns the work of the legislature and places priority on preserving the tradition of free speech by creating urgency. They create urgency by calling the limitations on corporate expenditures "criminal sanctions" and accusing the legislature of making free speech a "felony for all corporations" (*Citizens United v. Federal Election Commission*, 2010). In order to back their claims, the majority attempts to appeal to both sides by using examples of how the law in question punishes corporate free speech. In order to appeal to both sides, the majority uses one conservative example where the NRA "publishes a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban" and one liberal example where the ACLU "creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech" (*Citizens United v. Federal Election Commission*, 2010). Above all else, the majority emphasizes countless times the importance of preserving the tradition and principle of free speech in order to justify reversing all precedent and rewriting the law in this case. They make this clear through statements like: "the Government lacks the power to ban corporations from speaking" and "when Government seeks to use its full power, including criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves" (*Citizens United v. Federal Election*

Commission, 2010). In order to reverse all precedent and current legislation in this case, the majority justifies their decision with a heavy use of arguments based in tradition. The tradition they find imperative to preserve is the protection of free speech for all speakers.

Justice Kennedy's final major decision-making strategy utilized in his opinion was that of "logic." "Logic" is referred to both explicitly and implicitly throughout the majority opinion. The first time it's mentioned, it is in justification for refusing to restrict the political speech of most speakers. The majority relied heavily on this idea of logic and common sense to justify their protection of First Amendment rights. Justice Kennedy asks readers to consider logic explicitly when looking deeper into the restrictions under Section 441b. He states "Both history and logic lead us to this conclusion:" that the Government cannot impose restrictions on free speech based solely on speaker identity (*Citizens United v. Federal Election Commission*, 2010). Justice Kennedy points out that the BCRA provides an exemption for media corporations, despite the fact that they accumulate wealth due to their corporate form. The fact that this ban exempts some corporations but not others is "all but an admission of the invalidity of the anti-distortion rationale" (*Citizens United v. Federal Election Commission*, 2010). This rationale, presented by the defendant in this case, describes the "distorting effects" of large aggregates of wealth accumulated in the corporate form. This rationale was the ultimate reason why *Austin* decided to uphold their limitations on corporate independent expenditures; their wealth provided an unfair advantage (*Citizens United v. Federal Election Commission*, 2010). Justice Kennedy's point in bringing up the hypocrisy of the media corporation exemption shows that the anti-distortion rationale, the main precedent from *Austin,* is irrelevant if some corporations are exempt but not others.

The rhetorical strategies used by Justice Kennedy in his majority opinion intended to create lasting and convincing precedent. When breaking down the elements of the opinion, the most prominent judicial arguments referenced decisions that had little in common with *Citizens United* but provided justification for the majority's deviation from precedent. While the majority utilizes rhetorical strategies to craft their argument, the failure to acknowledge and provide strong evidence against ruling precedent

by originalist Justices casts suspicion on the authenticity of their argument. The rhetorical choices and judicial arguments presented by the majority in this case provides evidence to overturn *Austin*, but also reason to question the ultimate outcome.

Rhetorical Analysis of the Dissenting Opinion in *Citizens United*

The dissenting opinion in *Citizens United v. Federal Election Commission* as noted was written by Justice Stevens who was joined by Justice Sotomayor, Justice Breyer, and Justice Ginsberg. Justice Stevens took a lot of inspiration and content from Justice Souter's dissenting opinion that he had written before the re-argument of the case and his retirement. When reading this opinion, one may be struck by, not only the length, but the condemnatory rhetoric that the dissenting Justices utilized in this opinion. *Citizens United*, as the dissenting Justices point out, overturns decades of case law and challenges longstanding principles of stare decisis and judicial activism. In contrast to the majority opinion, the dissenting opinion utilizes many more rhetorical strategies and judicial arguments to justify their decision reaffirming the District Court's opinion. Where the majority provides few textual and intent-based arguments and only uses *Bellotti* and *Buckley* as precedent in order to provide a mostly policy-based argument, the dissenting Justices go much deeper in their reasoning. Rather than identifying and grouping the rhetorical strategies and judicial arguments used in Stevens' opinion, an analysis of each major point will show a variety of rhetorical strategies that help further the influence of this dissenting opinion.

An important distinction that the majority failed to mention but the dissenting highlights extensively is the definition of a corporation. The dissenters find it important to emphasize the distinction between a corporation and a human speaker. They use the footnotes to list extensive case law and statutes outlining the defining features of corporation: limited liability, perpetual life, separation of powers and control, advantages in accumulating and holding assets, etc. Their "financial resources [and] legal structure" raise concerns for corruption, making the anti-distortion principle so imperative (*Citizens*

United v. Federal Election Commission, Stevens, J. concurrence/dissent in part, 2010). The dissenters use this principle to explain why corporate funded electioneering communications may impair government interest and why those restrictions are not a violation of the First Amendment. One of those reasons is the effect corporate influence may have on the eventual winners of public office. If a politician receives large contributions from a corporation, they may feel indebted to the corporation when making policy decisions and when up for reelection. Corporate expenditures on political campaigns severely impacts a politician's ability to speak freely and make decisions without influence, an outcome that renders the restrictions set in the BCRA as necessary to combatting corruption. Corporations have many members and nowhere in the oral arguments or majority opinion is there a definition of whose views the corporation is presenting. By showing the ambiguity of a corporation's members, the dissenters provide a second policy argument (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010). They assert that in order to protect the autonomy of shareholders and members of a corporation who may not agree with their company's political views, they must use the BCRA to restrict use of general treasury funds. The majority mentions this point in their opinion only to assert that corporations can achieve the same autonomy through "corporate democracy." The dissenters recognize this point and discredit it by stating that the rights of members through corporate democracy are "so limited as to be almost nonexistent" (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010). By clarifying the definition of a corporation, the dissenters are able to provide a policy-based argument backed by precedent showing the negative implications of allowing corporations to operate the way the majority rules.

There are many procedural issues that the dissenting opinion points out in order to invalidate the question the majority rules on. Justice Stevens starts the opinion by stating how the question before the Court shouldn't be decided in the first place. They claim that the majority is attempting to rewrite the law to benefit for-profit companies, even though the corporation in question is a non-profit. The dissenters believe the question should not be whether corporations can fund electioneering communication, but how.

The strategy in these arguments shows how careful phrasing transforms meaning. Beyond the question at hand, the dissenters also challenge the way in which the question was brought to the Court. In the summary judgement, Citizens United testified that they were only raising an as-applied challenge to the statute in question. This difference is significant because it shows that Citizens United only intended to argue that parts of the BCRA were unconstitutional when applied to their case, rather than striking down the entire law under a facial challenge. The dissenters use precedent to show that only in "exceptional circumstances" will the Court consider questions outside of those presented (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010). They also provide precedent showing that parties cannot attempt to turn one type of challenge into another. The Court itself goes against this precedent by using judicial advocacy to change the as-applied challenge into a facial challenge. Citizens United, as the dissenters point out, doesn't even meet the facial challenge standards which prohibits courts from hypothesizing on future situations, like future technology and media outlets. In this way, the dissenters state that the "Court is operating as a sledge hammer rather than a scalpel" (*Citizens United v. Federal Election Commission*, 2010). This analogy portrays the majority as tyrannical and discredits their decision. The critique of the Court as a whole also appears to be a criticism of Justice Roberts specifically and his commitment to providing a minimalist approach in Supreme Court decisions. Through precedent and plain text meaning, the dissenting opinion defines the procedural issues in this case in an effort to discredit the majority opinion.

The strongest aspect of the dissenting opinion, one the majority lacks, is their argument from precedent. Stare decisis is an imperative legal concept that protects the rights of the elected branches to shape their laws effectively and in a manner consistent with previous Supreme Court decisions. The dissenters assert that the majority's decision effectively "takes away a power" that the other two branches of government were long permitted to exercise (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010). The precedent used to confirm this principle states that there needs to be a "special reason over and above the belief that a prior case was wrongly decided" in order to

overrule a decision. Justice Stevens claims there is no "special reason" to overrule, but instead reason to support the precedent the majority wants to overrule. In the few short years since *McConnell* and the decades since *Austin*, there were no major changes that would constitute a "special reason," besides the composition of the Court. In fact, none of the "affected" groups in *Austin* (corporations, organized labor, the states, etc.) argued that the limitations imposed were impractical or unconstitutional. The aspects of the statutes in *McConnell* that were controversial, Congress later worked to make more "user friendly" (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010). This precedent shows the Court's commitment to equitable laws that follow the principle of stare decisis. The dissenters argue that we should continue to follow relevant precedent. Limiting corporate funding in political campaigns dates back all the way to 1907 and President Roosevelt's Tillman Act, which aimed to curb the enormous power corporations had in elections and to protect shareholders from having their money support a candidate they may oppose. The principle of stare decisis and the decisions affirmed in *Austin* and *McConnell*, according to the dissenters, is the ruling precedent in this case and there is no special reason to overturn (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010). The reason why precedent is a much stronger rhetorical argument in the dissenting opinion instead of the majority is because the majority reverses and eliminates all previous precedent on this issue without providing a compelling special reason to overturn.

By effectively erasing all precedent affirming the restrictions in the BCRA, the dissenters express major policy concerns. By eliminating central parts of the complex legislation, the majority mangles the BCRA and its intended role in curbing corruption. An example of this is that the BCRA had barred political parties from soliciting or spending "soft money" funds on campaigns. The majority decision now allows corporations to spend unlimited general treasury funds on political ads, but national political parties still cannot. Through a policy-based argument, the dissenters assert that the majority opinion now "dramatically enhances the role of corporations" over political parties (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010).

In an attempt to discredit the majority's precedent-based argument, Justice Stevens argues they cherry pick lines from two decisions that were either factually inaccurate or unrelated. The first claim that the majority asserts is that *Buckley* states that government restrictions of some speech in order to enhance the relative voice of another is "wholly foreign to the First Amendment" (*Buckley v. Valeo*, 1976). The dissenters argue that this is factually wrong. They provide a litany of case law and statutes providing exceptions to the free speech of students and government employees. The majority also utilizes *Bellotti* as precedent, but ignores its unrelated fact pattern. The statute at question in that case "barred business corporations' expenditures on some referenda but not others" and dealt specifically with ballot measure campaigns (*First National Bank of Boston v. Bellotti*, 1978). These facts were inconsistent with those in *Citizens United*, so the dissenters argue this precedent is irrelevant (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010). The selective case law and quotations that the majority use to back their decision are discredited in multiple pages in the dissenting opinion.

The dissenting opinion makes a point of describing the duty of the Court in order to show how the majority is violating their role. Another central principle on the Court, cited twice in this decision, is that "if it is not necessary to decide more, it is necessary not to decide more" (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010). Citizens United, as the dissenting Justices point out, gave options to solve their case on narrower grounds that would not require the Court to overrule statutes or precedent. The facts that made Citizens United's Movie different from other banned electioneering communication outlined in the statute was the unusual length and the small amount of funding Citizens United received from for-profit corporations. According to the dissenters, the "only thing preventing them from affirming or adopting narrower grounds is their disdain for *Austin*" (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010). If the Court were to decide on narrower grounds, like the dissenters argue, modifications to the statute could have resulted in positive policy outcomes to protect nonprofit interests of corporations similar to Citizens United. While

the Court uses accusatory and condescending rhetoric towards the majority, their claims are not unsupported.

When reading the dissenting opinion from the Court, you can feel the emotion of Justice Stevens and the other dissenters. Their rhetorical choices show condemnation of the majority opinion, while also expressing fear of what consequences may come from this decision. They do so in a variety of sly comments such as: "essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case… to change the law;" "we are asked to reconsider *Austin* [whereas] they should have said 'we asked ourselves';" "[it] just so happens in every single case in which the Court has reviewed campaign finance… the majority failed to grasp this truth" (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010). The dissenters do not hold back in this regard, they make their disapproval of the Court's decision known. Likely, this wasn't only because they disagreed with the content of the decision, but also the way in which the majority came to their decision. The dissenters use disdainful rhetoric because they see the majority as going beyond the scope of their role as the judiciary. Legal concepts like stare decisis must be preserved in order to maintain the reputation and credibility of the Court. Judicial advocacy, on the contrary, severely hurts the credibility of the Court by advancing the interests of the Justices and not prioritizing the facts of a case. Generally, the Justices who craft dissenting opinions tend to have much more linguistic freedom because their opinion allows them to speak on behalf of their personal beliefs, whereas the majority speaks on behalf of the Court in order to set precedent. Through careful rhetorical choices, Justice Stevens and his colleagues provide strong reasoning against the majority's transformative decision in this case through their condemnatory and critical dissenting opinion (*Citizens United v. Federal Election Commission*, Stevens, J. concurrence/dissent in part, 2010).

Where Corporate Rights Stand Following *Citizens United*

The landmark decision in the 2010 Supreme Court case, *Citizens United v. Federal Election Commission*, sent shockwaves across the country almost immediately after it was decided. While the 5-4 majority to overrule Section 441b of the BCRA was solidified in this case, it appeared as though everyday Americans were not completely convinced of the majority's opinion. A poll conducted recently after the decision found that eight in ten Americans disagreed with the ruling, with disapproval crossing party lines (85% of Democrats, 76% of Republicans, and 81% of Independents thought *Citizens United* was wrongly decided) (Winkler, 2018, pp. 373-374). Regardless of public opinion, the Supreme Court decision to find sections of the BCRA unconstitutional required a complete rewrite of the 2 U.S.C. §441b statute in question. The ruling in this case opened the floodgates and allowed an unlimited use of general treasury funds from for-profit corporations on political campaign expenditures. In the next major general election following this decision, the 2012 Election, the Center for Public Integrity estimated there was nearly $1 billion in new political spending traceable to this decision (Winkler, 2018, pp. 373). The decision in *Citizens United* required Congress to rewrite their campaign finance laws in order to codify an edited version of Section 441b into 52 U.S.C. § 30118. Regardless of personal opinion on the recodified laws, the impact of *Citizens United* on the evolution of corporate rights is undeniable. *Citizens United* was the first major decision to affirm what decades of corporationalists had worked to make legislatures and the judiciary recognize and codify.

Chapter V:

Implications of Corporate Constitutional Rights

Public backlash against the decision reached in *Citizens United* was swift and widespread. On an issue as lackluster as campaign finance laws, the Justices in the majority may not have expected the reaction to be as strong as it was. The prioritization of corporate rights over that of natural citizens alarmed Americans, and rightly so. While movements like the Women's Suffrage Movement of the early twentieth century and the Civil Rights Movement of the 1960's were widely recognized and studied by Americans, the battle for corporate rights in the courts was a much less known civil rights movement. Citizens United was not the first business to seek constitutional rights, and they surely will not be the last.

Legal Implications

Citizens United paved the way for future legal challenges brought by businesses that attempted to gain rights even the most business-friendly historical Courts couldn't fathom granting corporations. Recall how the *Lochner* era Court, one of the most generous to businesses, made the distinction that corporations have property rights, *not* liberty rights. The 2014 Supreme Court case, *Burwell v. Hobby Lobby Stores, Inc.*, defied that principle and explicitly recognized that business corporations have religious freedom, a clear liberty right. Again, *Hobby Lobby* wasn't an anomaly, but the result of two-centuries worth of case law that was only enhanced by the influence of *Citizens United*.

Hobby Lobby Stores is owned by the Green Family. The Greens are devout Evangelical Christians who believe that some forms of birth control can cause abortion. Because of this, the Greens opposed birth control, claiming that it defied their religious beliefs. In 2010, President Obama signed into law the Patient Protection and Affordable Care Act (known as "Obamacare"), which mandated nearly all Americans buy or have health insurance. While the Act was upheld in a 5-4 Supreme Court decision, the Greens would find success in challenging a smaller section of the Act. They opposed the mandate which required all large employers to cover birth control in their employees' health plans. While the mandate fell on Hobby Lobby the corporation, the Green family felt it infringed on their religious freedom and

instructed the corporation to challenge the mandate in court. Hobby Lobby sued the government on the grounds that the mandate violated the Religious Freedom Reformation Act (RFRA) of 1993. The RFRA was intended to enhance the religious freedom rights defined in the First Amendment and entitled citizens to exemptions from federal laws that imposed a substantial burden on "persons" sincerely held religious beliefs (Winkler, 2018, pp. 380). The RFRA's deliberate use of the word "persons" throughout the law would be the biggest obstacle for Hobby Lobby. But as history would have it, the distinction wouldn't stop the Court from extending rights intended for "persons" to corporations.

In another 5-4 landmark decision, the same Justices in the majority in *Citizens United* sided with Hobby Lobby in this case. The majority relied heavily on the Dictionary Act, which defines terms used in federal statutes. The Dictionary Act gave meaning to the word "persons" as it was used in the RFRA. It stated, "unless the context indicates otherwise… [the word "person" includes] corporations, companies, associations, firms, partnerships… as well as individuals" (Dictionary Act, 2012). Justice Alito's majority opinion expansively read the RFRA to protect closely-held corporations and allowed them to bypass regulations that they claimed infringed on their religious freedom. The previous corporate rights cases that resulted in an expansion of rights opted to pierce the corporate veil and extend the rights of a corporation's members to the business itself. Justice Alito deviated from that ideology in his opinion and instead ignored the corporation completely. In Justice Alito's words, Hobby Lobby was permitted to assert their religious rights in order to protect "the religious liberty of the Greens" (*Burwell v. Hobby Lobby Stores, Inc.*, 2014). In other words, "Hobby Lobby was the Greens, and the Greens were Hobby Lobby" (Winkler, 2018, pp. 381). Once again, the Supreme Court would convolute the definition of a corporation to extend them further rights.

In one of her many famous dissenting opinions, Justice Ruth Bader Ginsberg claimed the majority decision would open the door for any corporation to claim business exemptions if they claimed it infringed on their religion (Winkler, 2018, pp. 381-382). Justice Alito insisted that the majority's opinion was narrowly tailored to Hobby Lobby's distinction as a closely held, family corporation. He asserted that

it “seems unlikely” that a public corporation would assert similar religious rights (*Burwell v. Hobby Lobby Stores, Inc.*, 2014). If history tells us anything, it is that a case outcome can never be predicted, especially when Justices take it upon themselves to assert their own views and beliefs into their opinion. If *Hobby Lobby* played out a century earlier, the outcome would have been very different. Even the *Lochner* Court warned against the danger of granting liberty freedoms to corporations. The evolution of precedent and use of judicial advocacy throughout American history initiated the contentious holding in *Hobby Lobby* and has allowed corporations to gain almost equivalent rights to humans under the law without ever amending the Constitution to explicitly include them.

Constitutive Rhetoric and the Supreme Court

James Boyd White, an American literary critic credited for his contributions to the study of constitutive rhetoric in the analysis of legal texts, stated: “The art of law is the art of integration” (1990, pp. 214). What he meant by this is that the law derives meaning from the careful and deliberate presentation of facts, history, and case law. A defense attorney and a prosecution attorney, while presented with the exact same facts and case law, will come up with two completely different interpretations of what the rule of law in that case should be. As such, these elements, like judicial opinions, “acquire different meaning as they are placed… in new contexts…. Meaning and identity lie not in the object itself but in its relation with others” (White, 1990, pp. 214). The role of lawyers and the Court is to create and interpret meaning using the materials from our common past. The law can either be preserved or transformed as it is “structurally tentative” (White, 1990, pp. 216). The influence and authority of the Court “must be created rhetorically” for their decisions depend on the ability for the reader to understand and comply with the “set of relations… created in the opinion,” despite whatever the “‘reasoning’ by which the result is reached” (White, 1990, pp. 217). In this regard, the Supreme Court has an ethical responsibility to rule based on the materials presented and the minds of the drafters of those

materials, all while considering how a reader would reasonably interpret their opinion. This conceptual framework provides an understanding for the grounds on which the public has interpreted *Citizens United.*

Public Opinion of Newly Gained Corporate Rights

One of the first prominent politicians to address and denounce the outcome in *Citizens United* was the sitting U.S. President at the time, President Barack Obama. Less than a week after the Supreme Court ruled in favor of Citizens United, President Obama delivered his State of the Union address. He used the speech to make a bold statement in front of members of Congress and several of the presiding Supreme Court Justices. In his address, President Obama stated: "last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limits in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities" (State of the Union Address, 2010). Obama was met with loud applause from Democrats, which was stark in contrast to the deadpan demeanor of the Justices in attendance. Justice Alito was the only one to acknowledge the comment, shaking his head and mouthing the words "not true" (Winkler, 2018, pp. 370-371).

President Obama's assertion, while controversial, was not completely off the mark. After *Citizens United* was decided, Obama's fear that the "floodgates" would open came to fruition. As a result of *Citizens United*, corporations not only were allowed to use unlimited general treasury funds to support political campaigns, but they also gained the ability to contribute to "Super PACs." These were special types of political action committees that had the ability to collect unlimited funds from corporations and individuals. In just two short years after *Citizens United*, corporations gave over $70 million to Super PACs, with many analysts believing that number would be much higher if they didn't have to disclose their contributions. Economic analysts were correct, corporations who wanted to influence politics but

feared the public exposure of contributions to Super PACs opted to contribute to political advocacy groups like nonprofit 501(c) organizations and trade organizations where they were not required to disclose donors. This led to what is referred to as "dark money," or undisclosed contributions to political campaigns (Winkler, 2018, pp. 371-372). Since 2020, groups that don't disclose contributors and the "dark money" that flowed from these organizations totaled $963 million in the decade since *Citizens United.* In the decade prior to *Citizens United*, that number was drastically lower, around $129 million. Another concerning statistic shows that election spending from non-party independent groups skyrocketed to $4.5 billion in the decade since *Citizens United*. In the two decades prior to the decision, those contributions totaled $750 million (Evers-Hillstrom, 2020). President Obama's nightmare was coming true, America's "most powerful interests" were now "bankrolling" American elections.

President Obama's concern was shared by most Americans, who saw large corporations as a threat to democracy. This fear manifested in anger which was channeled into movements like Occupy Wall Street in 2011. The Occupy protestors were upset with the evident income inequality in the country, calling themselves the "99 percent." They represented the "99 percent" of Americans who didn't have the money and power to oppose big business and their influence in American politics. The Occupy protestors proposed a constitutional amendment that would effectively overturn *Citizens United* and eradicate all constitutional protections for corporations. The amendment received bipartisan support and was endorsed by a slew of public interest organizations. In fact, by 2016, sixteen states and hundreds of municipalities passed resolutions supporting an amendment clarifying that constitutional rights only applied to humans, not businesses (Winkler, 2018, pp. 374-375). Despite its support, the amendment was never ratified. Jim Bopp Jr., the original attorney representing Citizens United, makes the point that "changing the Constitution on controversial issues through the amendment process [is] nearly impossible" (Winkler, 2018, pp. 376). Bopp himself had tried to promote different amendments defining "personhood." However, he found it much easier to fight these issues in the courts and adjust the way the Constitution was interpreted, than attempt to pass a divisive amendment. After all, that is how corporations had gained

their rights under the Constitution: a two-century long battle in the courts. Despite previous failure, the movement to push a constitutional amendment to overturn *Citizens United* has been reignited. In the 2020 election year, Democrats pledged that if they took control of the Senate they would bring the amendment to a vote. On January 21, 2021, two days after they gained control of the Senate and presidency, Democrats stayed true to their promise and reintroduced "The Democracy for All Amendment" with 221 bipartisan cosponsors (Public Citizen, 2021).

Societal Implications

One of the greatest overlooked consequences of *Citizens United* and the expansion of corporate constitutional rights was the impact it had on natural citizens and their local communities. American citizens, evident in the Occupy Wall Street protests, were fed up with corporations using their overwhelming wealth to influence politics and insert themselves in the business of local communities. To curb the influence of corporations, local municipalities enacted ordinances to keep corporate interests out of their community. Mora County, a remote community in New Mexico, took this approach by enacting an ordinance entitled "Mora Community Water Rights and Self-Governance Act." The ordinance enacted the first countywide ban on fracking, a controversial drilling technique that is harmful to the environment. John Olivias, Chairman of the Mora County Commission, told reporters that 95% of residents in Mora County opposed fracking and wanted to ban it to protect the environment (Winkler, 2018, pp. 389). A secondary reason for the ordinance was to directly target wealthy gas and oil companies in an effort to overturn *Citizens United* and the 200 years of precedent establishing corporate rights. Olivias took a traditionally populist tone, similar to the Occupy protestors, and placed the blame of corporate influence in local communities on both corporations and the Court. Olivias told reporters, "our lawmaking authority as 'We the People' has been largely eliminated" because "for well over a century now, corporations have used [their expanded] 'rights' to stop efforts, like ours, which seek to use local lawmaking to protect our

communities from harmful corporate activities" (Olivias, 2015). Olivias further claimed that most lawyers and judges view this issue as "untouchable," and in doing so, they are validating a system that has far too long sided with corporations. The system that they uphold "says that our communities have no rights, but corporations do" (Olivias, 2015).

The Mora County Act intended to strip corporations of all their constitutional protections if they violated the ordinance. The Act specified that any corporation in violation "shall not have the rights of 'persons' afforded by the United States and New Mexico Constitutions" (Mora Community Water Rights and Self-Governance Act, 2013). Instead, the ordinance placed high priority on their citizens "right to water," "right to a sustainable energy future," and "right to self-government" (Mora Community Water Rights and Self-Governance Act, 2013). As anticipated, a subsidiary of oil and gas giant Royal Dutch Shell challenged the ordinance in U.S. District Court. While Mora County had an annual budget of less than a million, Shell was the sixth largest corporation in the world with annual profits over $270 billion. Interestingly, the case of *SWEPI, LP v. Mora County* followed the historical patterns discussed in this thesis. Mora County resembled the settlers in Jamestown; two "small, desperate communities seeking to assert some control over their environment" (Winkler, 2018, pp. 391). Shell, following precedent set by Horace Binney and *Bank of the United States,* sought protections by challenging local laws in federal court. Their argument that the ordinance violated their property rights was one that the *Lochner* Court would agree with as well. Shell also argued that the ordinance's revocation of constitutional protections infringed on their Fourteenth Amendment right to due process and equal protection, an argument Roscoe Conkling successfully convinced the Court of 130 years prior. Lastly, Shell asserted that the county's ordinance was "'motivated by animus'" and was "'directed at a politically unpopular group,'" resembling the argument made in *Citizens United* regarding restrictive campaign finance laws (Winkler, 2018, pp. 392). None of the arguments made by either side were new or innovative. For Shell, "the law was already on the company's side" (Winkler, 2018, pp. 393).

In January of 2015, Mora County's ordinance banning fracking and prioritizing their citizens' right to self-government was struck down by the District Court. The judge delivering the opinion relied heavily on one of the most controversial corporate constitutional rights: freedom of speech. Truthfully, there was no way for the Justices to interpret the law any differently. It is unlikely that this type of ordinance would have been struck down had it been challenged a century earlier. The decision relied on more recent precedent, like *Citizens United*, that granted corporation's liberty rights, something the courts prior to the mid-twentieth century strongly opposed. In their opinion, the Justices affirm this point: "the Defendants' argument[s]… are arguments that are best made before the Supreme Court- the only court that can overrule Supreme Court precedent- rather than a district court" (*SWEPI, LP v. Mora County*, 2015). Unfortunately, the residents of Mora County feared further legislation would bankrupt their already impoverished county. So, when John Olivias lost his reelection bid to Commissioner, the county decided against appealing the District Court's decision. The populist agenda to reverse the wildly successful corporate rights movement "would have to wait for another day and a more deep-pocketed challenger" (Winkler, 2018, pp. 394). Communities continue to grapple with corporate intervention in their politics and resources. Until these communities can gain enough capital to compete with their wealthy corporate challengers, corporations will continue to possess and exert the constitutional protections granted to them by the nation's highest court.

Conclusion

Applying the concept of constitutive rhetoric to the evolution of corporate constitutional rights in America, the rhetorical culture is evident. With each new challenge in the courts, corporate attorneys utilized the most creative and transformative interpretations of the law. Horace Binney, Roscoe Conkling, Jim Bopp Jr., and Ted Olsen should have been at a disadvantage. They didn't have a single piece of legislation to point to that granted them the constitutional protections they sought. Instead, they had powerfully crafted arguments and innovative spins on well-established case law and legal texts. The law and authority of the Court, as White points out, is created when Justices give meaning to their decisions by writing judicial opinions (1990, pp. 217). As this thesis has shown, the constitutional rights that corporations presently hold resulted from the culmination of judicial opinions that used rhetorical strategies to transform the meaning of the Constitution. These observations beg the question: "How can it be that law was ever regarded as anything but rhetoric?" (White, 1985, pp. 685).

Corporations didn't gain their constitutional rights overnight. It took two centuries, a variety of rhetorical strategies, and numerous changes in the interpretation of the law. As of April 2021, corporations now have the constitutional right to: freedom of speech, freedom of religion, freedom of press, due process, equal protection, trial by jury in criminal and civil cases, protection from unlawful search and seizure, the taking clause, and protection against double jeopardy. This list is far from exhaustive and, based on the track record of the Roberts Court, a further expansion of corporate rights may be on the horizon. As White states, it is the duty of the Court to uphold their precedent and traditions, and it is up to the reader to decide whether or not the constitutional rights that the Supreme Court has bestowed upon corporations achieves that obligation.

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