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RHETORICAL CAPTURE

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“Rhetorical capture” refers to a form of discourse using conclusory labels. Forms of rhetorical capture include begging the question, capture by antithesis, capture by substitution, and capture by assimilation. Begging the “baseline” question has been especially prevalent in legal and political discourse; for example, the assertion that antidiscrimination rights “take” the property rights of owners who wish to exclude assumes a baseline that the owners had the right to discriminate in the first place. Capture by antithesis or substitution is also prevalent, as in “war is peacekeeping” and “attack is defense.” Another form of rhetorical capture, capture through assimilation, occurs when a word bearing culturally good connotations is applied to a practice that may not warrant those connotations—for example, the assumption that receiving a set of fine-print terms divesting important rights from an unknowing consumer is “freedom of contract.” When rhetoric displaces reasoning in matters important to democracy, democracy suffers.

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TABLE OF CONTENTS

INTRODUCTION.....	458
I. WHAT IS RHETORICAL CAPTURE?	459
A. A Form of Capture Using Discourse	459
B. Rhetorical Capture and Classical Fallacies of Argument	460
II. RHETORICAL CAPTURE BY BEGGING THE QUESTION	460
A. “Begging the Question”	460
B. Baseline Question-Begging	461
C. “Cybersquatting”	462
D. Baseline Question-Begging in Political Discourse.....	464
III. OTHER FORMS OF RHETORICAL CAPTURE	465
A. “Orwellian” Capture by Antithesis	465
B. Capture by Substitution	466
C. Capture Through Assimilation.....	467
CONCLUSION.....	468

INTRODUCTION

I begin this Essay with a disclaimer of sorts. With my use of the term “rhetoric,” I am not intending to adhere to the classical understanding of rhetoric, which goes back at least to Aristotle.¹ I am by no means a scholar of classical rhetoric, and I hereby tender apologies to those who are. In previous work as well as here, I have used the term “rhetoric” loosely to mean a form of discourse. In my book *Contested Commodities*, I used the term “market rhetoric” to mean the practice of understanding and talking about all values as if they were equivalent to, or could be expressed in terms of, market value.² Previously, I used the term “rhetoric of alienation” to consider the practice of describing market transfer of property as alienation, and to suggest a possible connection with the other meaning of alienation, personal estrangement.³ In an article titled *Affirmative Action Rhetoric*, I used the term “rhetoric” to refer to the habit of talking about affirmative action as if it were assumed that job candidates who were not white males were inferior.⁴ For example, at the time the article was written, many people

1. Christof Rapp, *Aristotle’s Rhetoric*, STANFORD ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/aristotle-rhetoric/> (last updated Feb. 1, 2010).

2. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 3–4 (1996) [hereinafter RADIN, *CONTESTED COMMODITIES*]; see also Margaret Jane Radin, *On the Domain of Market Rhetoric*, 15 HARV. J.L. & PUB. POL’Y 711 (1992).

3. MARGARET JANE RADIN, *The Rhetoric of Alienation*, in REINTERPRETING PROPERTY 191, 191–202 (1993).

4. Margaret Jane Radin, *Affirmative Action Rhetoric*, SOC. PHIL. & POL’Y, Spring 1991, at 51. In her kind introduction to the talk I gave at the Symposium on Political Discourse, Civility, and Harm, sponsored by the *Arizona Law Review*, former Dean Toni Massaro mentioned this article. As I said in my talk, she is the only one I can recall having mentioned the article, so perhaps she is the only one who read it. (Thank you, Dean Massaro.)

who indeed had liberal intentions would talk about “putting a thumb on the scale” for such candidates. By speaking of “thumb on the scale,” these speakers were tacitly assuming, and thereby reinforcing, the very distinctions that affirmative action was supposed to remedy. Many of the speakers who talked about putting a “thumb on the scale” considered themselves believers in equality and supporters of affirmative action. They were probably not deliberate in their rhetoric and its implications; rather, they were reflecting current social practice that had not been subjected to serious thought. They were exhibiting a form of rhetorical capture.

I. WHAT IS RHETORICAL CAPTURE?

A. A Form of Capture Using Discourse

Rhetorical capture refers to a form of discourse that channels speakers away from clear thinking and open debate. Although some of affirmative action’s supporters spoke about affirmative action in terms of “thumb on the scale,” they were not deliberately adopting a rhetoric that undermined their ostensible commitment. People can also implement rhetorical capture deliberately. Some forms of commercial advertising probably aim consciously at rhetorical capture, intended to attract consumers to a firm’s product or service. Rhetorical capture, whether or not deliberately implemented—but perhaps especially when deliberately implemented—is important to a consideration of incivility in political and legal discourse. Opposing positions in which one or both sides are suffering from rhetorical capture are apt to turn uncivil very quickly.

Rhetorical capture can be compared with regulatory capture, which is a common term in political and economic analysis.⁵ Regulatory capture refers to a situation in which those who manage a regulatory agency and have power to formulate and implement its policies eventually tend to be drawn from the ranks of the regulated industries and their sympathizers. That is, the regulator is “captured” by those it is supposed to regulate. Captured agencies then will make and implement rules that favor the interests of the regulated entities rather than the public interest—contrary to the reason the regulatory regime was enacted. Regulatory capture is regulation subverted, twisted against itself.

Rhetorical capture is not a process that takes place over time, as regulatory capture is thought to be. Rather, it is a variety (or varieties) of discourse that cuts off debate too soon; entrenches labels; and causes poor thinking, lack of clarity, and wrong answers for society. The theory of regulatory capture supposes that agencies might start out regulating in the public interest and become captured over time. Rhetorical capture is often phased the opposite way. A facile label or phrase can cut off debate from the beginning, but over time perhaps the capture may erode and honest debate may develop. Analogous to regulatory capture, however, is the idea that rhetorical capture represents political or legal discourse subverted, twisted against itself.

5. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); see also STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 26–52 (2008).

B. Rhetorical Capture and Classical Fallacies of Argument

By “capture” I mean something more than simply the notion that people fall prey to a fallacy in an argument. Sometimes courts and politicians accept and propagate rhetorical labels. Such labels can become pervasive, occupying the field of discourse and preventing appropriate reasoning from taking place. This is harmful to the law, the polity, and the people who inhabit the polity and must live under the law.

Even though I am not using rhetoric in the classical sense, rhetorical capture may sometimes involve instances of the classical argumentative fallacies. In uncivil discourse we certainly see plenty of *argumentum ad hominem* (“argument to the man”), otherwise known as mudslinging, name-calling, and character assassination. Once one side slings accusations making the other side’s candidate look weak on crime (the “Willie Horton” advertisement against Michael Dukakis⁶) or cowardly (the “Swiftboat” advertisement against John Kerry⁷), it seems that no amount of careful truth telling will undo the capture.

In uncivil discourse we also see a certain amount of *post hoc ergo propter hoc* (“after this, therefore because of this”)—making the assumption that an occurrence later in time is “caused” by an earlier event; this is related to the fallacy of assuming causation where there is correlation. The rooster crows and then the sun rises. That does not necessarily mean that the rooster causes the sun to rise. (Something else may cause that to happen.) Violent crime decreased in many areas of the United States during the past few decades, while more and more people (especially black men) are imprisoned and more and more people carry guns. That does not necessarily mean that imprisoning people and packing heat cause decreases in the crime rate.

In both law and politics, we also see *petitio principii* (“begging the question”), also known as circular reasoning—assuming in the premises of argument that which is to be proved in the conclusion, thus amounting to what lawyers call “conclusory” argument. In the next Part, I elaborate on “begging the question” as it occurs in political and legal discourse.

II. RHETORICAL CAPTURE BY BEGGING THE QUESTION

A. “Begging the Question”

First, what does “begging the question” mean? Except in informal talk, “to beg the question” does not mean “to raise the question,” nor does it refer to a question that cries out for an answer. The fact that children are starving does not “beg the question” of why our society tolerates it, though the question does cry out for an answer. Instead, “to beg the question” means to use an argument that

6. SHANTO IYENGAR & JENNIFER A. MCGRADY, *MEDIA POLITICS: A CITIZEN’S GUIDE* 146 (2007).

7. Wayne Journell, *Using YouTube to Teach Presidential Election Propaganda: Twelve Representative Videos*, 73 *SOC. EDUC.* 325, 329–30 (2009).

assumes what it is supposedly proving—an argument that takes as a premise, usually implicitly, what is supposed to be the conclusion.⁸

Suppose, for example, that a property owner wants an answer to the question: “Can I enjoin my neighbors from erecting a building that cuts off the view from my property?” Suppose the answer offered is: “No, because you have no property right to stop the neighbors from doing that.” The question—which a property owner might ask her lawyer, or a teacher might ask a law student—seeks to find out whether the owner has such a property right, so the answer should not just assume that the owner does not. A lawyer who gave such an answer should at minimum expect to have few clients, and a student who gave that answer should not expect an “A.” Instead the answer should investigate how property rights are defined and from what premises they are derived: Natural right? Custom? Statute? Implied contract? Implied license or easement? And so on.

B. Baseline Question-Begging

The example I just mentioned is a form of what I will call “baseline question-begging.” It is a form of question-begging that we see quite often in legal and political discourse. The “baseline” refers to what rights or entitlements a person or entity starts out with; that is, can be assumed to hold, and to hold *justly*. For example, in general, the concept of theft assumes that people have rights to retain their holdings. If Arthur grabs something from Betty who has a right to it—let’s say it is Betty’s bicycle and we know that she has a bill of sale and we are therefore sure that she is the rightful owner—then it would not be theft for Betty to take it back. If for other reasons society disallows such self-help,⁹ at least Betty’s baseline right will be vindicated through enforcement of the tort of conversion.

Baseline issues become quite complicated. Most people believe that if they hand over their wallet when the mugger says, “Your money or your life,” that is coercion, even though they made a voluntary decision to hand over the wallet. That is because they assume that they have a baseline moral right not to be put to this kind of choice. Even though most of us think this is intuitively obvious, philosophers have had difficulty with this kind of question.¹⁰

8. For an explanation of begging the question, see, for example, Ryan North, *Begging the Question*, DINOSAUR COMICS (Jan. 5, 2006), <http://www.qwantz.com/index.php?comic=693>.

9. One reason society might outlaw self-help is that it tends to revert to vigilante justice. As one court put it in the nineteenth century, self-help “invite[s] disorderly scrambles” between the friends and relatives of the disputing parties. *Tapscott v. Cobbs*, 52 Va. (11 Gratt.) 172, 177 (1854). For a discussion of self-help in a contemporary context, see MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* ch. 3 (forthcoming 2012) (arguing that technological protection measures are a form of self-help akin to a self-enforcing injunction).

10. For more information on the philosophy of coercion, see Scott Anderson, *Coercion*, STANFORD ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/win2011/entries/coercion/> (last updated Oct. 27, 2011).

Suppose someone today says, “All taxation is theft.” That assumes a baseline right not to be taxed at all—clearly not the baseline that prevails in our polity. But at the time the Sixteenth Amendment to the U.S. Constitution was debated, we can guess that many thought an income tax would be theft, and tax protesters still do.

We see a great deal of question-begging in nuisance and takings law. For example, one cannot just say that a zoning regulation that results in a decrease in developers’ profits is therefore a taking of property rights; instead, one would have to determine that the developers actually had a property right to those profits. In order to be acceptable as the baseline that must be found (not just assumed), the property right would have to be justified; that is, not unjustly held. It would not be easy to define developers’ baseline property rights this way. Entrepreneurs generally do not have a property right in expected profits based on external circumstances remaining the same; so why should property entrepreneurs have a different baseline from that of other entrepreneurs in the competitive marketplace? At least, before one came to such a conclusion, one would need a much more nuanced argument about the baseline.

C. “Cybersquatting”

I have previously written about the baseline problem in takings adjudication.¹¹ The issue that started me on the topic of rhetorical capture, however, was the word “cybersquatter.” Some brilliant trademark lawyer apparently coined that word, and that word won a battle without a single genuine argumentative sally.

By now, everyone knows something about Internet domain names, which end in .com, .org, .edu, and so on. When the Internet was in its early phases, no one owned domain names. They were a new asset that was made available to the first comer who registered and paid a fee to an organization set up to administer the system. (When he was a teenager, my son registered “digitaldream.org,” and he still owns it.)

Speculators began registering names that they thought would be valuable to firms. They were like land speculators who buy vacant land that they think is in the path of development. In capitalist theory, speculators are valuable actors in the marketplace, to be praised, not blamed; they take a risk and either get rewarded, or not, based on how markets develop. But capitalist kudos did not accrue to domain name speculators—at least, not all of them.

Some of the speculators registered names that were generic words they thought would be valuable to certain types of firms, such as “sex.com,” “music.com,” “Hanukkah.com,” and many, many others. This group of speculators

11. See MARGARET JANE RADIN, *Diagnosing the Takings Problem*, in REINTERPRETING PROPERTY, *supra* note 3, at 146, 146–65.

made out quite well. “Sex.com,” in particular, turned out to be quite valuable.¹² Other speculators registered names that were similar to words that firms used in trademarks, such as “Panavision.com.”¹³ This group of speculators did not fare so well.¹⁴

What was the baseline applicable to ownership of these words that became useful as domain names? For all we might know, they were all unowned and ready for appropriation, just as we learned in property class about unowned things. Indeed, that is how “sex.com” was treated. If we thought that “sex.com” came into being already owned or promised to a commercial firm with a recognizable use for it, we might have thought that “sex.com” came into being already owned by Larry Flynt or Hugh Hefner. That is, we might have thought that Larry Flynt or Hugh Hefner should own it without having to pay for it, and that no one else should be able to register it.

Something like this happened to the second group of speculators, those who chose words that would be useful to a firm that used the word in its name, and therefore as an aspect of its trademark. Trademark owners easily convinced courts that words that were in some company’s trademark came into being already owned by that company. Instead of actually arguing why this should be so, they labeled the registrants “cybersquatters.” And that was that.¹⁵ We know that “squatters” are without rights in the property on which they are “squatting,” so these speculator registrants are *ipso facto* without rights. That is rhetorical capture. We even have an Anticybersquatting Consumer Protection Act.¹⁶

The trademark owners (that is, their lawyers) had invented a word that begs the baseline question. By labeling someone a squatter, one is assuming that that person has no property right to the asset in question; but that was the question to be decided. We got a poorly reasoned body of law out of this, which caused many problems. There is only one “apple.com,” but there is more than one trademark with “apple” in it (e.g., Apple Bank, Apple Records). Should the first one to register own it? Should a small local book store called “Apple” be able to register “apple.com” and then sell it to one of the big “Apples”? And should we

12. Sara Yin, *Sex.com Sold for \$13 Million*, PC MAG. (Oct. 21, 2010, 1:53 PM), <http://www.pcmag.com/article2/0,2817,2371239,00.asp>; see also Stephen Foley, *Will Sex Still Sell?*, INDEPENDENT (London), Mar. 18, 2010, at 48.

13. Panavision Int’l, L.P. v. Toeppen, 141 F.3d 1316, 1319 (9th Cir. 1998). Of course, the word itself is not the mark; the mark consists of the word plus other design elements, used in commerce to designate the goods of the owner.

14. See, e.g., *id.* at 1326–27.

15. It is not quite true that early court cases dealing with domain name speculation were totally devoid of reasoning, but a reading of them makes clear that courts were captured by the term “squatter.” One does not see the neutral term “speculator” in these cases, nor does one see argument about how allocation of a previously unowned asset might be decided, especially when that asset is offered on a first-come-first-served registration basis. See, e.g., *Sporty’s Farm L.L.C. v. Sportsman’s Mkt., Inc.*, 202 F.3d 489, 493–96 (2d Cir. 2000); *Intermatic Inc. v. Toeppen*, 947 F. Supp. 1227, 1233–34 (N.D. Ill. 1996).

16. 15 U.S.C. § 1125(d) (2012).

think that a person named Ms. McDonald should not be able to have “McDonald.com”? Should we think that we should all be able to register our surnames as domain names, except for those unlucky enough to have a surname that also belongs to a large company?

Maybe if we had actually had the debate—who should be the owner of this previously unowned (previously nonexistent) asset?—we would have ended up thinking it should be some trademark owner, perhaps the first one to register the word. But we should have had the debate. It was waylaid by rhetorical capture.

D. Baseline Question-Begging in Political Discourse

Now to come more specifically to political discourse: In political discourse generally, there is a lot of baseline question-begging. Perhaps after reading this Essay you will be seeing it everywhere.

Because baseline rights are rights that are held justly, not merely rights that some segments in society are able to hang on to, the scope of baseline rights is often as controversial as justice. As we tend to believe that we make progress toward justice, baseline rights are reinterpreted over time.¹⁷ For that reason, it is easiest to see political baseline issues historically. Example: Slave owners thought it was a taking of property rights when their slaves were freed. We should not agree with that argument if we think the baseline is that people ought not to be enslaved, because if we think that is the baseline, then the slave owners were holding their “property” unjustly. Another example: Civil rights laws were enacted in the 1960s, prohibiting discrimination in the sale of property, or in restaurants and hotels, etc.¹⁸ Some property owners thought it was a taking of property rights to deny them the ability to discriminate. They thought they had a property right to deny anyone access to their property for any reason.¹⁹ We should not agree with that argument if we think the baseline is that people have a right not to be discriminated against, because if we think that is the baseline, then property owners simply did not have the right they claimed to have.²⁰

17. This would be true even if over time society changes its commitments about justice, whether or not those changes should be thought of as progress.

18. Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (codified at 42 U.S.C. § 2000a (2012)).

19. See KEITH M. FINLEY, DELAYING THE DREAM: SOUTHERN SENATORS AND THE FIGHT AGAINST CIVIL RIGHTS, 1938–1965, at 259 (2008). For a historical overview of the Senate debate over the Civil Rights Act of 1964, see generally *id.* at 233–80.

20. This is by no means a dead issue. Consider, for example, the remarks of Congressman Ron Paul from June 23, 2004, on the anniversary of the Civil Rights Act of 1964 (Did Congressman Paul beg the baseline question?):

The Civil Rights Act of 1964 [resulted in] a massive violation of the rights of private property and contract, which are the bedrocks of free society. The federal government has no legitimate authority to infringe on the rights of private property owners to use their property as they please and to form (or not form) contracts with terms mutually agreeable to all parties. The rights of all private property owners, even those whose

In today's political discourse, it is often said that "redistribution" is a bad thing. "Redistribution" is treated rhetorically as something that is unfair to those who give up some wealth in favor of others who gain some wealth. But that is rhetorical capture. First, we need to know whether the status quo is just; that is, we need to know what the just baseline is. If the wealthy are holding some of their wealth unjustly, then redistribution is just, not unjust. The justice or injustice of redistribution is a many-faceted question, not something that a descriptive label can decide.²¹

III. OTHER FORMS OF RHETORICAL CAPTURE

A. "Orwellian" Capture by Antithesis

Capture is "Orwellian" when it applies a word to its opposite and makes it stick.²² To call a war "peacekeeping" is an example. The United States changed the name of its Department of War to Department of Defense in the late 1940s.²³ Does the word "defense" convince us—or at least incline us to accept—that any war in which we are engaged is a defensive action? To label a hero a coward is a pure example of "Orwellian" antithesis.²⁴ To label one's political opponents "socialists" is another example. The label in such cases will be whatever kind of political thought is anathema to those who are not students thereof. "Marxist," "communist," etc., have earlier had their day. Today's rhetoric is so divorced from the meaning of the disfavored terms that the same person can be labeled both a socialist and a fascist.

The success of the antithesis strategy in political discourse most often depends on large amounts of media money to hammer home the rhetoric. Perhaps, however, other factors make entrenchment of the rhetoric possible. Lack of education—that is, the kind of education needed for the meaningful political discourse necessary for successful democracy—may well play a role.²⁵ So indeed

actions decent people find abhorrent, must be respected if we are to maintain a free society.

150 CONG. REC. 13,667 (2004) (statement of Rep. Ron Paul).

21. Another instance of rhetorical capture (or at least attempted rhetorical capture) is using the term "tax increase" for the situation where a tax has been subject to a temporary moratorium or temporary forgiving of a portion of the tax. Is the baseline the old tax? Then reversion to the old tax is not a "tax increase," but rather conclusion of a moratorium.

22. See, e.g., GEORGE ORWELL, *ANIMAL FARM* (Harcourt, Brace & Co. 1946) (1945); GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949). Orwell invented the terms "doublespeak" and "doublethink." SUSAN BLAU & KATHRYN BURAK, *WRITING IN THE WORKS* 58 (2d ed. 2010).

23. HISTORICAL OFFICE, DEP'T OF DEF., *DOCUMENTS ON ESTABLISHMENT AND ORGANIZATION 1944–1978*, at 63 (Alicia C. Cole et al. eds., 1978).

24. The "Swiftboat" campaign against John Kerry seems to be an example of this kind of capture. See *supra* text accompanying note 7.

25. Here I am an avowed proponent of the thought of John Dewey: Democracy cannot function without robust public education. See RADIN, *CONTESTED COMMODITIES*,

may living a life that lacks any leisure in which to consider actual arguments—the kind of life that is led by someone who holds down two or more low-wage jobs while attempting to care for a family.

We see the antithesis form of rhetorical capture in law, too. Lawyers and judges are not subject to media blitzes and presumably do have the time and intellectual wherewithal to consider the rhetoric closely rather than just accepting it. Nevertheless, we will find numerous examples of antithesis in various forms of legal fictions, often using the word “constructive”; for example, “constructive eviction” refers to a departure of a tenant that was voluntary but that the court believes should be treated as if it were not.

A particularly clear example of rhetorical capture by antithesis is what has happened to the word “contract” in the presence of large-scale deployment of fine print by firms to curtail rights of consumers. Some theorists and judges are willing to call something a “contract” even when its characteristics are the opposite of what we expect to find in “contract”; that is, when the party who is said to have consented to terms actually did not know there were terms, and certainly did not know that important rights such as due process and trial by jury were being lost.

The underlying justification of contract, of course, is to support private ordering by making it possible for individuals and firms to make gains from trade by agreement. It does seem Orwellian to call incomprehensible boilerplate “Terms of Service”—interior to a website on which few users would click, and that deletes important user rights—an “agreement” that forms a “contract.” To call this a contract is to say that sheer ignorance equals consent.²⁶

B. Capture by Substitution

It is possible that there is a more subtle form of capture strategy substituting one description for another. Rather than labeling something by the word for its opposite (war is peace, attack is defense), a rhetorical capture strategy could just consist of substituting weak words for strong ones (war is police action, attack is preemption). This strategy can dissipate political arousal in the populace by dislodging a political or moral commitment. At least, those who use this strategy apparently believe it will accomplish that.

Lately, it has become prevalent among those who wish to unwind the New Deal to substitute the word “entitlement” for the word “right.”²⁷ I am not sure why the word “entitlement” has proved to be a weaker word than “right.” It is possible that, for some reason, “rights” are viewed as natural law, not subject to cancellation by positive law, whereas “entitlements” are viewed as positive law, amenable to cancellation by the government. It seems, for example, that calling

supra note 2, at 74, 211–12; see also Margaret Jane Radin, *A Deweyan Perspective on the Economic Theory of Democracy*, 11 CONST. COMMENT. 539, 542 (1995).

26. See RADIN, *supra* note 9.

27. See Douglas Turner, ‘Entitlement’ Label Puts Social Security at Risk, BUFFALO NEWS (Feb. 20, 2012, 6:33 AM), <http://www.buffalonews.com/editorial-page/columns/douglas-turner/article736325.ece>.

Social Security an “entitlement” weakens any understanding that after paying into its fund for 40 or more years, retirees have the “right” to draw out of it. In popular discourse, “entitlement” seems to have a connotation of government largesse that can be withdrawn, whereas “rights” are inherent in our political compact and cannot be withdrawn.²⁸

C. Capture Through Assimilation

Another form of rhetorical capture—capture through assimilation—occurs when a word that has culturally good connotations is applied to a practice that may not warrant those connotations. The use of “free” and “freedom” frequently reflects this type of rhetorical capture.

As mentioned earlier, firms deploy incomprehensible boilerplate terms to delete people’s constitutional and statutory rights without their knowledge, and courts frequently call this procedure “freedom of contract.” Freedom of contract actually means voluntary choice to enter into transactions with others, to achieve gains from trade, and to use private ordering to order one’s own life and affairs. Classical liberal thought relies on freedom of contract because it views the political state as necessary to maintain a legal infrastructure (consisting of property and contract) in order make private ordering possible. Using the word “freedom” to talk about involuntary divestments of a person’s rights (to a jury trial, and to bring suit in a convenient forum, for example) is an assimilation that reaches its Orwellian opposite.

Freedom of speech has also been attached as an honorific to activities that we did not previously understand as speech and nonhuman entities that we did not previously understand as speakers. Now, we are forced to understand that money talks very powerfully; and mute corporate entities are found to be able to speak, and must have the freedom to do so.²⁹

The most prevalent use of the word “freedom” to assimilate a procedure or state of affairs to something desirable or laudable is the term “free market.” Of course, we all realize—if we take time to think about it—that a market cannot be “free” in the sense of anarchy. Markets require a legal or social infrastructure in order to function. Without enforceable rules of property and contract, at minimum, and a system to decide borderline cases (for example, of trespass vs. property, of duress vs. contract), markets would not function.

28. For a cautionary tale about Social Security, today’s students of rhetorical capture should re-read *Flemming v. Nestor*, 363 U.S. 603 (1960). In that case, the majority used the rhetoric of “flexibility and boldness” to allow what I am sure—or at least sincerely hope—would today be considered an unconscionable divestment of an individual’s rights. *Id.* at 610. A strong dissent used the rhetoric of “insurance” that the rights holder had paid for to maintain that the divestment was illegal. *Id.* at 624 (Black, J., dissenting).

29. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898, 900–01 (2010).

The markets that are labeled the most “free” are some of the most structured. Consider the stock or commodities exchanges.³⁰ When someone complains of “imposing regulation on the free market,” that person actually just disagrees with the way a particular market is constituted. That person is not only assimilating markets to the honorific, “freedom,” but is begging the baseline question, too. The questions to be asked would be: What would be the appropriate (justified) legal infrastructure for a particular market or type of market? What factors bear on that decision, and how do they interact with each other?

To take an example, to what extent should monopolization in the form of intellectual property rights displace competition so that producers of knowledge and creative works, knowing that monopoly profits await them, are incentivized to create? On the other hand, to what extent should competition prevail so that intellectual property rights should be nonexistent or narrow? These are not questions that can be answered by pitting “free” competition for everyone against “free” markets for holders of intellectual property rights.³¹

CONCLUSION

This Essay is a beginning of some lines of thought about rhetorical capture, but it is by no means a “theory” thereof. Its proper conclusion must therefore be an invitation to the reader to take these lines of thought further, or to show that they should be discarded, superseded by other lines of thought that may be more apt. I believe accepting my invitation would be a worthy endeavor. When rhetoric displaces reasoning in matters important to democracy, democracy suffers.

30. Bernard Harcourt has masterfully shown how the Chicago Board of Trade (thought to be the epitome of a “free” market) is just as regulated (or regulated in just the same sense) as was the French Marais (thought to be the epitome of a “regulated,” thus “unfree” market). BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 1–18 (2011).

31. See Margaret Jane Radin, *A Comment on Information Propertization and Its Legal Milieu*, 54 CLEV. ST. L. REV. 23, 27–28 (2006).