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The Corporate "Free Speech" Racket

How corporations are using the First Amendment to destroy government regulation.

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In late summer 2011, the National Labor Relations Board (NLRB) released a new rule requiring businesses to put up an eleven-by-seventeen-inch black-and-white poster notifying employees of their rights under federal law.

The poster, drafted over the course of a year by a committee of rule makers taking into account more than 7,000 public comments and dozens of meetings with industry groups, labor unions, and "right-to-work" advocacy organizations, emerged as would have been expected: even-keeled and rather bland. Beneath the official NLRB seal and above the phrase "This is an official government poster," it informed employees that they have the right to join or not to join a union, and that they cannot be coerced into doing either.

Still, the business community was incensed. Describing the new rule as yet another government intrusion that would do nothing more than "create unemployment," "weaken the economy," and cause "immediate, irreparable harm for which no adequate remedy at law exists," a coalition of industry groups led by the U.S. Chamber of Commerce and the National Association of Manufacturers (NAM) launched a firestorm of litigation, eventually suing the agency in two federal appellate courts.

On its face, this little drama isn't all that surprising. For the past decade or so, industry groups have made a habit of waging war in the form of endless litigation on regulatory agencies, hoping to slow the rule-making process, drain agency resources, and, when possible, get final rules thrown out. In most cases, these lawsuits play out in the weedy battleground of administrative law, where lawyers tussle over economic analyses or some minutiae within the Administrative Procedure Act. But this time was different.

This time, NAM, the biggest trade group in the country, was arguing that by forcing companies to "engage in speech they would not otherwise issue," the government was "in violation of their rights under the First Amendment."

And that, dear readers, is a pretty ballsy claim. For one, it's a little like dealing with your gopher problem by firebombing the neighborhood. By claiming that the government cannot, under the Constitution,

compel companies to "engage in speech they would not otherwise issue," NAM is essentially undercutting nearly *all* economic regulation. "If that seems alarmist, it's not," wrote University of Tulsa law professor Tamara Piety, the author of *Brandishing the First Amendment*. In the legal context, the current definition of "speech" is famously fuzzy and could, depending on the situation, include very nearly everything a company does, from advertising and performing financial transactions to transferring data and utilizing computer algorithms. So if NAM's claim were true, it's very possible that the government couldn't regulate any of those activities. "If you cannot regulate commercial speech," Piety wrote, "you cannot regulate commerce, period."

The other reason it's such a ballsy claim is simply that until very recently, it would have been laughed out of court. Most jurisprudence from at least the past eighty or so years backs up the idea that the government, acting in the interest of the greater public, has the authority to force companies to convey certain non-ideological, government-mandated messages, so long as it's clear that it's the government "speaking," not the company. Those messages can take the form of posters or warning labels, or those little placards in bathrooms reminding employees to wash their hands, or some other form of government-mandated "fine print" informing consumers, investors, shareholders, employees, or job seekers about risks or rights or government protections.

So with that, hold on to your socks. In September 2012, a three-judge panel of the U.S. Court of Appeals in the D.C. Circuit, made up of A. Raymond Randolph and Karen Henderson, both appointed by George H. W. Bush, and Janice Rogers Brown, a George W. Bush appointee, heard the case. And in May last year, they published their final decision, striking down the NLRB's rule—on First Amendment and statutory free speech grounds.

It did not matter that the "speech" in question here was a non-ideological poster clearly stating U.S. law, the judges said. And it did not matter that the rule placed no other constraints on companies' speech or on the free flow of information. (The mere act of compelling a company to "host or accommodate another speaker's message" was enough to violate its free speech, according to the opinion.) And it did not matter that, in 2003, this same court—and the same judge, Randolph!—had confirmed the legality of President George W. Bush's executive order requiring federal contractors to put up explicitly anti-union posters in their workplaces on the grounds that "[a]n employer's right to silence is sharply constrained in the labor context and leaves it subject to a variety of burdens to post notices of rights and risks."

It is tempting, of course, to simply write off this decision; to chock it up to the fact that it had to do with organized labor, an incendiary topic these days, or that it was decided by a very conservative panel on a very conservative court. After all, Republican senators repeatedly filibustered Obama nominees to precisely this court, leading Democrats last November to end filibusters for all nominees except those for the Supreme Court. And indeed, ideology was a factor. But there's also something else going on here.

As crazy as this decision was, as ill-founded and sweeping in its implications for government regulations going forward, it's not exactly an outlier. In the past decade, both the U.S. Supreme Court and lower federal courts have begun, with increasing frequency, to strike down rules and sometimes entire laws, on the grounds that they infringe on companies' First Amendment rights to free speech and expression. This spring, for example, the Supreme Court will hear a case brought by the Christian-owned national craft supply chain, Hobby Lobby, claiming that the mandate in Obamacare requiring corporations to pay for some of their employees' contraception is a violation of the company's First Amendment right of

religious expression. In another pending case, the Department of Justice filed a suit alleging that the credit rating agency Standard & Poor's behaved fraudulently in giving high, and often AAA, ratings to toxic securities before the housing collapse. S&P is claiming that the DOJ's case is retaliatory and therefore a violation of its First Amendment rights. As Columbia law professor Tim Wu put it in the *New Republic* last year, it's tempting to call industry's use of the First Amendment "the new nuclear option for undermining regulation, except that its deployment is shockingly routine."

The mother of all corporate First Amendment cases is, of course, *Citizens United*, in which the Supreme Court held in 2010 that any law constraining corporate political expenditures was a violation of companies' rights to free speech. But it neither began nor ended there. Just a year after that precedent-contorting decision, the Supremes scrapped a Vermont state law on similar grounds. The law restricted data miners from selling pharmacy records to pharmaceutical companies, which were, in turn, using that data to target certain doctors for their sales pitches. The Vermont law was designed to protect doctors' privacy and control health care costs, but the Court decided those weren't compelling enough state interests to warrant violating the companies' First Amendment-protected commercial speech. It was one of those decisions, a constitutional law professor told me, that was "like getting whacked by a two-by-four: what the *hell*? Where did that come from?"

There have been dozens more cases like it. Over the past few years, corporations like Nike, Verizon, Google, and the big credit ratings agencies like S&P and Moody's have been crafting innovative new First Amendment defenses to parry all sorts of "government intrusions," from antitrust suits to false advertising. Last summer, the U.S. Chamber of Commerce attacked two new Securities and Exchange Commission rules mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act that required publicly traded international corporations, including Exxon and Chevron, to disclose certain information to the public (such as how much they were paying host countries for their extraction rights). Forcing those companies to speak, the Chamber argued, was a violation of their First Amendment-protected commercial speech. The Chamber and Business Roundtable have appealed one of those cases to the D.C. Court of Appeals, which will hear it this month.

The same court will also hear another case this month from the American Meat Institute, representing behemoth meat-packers like Tyson and Cargill, which is taking a similar tack in an attempt to kill a Department of Agriculture rule mandated by consumer protection requirements in the 2002 Farm Bill. It requires meat-packers to label their products indicating in what country the animal, or animals, in their meat had been born, raised, and slaughtered. Forcing companies to use those labels, the meat-packers say, is equivalent to making them engage in speech they would not otherwise issue and is therefore a violation of their First Amendment-protected commercial speech.

While none of these cases is by itself a game changer, the collective weight of all of them—combined with sweeping decisions, like the one in the recent NLRB case—is enough to begin to bend legal precedent in favor of industry. Frederick Schauer, who was a First Amendment scholar at Harvard for nearly two decades and is now a professor of law at the University of Virginia School of Law, coined the term "First Amendment opportunism" more than a decade ago to describe precisely this trend. "It used to be that if a lawyer claimed free speech in most of the cases we're seeing now, the judge would have looked at him and said, 'Counselor, you can't be serious,'â€‰" Schauer told me. "But now you see them being taken seriously. That's a very big battle they've already won."

And if industry goes on to win the war—if they collect a body of First Amendment case law establishing that corporations' First Amendment-protected speech cannot reasonably be fettered by economic

regulation—our society will be in a world of hurt. There will be no corporate transparency whatsoever. No way to enforce workers' rights. No way to compel companies to protect investors or shareholders. And all regulations that require corporate disclosure, including most financial regulations, will cease to exist in any meaningful way.

And if you don't believe me, how about the late William Rehnquist? After the Supreme Court first granted that commercial speech considerations can trump state law in the 1970s, the famously conservative Supreme Court justice described a similar vision in his dissent, recalling, with a shudder, the "bygone era of Lochner v. New York." Named for a case in which the Supreme Court overturned a law limiting the number of hours bakers could be forced to work, the Lochner Era describes a period from the Gilded Age to the Great Depression characterized by unchecked corporate power, untouchable monopolists, very few worker or consumer rights, rampant environmental degradation, and extreme inequality.

One of the primary reasons those social conditions persisted for so long was because of a fiercely libertarian intellectual culture in many federal courts at the time, and especially the U.S. Supreme Court, which, during a fifty-year period, struck down all or part of more than 200 state and federal laws, including those outlawing child labor, banning sweatshops, and establishing a minimum wage and fair working hours. In the Lochner Era, big industry groups and their allies on the Court wielded the notion of "freedom of contract"—any regulation that abridged it was chucked. Today, the notion of "freedom of speech" is being used virtually the same way, just as Rehnquist worried it might be. Any rule or law that abridges a company's claims to First Amendment-protected speech is now vulnerable to attack.

Many members of the younger, more radical generation of conservative lawyers and judges now working in the lower federal courts and the U.S. Supreme Court dismiss their conservative forebears' calls for judicial restraint; Rehnquist's quaint worries are seen as outmoded by conservative activists today. They instead regard the First Amendment as one of the most powerful weapons in the battle to achieve "economic liberty." And they are joined in their efforts by a cadre of eminent liberals who, having made their name in the 1970s arguing for the inviolability of the First Amendment under any circumstances, have been unwilling to unpack the flawed logic that got us here to begin with, and are now defending industry's claims to free speech, lending both credibility and respectability to an argument powerful enough to dismantle the entire regulatory state.

The First Amendment dictates that "Congress shall make no law … abridging the freedom of speech." It makes no mention of corporations, commercial transactions, or advertising, but nor does it name dissidents, or anarchists, or seditious radicals of any stripe, and for a long time, justices, judges, lawyers, and jurists were more or less in agreement that the First Amendment didn't protect any of those things. In fact, it wasn't until about eighty years ago that liberal judges and justices like Oliver Wendell Holmes and Louis Brandeis began, in isolated cases, to use the broad language of "free speech" to protect religious minorities and marginalized groups like Jehovah's Witnesses and labor rights activists.

Our modern imagination of the First Amendment as a robust, powerful, content-blind doctrine didn't even really hit the scene until about fifty years ago, in the 1960s and '70s, when the definition of "speech" began to stretch and morph, becoming both more generous and more distorted in its scope. It was then that liberal Americans and the broader legal establishment began to embrace for the first time the rather radical notion that the First Amendment protects *all* political speech, regardless of *who* said it, or *what* was said. Almost overnight, acts that would have been considered seditious, blasphemous, or profane, and therefore jailable offenses just a generation before, became, by the late '70s, cultural

touchstones, symbols of an age defined by radical individualism. Under the banner of the First Amendment, a teenager could wear a jacket printed with the words "Fuck the Draft"; a man could burn the American flag; the *New York Times* could print top-secret government records that would help bring down a president.

By the end of the '70s, it was written squarely into First Amendment case law that, aside from a handful of exceptions for libel, slander, and hate speech, no government—federal, state, or local—could pass a law that abridged citizens' political speech, no matter how unpopular or despicable the speaker, no matter how unsavory his message. This idea was sanctified in American lore in 1977, when the American Civil Liberties Union stepped in to defend the Nazis' First Amendment right to parade through the predominately Jewish streets of Skokie, Illinois.

That's generally where our high school textbooks stop. But a less-well-known redefinition of the First Amendment was beginning to appear at the same time. In the early '70s, intellectual contrarians like Martin Redish, ingenious lawyers working for businesses and corporations, and liberal purists, who distrusted *any* constraints on *any* speech, began to promote in legal journals and the occasional lawsuit the idea that companies' advertisements and marketing campaigns ought to count as "speech," too. Conservative jurists like Robert Bork dismissed these ideas as wrongheaded and dangerous, writing that "the protection of the First Amendment must be cut off when it reaches the outer limits of political speech." And for years, most legal experts shared Bork's view. The notion that commercial entities possessed the ability to "speak," much less that such "speech" should be afforded constitutional rights, was laughable.

But again, that changed almost overnight. In 1975, the consumer group Public Citizen, then still controlled by Ralph Nader, sued the state of Virginia over a law restricting pharmacies from advertising the price of their drugs. In that now-famous case, known as *Virginia Pharmacy*, Public Citizen argued that since consumers could benefit from "hearing" that speech—they could get a better deal by comparing pharmacies' prices—the government should not be allowed to limit such speech without a "compelling state interest." It's important here to note that Public Citizen was arguing that commercial speech is deserving of protection *only insofar* as it's valuable to the public. But the Supreme Court's decision in 1976, in which it sided with Public Citizen and struck down the Virginia law, made a much larger point. It established, first, that a commercial entity can be legally defined as a "speaker" with limited claims to free speech, and second, that even "purely economic" speech, like advertising and marketing, enjoys some First Amendment protections.

Having flown us up to 10,000 feet and opened the hatch, however, the justices forgot to show us how to work the parachutes. "[W]e of course do not hold that [commercial speech] can never be regulated in any way," wrote Justice Harry Blackmun for the majority. "Some forms of commercial speech regulation are surely permissible." In other words: commercial entities' economic speech is protected, but at a lower standard of scrutiny than citizens' *political* speech. What, exactly, was that "lower standard of scrutiny"? It was left unsaid.

While liberals celebrated the decision as a win for consumer rights, conservatives like Rehnquist saw the writing on the wall. "The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse … to the same place as had been previously reserved for the free marketplace of ideas, are far reaching indeed," he wrote in a dissenting opinion.

The years that followed would bear out his warnings as the legal establishment fumbled with the parachute strings. A handful of cases in the 1980s attempted to address the questions that the Supreme Court had left unanswered: What is the definition of commercial speech? What forms of commercial speech regulation are permissible? And under what circumstances can commercial speech be abridged? A tangled and sometimes contradictory "doctrine of commercial speech" emerged, which attempted to set down criteria under which the government *can* regulate commercial speech—for instance, if the regulation is "narrowly tailored" to address a "substantial" government interest—and under which companies have the right "not to divulge accurate information." But these criteria and definitions have been Silly Putty in the hands of clever industry lawyers, stretched and molded over the years to fit their needs.

Take, for example, the very definition of "commercial speech." In the *Virginia Pharmacy* opinion, Blackmun wrote almost exclusively about advertising and other marketing materials designed for consumers. But in subsequent years, lawyers have stretched that definition, sometimes successfully, to include basically anything whatsoever that involves information—a very, very broad umbrella in today's information economy—including the act of accessing or transferring digital data. That 2011 Supreme Court decision striking down the Vermont law barring data miners from selling information to pharmaceutical companies hinged on the assumption that the act of purchasing and utilizing digital records to facilitate a marketing strategy fell under the auspices of First Amendment-protected commercial speech. A dismayed Justice Stephen Breyer asked in his dissent why the Court had not given "significant weight to legitimate commercial regulatory objectives," as precedent demanded. "The far stricter, specially 'heightened' First Amendment standards … are out of place here."

In the midst of this intellectual tumult in the mid-'70s, another, even more powerful, idea began to take root. If commercial entities' *economic* speech is protected by the First Amendment, but at a lower standard of scrutiny, and citizens' *political* speech is protected by the First Amendment, at the highest standard of scrutiny, then what would happen if a commercial entity issued *political* speech? Would *that* get the highest standard of scrutiny, too?

This question bubbled all the way up to the U.S. Supreme Court in 1978. A few years before, Massachusetts had passed a law barring companies from spending money to sway public referenda, unless their business was directly affected. The First National Bank of Boston sued Massachusetts Attorney General Francis Bellotti, arguing that spending money was a corporations' form of political speech, and therefore protected by the First Amendment at the highest standard of scrutiny. The Supreme Court agreed: prohibiting corporate spending on political ends indeed violates corporations' "protected speech in a manner unjustified by a compelling state interest." The decision threw legal theorists into a tizzy. If the First Amendment treats corporations' political speech the same way it treats citizens' political speech, does that make corporations citizens? And if so, do corporations get the same rights as citizens? Justice Lewis Powell, writing for the majority in the *Bellotti* decision, sidestepped that burning question: it doesn't matter "whether corporations *have* First Amendment rights and, if so, whether they are coextensive with those of natural persons," he wrote. The only question that matters is whether speech "that the First Amendment was meant to protect" is being abridged. In other words, it was all about the *speech* itself. Political speech, no matter who—or what!—the speaker was, or what was said, enjoys the fullest First Amendment protections, the Court decided.

Three decades later, Justice Anthony Kennedy would cite the *Bellotti* case as precedent twenty-four times in the *Citizens United* opinion, claiming that "the Government lacks the power to restrict political speech based on the speaker's *corporate* identity." But at the time, traditional conservatives were

appalled by the idea that corporations and other commercial entities would be afforded the same rights as people when it came to political speech. Rehnquist argued that since the government allows corporations to exist by providing them with "special privileges or immunities different from those of natural persons," it's only logical that those entities would "be subject to like regulation." The government, furthermore, allows corporations to exist so that they may perform a circumscribed economic purpose, not so that they can become political participants, he wrote. "[L]iberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist."

Yet while traditional conservatives fulminated, a younger generation of conservatives was outright celebratory. Unlike their elders, these more radical conservatives "saw a link between the First Amendment and the larger project of restoring the 'economic liberty' that they believed had been eroding since the New Deal," wrote Columbia law professor Wu. By granting complete, unlimited, inviolable protections to commercial entities' political speech, *Bellotti* dramatically elevated the stature of corporations under the First Amendment. If liberals insisted on brandishing the First Amendment to protect anarchists and communists, they reasoned, why couldn't they could use it to protect businesses and restrict government interference in the economy? And that is more or less exactly what they did. Beginning in the early 1970s, a new crop of conservative think tanks, clubs, and legal funds, like the Pacific Legal Foundation, the Heritage Foundation, and what later became the CATO Institute, funded by the Koch brothers, formed alliances with the U.S. Chamber of Commerce and other powerful trade groups, in an effort to push an anti-regulatory, pro-business agenda, with expanded corporate free speech rights as a key weapon.

This revolution was aided in no small part by many in the liberal establishment, who, even today, continue to support the *Bellotti* decision on the grounds that it was framed as an anti-discriminatory measure: *all* political speech by *all* speakers enjoyed First Amendment protection—even if the speaker was a bank or a corporation. Many of the traditionally liberal First Amendment lawyers, like Floyd Abrams, Laurence Tribe, and Walter Dellinger, who made their names in the '70s as defenders of the oppressed, have in more recent years dedicated themselves to advancing and defending this idea—that the identity, even the *corporate* identity, of a speaker cannot be a determining factor of whether or not speech is regulated. As a result, they have, along with organizations like the ACLU, lent their talents, as well their credibility and respectability, to corporations' First Amendment attacks, often finding themselves among unlikely allies, like the National Rifle Association, Monsanto, and Exxon.

Abrams, for example, who earned his reputation defending the *New York Times* in the Pentagon Papers case, later wrote the brief in support of Mitch McConnell in *Citizens United* and, in 2012, successfully argued on behalf of the tobacco industry. In that case, the tobacco industry had claimed that a Food and Drug Administration rule, mandated by the 2009 Family Smoking Prevention and Tobacco Control Act, that required newer, more graphic warning labels on cigarette packaging was a violation of companies' First Amendment-protected speech. Abrams now represents the massive credit rating agency Standard & Poor's, which has argued, repeatedly and successfully, that its irresponsible, dangerous, and overly optimistic ratings are just speech—the "world's shortest editorials," as one legal scholar put it—and that the company therefore cannot be held responsible for using those ratings to line its own pockets while fleecing investors of billions of dollars and contributing to the collapse of the housing market.

By the early 2000s, First Amendment jurisprudence had become a vague, messy, and sometimes-contradictory mess, vulnerable to exploitation. On the commercial speech side, it was clear that the First Amendment provided some limited protections to companies, but it wasn't clear what activities were

included under the definition of commercial speech, or where that "lower standard of scrutiny" began or ended. On the political speech side, the Supreme Court had clearly ruled that the First Amendment provided total protection at the "highest standard of scrutiny" to all speakers, including corporations, but it wasn't clear what speech should be considered political, or what would happen in circumstances in which a company's political and economic speech overlapped. And in the area of compelled speech—requiring companies to disclose certain information, say, or refrain from making false claims—things were even murkier.

Take, for example, the recent cases brought against the government by Hobby Lobby, a Christian-owned national craft supply chain with 578 stores and tens of thousands of employees across the country. Hobby Lobby argues that the mandate in Obamacare requiring businesses of a certain size to pay for their employees' contraception violates the company's First Amendment-protected rights of religious expression. The company's owners do not believe personally in using certain types of contraception. While that case is slightly different since it involves First Amendment protections of religious expression, rather than speech, much of the same case law applies. In October, the U.S. Court of Appeals in the Tenth Circuit, based in Colorado, cited the First Amendment precedent of *Citizens United* to decide in favor of Hobby Lobby, leaving its thousands of employees, including those who do not share the religious beliefs of their employers, out of luck. "We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression," wrote Judge Timothy M. Tymkovich for the majority. The U.S. Supreme Court will hear the case this year.

Or for another example, consider the aftermath of the *Citizens United* decision in 2010. Perhaps in an effort to quell fears, Justice Kennedy, writing for the majority, noted that while the Court held that laws restricting commercial entities' expenditures on political messages violated their First Amendment-protected speech, he very pointedly left the door open for Congress to pass laws compelling commercial entities to disclose their expenditures. "Citizens and shareholders" must be able to "make informed decisions and give proper weight to different speakers and messages," he wrote. It sounded reasonable at the time. After all, if we can't restrict corporate expenditures, at least we can see how much they're spending on what, right?

Not so fast. In the months and years since that decision, corporations and industry groups have been fighting tooth and nail any laws or regulations that would require commercial entities to disclose their political expenditures on the grounds that—drum roll, please!—any such action would infringe on commercial entities' First Amendment-protected political speech. They argue that such disclosure might subject them to criticism for making the expenditures, which would, in turn, have a "chilling effect" on their ability to spend—er, "speak"—in the future. Just as the government cannot force a citizen to speak or not speak about his political beliefs, they argue, the government cannot force a corporation to disclose its political donations either. Welcome to the NFL.

It helps to think of the current state of First Amendment jurisprudence the same way you might think of a sci-fi novel. Within its own self-contained universe, organized according to its own laws and assumptions, everything makes logical sense. Kennedy, Abrams, the ACLU, and all the rest of those "purists" make three main assumptions. First, they assume that the information issued by a corporation is "speech" and that the corporation itself should be considered a "speaker." Second, they assume that all political speech, no matter what is said, enjoys the full protections of the First Amendment. And third, they assume that we cannot discriminate against *any* political speech regardless of the speaker's identity. On the basis of those three assumptions, their conclusion is logically inevitable: political speech issued by a corporate speaker enjoys the full protections of the First Amendment.

But there's one fatal problem with that little proof: there's no reason why the first premise—that information issued by a corporation qualifies as "speech"—should pass the test of common sense. As Rehnquist, Bork, and other old-guard conservatives noted decades ago, a corporation is a legal entity that exists because our laws allow it to exist, so that it may perform an economic purpose. It issues information to consumers and the public so that it might advance that economic purpose. That seems like a very, *very* different thing than a natural person, who is not a legal entity, and exists regardless of the will of the government, speaking about beliefs and convictions. Why not agree that entities that are not alive create information, while only people create speech?

It's at this stage in the conversation that the First Amendment purists, having worked themselves into a bit of a froth, make three points. First, they argue that if we limit the definition of speech or wade into the muck of deciding who gets to be a "speaker" under the law and who does not, then we position ourselves on a slippery slope: we are in danger of creating loopholes that allow the First Amendment to protect one type of speaker but not another. Without total absolutism, wherein *all* speech, by *all* speakers is protected, they argue, we risk creating a world in which, say, Muslims are silenced just because they're Muslims, or anarchists are denied free speech just because they're anarchists. It is, admittedly, a scary prospect, but in reality, it seems that we are in no danger at all of that actually happening. Would it not be perfectly possible to guarantee, absolutely, free speech rights for *every single solitary American*—full stop, no exceptions!—without also agreeing to guarantee those rights to corporations? If the line is drawn between people and non-people, that slippery slope seems pretty sticky to me.

The second point the purists raise is what happens when people, who individually enjoy full First Amendment protections, arrange themselves into a group and form legal entities, like corporations, unions, or nonprofits. And the answer, again, seems fairly simple. After all, the government already treats legal entities differently than it treats people. Legal entities are taxed differently, they're afforded different privileges, and they're subject to different duties, punishments, and rights. Legal entities cannot be jailed. They cannot plead the Fifth so as not to perjure themselves. They can only be held to limited liability for their financial mistakes. So, in the same way that the law already treats a legal entity differently than it treats a person, so too should it treat the information issued (and cash spent) by a legal entity differently than it treats the speech created (and cash spent) by a person.

The third point the purists make is that since many newspapers and media outlets are corporations, any jurisprudence that does not consider corporations' speech to be protected by the First Amendment threatens the freedom of the press. Again, that sounds scary, but it seems that there is no reason that must be the case. As Stanford law professor Michael McConnell points out, the First Amendment specifically names the "press" as worthy of its protections, and our laws reflect that, carefully defining and affording protections to editorial activities. "No one disputes that corporations, such as the New York Times Company, can editorialize during an election, and other groups performing the press function have the same right, even if they are not part of the traditional news media industry," he wrote. But there is no reason to assume that the First Amendment's press clause should apply to activities, like "campaign contributions, which are not an exercise of the freedom of the press."

And that, of course, leads to the most important point of all. Shouldn't our democratically elected governments—local, state, and federal—have the power to police commerce within their jurisdictions? That doesn't mean that corporations, unions, or nonprofits would be unable to issue commercial or political information. They would simply have to fight, alongside the citizens who *benefit* from that information, for favorable laws in the political arena, lobbying elected officials and regulators, as they do

now. What they wouldn't be able to do is use the courts, marshalling a supposed constitutional right to circumvent the political process.

Of course, the only way to ensure that these commonsense lines between people and legal entities get redrawn is for political leaders to first understand the threat posed by runaway commercial speech rights, and then to put on the bench judges who do, too—and soon. Legal precedent is powerful and consequential, but it can, as we've seen, evolve or devolve over time, depending on who is making the calls.

Obama's ability to shift the Court has been immeasurably strengthened by the Senate's decision this past fall to end the filibuster for judicial appointments. He should use that power decisively and quickly. But that's not the same as moving the Court "to the left," at least on this issue. Rather, what's needed are jurists dubious of both liberal First Amendment purism and radical corporate libertarianism. What's needed are moderate judges willing to admit that when it comes to commercial information, old-guard conservatives like Rehnquist were right, and so too was Justice John Marshall, when he wrote in 1819, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."