



# Contaminating the Courts: How Corporations Are Misusing the Constitution to Attack the Environment

**A Joint Report by Free Speech For People  
and Greenpeace, Inc.**

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## Downloadable Talking Points

- Challenging the new corporate campaign in a public meeting
- Challenging the new corporate campaign in a private meeting
- Guide to writing a related Letter to the Editor
- Sample letter to the editor
- Key quotes about corporations and the Constitution

# Executive Summary

It's not news that many business executives would prefer to challenge environmental laws in court than comply with them. But corporations have increasingly begun to resurrect the legal strategy of expanding the concept of corporate personhood to argue that local, state, or federal environmental laws violate their constitutional rights. This trend isn't totally new, but it has accelerated since the Supreme Court's 2010 *Citizens United v. FEC* decision. Consider just a few examples:

- When two state attorneys general started investigating whether ExxonMobil had committed fraud by publicly denying what it knew about climate change, ExxonMobil sued to stop the investigations.
- In St. Louis, Missouri, coal interests challenged a popular local ballot initiative to eliminate municipal tax breaks and other subsidies from fossil fuel companies.
- In Vermont, multinational corporations have repeatedly challenged consumer labeling laws that require companies to disclose recombinant hormones in milk, mercury in light bulbs, and food containing genetically modified ingredients.
- In Seattle, Washington, "yellow pages" companies challenged a waste-prevention measure that would have saved the city hundreds of thousands of dollars in fees to recycle unwanted and unneeded yellow pages books that were still being dropped on residents' doorsteps well into the Internet era.
- In Kaua'i, Hawai'i, multinational seed companies challenged an agricultural management ordinance that required buffer zones around plots farmed with substantial quantities of genetically engineered crops or heavy application of pesticides.

These seemingly unrelated cases are connected by a common thread: each of these cases were brought by corporations alleging their constitutional rights were violated by these laws and regulations. Of course, not all of these claims succeed. But many do. For example, in Missouri, a local judge blocked the St. Louis initiative from even appearing on the ballot, citing *Citizens United* and opining that the initiative would unconstitutionally "discriminate" against fossil fuel corporations and their major business partners in violation of the Constitution's Equal Protection Clause. And federal courts invoked the grand principles of freedom of speech to strike down the Seattle waste-reduction ordinance, and the Vermont milk labeling requirements.

Until recently, these types of claims would have been considered fringe legal theories. Over the past few decades, however, business has launched a targeted, well-financed assault on laws protecting the public interest aimed at stretching constitutional protections to provide regulatory escape hatches for ordinary commercial corporations. Often, the targets of this assault are commonsense environmental measures supported by broad popular majorities, and the corporations claiming constitutional protections from these laws are giant multinationals. Though this corporate constitutional litigation strategy does not always prevail, arguments like these no longer occupy the radical fringe. As the arguments are made more and more often, they become part of the legal mainstream.

This new corporate assault has centered on an expanded interpretation and application of the First Amendment's protection of free speech and the Fourteenth Amendment's guarantee of equal protection. These claims present some of the most egregious mis-readings of the purpose and origins of these constitutional protections; however, attempts to expand corporate protections have also been raised in the context of what's known as the "Dormant Commerce Clause," and with respect to the Fourth Amendment protection against unreasonable searches in a few cases concerning environmental and safety inspections. As this report makes clear, one of the key dangers of this corporate campaign misusing the Constitution is the chilling effect it has on state and local officials concerned about costly litigation, but another key aspect of it is normalizing legal arguments that once would have been considered beyond the pale.

Yet many supporters of environmental protection aren't even aware of this dangerous trend in corporate litigation strategy. To be sure, most environmentalists understand how corporations manipulate the *political* and *regulatory* processes through political spending, lobbying, revolving doors, and regulatory "capture." But the environmental movement is only beginning to understand how corporations are now exploiting the *judicial* process, treating the courts as a new front in weakening environmental protections after laws have been passed, regulations have been promulgated, and public attention has moved on to other matters. This report focuses primarily on how "corporate constitutional rights" doctrines endanger much-needed environmental protections, and how we can fight back.<sup>1</sup>

# Introduction

The complex environmental challenges of our time require collective action, which in a democracy we express through law. But some companies' business models depend on environmentally unsustainable practices, and it's unsurprising that many of them oppose laws that curb environmental abuses when profits are at stake. Many environmental activists are already aware of corporate money's detrimental effect on the electoral process. As demonstrated by Greenpeace's 2014 report, "The Kingpins of Carbon and Their War on Democracy," oil and gas executives, with the aid of lax campaign finance law, have used their vast financial resources to logjam the lawmaking process and undermine attempts at serious environmental policy reform.<sup>2</sup>

But even when corporate opposition fails to block a law through the political process, corporations fighting environmental laws can get a second bite at the apple in the courts.

ExxonMobil ("Exxon") presents the most recent and clear case of a corporation using the courts to undermine attempts at environmental reform. In 2015 and 2016, Exxon came under investigation by the attorneys general of Massachusetts and New York for potential consumer and securities fraud.<sup>3</sup> There is evidence that Exxon ran campaigns casting doubt on the science of global warming, despite having long-standing scientific evidence that global warming is real and escalated by burning fossil fuels.<sup>4</sup> The evidence showed Exxon had data proving global warming existed, yet still spent over \$30 million promoting the denial of global warming for its own economic benefit.<sup>5</sup> In response to this investigation,

Exxon filed a counter-suit claiming, among other things, that the attorneys general were violating its First, Fourth, and Fourteenth amendment rights simply by investigating potential fraud.<sup>6</sup>

Exxon's counter-suit claimed the attorneys general investigations on consumer and securities fraud violated its First Amendment rights.<sup>7</sup> Specifically, Exxon alleged that the attorneys general were targeting only one side of the political debate, thus having a chilling effect on Exxon's "free speech" rights. Exxon continues to cast its funding of climate misinformation as well as its own conflicting statements about the science of climate change as an issue of free speech, without acknowledging that the First Amendment provides no refuge from either the long-standing legal restrictions on misleading investors at the federal and state levels or consumer protection laws.

Ironically, Exxon's shareholders increasingly see a clear-eyed assessment and strategy for addressing the financial risks presented by shifting market dynamics—brought on by a combination of technological advances, climate impacts, and the transition to a lower carbon economy—as critical to the company's value proposition.<sup>8</sup> Even though Exxon launched a full court press against a shareholder resolution calling for scenario analysis of how the company's portfolio would fare in a low carbon future, investors overwhelmingly supported the proposal by voting 62% of shares in its favor.<sup>9</sup> Exxon's legal and proxy battles are increasingly becoming a liability for the company, but given the company's history and

## WHAT MAKES THE CONSTITUTION SO SPECIAL?

Often, corporate challenges to environmental laws are based on statutory law. For example, a power plant trade group might claim that a certain type of greenhouse gas limit is not allowed under the terms of the federal Clean Air Act.<sup>11</sup> This type of litigation, while frustrating, is not inherently anti-democratic; Congress specifically authorized environmental activists, states, and—yes—companies to file these types of lawsuits. In fact, this type of corporate litigation is the mirror image of the (often successful) lawsuits that environmental activists have often filed when the Environmental Protection Agency or other agencies have failed to implement the Clean

Air Act, Clean Water Act, Endangered Species Act, and other crown jewels of our environmental law. And if the court gets it wrong, Congress (at least in theory) can fix the problem by amending the law.

The problem addressed in this report occurs when a corporation claims not that an environmental protection is inconsistent with a democratically-passed law, but rather when a corporation claims that a democratically-passed law violates the Constitution.<sup>12</sup>

aggressive legal posturing in opposing the investigations of the attorneys general, environmentalists should keep a close watch on these claims.

This report examines this judicial “second front” of the corporate attack on environmental law. It begins by explaining the history of corporate constitutional rights claims—what they entail, how they were viewed throughout America’s past, and how they have gained a foothold over the last few decades. It shows that these newfound constitutional interpretations are at odds with the very definition of a “corporation,” are diametrically opposed to the Founders’ intentions, and did not exist before corporate leaders launched a concerted effort to create them. The report shows how corporate constitutional claims rose in the nineteenth century, were defeated in the early twentieth, and have risen again in recent years.

Next, this report lays out how this new corporate campaign developed, and discusses key faux-constitutional arguments that corporations have advanced in order to undermine environmental protection. These courtroom developments may garner less press than the politics of Congressional gridlock, but in many ways the dangers they present are more pressing. If an environmental bill fails to pass Congress because of industry opposition, the defeat is temporary; the measure can be revived in the future. But if a court rules that

a law is unconstitutional, the defeat creates legal precedent. And precedent, no matter how irresponsible, is not easily undone. These court cases that target environmental law have another, often unseen, consequence. Whether the corporation prevailed or not, these cases make legislators and policymakers think twice before passing environmental laws. Legislatures are hesitant to pass legislation that they fear will embroil them in costly litigation. Considering how relentless the industry’s well-financed attack on environmental law has been, supporters of environmental protection would be wise to pay attention to these developments and take actions to counter them.<sup>10</sup>

Finally, this report provides practical advice and tools for challenging this new corporate campaign when it comes to your community.

The report concludes by detailing what action needs to be taken and how you can help. The fight against the new corporate campaign to misuse the Constitution will not be easy. But if we are to meet tomorrow’s environmental challenges, it will not be enough to mobilize voters and pass laws if courts continue to strike down those laws under dubious constitutional theories. We need to roll back the corporate constitutional assault on environmental law. Our planet’s future hangs in the balance.

# Part 1: How Did We Get Here?

## What is a Corporation?

“What is a corporation?” seems like an obvious question. But the answer is more technical than we might expect. From a legal perspective, the essential feature of a corporation is that it is a distinct legal entity, legally separate from the people who invest in it or work for it.

Corporations do not exist naturally. Rather, the new legal entity must be created by an act of state government (or in rare cases Congress) that creates a corporate charter. Unlike human beings, whom the Declaration of Independence affirms are “endowed by their Creator with certain unalienable Rights,”<sup>13</sup> corporations are created by state governments, and given charters that specify their powers and rights. Thus, corporations are not, as some suggest, mere “associations of people,” nor are they a “product of private contract.”<sup>14</sup> And unlike other private associations and ways of doing business, people cannot form or operate corporations without state laws authorizing their formation and defining rules for their operation.

The corporate “personhood” established under state corporate laws is not inherently objectionable. Democratically elected state legislatures create corporations and define the corporation’s powers. Nor is there a problem when legislatures choose, in writing modern environmental statutes such as the Clean Water Act or the Clean Air Act, to define the term “person” to include corporations (as well as states, municipalities, and other entities).<sup>15</sup> Including corporations or other entities within the definition of person for a particular statutory regime is a common tool for allowing ease of reference to a broader category of entities. That’s a shorthand so that other parts of those statutes can be written more simply. For example, the Clean Water Act’s enforcement section refers over fifty times to a “person” who violates the Act, using the shorthand from the overarching definitions section to ensure that prohibitions and liabilities are extended to corporations in other sections without needless repetition.<sup>16</sup> This *statutory* inclusion of corporations in the definition of “person” in laws passed by the democratically elected Congress, is entirely different from the *expansion of the concept* of corporate personhood created by federal courts to confer constitutional rights on corporations, and is not the subject of this report.

The corporate form, as defined in virtually all states’ laws, provides those who choose to use it with special privileges that prove immensely useful to the development of profitable business enterprises. The most fundamental of these privileges is that the corporation is treated for many purposes as a separate, artificial legal “person,” with the ability to sue and be sued, buy and sell property, and make contracts in its own name, rather than those of its owners.

Beyond these basics, a crucial advantage of the corporate form is limited shareholder liability, which guarantees that a corporation’s investors can only lose as much money as they put in and can’t be held accountable for further debt or losses by the company. Another state-conferred advantage is perpetual life, which allows a corporation to exist as a continuous entity across generations, even after all the individuals who created it are long gone.

Nothing requires states to confer these benefits on corporations. A state could limit the corporate “lifespan” to twenty years (as was once common in America),<sup>17</sup> or it could outright eliminate the corporate form from its laws. Similarly, no entrepreneur is required to incorporate; people can start and run businesses without government permission. But the corporate form has been incredibly effective at amassing capital and investment, encouraging risk, and enabling the long-term organization and operation of business enterprises. It has been so effective, in fact, that we often forget what corporations are in the first place: policy tools, implemented by state governments to advance economic interests. And, more dangerously, we forget what they are not: natural creatures, with features and purposes outside of those assigned to them by law.

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Nonprofit organizations of all stripes, including charitable, civic, educational, advocacy, and religious organizations, can also be corporations. Obviously, there is no wave of legal attack on environmental laws on behalf of nonprofits.<sup>18</sup> A full discussion of nonprofits and constitutional rights is beyond the scope of this report.

# The Origins of Corporate Constitutional Personhood

## “We, the People”: The Founding

Our constitutional rights mark off the areas of our lives that we have deemed too fundamental to our liberty to be controlled by the government. How, then, did we get to a point where corporations—which only exist because of the laws that define them—could claim access to those same fundamental protections? Where does the Constitution state that “We, the People” includes corporate legal entities? It doesn’t.

There are many ways to interpret the Constitution. When interpreting the Constitution, lawyers use several tools, including text, structure, judicial precedent, and history. One tool that is often helpful is the original understanding of the public that debated and ratified the constitutional provision in question. There’s no evidence that the Founding-era public understood that the Constitution would permit corporations to skirt laws by claiming these basic human rights. At the time of the Constitutional Convention in 1787, corporations were very rare—the entire nation counted only twenty business corporations when the Framers convened in Philadelphia. During the Republic’s early days, state legislatures issued corporate charters to serve the public interest by facilitating the development of roads, dams, bridges, and other public goods. To protect against corporate overreaching, state charters firmly restricted the activities in which corporations could engage and the durations of their existence.<sup>19</sup> The drafters of our Constitution and Bill of Rights couldn’t have been more clear how they felt about corporations. As James Madison—the “Father of the Constitution”—put it, “incorporated Companies with proper limitations and guards, may in particular cases, be useful; but they are at best a necessary evil only.”<sup>20</sup> Thomas Jefferson expressed more bluntly his desire to “crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength.”<sup>21</sup>

The Supreme Court understood corporations as artificial legal entities, with only the legal rights conveyed by their charters. As the influential Chief Justice John Marshall wrote in 1819, a corporation is not a person but a “mere creature of law, [and] it possesses only those properties which the charter of its creation confers upon it.”<sup>22</sup> This decision was not an outlier. The Court restated this in 1839: “The only rights [a corporation] can claim are the rights which are given to it in that character, not the rights which belong to its members as citizens of a state.”<sup>23</sup> These decisions were just reiterating what had been obvious to America’s founders: Corporations, as economic creatures of the law, should not have special human “rights” outside of the law that creates them.

## “The Court Does Not Wish to Hear Argument”: The Birth of Corporate Personhood

The notion of corporate constitutional personhood emerged in the late nineteenth century Gilded Age, an age of wealth inequality and business influence in government unparalleled until today. After the Civil War, the United States passed the Fourteenth Amendment to guarantee that our founding promise of equality—and, by extension, dignity and liberty—extended to *all* Americans, regardless of skin color. That amendment’s Equal Protection Clause provides: “No State shall make or enforce any law which shall... deny to any person within its jurisdiction the equal protection of the laws.”<sup>24</sup>

Corporations did not wait long to develop a personhood argument to claim constitutional rights. In the 1886 case of *Santa Clara County v. Southern Pacific Railroad Company*, Southern Pacific tried to avoid taxes by claiming it was a “person” protected by the Equal Protection Clause of the newly enacted Fourteenth Amendment. The Court sided with Southern Pacific, but on the grounds of state law, not the corporation’s claim to personhood. However, before oral argument, the Chief Justice announced:

The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of the opinion that it does.<sup>25</sup>

Corporate lawyers, and friendly judges, began citing the *Santa Clara* decision and Southern Pacific’s argument to fabricate new corporate constitutional rights. During the late 19th and early 20th centuries, courts increasingly accepted business-friendly constitutional arguments and struck down laws addressing workers’ compensation, child labor, and work hour limits. This forty-year era is known to lawyers as the *Lochner* era, after a 1905 decision that struck down a state working-hours law as supposedly violating an unwritten constitutional guarantee of “liberty of contract.”<sup>26</sup>

The *Lochner* era crystallized the first rise of a corporate campaign to misuse the Constitution and acquire fabricated constitutional rights. By 1938, Justice Black observed that the Fourteenth Amendment, which “sought to prevent discrimination by the states against classes or races,” had

become a tool for corporate challenges: “[O]f the cases in [the] Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of 1 per cent invoked it in protection of the negro race, and more than 50 per cent asked that its benefits be extended to corporations.”<sup>27</sup>

But the first wave of the Court’s pro-business activism was already on its way out the door by the time Justice Black wrote those words. During President Franklin D. Roosevelt’s first term, the Court repeatedly invalidated New Deal laws. After President Roosevelt’s landslide re-election, he proposed to address Court recalcitrance by appointing six additional justices, thus reducing the influence of the pro-*Lochner* faction. Just in time to forestall this outcome—and known thereafter as “the switch in time that saved nine”—one of the justices switched sides, and voted to uphold a minimum wage law, beginning the end of the *Lochner* way of thinking.<sup>28</sup> The legal foundation of the first corporate campaign to misuse the Constitution began to show cracks, as in 1949, Justice Douglas, dissenting in a Fourteenth Amendment case, wrote that “now that the question is squarely presented, I can only conclude that the Santa Clara case was wrong, and should be overruled.”<sup>29</sup>

Ultimately, the Supreme Court found a way to brush aside that first corporate campaign without fully renouncing it. The corporate constitutional rights doctrine was not quite

abolished, but it did fade. By the 1950s, the judiciary returned to the once-obvious recognition that the Constitution was not intended to provide a shield against economic and public health laws. For example, in 1950, the Supreme Court evoked the rhetoric of Marshall, Jefferson, and Madison in rejecting corporate privacy rights: “[C]orporations can claim no equality with individuals. . . they derive the privilege of acting as artificial entities.”<sup>30</sup>

Corporate constitutional rights claims were extremely limited during the postwar era. Justice Douglas, rejecting a Fourteenth Amendment challenge to an Oklahoma law, wrote that “[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought.”<sup>31</sup>

In the years that followed, major public policy initiatives faced little opposition from corporate “rights” claims that would have undermined such legislation in the Gilded Age. The Court did not quite reverse the corporate constitutional rights doctrine, but it weakened it so far that it became essentially toothless.

# Part 2: The New Corporate Campaign to Misuse the Constitution

## The Corporate Constitutional Counterattack on New Environmental Reforms

In the 1970s, inspired by events such as Rachel Carson's *Silent Spring* and the first Earth Day, the American people turned their efforts to the environment. In just a few years, Congress passed the core pillars of modern environmental law, including the National Environmental Policy Act, the Clean Water Act, the Toxic Substances Control Act, the Wilderness Act, the Endangered Species Act, and the Safe Water Drinking Act, as well as the creation of the Environmental Protection Agency.

Corporate leaders, however, were not willing to surrender power to the democratic process without a fight. Even as these bold environmental reforms were passed, a new corporate counterattack was brewing in the backrooms of America's largest transnational conglomerates. In 1971, Lewis Powell—a corporate lawyer who had spent the last decade helping large cigarette manufacturers bury evidence of smoking's grave dangers<sup>32</sup>—wrote a memorandum outlining a new, aggressive strategy for the U.S. Chamber of Commerce, a lobbying group representing the powerful business interests that opposed environmental and other public-interest reform. Titled “Attack on American Free Enterprise System,” Powell's memorandum described how corporate interests were under “broad attack” from regulators and the public, and that the nation's business leaders needed to launch a “careful long-range” plan with “united action” and “consistency... over an indefinite period of years” in order to regain their political power. The crux of his plan was to focus on the courts where corporations did not need the support of the public, but just the right judges. “Especially with an activist-minded Supreme Court,” he wrote, “the judiciary may be the most important instrument for social, economic and political change.”<sup>33</sup>

Had history played out differently, perhaps Powell's memo would have been lost to the file room. But just months after delivering his memorandum advocating pro-corporate judicial activism, Lewis Powell was appointed by President Nixon to the Supreme Court. At the time, neither the American public nor Congress knew of Powell's memorandum or

the agenda it outlined. Neither Powell nor the Chamber revealed the memorandum during his background check or confirmation hearing.

Global cigarette manufacturer Philip Morris Inc., of which Powell had been a director, held a private farewell dinner in his honor where the CEO presented him with robes to wear during his tenure on the Court.<sup>34</sup> Donning those robes, Justice Powell proceeded to author a series of radical decisions that advanced an expansive view of “corporate personhood” to revive the corporate constitutional rights doctrine from its grave. Businesses did their part, filing incessant legal challenges, all filled with descriptions of corporations as “persons” and “speakers” with “liberty” and “rights.” Soon, what was once a fringe opinion from a bygone era had reentered the mainstream. Having created the “activist-minded” court system they wanted to see, Justice Powell and big business ushered in a new era.

The new corporate campaign to misuse the Constitution came to full fruition in *Citizens United v. FEC*, a 5-4 decision in which the Supreme Court swept away a century of precedent to invalidate limits on corporate political spending. Most public attention focuses on the case's implications for money in politics and campaign finance reform. But equally important is the decision's wholesale rejection of any relevant differences between corporations and human beings under the First Amendment. Describing for-profit corporations as “associations of citizens,” Justice Anthony Kennedy's majority opinion rejected any argument that constitutional rights should apply any differently “based on the speaker's corporate identity.”<sup>35</sup>

The new corporate campaign to misuse the Constitution is about more than political spending: it is a legal theory for corporations to seek a judicial second bite at the apple after lobbying and influence-peddling fail to prevent the democratic process from enacting laws over corporate objection. To be sure, corporations do not always win these battles. But this disturbing trend of corporate constitutional litigation continues, as industry tests new routes of constitutional attack. The next part of this report investigates these strategies and how they endanger environmental reforms.

# The New Corporate First Amendment

## Origins of the New Corporate Campaign to Misuse the Constitution

The words “freedom of speech” most commonly evoke the image of political, religious, or artistic dissent, such as a radical thinker boldly expressing her views in the public square without fear of political persecution. But over the last forty years, corporations have undertaken what Harvard Law School professor John C. Coates IV calls a “corporate takeover of the First Amendment.”<sup>36</sup>

For most of American history, commercial advertisements and other business-related communications were not understood as being within the protection of the First Amendment’s “freedom of speech.” First Amendment claims by businesses were rare and did not focus on advertising. The Supreme Court’s first free speech decision involving a business did not come until 1952, and it was a challenge by a movie distributor to state censorship of a Federico Fellini movie as “sacrilegious.”<sup>37</sup> Through the early 1970s, only media and artistic businesses—such as newspapers, radio stations, publishers, and movie distributors—won First Amendment cases. Ordinary corporations were not understood to have First Amendment claims to attack consumer disclosure requirements, rules of the road for commercial advertising, or prohibitions on corporate entanglements with elections.<sup>38</sup>

### NOT JUST ENVIRONMENTAL CASES

Courts don’t think of environmental cases as a separate category under the Constitution. Rather, they interpret and apply broadly written constitutional provisions to a wide range of circumstances. That means that critical precedent that can affect environmental matters often comes from cases having nothing to do with environmental issues. For example, *Virginia Pharmacy* involved price advertising for prescription drugs, but it launched the entire “commercial speech doctrine.”

The consensus constitutional status of “commercial speech” was famously stated in the 1942 case of *Valentine v. Chrestensen*, which involved a business’s challenge to a New York City anti-litter ordinance prohibiting handbill advertisement distribution. The Supreme Court *unanimously* agreed that “the Constitution imposes no [First Amendment] restraint on government as respects purely commercial advertising.”<sup>39</sup>

In First Amendment law, the new corporate campaign to misuse the Constitution began to emerge just a few years after Justice Powell joined the Court, with a seemingly-innocuous 1976 case called *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, which for the first time held that laws affecting only “commercial speech” could be struck down under the First Amendment.<sup>40</sup> That case did not involve a for-profit corporation, but it set the stage. Two years later, in an opinion by Justice Powell, the Supreme Court struck down limits on corporate political spending in state ballot elections, opening the door to expanded corporate First Amendment claims and sowing the seeds for *Citizens United*.<sup>41</sup>

Since *Virginia Pharmacy*, we’ve seen a proliferation of corporate First Amendment claims, and an ever-growing intermingling of business and politics. From the 1950s to the 1970s, business claims occupied about 20% of the Court’s First Amendment docket. But since *Virginia Pharmacy*, that proportion has doubled. And the Court is siding with businesses more often. Before 1976, individuals won First Amendment cases twice as often as businesses. Now, they win at the same rate. In lower federal courts, too, “commercial speech” cases have increased steadily.<sup>42</sup>

This section reviews two types of corporate First Amendment challenges that are relevant to environmental concerns: challenges to disclosure, labeling, and reporting laws, and challenges to advertising restrictions. Sometimes they win, and sometimes they lose, but the overall trend is unmistakable; these cases are normalizing the idea that corporations not only have the same constitutional rights as individuals, but that their rights trump the public good.

## Challenges to Disclosure, Labeling, and Reporting Laws

Modern environmental law relies heavily on disclosure, labeling, and reporting requirements. These serve several purposes:

- **Enforcement.** Much environmental law is based on self-reporting. For example, the federal Clean Air Act and the Clean Water Act rely on polluters to report their air and water emissions to states and EPA so that inspectors can determine whether the companies are violating emissions standards in rules or permits. In other cases, EPA issues specific information requests to particular companies to gather information on polluting facilities.
- **Emergency response preparation.** For example, the federal Resource Conservation and Recovery Act and Emergency Pollution and Community Right-to-Know Act (EPCRA) require companies to provide information that may be essential for first responders and communities in understanding how to address releases of hazardous or toxic chemicals.

- **Consumer disclosure.** For example, the residential lead paint provisions of the federal Toxic Substances Control Act require tenants or homebuyers to be warned of potential lead hazards. California’s Proposition 65 warns consumers of products that contain chemicals that can cause cancer or birth defects.<sup>43</sup>
- **Voluntary reductions.** In many cases, *disclosure* leads to *reductions*. When companies are required to disclose toxic air emissions through EPCRA’s Toxics Release Inventory, or cancer-causing chemicals in consumer products through Proposition 65, they often choose to reformulate their products or processes so as to reduce environmental harms, increase efficiencies or eliminate reputational risks and other potential liabilities, and therefore have less to disclose.<sup>44</sup>
- **Information gathering to assist future rulemaking.** Sometimes, a government agency wants to collect environmental data for the purpose of building a knowledge base that might support future rulemaking. For example, in 2008 Congress required EPA to develop a Mandatory Greenhouse Gas Reporting Rule to develop data on greenhouse gas emissions that could be (and ultimately was) used in support of air pollution controls.<sup>45</sup>

Recently, corporations have been challenging these types of disclosure, labeling, and reporting requirements as violating the First Amendment’s “compelled speech” doctrine—the right not to speak.

The “compelled speech” doctrine derives from cases involving a marginalized religious minority, Jehovah’s Witnesses. Their religious precepts mandate that followers not worship any “earthly emblem,” including the American flag. In the 1930s, a family of Jehovah’s Witnesses in Pennsylvania objected to their children being forced to recite the Pledge of Allegiance in the classroom. Instead of being exempted, the children were expelled, and their parents’ store was run out of business by a local boycott. The family sued the school district; ultimately, the Supreme Court rejected the family’s claim.<sup>46</sup>

But Jehovah’s Witnesses’ refusal to pledge allegiance became even more unpopular during World War II, and they became the targets of thousands of attacks in hundreds of communities.<sup>47</sup> Against this background, in 1943, the Court changed course and prohibited government from compelling these recitations. As Justice Robert Jackson explained: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein.”<sup>48</sup> With those words, the Court established the First Amendment as a lasting assurance that minority groups could live and speak—or not speak—without fear of majority persecution.

This has very little to do with corporate disclosures. But in recent years, corporations have successfully used the compelled speech doctrine to challenge a variety of laws with direct or indirect environmental consequences. To be sure, as with all corporate constitutional challenges, not all of these cases have succeeded—but some have, and even those that fail inject these arguments into the mainstream discussion.

## **CORPORATE VICTORY: RGBH LABELING FOR MILK**

One of the first corporate “compelled speech” victories in consumer labeling came in the 1996 case of *International Dairy Foods Association v. Amestoy*.<sup>49</sup> The case involved a challenge by dairy manufacturers to a Vermont law requiring labeling of products from growth hormone-treated cows. The statute, passed in 1994 in response to strong consumer concern about unnatural chemicals in dairy cows, required all products created with recombinant Bovine Growth Hormone (rBGH, also called recombinant bovine somatotropin or rBST) to be so marked. The labeling requirement was unobtrusive, and could be satisfied by a small blue dot on the packaging to inform concerned buyers. Dairy corporations challenged the law and sought a preliminary injunction blocking its enforcement. They argued that the requirement constituted compelled speech, violating their First Amendment rights, and caused “irreparable harm” to rBGH-using manufacturers.

The federal trial court rejected the challenge, but on appeal, the U.S. Court of Appeals for the Second Circuit sided with the dairy manufacturers. The court of appeals found that “[b]ecause the statute at issue requires [manufacturers] to make an involuntary statement whenever they offer their products for sale, we find that the statute causes the dairy manufacturers irreparable harm.” Since the FDA had found rBGH-derived milk safe, the court ruled—citing *Barnette*, the Jehovah’s Witness case—that “the public’s ‘right to know’” could not require corporations “to speak when they would rather not.”<sup>50</sup> Thus, by elevating a factual label to the constitutional plane of a forced salute to the flag, and by disparaging real people’s desire to make informed decisions as a mere side concern, the decision opened the door for a flood of corporate “compelled speech” claims.

## **CORPORATE VICTORY: CONFLICT MINERALS DISCLOSURE**

*The National Association of Manufacturers v. SEC* lawsuit shows how corporations can defeat disclosure rules without even pretending to do it on behalf of shareholders.

In some war-torn parts of Africa, armed warlords control the mining and trading of minerals such as gold and tungsten, and the trade in these minerals fuels an ongoing humanitarian catastrophe.<sup>51</sup> As part of the 2010 Dodd-Frank

Wall Street Reform and Consumer Protection Act, Congress ordered the Securities and Exchange Commission (SEC), which polices publicly-traded corporations, to make those companies report whether their products contained or used minerals that could be traced back to armed groups. That disclosure would help investors and customers understand which companies trade in conflict minerals. Consumers may have an obvious and legitimate interest in knowing whether their purchases fund brutal armed conflict in central Africa; and, unlike earlier disclosure cases, the conflict-mineral rule wasn't even a product labeling law, but merely a disclosure that corporations had to make accessible on the Internet.

The conflict minerals rule touches on environmental issues in two ways. Obviously, mines run by warlords and militias are particularly unlikely to be run according to state-of-the-art environmental standards. But more broadly, the disclosure rule is an example of how Congress or the SEC might require publicly traded corporations to disclose the environmental impacts of their business, such as the environmental impacts of mineral extraction or climate-related impacts of business overall.

The National Association of Manufacturers (a trade group for manufacturing companies) sued the SEC, arguing that the rule—which was designed to provide *these corporations' own investors* with information—violates publicly traded corporations' First Amendment right not to speak. At first, a three-judge panel of the D.C. Circuit agreed. It said that Congress couldn't require these companies to disclose whether their products were “conflict free” because that would be like compelling a company “to confess blood on its hands,” and the government could not require commercial disclosures for any purpose other than preventing consumer deception.<sup>52</sup> Then the en banc (full court) D.C. Circuit issued its decision in *American Meat Institute* (discussed below), which undermined the panel's ruling. The SEC asked for another hearing, but the second time around, the court still insisted on invalidating the conflict minerals rule.<sup>53</sup> The SEC appealed, but the D.C. District Court entered a final judgment invalidating the conflict minerals rule and the SEC has announced that it will not pursue enforcement actions.<sup>54</sup>

## **CORPORATE DEFEAT: MERCURY LABELING FOR LIGHT BULBS**

In the 1999 case of *National Electrical Manufacturers Association v. Sorrell*, corporations manufacturing mercury-containing light bulbs challenged a state labeling law requiring their mercury content to be disclosed.<sup>55</sup> In contrast to *Amestoy*, in which rBGH corporations only prevailed because hormone-treated milk was found to be just as safe as untreated milk, mercury-containing light bulbs were universally seen as harmful. As the district court noted, “[n]o one disputes mercury is a toxic substance, exposure

to which can result in serious impacts on human health and the environment.” Despite this observation, however, the district court misapplied *Amestoy*, quoting its ruling that a law requiring corporations “to speak when they would rather not” results in irreparable harm.<sup>56</sup> As a result, the court blocked the law from going into effect.

The consequences of this ruling could have been dire. It would be one thing to rule that consumers' “right to know” alone was an insufficient justification for a labeling law; it would be entirely different to rule that consumers' right to safety from toxic substances couldn't justify “forced corporate speech.” Fortunately, the Second Circuit recognized the district court's error and reversed the decision.<sup>57</sup> Its ruling reminded us that “mandating that commercial actors disclose commercial information ordinarily does not offend the important utilitarian and individual liberty interests that lie at the heart of the First Amendment,” and made the obvious point that “[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information.” To elevate each of these simple requirements to the highest plane of First Amendment protection would be “neither wise nor constitutionally required.”<sup>58</sup>

## **PREEMPTED WHILE ON APPEAL: GMO LABELING**

Many people are concerned about potential environmental impacts of GMOs; others are not. Recognizing the ongoing debate, a Vermont law, passed in 2014 and intended to be phased in over the following two years, did not attempt to restrict the production or sale of GMO-containing foods. But it did require manufacturers to label GMO products as “produced with genetic engineering” so that consumers could make their own choices.

In *Grocery Manufacturers Association v. Sorrell*, an agribusiness trade group challenged the Vermont law and argued that corporations were being forced to “speak” against their will. Citing the *National Electricity Manufacturers Association* precedent, the federal court in Vermont dismissed this claim, noting that there were many “substantial” reasons for Vermont to mandate the disclosure of GMOs and that inclusion of truthful information on a product label did not warrant the most stringent First Amendment protection.<sup>62</sup> The agribusiness lobby then appealed to the U.S. Court of Appeals for the Second Circuit.

The Second Circuit never got the chance to decide the case, though. In July 2016, Congress passed a federal law requiring the U.S. Department of Agriculture to establish a “national bioengineered food disclosure standard,” and explicitly preempting state laws such as Vermont's.<sup>63</sup> Consequently, Vermont stopped enforcing its state law and the grocery manufacturers dropped the appeal.

## WHY EVEN THE CORPORATE DEFEATS MATTER

It might seem unnecessary to discuss cases where courts rejected a corporate constitutional claim. After all, “the system worked” and the corporation lost its claim. But even failed corporate claims can cause pernicious effects.

First, these claims, even when they lose, can lay the groundwork for future cases. If a court accepts the basic premise of a claim, but rejects it on particular details, then in a future case, a corporation can point to the earlier loss and say “while the company in that last case lost because of such-and-such details, this case is different and doesn’t have the problems cited by the court in the previous case.”

Second, defending laws against these corporate lawsuits can cost thousands or tens of thousands of taxpayer dollars. That might not be a major problem for the U.S. Department of Justice, but it can easily overwhelm a local government (which may not have its own full-time legal department) facing well-funded corporate litigation firms. For example, in the Kaua’i GMO case, discussed later in this report, the county was nearly deterred from even passing the law in the first place by the threat of litigation, because there was a serious question as to whether the county would be able to provide the estimated \$75,000 needed to pay an outside law firm to defend the law.<sup>59</sup>

As of this writing, the U.S. Department of Agriculture is still working on developing a proposed National Bioengineered Food Disclosure Standard. The food industry tends to be quite effective (many would say too effective) in advocating for itself in these types of regulatory processes. But if agribusiness is displeased with the final disclosure requirements, we may see this type of First Amendment challenge again.

### **CORPORATE VICTORY: CELL PHONE RADIATION RISKS**

As cell phones are used more frequently, and in different ways than the past, risks from radiofrequency (RF) emissions have become an increasing concern. Federal RF emissions safety standards were developed in the 1990s based on the assumption that cellphone users carry their phones at least one to fifteen millimeters (anywhere from 0.04 inch to half an inch) from their bodies. That may have been a reasonable assumption in the 1990s, when cell phones were sometimes carried in belt holsters, but it is not how many Americans carry their phones today, in a pants or phone pocket or tucked into a bra. San Francisco passed an ordinance that required cellular phone vendors to inform customers about issues pertaining to RF emissions and about precautions to minimize RF energy exposure, through in-store informational posters, customer fact sheets, and stickers on display literature.

The cellular telephone industry’s trade group sued, arguing that the ordinance compelled “speech” with which the industry disagreed. The federal district court largely agreed, striking down the poster and sticker requirements as too burdensome for the companies, and heavily editing the informational fact sheet (to the point of imposing artistic and layout requirements).<sup>64</sup> On appeal, the U.S. Court of Appeals for the Ninth Circuit struck down even the fact sheet as edited by the district court judge.<sup>65</sup>

### **CORPORATE LOSS: CELL PHONE RADIATION RISKS—ANOTHER TRY**

In 2015, the City of Berkeley, California—just across the bay from San Francisco—tried a modified cell phone radiation disclosure law designed to improve the chances of surviving judicial review. The drafters were assisted by leading constitutional law scholars, including the dean of Yale Law School. In particular, the law was carefully crafted so that the required message made very clear that it came from the city, rather than the vendor. A (different) federal district judge upheld Berkeley’s rule, noting that “while [cellphone vendors] are being compelled to provide a mandated disclosure of Berkeley’s speech, no one could reasonably mistake that speech as emanating from a cell phone retailer itself.”<sup>66</sup>

On appeal, the Ninth Circuit affirmed this ruling, concluding that the language required by the City of Berkeley was constitutional because the disclosure was reasonably related to a substantial governmental interest and was purely factual.<sup>67</sup>

## GOVERNMENT SPEECH

Disclosure laws that make clear that the message comes from the government, not the company, may be somewhat more likely to survive review. California’s Proposition 65 implementing details also specify language that attributes the determination to the state, not the corporation.<sup>68</sup>

## Challenges to Advertising Restrictions

Commercial advertising can serve a valuable economic role when it helps consumers understand the availability and pricing of goods and services. But advertising can also promote overconsumption of environmentally unsustainable products and services, and in some cases the advertising *itself* can directly cause negative environmental impacts.<sup>69</sup> And unlike personal, political, or artistic expression, commercial advertising generally does not involve issues of democratic self-governance or personal dignity. Rather, corporate advertisements are economic devices, crafted by paid consultants, to maximize profits. To equate this business mechanism with the passionate speech of an individual seems not only wrong but disrespectful to human agency and liberty. By placing sensible limits on advertisements, environmentalists can help reduce overconsumption, force corporate honesty, limit needless waste from the ads themselves, and ensure that eco-conscious consumers have the information they need to make informed decisions. These requirements may affect corporations' bottom lines, but one would be hard-pressed to find any individual whose liberty is at stake. For this reason, public interest laws that cover commercial advertising should generally not be treated as infringements on freedom of speech.

### **CORPORATE VICTORY:**

#### **ADS ENCOURAGING ELECTRICITY CONSUMPTION**

In the 1970s, at the apex of the energy crisis, New York state (like the nation as a whole) faced an extended fuel shortage—at then-current consumption rates, it would not have had enough fuel stocks to furnish all customer demand. So New York's Public Service Commission, hoping to conserve energy and protect the environment, prohibited electric utility companies from promoting increased electricity use. It was a narrowly drawn restriction, permitting utilities to provide informational advertisements; the commission only hoped to limit the constant stream of ads urging people to consume *more*. Under *Valentine*, this decision would have been uncontroversial. But under *Virginia Pharmacy*, a corporate challenge was plausible. The utilities filed suit and won, with a Supreme Court majority opinion written by Justice Powell.<sup>70</sup>

Justice Powell's opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* held that the utilities' advertising was First Amendment expression, and that this "speech" couldn't be restricted without a "substantial" government interest. With this decision, Powell changed the entire landscape of advertising law, endowing corporations with a brand new "right" that they could use to fight advertising restrictions of all types.<sup>71</sup>

### **CORPORATE VICTORY:**

#### **WASTE FROM UNWANTED PHONE DIRECTORIES**

In some cases, environmental harm comes from the *advertising itself*. An obvious example is the 1942 *Valentine* case, when the Supreme Court upheld a city's restriction of distribution of commercial handbills to reduce litter. But much changed in the seventy years from *Valentine* to the 2012 case of *Dex Media West Inc. v. City of Seattle*. In 2010, the Seattle City Council passed an ordinance restricting the distribution of "yellow pages" phone directories to the city's residents. Washington state law required telephone companies to create these directories, and local telephone carriers often contract with publishers to compile and mass-distribute the catalogues. The massive tomes that result (Dex Media's directory was over 1,300 pages) are filled with a combination of local phone numbers and hundreds of pages of advertisements that allow the publishers to reap a profit.<sup>72</sup> But in the Internet era, most of these yellow pages directories are unwanted and unneeded, and so were immediately discarded at public expense. Thus, the yellow pages are environmentally damaging, both in the resource consumption required to produce and distribute them, and in waste management costs and burdens.

After a city evaluation estimated that yellow pages generated 2.6 million pounds of waste annually, costing the municipality almost \$200,000, the City Council enacted Ordinance 123427.<sup>73</sup> This law required phone book publishers to obtain a yellow pages distribution license, pay a fourteen-cent fee to the city for each book distributed, and offer residents the ability to opt-out of receiving the directory—an option that had to be prominently displayed on the directory's cover.

Publisher Dex Media West challenged the waste-saving ordinance, claiming that their First Amendment right to "free speech" was infringed by the ordinance. A federal judge in Seattle rejected this claim. The company appealed to the U.S. Court of Appeals for the Ninth Circuit, which reversed the lower court decision and struck down the ordinance. The court held that the *phone numbers themselves* constituted "core" First Amendment speech in need of strict constitutional protection. Thus, the court decided, a corporation's right to "speak" through the reproduction of a predetermined index of 10-digit numbers is more important than the people's right to take even moderate steps to limit waste and protect the environment.

## **PREEMPTED WHILE ON APPEAL: GMO “NATURAL” MARKETING**

Part of Vermont’s 2014 GMO labeling law was designed to avoid confusing customers who seek to reduce their environmental impacts by focusing on natural products. The law prohibited labeling or advertising GMO-containing foods as “natural,” “naturally grown,” “all-natural,” or similar terms—in other words, that GMO producers couldn’t mislead consumers with disingenuous advertising about the nature of their products.

In the *Grocery Manufacturers Association v. Sorrell* case, discussed earlier, the food production corporations challenged this provision as violative of packaged food manufacturers’ freedom of speech. The federal district court in Vermont opined that this claim was “likely to succeed on the merits of this claim at trial,” and blocked the marketing restriction from taking effect. It may seem obvious that “natural” and “genetically engineered” are not compatible terms—in passing the law, the Vermont General Assembly cited a poll showing a sizable majority of the state’s residents believed “natural” labels to imply an absence of GMOs. But the district court judge dismissed the opinions of the legislature and the public, opining that these labels were only “potentially” misleading. “Speech that is shown to be only *potentially* misleading,” the judge wrote, “is protected by the First Amendment.”<sup>74</sup>

As noted above, Vermont agreed to stop enforcing the law while the case was still on appeal to the U.S. Court of Appeals for the Second Circuit, because of a federal law that preempted the state law.

## **Challenges to Civil Investigative Demands**

### **STILL PENDING: EXXON’S NEW GAMBIT ON VIEWPOINT DISCRIMINATION**

In November 2015, the news broke that the New York Attorney General’s Office was investigating whether Exxon had misled investors about climate change.<sup>75</sup> At the end of March 2016, a group of attorneys general, including Massachusetts Attorney General Maura Healey announced they would also be investigating Exxon’s climate change disclosures to determine whether Exxon had misled investors and consumers about climate change. The attorneys general issued civil investigative demands and subpoenas to obtain information from the company to carry out the investigations. As the highest law enforcement official of a state, attorneys general have broad powers and authority to investigate and enforce the laws, and civil investigative demands and subpoenas are routinely issued to carry out that authority.

Exxon’s response was anything but routine. In a preemptive strike, Exxon filed suit against the Massachusetts Attorney General in the United States District Court for the Northern District of Texas alleging that the investigation deprived Exxon of its First Amendment right to free speech, among other constitutional claims.<sup>76</sup> After contentious proceedings and the joinder of the New York Attorney General, the case was transferred to New York federal district court. At the same time, Exxon also brought suit in Massachusetts state court seeking to quash the civil investigative demand, and again raised the claim that the investigation constituted an attempt “to limit free speech and the free exchange of viewpoints and ideas about climate change.”<sup>77</sup> The Massachusetts Superior Court summarily dismissed Exxon’s free speech claims noting that “misleading or deceptive advertising is not protected by the First Amendment.”<sup>78</sup> While it should be clear that the First Amendment does not protect fraud, Exxon has also been pursuing its free speech arguments in the United States District Court for the Southern District of New York.<sup>79a</sup> The court issued a ruling dismissing Exxon’s “extraordinary” claims and affirming that fraud does not fall within the ambit of protected speech,<sup>79b</sup> but Exxon seems likely to appeal given that it has also been raising these claims in response to litigation by cities and towns.<sup>79c</sup>

## **New Corporate “Discrimination” Theories**

“We hold these truths to be self-evident, that all men are created equal.”<sup>80</sup> The Declaration of Independence laid out the founding ideals of the American experiment as a democratic republic, based on a doctrine of equality, committed to ensuring the ideals of “life, liberty, and the pursuit of happiness” for all its inhabitants. But for most of the nation’s first century, these professed ideals stood in stark contradiction to the presence of the world’s largest slave population in our southern states. Moreover, as discussed earlier, the misapplication of the Fourteenth Amendment’s Equal Protection Clause to inanimate business forms was where the corporate constitutional rights doctrine was first established. But more recently, a new corporate campaign to claim “discrimination” has re-emerged, under a surprising guise.

## **Origins of the New Corporate Campaign to Misuse the Constitution**

After World War II, courts were hesitant to strike down laws regulating commerce under the Equal Protection Clause. As the Court explained in a famous 1955 case, “[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination.”<sup>81</sup> That principle lasted many years. But the new corporate campaign to misuse the Constitution has resurrected fabricated equal protection claims that

corporations have suffered discrimination under the clause. In large part, the renewed threat stems from unclear judicial writing by the same Supreme Court justice, Anthony Kennedy, who wrote the *Citizens United* decision—but this time, in cases having nothing to do with corporations.

In the landmark 1996 case of *Romer v. Evans*, Justice Kennedy struck down a Colorado Amendment that prohibited cities and schools from adopting policies that protected individuals based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” Writing for the majority, Justice Anthony Kennedy explained that the Equal Protection Clause forbade laws motivated by a mere “desire to harm a politically unpopular group.”<sup>82</sup> Since the Colorado ordinance couldn’t be explained “by anything but animus” toward gay and lesbian people, it not only broke the promise of fairness and equality enshrined by Congress after the Civil War, but—in legalese—was *irrational*. With that decision, gay and lesbian Americans gained access for the first time to the Constitution’s protections against majority-ordained discrimination. But while Justice Kennedy’s analysis leaned heavily on the *animus* motivating the law, his opinion purported to apply ordinary rational basis review.

Many scholars and some lower court judges noticed this shift, and began speaking of an unofficial fourth standard of review, called (unofficially) “heightened rational-basis review,” “rational basis with bite,” “rational basis with

teeth,” or “rational basis plus.”<sup>83</sup> Under this standard, a law could be challenged under the Equal Protection Clause on the basis that—even if there was a supposedly rational reason on the surface—the real motivation was to harm or disparage a group of people. But the Supreme Court never stopped pretending that it was simply applying “rational basis review.”

## Challenges Under the Equal Protection Clause

Unfortunately, corporate lawyers saw an opening. When an economic, environmental, or safety law makes distinctions among different types of corporations, activities, or operations, and a company challenges it under the Equal Protection Clause, the legal standard is “rational basis review”—the real rational basis review. But recent judicial opinions that apply a more protective legal standard to disfavored minorities say they are applying “rational basis review.” That gives corporate lawyers an opportunity to cite cases about discrimination against gay and lesbian people, or undocumented immigrant children, and talk about “motive” and “animus” in an equal protection challenge against an ordinary law regulating business.

It should seem clear that this protection, which has done so much to defend the dignity of powerless minority groups, has no business being applied to corporations. After all, at the core of the Equal Protection Clause’s rationale is our

## TIERS OF SCRUTINY

In the 1970s, the Supreme Court settled into the idea of “tiers of scrutiny” for equal protection cases based on who exactly the law allegedly treated unequally. If the unequal treatment was based on race or color, it would be subject to “strict scrutiny” and almost always unconstitutional. On the other hand, if a law simply made distinctions between different types of businesses for the purpose of tax law or safety protections, it would be subject to “rational basis review” and almost always upheld, unless there was no conceivable rational basis for it. As claims based on sex discrimination emerged, the Supreme Court was not comfortable categorizing classifications based on sex under either tier, so it invented “intermediate scrutiny,” which meant that it would sometimes uphold laws that classified women differently from men, but sometimes not.

This three-tiered system was unstable, though, as new challenges against government discrimination emerged. During the 1970s, the Supreme Court heard a series of

challenges based on discrimination against intellectually disabled people, children of undocumented immigrants, and “hippies.” It was clear that these cases involved pernicious discrimination (what the Court calls “animus”), but the governments defending the laws gave rational-sounding pretexts.

For various reasons, the Supreme Court decided that it needed a standard that was slightly more rigorous than “rational basis review,” but not quite as stringent as “intermediate scrutiny,” and so it invented a fourth standard applicable where a law might have a rational-seeming pretext, but is actually motivated by animus. (This is important because under normal rational basis review, courts don’t consider if there is a deeper or hidden motive behind a law, so long as it has a rational basis.) However, it made one crucial mistake: *it did not admit that it was creating a fourth standard*. Instead, the Court wrote as if it were applying ordinary rational basis review.

founding, self-evident truth that “all [people] are created equal.” Moreover, unlike LGBTQ people, undocumented immigrants, or people with intellectual disabilities, corporations are not a politically marginalized minority that needs judicial protection from the democratic process.

Over the last 15 years, corporations have begun invoking *Romer* and the Equal Protection Clause in challenging such “discriminatory” legislation—arguing, for example, that treating a fracking company differently from sustainable producers is no different than discriminating based on race or sexual orientation. Though most judges have recognized the absurdity of this comparison, corporations have repeated the “equal protection” argument over and over, in hopes of triggering judicial amnesia as to the roots and purpose of the Fourteenth Amendment.

### **EARLY SORTIE: PESTICIDES AND GMOS IN AGRICULTURE**

In 2014, the Kauaʻi County Council in Hawaiʻi, concerned about multinational agribusinesses using their land as a test bed to experiment with new GMOs and pesticides, passed legislation regarding agricultural sites using significant quantities of GMOs or pesticides. The County hesitated before even passing the law, because of the risk of litigation from corporate growers, and was very nearly deterred entirely from passing the law.<sup>84</sup> The law did not restrict the use of GMOs or pesticides, but required commercial agricultural corporations to tell the public which pesticides and GMOs they were using, and leave buffer zones around sites where GMOs or pesticides were used. As mild as these requirements may seem, corporate growers fought back.

The seed companies cited the Equal Protection Clause in their claim, and used the *Romer* analogy to argue that the same “animus” protection for gay and lesbian people should apply to giant agribusinesses.<sup>85</sup> Though the district court judge decided the case on other grounds, not even addressing the equal protection claim,<sup>86</sup> the legal argument may have foreshadowed a broader legal strategy.

### **CORPORATE VICTORY: BAN ON PUBLIC SUBSIDIES FOR FOSSIL FUEL COMPANIES**

In 2014, St. Louis residents, concerned about both the negative environmental impacts of unsustainable energy production and the city’s economic development model, gathered enough signatures to put a bold initiative on the ballot. This initiative would have prevented the city from giving tax breaks to fossil fuel and other unsustainable energy production companies and their major business partners. But, before the ballots were even printed, it was challenged in state court by citizens presumed to be fronting for St. Louis-based coal giant

Peabody Energy.<sup>87</sup> Like the Kauaʻi GMO multinationals, the plaintiffs in the Missouri state case of *Noel v. Board of Election Commissioners* cited *Romer v. Evans*, arguing that this limit on corporate tax benefits was no different than discrimination against a disfavored sexual orientation.

At the trial, the initiative committee presented the testimony of a key initiative drafter to explain the basis for the initiative. But on cross-examination, the coal company’s lawyers engaged in irrelevant red-baiting, suggesting (based on unrelated quotes) that the real motivation for the initiative was simple hostility to “corporations” and capitalism in general, and Peabody Energy in particular.

Ultimately, the state judge agreed. Citing both *Citizens United* and *Romer*, he held that “business organizations are ‘persons’ entitled to equal protection as well as other constitutional rights,” and “legislation that is designed to ‘fence out’ selected classes from the full rights of citizens can be found defective under equal protection principles.”<sup>88</sup> Ultimately, rather than viewing the initiative as targeted towards economic development and environmental sustainability, he viewed it as an unconstitutional form of discrimination against energy corporations, as “not really a regulation of business activity: it is an act of exclusion of a disfavored group from general benefits under a wide range of government programs.”<sup>89</sup> Instead, he opined, “the manifest purpose of the sustainable energy amendment is not so much to advance the use of approved fuels, as to punish enterprises which deal in the disfavored fuels.”<sup>90</sup> Thus, he ruled, a ballot initiative designed to eliminate tax breaks for fossil fuel companies violated the Equal Protection Clause.

### **MIXED RULING: FRACKING BAN**

As with First Amendment cases, corporate equal protection clause challenges do not always succeed. For example, in the 2015 case of *Swepi, LP v. Mora County*, a district court judge, dismissing *Romer*’s application to a New Mexico fracking ban, refreshingly reminded the corporate litigants what “equal protection” really means. LGBTQ people “have been subject to a history of discrimination and oppression, but such a description cannot be said of corporations,” he wrote. Further, corporations “are not real beings, deserving of respect and human dignity. Corporations are often the most powerful lobbyists in Washington, D.C., and... are hardly politically powerless and have not suffered a history of oppression.” In fact, this judge noted that there had long been “dissenters to the concept of corporate constitutional rights” in general.

Unfortunately, construing some unrelated constitutional challenges to the ordinance, the judge acknowledged that “[t]he Defendants’ argument that corporations should not be granted constitutional rights, or that corporate rights

should be subservient to people's rights, are arguments that are best made before the Supreme Court—the only court that can overrule Supreme Court precedent—rather than a district court.”<sup>91</sup> Ultimately, the court concluded that the ordinance violated the Supremacy Clause and was impermissibly overbroad.<sup>92</sup>

### **CORPORATE DEFEAT: SEWAGE SLUDGE**

In the 2002 case of *Synagro-WWT, Inc. v. Rush Township*, a sewage sludge application company challenged a local Pennsylvania ordinance requiring testing of sewage sludge for toxins and pathogens before disposal on farms and mine reclamation sites. The ordinance was clear about its purpose: it was passed to “protect the health, safety, and general welfare of all township citizens”—not to ‘discriminate’ against corporations dealing in sewage sludge. Still, Synagro claimed that since “the Ordinance treats sewage sludge entities differently than it treats other entities,” it failed the constitutional guarantee of “equal protection of the laws.” The taxpayers were forced to spend time and money defending against this legal claim.

Ultimately, a district court judge needed just one paragraph to dismiss Synagro's bizarre equal protection claim, writing that “Synagro's allegations are simply legal conclusions without any factual support,” and that “[t]he difference in safety between sewage sludge and other types of waste is a sound, rational basis for creating the classification.”<sup>93</sup>

### **STILL PENDING: BULK OIL EXPORT**

In early 2015, a local Maine ordinance prohibiting the bulk loading of crude oil onto marine tank vessels came under equal protection attack by pipeline operators. The case, *Portland Pipe Line Co. v. City of South Portland*, marks an unprecedented attempt to stretch the Romer analogy. Here, the environmental protection in question does not even treat certain oil corporations differently, like the restriction on fossil companies in *Noel*. The ordinance applies equally to all corporations and merely ensures that every company operating in the district must follow basic environmentally sound practices in transporting crude oil. Pipeline operators have argued that the ordinance discriminates against the oil that they transport through Portland from Canada.<sup>94</sup>

If it would seem wrong for corporations to raise challenges to environmental protections under the Equal Protection Clause—which, again, prohibits a state from denying “equal protection” to any “person” who is “within its jurisdiction”<sup>95a</sup>—it should seem absurd for them to claim that protection for a *product* coming from a *different country*. Canadian oil is not a “disfavored minority,” like LGBTQ people, and neither the oil nor the pipeline company deserve judicial protection from local zoning and safety ordinances.

The federal district court in Maine granted the City's motion for summary judgment on the Equal Protection Clause claim; however, the case will proceed to trial on other counts in June 2018.<sup>95b</sup>

## **Challenges Under the “Dormant” Commerce Clause**

A different type of “discrimination” argument involves supposed discrimination against companies or products that cross state lines. As congressional gridlock persists, the most likely vehicles for environmental reform are state and local governments. Unfortunately, state and local environmental laws can sometimes be frustrated by challenges claiming “discrimination” against interstate commerce.

Under the Constitution's Commerce Clause, Congress is authorized to “regulate commerce with foreign nations, and among the several states.”<sup>96</sup> A judge-made doctrine called the “dormant Commerce Clause” holds that since the Constitution explicitly delegates the power to regulate interstate commerce to the federal government, states cannot pass laws that “discriminate against or unduly burden interstate commerce.” To be sure, our Constitution envisions trade between the states, and no one is suggesting that (for example) Wisconsin should be able to ban imports from Michigan. But this judge-made doctrine goes far beyond.

Not all dormant Commerce Clause cases with environmental implications are filed by corporations. For example, one of the most famous cases involved New Jersey's response to an overload of imported garbage and hazardous waste. Because it is sandwiched between New York City and Philadelphia, in the 1960s and 1970s New Jersey became a dumping ground for municipal waste and toxic waste from both cities. As the volume grew intolerable, in 1973 the state passed a law limiting importation of out-of-state waste. The City of Philadelphia, which relied on delivering its municipal waste to New Jersey landfills, sued under the dormant Commerce Clause. The Supreme Court agreed, holding that New Jersey could not “discriminat[e] against articles of commerce coming from outside the State.”<sup>97</sup>

The plaintiff in the New Jersey case was a city, not a corporation. But it established a precedent that can be exploited most effectively by corporations. Unlike the Equal Protection Clause, this constitutional theory has no real basis in protection of individuals; it is explicitly to protect “commerce.” Therefore, most dormant Commerce Clause cases involve challenges by corporations. A few examples follow.

## CORPORATE VICTORY: FAMILY FARMING

Excessive concentration of land ownership, especially in agribusiness corporations, has been a major concern in the Midwest for over a century. And while farming practices vary, family farmers may be more likely to use environmentally sustainable farming practices than large industrial farms, both because some industrial-scale approaches don't work well on a smaller family farm, and because a family farmer may see the farm as a heritage to be passed onto his or her children, rather than an asset to be maximally exploited this quarter in time for annual bonuses.<sup>98</sup>

Several Midwestern states have passed statutes or constitutional amendments restricting corporate ownership of farmland. Before the rise of the new corporate campaign to misuse the Constitution, courts took a restrained approach when corporations challenged these laws. In the 1940s, a Minnesota corporation challenged North Dakota's law limiting corporate farm ownership, citing not just the Equal Protection Clause but also several other constitutional provisions. The Supreme Court upheld North Dakota's law against this constitutional challenge in 1945.<sup>99</sup> But the Minnesota company had not thought to raise a dormant Commerce Clause challenge, and so that left an opening for future corporate claims. In 1998, South Dakota voters passed a state constitutional amendment that prohibited any further acquisition of farmland by non-family corporations. Part of the rationale was that individual farmers would be more likely to follow environmental laws than corporations with limited liability.<sup>100</sup>

Agribusiness companies challenged the law under the dormant Commerce Clause theory. The U.S. Court of Appeals for the Eighth Circuit agreed, finding that the amendment's drafters and indeed "the South Dakota populace" had "intended to discriminate against out-of-state businesses." The court cited such supposedly damning statements as: "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations." The court even noted with disapproval that a key initiative supporter, after looking into a corporation's proposal to build a hog farm in South Dakota, had become concerned about that same company's industrial hog farming operation in North Carolina and its environmental impacts.<sup>101</sup> The court struck down the South Dakota law without even citing the Supreme Court's 1945 decision.

## CORPORATE VICTORY:

### GREENHOUSE GAS ELECTRICITY STANDARDS

In many ways, states lead the way on greenhouse gas rules for the electric power sector. Minnesota's 2007 Next Generation Energy Act set a cap on statewide power sector carbon dioxide emissions, and prohibited construction of new large power plants that would increase statewide power sector carbon dioxide emissions unless it offset these new emissions with a carbon dioxide reduction project. But, like many states, Minnesota has a restructured electricity market, in which electric utilities do not own their own power plants, but rather buy electricity from generating companies—some of which may be located across state lines. And the purpose of the law could be completely frustrated if Minnesota electric utilities simply bought electricity from coal-fired power plants in nearby states. So the law also prohibited *importing* electricity from out of state that would contribute to statewide power sector carbon dioxide emissions.

Coal industry plaintiffs such as the Lignite Energy Council and the North American Coal Corporation, as well as the state of North Dakota, sued Minnesota, claiming this law violates the dormant Commerce Clause. The federal district court agreed and the U.S. Court of Appeals for the Eighth Circuit affirmed.<sup>102</sup>

## Other Corporate Constitutional Challenges

While the primary focus of the new corporate campaign to misuse the Constitution involves the First Amendment, the Fourteenth Amendment, and dormant Commerce Clause claims described above, corporations continue to raise other constitutional challenges against environmental laws. There are many types of claims—too many to list here—but two major categories are especially worth noting: resistance to environmental inspections, and claims for lost property value.

### Corporate Resistance to Environmental Inspections

In the years before the Revolutionary War, the British government unilaterally imposed a number of intrusive policies on its American subjects in an attempt to squeeze every possible drop of profit out of the colonies. These impositions became more and more egregious until the colonists were forced to announce, in the form of the above-described Declaration of Independence, that their individual liberties could not survive while they remained under British rule. One of the most loathed policies was the British government's use of "writs of assistance." These documents, issued by British provincial courts, gave English officers permission to enter and search any home, without

evidence or even suspicion, in pursuit of smuggled goods. Revolutionary leader James Otis, speaking on behalf of the many innocent colonists subjected to warrantless searches, described the writs as “the worst instrument of arbitrary power, the most destructive of English liberty... that was ever found in an English lawbook.”<sup>103</sup>

The Founding Fathers’ bitter memories of these violations led them to encode a protection against them in the Bill of Rights’ Fourth Amendment, which ensures the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>104</sup> It ensures that without established probable cause and a judicial warrant specifying the location to be searched, the government cannot arbitrarily intrude in the American people’s private homes and lives. Such a protection, as Otis argued, is crucial to maintaining individual liberty; if a lawful citizen cannot rest assured that he is entitled to privacy in his own home, among his own possessions, he can never feel truly free to pursue happiness without the looming threat of government intrusion.

Unfortunately, in 1978, Powell and his corporatist allies began reshaping the interpretation of the Fourth Amendment to give corporations a legal tool to resist health, safety, and environmental inspections in the case of *Marshall v. Barlow’s Inc.*—one that, like *Central Hudson* two years later, continues to harm regulatory efforts today. Under the Occupational Safety and Health Act of 1970 (OSHA), Congress empowered safety inspectors to conduct surprise workplace inspections. No warrant was required for these routine inspections, which allowed them to have the element of surprise necessary to ensure that corporate managers weren’t hiding safety hazards in anticipation of a search. The president of an electrical installation business refused to submit to an OSHA search, and sued to enjoin it as violating the company’s Fourth Amendment rights. At the Supreme Court, a five-justice majority—the same five justices who made up the *Central Hudson* majority—ruled that corporate buildings, like private homes, enjoy the security of Fourth Amendment protection.<sup>105</sup> Thus, the surprise inspections crucial to the enforcement of OSHA and numerous other state and federal statutes were suddenly rendered “unconstitutional.”

When the government cannot check to ensure that large corporations are complying with necessary safety provisions until it has “probable cause” to believe they are not, it often allows noncompliant companies to exceed pollution limits until it is too late to prevent damage to workers, surrounding communities, and the environment. And as we have seen with the steady procession of oil spills, nuclear accidents, and other environmental calamities perpetrated by noncompliant corporations, the consequences of being “too late” can be dire.

Many corporations, of course, comply with the law, and submit to routine health, safety, and environmental inspections without argument. But those that have committed to battling environmental protection at every turn have seen the Fourth Amendment as a promising faux-constitutional ground for avoiding environmental protections.

## **CORPORATE DEFEAT: AERIAL PHOTOGRAPHY INSPECTIONS**

Perhaps the most famous and egregious case of such a “privacy” claim came in 1986. The case, *Dow Chemical Co. v. United States*, involved a routine Environmental Protection Agency inspection of Dow’s Midland, Michigan facilities. After Dow denied the EPA’s request for an on-site inspection of the plant, the EPA chose not to seek an administrative warrant to search the 2,000-acre chemical complex. Instead, the agency employed a commercial aerial photographer, which used standard equipment to take photos of the facility—much of which was outdoors, but blocked from ground-level view by elaborate perimeter security—from various altitudes in lawful airspace.

When Dow learned of the aerial photography, it brought suit against the EPA, claiming that any observation of the compound without a warrant, even its outdoor areas visible from above, violated the corporation’s Fourth Amendment privacy rights. In other words, it claimed, the entire walled-off chemical production complex was effectively its “home” under the Fourth Amendment.

Fortunately, in a 5-4 decision, the Supreme Court sided with the EPA. Chief Justice Warren Burger, writing for the majority, reiterated that the Fourth Amendment is intended to protect the “intimate activities associated with family privacy and the home.” These intimate protections, further, “simply do not reach the outdoor areas or spaces between structures or buildings of a manufacturing plant.”<sup>106</sup> With that, the notion that a 2,000-acre industrial facility is no different to a corporation than a home is to an individual was dismissed. It should not surprise us that Justice Lewis Powell wrote the dissent.

## **CORPORATE VICTORY: WASTEWATER INSPECTION**

While *Dow Chemical* dismissed the most expansive corporate claim to Fourth Amendment privilege, more targeted claims have enjoyed success. Take, for example, the 2001 case of *United States v. Knott*, another instance of routine EPA inspection being attacked by “privacy” claims. In 1997, the EPA received an anonymous tip that the waste treatment facility at the Riverdale Mills Plant in Massachusetts was not functioning. Riverdale Mills produced plastic mesh using a process that produces highly acidic wastewater, and a dysfunctional treatment facility could release harmful

waste into the local sewer system, in violation of the federal Clean Water Act. In response, the EPA sent two inspectors to the plant who asked for and received consent to examine the facilities, provided that a Riverdale Mills employee accompany them throughout the inspection. Based off the evidence collected during the visit, the EPA obtained a federal search warrant. During the ensuing search the EPA's criminal division found significant evidence of Clean Water Act violations, including employee statements and comprehensive water tests. During the ensuing litigation over the violations, however, Riverdale Mills sought to have all of this evidence dismissed—on the grounds that, for a short period during the *initial* examination, the inspectors had been left unattended by a Riverdale employee.

The federal district judge agreed, deciding that the brief lack of supervision rendered the entire search a violation of Riverdale Mills' Fourth Amendment rights. Thus, all evidence collected after that occasion was deemed inadmissible. The government was ultimately forced to drop all charges against the company.<sup>110</sup> Unsatisfied by the mere evasion of justice, however, Riverdale Mills filed a *countersuit* against the government for “vexatious prosecution,” “malicious prosecution,” and damages resulting from its Fourth Amendment violation, seeking government payment of attorney's fees as well as compensation. These claims, too,

were initially successful. Though the government eventually had them thrown out on appeal, the Riverdale case was not ultimately closed until 2004—seven years after the EPA's initial tests.<sup>111</sup> Due to the corporate ability to assert a constitutional “privacy” violation, Riverdale Mills was able to avoid all culpability while wasting nearly a decade of EPA time, resources, and taxpayer dollars with frivolous countersuits.

## Corporate Claims for Lost Property Value

The Fifth Amendment guarantees that “private property [shall not] be taken for public use, without just compensation.”<sup>112</sup> This Takings Clause is an important protection of private property rights: the government cannot simply seize private property. Yet it has been twisted into a price-protection scheme to deter environmental laws. According to the Supreme Court, environmental and land use protections can “take” some of the property value. That would require taxpayers to reimburse property owners for any changes in property value due to environment laws.

In the seminal case *Pennsylvania Coal Co. v. Mahon*, a statute prohibited coal companies from mining coal in a way that would cause the subsidence of a house. The court found that the statute resulted in a taking, meaning the government took private property without compensating the owner.<sup>113</sup>

## CORPORATE SURVEILLANCE VS. INDIVIDUAL PRIVACY

Corporations are quick to claim “privacy” against environmental inspections, but perfectly willing to spy on activists.<sup>107</sup> Yet many activists may not realize that the new corporate campaign to misuse the Constitution helps facilitate corporate spying. In recent years, “Big Data” corporations have begun using novel First Amendment theories to fight privacy-protection laws. And they've been winning.

For example, several states passed “prescription confidentiality” laws to stop pharmacies from selling doctors' prescription records to pharmaceutical corporations and sales middlemen. But in the 2011 *Sorrell v. IMS Health Inc.* decision, the Supreme Court struck down Vermont's prescription confidentiality law, holding that restrictions on sale and use of private prescription records violated Big Pharma's “freedom of speech.”<sup>108</sup>

Surveillance corporations are already using the *Sorrell* decision to bolster even more aggressive corporate anti-privacy claims. Consider digital license plate readers. These are small, high-quality cameras which, when mounted on top of trucks, can photograph every passing car, scan their license plates (at a rate of up to 60 plates per second), and

record each vehicle's exact GPS location at a given date and time. The companies that run these networks mine and sell the data to banks, insurance companies, credit agencies, and “repo” agencies.

Privacy advocates have long been concerned about these license plate readers, and have helped pass laws in several states to limit their use. But the corporate First Amendment threatens these laws. In Utah, the legislature passed a law to limit collection, use, and dissemination of captured license plate data. But license plate reader companies filed a First Amendment lawsuit, citing the *Sorrell* decision treating the collection and sale of doctors' prescription data as “free speech.” Unfortunately, this question never even reached the courts; facing massively expensive federal litigation, lawmakers backed down and repealed most of the law.<sup>109</sup>

Imagine now that environmental activists are traveling to a meeting, demonstration, or direct action. Corporate intelligence could buy GPS data *in real time* from license plate reader companies to track activists' movements. That's what the corporate First Amendment means for *your* freedom of speech.

## WHEN A CORPORATION WANTS YOUR HOUSE

While the Supreme Court has been expanding the Takings Clause to protect corporate landowners against environmental laws, it has also reduced actual protections for ordinary homeowners. When wealthy developers want people's homes, they have an opportunity to take them, with the help of the government, through the Takings Clause. In New London, Connecticut, the city used its eminent domain authority to seize private property to sell to private real estate developers. Homeowners challenged this under the Takings Clause as not a "public use," but the Supreme Court rejected their claim. The Supreme Court claimed that the new development would

create jobs and increase tax revenues, and therefore it could be considered "public use."<sup>115</sup> Homes and land have also been at the heart of many of the disputes over new oil and natural gas pipelines as state and federal agencies authorize multi-million dollar corporations to "take" private land for the "public convenience and necessity."<sup>116</sup> The result: when a corporation wants your house, the government can take it and give it to the developer (paying you "fair market value," of course). But if an environmental law reduces the theoretical maximum economically profitable value of the property, then the taxpayer may have to reimburse the developer for the "loss."

This case also lays out the doctrine of a "regulatory taking," stating: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>114</sup>

How far is "too far"? In the 1990s, the City of Monterey, California found out. A corporation proposed to develop a residential complex on thirty-seven environmentally sensitive ocean-front acres in Monterey, California. The city denied the permit, and the company applied with a slightly different application. While this was pending, a different company (fully aware that the previous permit had been denied)

bought the land and continued pursuing the project. The city denied the revised application, finding that it did not protect native flora and fauna, and in particular, would substantially damage habitat of an endangered butterfly. Eventually, the state agreed to buy the property at a price \$800,000 higher than what the company had paid in the first place. But the corporation still sued the City of Monterey, claiming its property had been "taken" without just compensation, and won a \$1.45 million verdict.<sup>117</sup>

# Part 3: Where do we go from here?

The history of American corporations and the re-emergence of the fabricated corporate constitutional rights doctrine reveals that the new corporate campaign to misuse the Constitution is not just alive, but thriving. The corporate legal strategy has in recent years opened up several different constitutional avenues for attacking public responses to stem corporate depletion of our resources, protect the public's health and safety, and ensure a livable planet for future generations. Though many judges continue to reject these misguided claims, the corporate strategy has always been to change doctrine through persistent and unceasing litigation. This strategy—an unending, full-on attack of any identifiable crack in the legal structure—has brought the corporate constitutional doctrine back into the mainstream.

The effects of judicial opinions stretch far beyond the law at issue in the individual case. Each decision sets precedent that the issuing court or a lower court can use to strike down further environmental protections. And court decisions impact the way the government acts behind closed doors. The threat of litigation is a powerful one; this threat could dissuade legislatures and agencies from enacting policies that risk a costly lawsuit by a corporation claiming its Constitutional rights were violated.

Those who refuse to passively accept corporations' purported "right" to pollute, mislead, and degrade the planet would be wise to fight their constitutional rights claims. After all, in the long run, unfettered corporate freedom and the environmental protections our planet needs are simply incompatible. How can supporters of environmental protection resist the new corporate campaign to misuse the Constitution?

## Blueprint to Defend the Environment From the New Corporate Campaign to Misuse the Constitution

The strategy consists of three parts:

1. Educate and Build Alliances
2. Anticipate the Challenge
3. Defend in Court

### Educate and Build Alliances

Many pro-environment citizens, activists, elected officials, and funders are simply unaware of the pernicious role of this new corporate assault on our environmental laws. Supporters of environmental protection need to understand that the fight isn't over when a law gets passed or a regulation gets finalized, if a court can strike it down later. That means that supporters, voters, and donors need to understand the weapons that corporations will use in court *before* it gets to that point, and take proactive action to push back against the new corporate campaign to misuse the Constitution so that it doesn't interfere with the democratic process.

The good news is that many individuals, non-profits, legal practitioners, scholars, and elected officials are paying attention to the rise of this new corporate campaign. The power and wealth wielded by corporations may at times seem difficult to counter, but working together, concerned citizens and organizations can succeed in stemming the tide of this corporate overreach. Here are some examples of how you as an individual, or as a supporter of a nonprofit, can help to rein in the new corporate campaign to misuse the Constitution.

## THE LAWS NOT PASSED: BARGAINING IN THE SHADOW OF THE LAW

The mere threat of corporate constitutional lawsuits (and their expense) can intimidate governments from passing these laws in the first place. If the government loses, not only has it wasted money defending a law in court, but it may even be forced to pay the corporate plaintiff's legal fees.

A small state, let alone a town or city, may not want to take on the burden of defending a law against take-no-prisoners litigation by expensive law firms. As noted above, Kaua'i was very nearly deterred from passing an agricultural ordinance by the prospect of needing to pay \$75,000 to defend the law against corporate challenge.<sup>118</sup>

Are you a member of a state or local non-profit that supports civil rights, environmental protection, conservation, immigrant rights, shareholder rights, equality, affordable housing, or another issue or underserved population? Does your group collaborate with a larger coalition to effect change? Bring this report to your group and consider whether the new corporate campaign to misuse the Constitution is already having an impact on your work or is likely to have an impact. Reach out to Free Speech For People or Greenpeace for more information and support. You could work with your allies to host a meeting or event to talk about how fabricated corporate constitutional arguments may be affecting your work and your community and how to fight back.

Are you a law student? Do you want to play an important role in pushing back on this new corporate campaign? This problem didn't arise overnight, and you can be among the leaders, advocates, and lawyers needed to rein in corporate overreach and provide support for common sense environmental protections. Challenge yourself to think about the role of corporations and corporate constitutional rights in a democracy. Examine the role that corporate or trade group contributions to your school has had in the development of curriculum and initiatives.<sup>119</sup> Talk to your professors about that influence, its history and its potential future. Start to develop your own ideas about what jurisprudence is necessary to preserve the planet, community rights, and the public interest more broadly. This report provides a set of tools for a beginning, but you may invent the tools that ultimately win this battle.

## Anticipate the Challenge

Strategies for passing a pro-environment law need to anticipate the types of constitutional challenges that corporate opponents will raise, and where possible, try to defuse them. Of course, the tail shouldn't wag the dog—the strategy should not be dictated by defensiveness. But the chance of facing (and potentially losing) a draining constitutional challenge in court may be diminished by some careful preparation in drafting laws and organizing to pass them.

### "Freedom of Speech"

For disclosure and labeling laws, be prepared for any law or requirement that requires corporations to provide information to consumers, the government, or the public to be challenged as "compelled speech." Based on past cases, disclosure, labeling, and reporting laws will be more likely to survive court review if they are accompanied by a detailed factual record and findings that demonstrate the severity of the problem. As we've seen, these requirements may also be more likely to survive

review if they specifically state that the text comes from the government and is therefore "government speech" rather than compelled corporate speech.

Unfortunately, the policy tool of decreasing pollution or waste by restricting advertising has been seriously weakened by court precedent. Courts tend to look skeptically on advertising restrictions outside of the narrow contexts of preventing consumer deception or preventing promotion of illegal activity (e.g., underage drinking or smoking). That's not to say we shouldn't try, but—until we change the constitutional doctrine—the odds are longer.<sup>120</sup>

### "Discrimination"

Corporate "discrimination" challenges often turn on perceived intent as much as the law's text. In the Equal Protection Clause cases, the new corporate campaign to misuse the Constitution is still relatively new, and not all judges will fall for "animus" theories. However, lawyers are trying out the theory in more and more cases.<sup>121</sup> And if there is an effect on interstate commerce, it is currently well-established that corporate plaintiffs can allege "intent to discriminate" as a basis for striking down the law.

The key lesson is that when drafting a law, the primary emphasis should be on protecting unassailable values—like communities, the environment and public health. People officially involved in promoting legislation—particularly official sponsors, such as city councilors sponsoring an ordinance, or the initiative committee for a ballot initiative—should avoid using language or materials that suggests the law's only purpose is hostility or an intent to discriminate against an industry or product. The language should instead emphasize who or what the law is protecting. As George Lakoff has explained, it is crucial to point out that "regulations" are "protections."<sup>122</sup> That is, although corporations may view regulations as nothing more than an additional cost to doing business, virtually all regulations are aimed at protecting the public from very real, and often very costly harms. So, focus on explaining the costs and harms that the law will prevent, and create a clear record of the link between the regulated entity and the harms to be prevented.

## Defend in Court

When these laws are challenged on the basis of corporate constitutional claims, a strong legal defense is essential. Government attorneys are usually dedicated and skillful, but there are two areas where activists can and often should pay particular attention.

First, with local or state ballot initiatives, the primary defense may fall to initiative petitioners rather than the government. In a pre-election legal challenge (i.e., before the ballot measure has even gone to a vote), the government may not defend the law at all. And even after the initiative is passed, if the government leadership was not in support, the official defense of the law may not be as vigorous as that of the advocates who pressed for the initiative. Importantly, ballot measure proponents may not always satisfy the standing requirements necessary to bring a case or defend the law.<sup>123</sup> In those instances, it may be necessary for initiative supporters to intervene in court proceedings either as a party or an *amicus curiae* (friend of the court) to ensure a full defense of the law.

Second, even where government lawyers provide a vigorous defense, it is important to understand that federal and state government attorneys are generally highly skilled advocates, but the nature of government lawyering means that their legal argument rarely confronts the corporate personhood arguments directly. For example, in a corporate equal protection “animus” challenge, the government’s brief is likely to assert that the particular law has a rational basis and was not based on animus; it is not likely to argue that animus-based corporate challenges should be rejected outright because corporations are not politically powerless minorities. As a result, even if the court upholds the law, the judicial opinion may contain damaging language applying the animus theory to corporations (i.e., acknowledging it as a legitimate argument) that could be used to build precedent for the next case. Submitting an amicus brief, or even intervening as a party in the lawsuit, can ensure that more robust and complete legal arguments in favor of the public interest that directly address the corporate personhood theory are presented to the court.

## Wrapping Up: It Starts with You

It seems, as this discussion of “corporate constitutional rights”—where they came from, how they harm our society and the environment, and what challenges lay ahead—reaches its conclusion, one question still remains: What about the non-lawyers and non-legislators, the concerned citizens who want to help fight for the Constitution but who can’t sign a law, win a lawsuit, or pass an amendment? Though it is easy to feel powerless in the face of aggressive, well-funded conglomerates, the truth is that, in the fight to reclaim our democracy the role of the individual and communities couldn’t be more important. After all, unlike the political

status quo of the past few years, where action begins with the checkbook of the largest donors, the battle to restore the power of the average citizen must start with that average citizen speaking up.

As a first step, this means an end to apathy. It means keeping up with “corporate constitutional rights” cases.<sup>124</sup> Ultimately, it means letting corporations know that they can no longer count on sneaking below the radar of public indifference, bypassing public considerations through slippery court maneuvers.

Next, it means adding your voice to the movement by letting those in power know that you are one of the millions who aren’t willing to sit idly by as corporations co-opt more and more of the people’s protections. This can take numerous forms—including signing an online petition; writing a letter to your local newspaper; and calling your elected representatives to ask their stance on corporate claims of constitutional rights. What is most important is that each of us does *something*, rather than resign ourselves to powerlessness over our government.

If it feels like one voice is too small to make a difference, like individual activism is futile in the face of corporate money, three things are important to keep in mind. This defeatist attitude is exactly what socially and environmentally harmful corporations have long tried to instill in the American public. Corporations prefer that we see ourselves as consumers, rather than as sovereign citizens. After all, if the people can be cut out of the political process entirely, corporate interests will be free to strive for profits without the pesky distraction of democracy and public interest.

Consider the alternative to action: a world in which corporations, fully protected by the people’s Constitution, degrade and deplete our environment with free rein until our planet is rendered uninhabitable for future generations. This is the world that will result if the public does not fight back against short-sighted corporate challenges to sensible protections. From this perspective, even if each person’s impact is small, it is hard to imagine a better cause to devote oneself to than the restoration of a government of, by, and for the people—not the corporations.

To support your efforts to engage, here are a few templates for taking action in your community either pre-emptively or in response to claims of corporate personhood. Consider them your citizen action templates for challenging, in a variety of forums, the new corporate campaign to misuse the Constitution.

# Endnotes

- 1 For further reading on the broader context of this new corporate campaign claiming constitutional rights beyond its role in undermining environmental protections, see Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: Liveright, 2018).
- 2 Charlie Cray & Peter Montague, Greenpeace, “The Kingpins of Carbon and Their War on Democracy” (Sept. 2014), at <http://goo.gl/UD6gTa>.
- 3 John Schwartz, “Exxon Mobil Climate Change Inquiry in New York Gains Allies,” *New York Times* (Mar. 29, 2016) <https://goo.gl/fgrFWV>.
- 4 Geoffrey Supran and Naomi Oreskes, “What Exxon Mobil Didn’t Say About Climate Change,” *New York Times* (Aug. 22, 2017) <https://goo.gl/K4puwG>.
- 5 Lonnie Sheckhtman, “Exxon knew about climate change decades ago, spent \$30M to discredit it,” *Christian Science Monitor* (Sept. 17, 2015) <https://goo.gl/8s6kmZ>.
- 6 Benjamin Hulac, “Exxon sues 2nd AG in bid to block climate investigation,” *ClimateWire* (Nov. 14, 2016).
- 7 *Exxon Mobil Corp. v. Healey*, No. 4:16-CV-469, Complaint, 6 (N.D. Tex. June 15, 2016).
- 8 Jeff Mosier, “Wall Street may take on Exxon, to the delight of environmental activists,” *Dallas Morning News* (May 30, 2017) <https://goo.gl/giece3>.
- 9 Bradley Olson, “Exxon Shareholders Pressure Company on Climate Risks,” *Wall Street Journal* (May 31, 2017) <https://goo.gl/i4yyp1>.
- 10 Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (New York: Doubleday, 2016); Thomas O. McGarity, *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival* (New Haven: Yale University Press, 2013); Naomi Oreskes and Erik Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (New York: Bloomsbury Press, 2010); Devra Davis, *When Smoke Ran Like Water: Tales of Environmental Deception and the Battle Against Pollution* (New York: Basic Books, 2002).
- 11 *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2447 (2014).
- 12 Or a rule developed by an agency, such as the Environmental Protection Agency, that is implementing a democratically-passed law.
- 13 Declaration of Independence, <http://goo.gl/auwtky>.
- 14 Jeffrey D. Clements, *Corporations Are Not People: Reclaiming Democracy from Big Money and Global Corporations* 66 (2d ed. 2014) (quoting Kent Greenfield, *The Failure of Corporate Law* 30-33 (2006)).
- 15 Clean Water Act § 502(5), 33 U.S.C. 1362(5), <https://goo.gl/UpV1IB>; Clean Air Act § 302(e), 42 U.S.C. 7602(e), <https://goo.gl/dLloC3>.
- 16 Clean Water Act § 309, 33 U.S.C. 309, <https://goo.gl/iYzgll>.
- 17 *Corporations Are Not People*, supra note 13, at 68.
- 18 Although, it is worth noting that there is a long history of corporations creating, funding, and maintaining nonprofit organizations to pursue corporate objectives under the guise of protecting individual liberties or rights. See, e.g. Oliver A. Houck, “With Charity for All,” 93 *Yale L.J.* 1415, 1419 (July 1984).
- 19 *Id.* at 73.
- 20 James Madison, “To J.K. Paulding,” March 10, 1827, in Gaillard Hunt, ed., *The Writings of James Madison* (New York: Putnam, 1900), Vol. 9.
- 21 *Corporations Are Not People*, supra note 3 at xii-xiii.
- 22 *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819), <https://goo.gl/d3pFyv>.
- 23 *Bank of Augusta v. Earle*, 38 U.S. 519, 587 (1839), <https://goo.gl/Bj5lxo>.
- 24 U.S. Constitution, amend. XIV, § 1, <https://goo.gl/OPWtwc>.
- 25 *Santa Clara Cty. v. S. Pac. RR.*, 118 U.S. 394, 396 (1886), <https://goo.gl/m6tDSi>.
- 26 *Lochner v. New York*, 198 U.S. 45 (1905) (striking down 10-hour work day limit as unconstitutional), <https://goo.gl/sWfc3c>. *Lochner* itself did not feature a corporate plaintiff, but corporations seized upon the doctrine to great effect.
- 27 *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting), <https://goo.gl/EJRwRU>.
- 28 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), <https://goo.gl/bNgmH3>.
- 29 *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 580 (1949) (Douglas, J., dissenting), <https://goo.gl/XN2Xhm>.
- 30 *United States v. Morton Salt Co.*, 338 U.S. 632, 651-652 (1950), <https://goo.gl/yHbQgj>.
- 31 *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955), <https://goo.gl/xEgzzf>.
- 32 See Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right*, 91 (NY: First Anchor Books Edition, 2017).
- 33 Greenpeace USA, *Investigations: Lewis Powell Memo* (Aug. 22, 2011), <http://goo.gl/uLAVj2>.
- 34 *Corporations Are Not People*, supra note 13, at 25.
- 35 *Citizens United v. FEC*, 558 U.S. 310, 347-49 (2010), <https://goo.gl/5pxIH4>.
- 36 John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 *Const. Comment.* 223, 239 (2015), <http://goo.gl/3QaCy9>.
- 37 *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), <https://goo.gl/ebG14u>.
- 38 Coates, supra note 35, at 224-41.
- 39 *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), <https://goo.gl/9GJzx4>.
- 40 *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976) (“Today the Court ends the anomalous situation created by *Chrestensen* and holds that a communication which does no more than propose a commercial transaction is not ‘wholly outside the protection of the First Amendment.’” Stewart, J. concurring), <https://goo.gl/tUVuvD>.
- 41 *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (“We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simple because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.”) <http://goo.gl/zDcgTB>.
- 42 Coates, supra note 35, at 257-62.
- 43 California Safe Drinking Water & Toxic Enforcement Act of 1986, Cal. Health & Safety Code §§ 25249.5 et seq., <http://goo.gl/RZpwEG>.
- 44 Ken Geiser, *Chemicals Without Harm* (Cambridge: MIT Press, 2015); Joel S. Hirschhorn and Kirsten U. Oldenburg, *Prosperity Without Pollution* (Van Nostrand Reinhold Company, 1990).
- 45 See EPA, *Learn About the Greenhouse Gas Reporting Program* (Aug. 20, 2015), <https://goo.gl/rIHfGu>.

- 46 *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), <https://goo.gl/ryW0wJ>.
- 47 Tim Wu, *The Right to Evade Regulation*, *The New Republic* (June 3, 2013), <http://goo.gl/bkloxw>.
- 48 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), <https://goo.gl/jzCkBR>.
- 49 *Int'l Dairy Foods Ass'n v. Amestoy*, 898 F. Supp. 246 (D. Vt. 1995), rev'd, 92 F.3d 67 (2d Cir. 1996), <https://goo.gl/mYLy1Q>.
- 50 *Amestoy*, 92 F.3d at 71-73.
- 51 Human Rights Watch, *Testimony at Senate Foreign Affairs Committee, Subcommittee on African Affairs and Global Health Policy on Dodd-Frank Section 1502* (April 5, 2017), <https://goo.gl/HMbZ8q>.
- 52 *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 375 (D.C. Cir. 2014), overruled by *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014), aff'd on reh'g, 800 F.3d 518 (D.C. Cir. 2015), <https://goo.gl/dK8FqR>.
- 53 *Id.* at 375-76.
- 54 *Nat'l Ass'n of Mfrs. v. SEC*, No. 13-CF-000635 (D.D.C. Apr. 3, 2017); see also SEC, *Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule* (Apr. 7, 2017), <https://goo.gl/ahu8JZ>.
- 55 *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 72 F. Supp. 2d 449, 451 (D. Vt. 1999), <https://goo.gl/WIQLCr>, vacated and remanded, 272 F.3d 104 (2d Cir. 2001).
- 56 *Id.* at 454 (quoting *Amestoy*, 92 F.3d at 72).
- 57 *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114-15 (2d Cir. 2001), <http://goo.gl/oXEA4s>.
- 58 *Id.*
- 59 Kauai council OKs \$75K for defense in GMO case, *Maui News* (Feb. 14, 2014), <http://goo.gl/kBLQJm> (explaining that council first hoped to receive free legal services but was unable to do so).
- 60 *Am. Meat Inst. v. USDA*, 760 F.3d 18, 23 (D.C. Cir. 2014), <https://goo.gl/bDDHI8>.
- 61 *d.*
- 62 *Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-cv-117, 2015 WL 1931142, at \*13 (D. Vt. 2015), <http://goo.gl/3bXSww>, appeal filed, No. 15-1504 (2d Cir. argued Oct. 8, 2015).
- 63 Pub. L. No. 114-216 (July 29, 2016), <https://www.congress.gov/114/plaws/publ216/PLAW-114publ216.pdf>.
- 64 *CTIA-The Wireless Ass'n v. City of San Francisco*, 827 F. Supp. 2d 1054, 1063 (N.D. Cal. 2011), <https://goo.gl/h8TRxn>, aff'd, 494 F. App'x 752 (9th Cir. 2012).
- 65 494 F. App'x at 753-54.
- 66 *CTIA-The Wireless Ass'n v. City of Berkeley*, No. C-15-2529 EMC, 2015 WL 5569072, at \*14 (N.D. Cal. Sept. 21, 2015), <https://goo.gl/Dwn7Sh>.
- 67 *CTIA v. City of Berkeley*, 854 F.3d 1105, 1118-19 (9th Cir. 2017).
- 68 E.g., 27 Cal. Code of Regs. 25603.2(a)(1) (specifying warning language of "WARNING: This product contains a chemical known to the State of California to cause cancer" for consumer products containing carcinogens), <http://goo.gl/wqg4Rm>. Proposition 65 has not been directly challenged on First Amendment grounds; the one time that a company tried, the court rejected the argument for procedural reasons. See *Baxter Healthcare Corp. v. Denton*, 120 Cal. App. 4th 333, 363 n.5 (Cal. App. 2004), <http://goo.gl/1NvwDj>.
- 69 Omega Institute, "Print or Digital: It All Has Environmental Impact," *HuffPost* (Feb. 27, 2014) <https://goo.gl/qKeXeY>.
- 70 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), <https://goo.gl/MpZeMF>.
- 71 Later cases have made it even harder to use the tactic of advertising restrictions to reduce consumption of lawful but harmful products. See 44 *Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996), <https://www.law.cornell.edu/supct/html/94-1140.ZS.html>.
- 72 *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 954 (9th Cir. 2012), <https://goo.gl/iivWcw>.
- 73 See *id.* at 954.
- 74 *Grocery Mfrs. Ass'n v. Sorrell*, 2015 WL 1931142, at \*3, \*25, \*40.
- 75 Justin Gillis and Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, *New York Times* (Nov. 5, 2015) <https://goo.gl/zo544c>.
- 76 *Exxon Mobil Corp. v. Healey*, No. 4:16-CV-469, Complaint, 6 (N.D. Tex. June 15, 2016).
- 77 *In re Civil Investigative Demand No. 2016-EPD-36*, No. 16-1888F (Mass. Sup. Ct. June 16, 2016) <https://goo.gl/vhWc8M>.
- 78 *In re Civil Investigative Demand No. 2016-EPD-36*, 34 Mass. L. Rptr 104, (2017 WL 627305), \*4 n. 2 (Jan. 11, 2017).
- 79 a. *Exxon Mobil Corp. v. Schneiderman*, No. 17-CV-2301 (S.D.N.Y. June 15, 2016).  
b. John Schwartz, "Court Dismisses Exxon's Effort to Block Climate Investigation," *New York Times* (Mar. 29, 2018) <https://goo.gl/cgCjKn>.  
c. Bob van Voris, "Exxon Sues the Suers In Fierce Climate-Change Suit," *Bloomberg* (Feb. 13, 2018) <https://goo.gl/TN4Azo>.
- 80 Declaration of Independence, <http://goo.gl/auwtky>.
- 81 *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955), <https://goo.gl/xEgzzf>.
- 82 *Romer v. Evans*, 517 U.S. 620, 634 (1996), <https://goo.gl/ZEmlLx>.
- 83 *Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir. 2014) (Holmes, J., concurring) (internal quotation marks and citations omitted), <http://goo.gl/XINpM4>; see also Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 *Wash. L. Rev.* 281, 282 (2011) ("Although rationality review purports to be a single standard, it has two faces that use different methods and produce conflicting results. The United States Supreme Court employs both versions but does not acknowledge that a conflict exists between them.").
- 84 Kauai council OKs \$75K for defense in GMO case, *Maui News* (Feb. 14, 2014), <http://goo.gl/kBLQJm> (explaining that council first hoped to receive free legal services but was unable to do so).
- 85 *Syngenta Seeds, Inc. v. County of Kaua'i*, No. Civ. 14-00014BMK (D. Haw. filed Jan. 10, 2014), <http://goo.gl/uQaSeh> (complaint).
- 86 *Syngenta Seeds, Inc. v. County of Kaua'i*, 2014 WL 4216022 (Aug. 25, 2014) aff'd, 842 F.3d 669 (9th Cir. 2016). This sometimes happens. Corporations raising equal protection challenges typically also raise other legal claims, based on federal or state law, and the final outcome of the case is often determined by one of those other claims.
- 87 *Noel v. Bd. of Elections*, No. 1422-CC00249 (Mo. Cir. Ct. 2014) (finding that ballot measure denying public financial incentives to nonrenewable energy corporations and their major business partners violates Equal Protection Clause), <http://goo.gl/4zclr8>, aff'd on other grounds, 465 S.W.3d 88 (Mo. Ct. App. 2015). The nominal plaintiffs were St. Louis citizens opposed to the measure, but they somehow managed to afford to hire, as their attorney, the former chief lobbyist for St. Louis-based coal giant Peabody Energy.
- 88 *Id.* at 18.
- 89 *Id.* at 19.
- 90 *Id.* at 21.
- 91 *Swepi, LP v. Mora County*, 81 F. Supp. 3d 1075, 1172, 1186, 1192 & n.30 (D.N.M. 2015), <https://goo.gl/10R9MY>.

- 92 *Id.*
- 93 *Synagro-WWT, Inc. v. Rush Twp.*, 204 F. Supp. 2d 827, 833 (M.D. Pa. 2002), <http://goo.gl/ouu9Hr>.
- 94 *Portland Pipe Line Co. v. City of South Portland*, No. 15-cv-00054-JAW (D. Me. filed Feb. 26, 2015); Kelley Bouchard, *Portland Pipe Line says South Portland's ban on crude exports threatens its survival*, *Portland Press Herald* (Jan. 21, 2016), <http://goo.gl/pwNKch>.
- 95 a. U.S. Const. amend. XIV, § 1, <https://goo.gl/gtBzZ5>.  
b. *Portland Pipe Line Co. v. City of South Portland*, No. 15-cv-00054-JAW, Doc. #200 (D. Me. Filed Dec. 29, 2017).
- 96 U.S. Const. art. I, § 8, <https://goo.gl/Ujsi2k>.
- 97 *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978), <https://goo.gl/rdcsQd>.
- 98 E.g., Greenpeace, *Ecological Farming* (May 2015), <http://goo.gl/Vql9eJ>.
- 99 *Asbury Hosp. v. Cass Cty.*, 326 U.S. 207 (1945), <https://goo.gl/X9CPYm>.
- 100 *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 595 (8th Cir. 2003).
- 101 *S. Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593-94 (8th Cir. 2003), <http://goo.gl/g2lqBw>.
- 102 *North Dakota v. Heydinger*, 15 F. Supp. 3d 891 (D. Minn. 2014), <http://goo.gl/6io0lj>, *aff'd*, 825 F.3d 912 (8th Cir.2016).
- 103 *Writ of assistance*, *Encyclopædia Britannica* (2015), <http://goo.gl/oqUT9t>.
- 104 U.S. Const.amend. IV, <https://goo.gl/XmvZsg>.
- 105 *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), <https://goo.gl/WCKuGl>.
- 106 *Dow Chem. Co. v. United States*, 476 U.S. 227, 228 (1986), <https://goo.gl/f2n4Wg>.
- 107 E.g., Gary Ruskin, *Essential Information*, *Spooky Business: Corporate Espionage Against Nonprofit Organizations* (Nov. 20, 2013), <http://goo.gl/N5Yp01>.
- 108 *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), <http://goo.gl/Jhjedx>.
- 109 For more background on this issue, see Ron Fein & Danny Gifford, *Apple, the FBI, and the Real Meaning of the First Amendment*, *Daily Caller* (Mar. 4, 2016), <http://goo.gl/mdrRDb>.
- 110 *United States v. Knott*, 256 F.3d 20, 25 (1st Cir. 2001), <https://goo.gl/jaPDyp>.
- 111 *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55 (1st Cir. 2004), <https://goo.gl/G14SF3>.
- 112 U.S. Const. amend. V, <https://goo.gl/dqQE5d>.
- 113 *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), <https://goo.gl/pR38zR>.
- 114 *Id.* at 415.
- 115 *Kelo v. City of New London*, 545 U.S. 469 (2005), <https://goo.gl/v6AQdc>.
- 116 Kevin Hardy, "Dakota Access pipeline had right to take Iowa land, judge rules," *Des Moines Register* (Feb. 16, 2017) <https://goo.gl/pwRfNM>.
- 117 *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), <http://goo.gl/CoV8s5>.
- 118 *See also* UU World, *Corporations 1*, *Citizens 0* (May/June 2003), <http://goo.gl/jn3G8r> (describing how small New England town was intimidated by lawsuit threats from regulating cell phone tower placement).
- 119 Exxon and the Koch's funding of Willie Soon has become emblematic of the use of corporate funding to influence "expert" testimony. *See* <http://www.greenpeace.org/usa/global-warming/climate-deniers/koch-industries/dr-willie-soon-a-career-fueled-by-big-oil-and-coal/>. *See also* ; Dave Levinthal, "How the Kochs are influencing U.S. colleges," *Time* (Dec. 15, 2015) <http://time.com/4148838/koch-brothers-colleges-universities/>; Jeffrey Rosen, "Packing the Courts: 'The Federalist Society' by Michael Avery and Danielle McLaughlin," *New York Times Book Review* (May 10, 2013) <http://www.nytimes.com/2013/05/12/books/review/the-federalist-society-by-michael-avery-and-danielle-mclaughlin.html>.
- 120 Though it is important to note that galvanizing a broad and vocal public movement is a key part of changing those odds. *See, e.g.* Arwa Mahdawi, *Can cities kick ads? Inside the global movement to ban urban billboards*, *The Guardian* (Aug. 12, 2015) <https://goo.gl/bksrW3> (discussing successful efforts to reduce outdoor advertising).
- 121 For discussion of how corporations are using similar Equal Protection Clause arguments to challenge local minimum wage laws, *see* Ron Fein, *Why judges should stay out of the minimum wage debate*, *L.A. Daily News* (Aug. 1, 2015), <http://goo.gl/zk8HiF>.
- 122 George Lakoff, *The Public's Viewpoint: Regulations are Protections*, *George Lakoff Blog* (Jan. 28, 2017) <https://goo.gl/ggAehe>.
- 123 *Hollingsworth v. Perry*, 570 U.S. 693 (2013).
- 124 One way to do that is to join Free Speech For People's email list. Find out more at [www.freespeechforpeople.org](http://www.freespeechforpeople.org).

# Challenging the New Corporate Campaign to Misuse the Constitution in a Public Meeting or Hearing

**For use when speaking in support of proposed legislation, regulation, ordinance or resolution at a public meeting or hearing.**

**Introduction: Start with who you are and why you are speaking.**

*For example:* I'm \_\_\_\_\_, and I'm here to voice my support for \_\_\_\_\_ because as a mother I'm concerned about the effects that \_\_\_\_\_ is having on children. This proposal will protect the children of our community from \_\_\_\_\_.

## **1. Focus on the objective and rationale for the proposal:**

- + Explain the harms the proposal will protect the public from.
- + Describe specific examples of how these harms have affected you, your community, or other similar communities. (If you have not been directly affected, but you know someone who has, do your best to arrange for them to attend and speak, too).
- + Describe the costs that this harm is imposing on the community and estimates of how those costs may grow if left unchecked.

## **2. Point to the authority/obligation that allows/requires the body you're addressing to protect residents/citizens/vulnerable populations from this harm:**

- + Cite to the law, regulation, executive order, ordinance, whatever it is that gives the body you are addressing the authority to protect the public, and if there are particularly important or compelling phrases in that document, quote them.
- + Explain how the proposal is within that authority/obligation.
- + Explain how the proposal protects the public.

## **3. Challenge the New Corporate Campaign to Misuse the Constitution**

- + Name the company or companies (or trade associations) that are trying to hide behind a cynical legal strategy to avoid responsibility for the dangers of their product/action/strategy.
- + Call out the specific protection being claimed (e.g. "free speech," "equal protection," or "discrimination") by the company.
- + If you think it would help, bring copies of this report to explain that this is part of a growing trend by corporations that elected officials should stand up to. (PDF copies can be printed off the web site)
- + Reiterate, this proposal is about protecting the community from x, this is not a threat to ["free speech," "equal protection," etc.]

**Conclusion: As your constituent, I expect you to use your authority to meet your obligations to protect the public. Don't let corporate interests pressure you with their attempts to distort the Constitution to put profits before public safety.**

# Challenging the New Corporate Campaign to Misuse the Constitution – in Small Meetings with Decision Makers

For use in small meetings with elected officials or regulators regarding pending proposals.

- 1. Gather information about any potential challenges that have been made or threatened in advance, and be sure to know who you are meeting with, including key staff. Be respectful and don't assume they have made up their mind.**
  - + Ask if anyone has raised concerns about the proposal.
  - + Ask whether the elected official/regulator has any concerns about the proposal.
  - + If others have raised concerns, ask where the concerns are coming from. Try to identify which companies or lobbyists are making the arguments.
  - + If it sounds like the “concerns” may have been framed as constitutional get as much detail as possible.
- 2. Discuss the purpose and rationale of the proposal**
  - + Explain the harm this proposal seeks to protect the public from. Bring people who have either already been affected or would be directly harmed.
  - + Describe specific examples of how this harm has affected you, your community, or other similar communities.
  - + Describe the costs that this harm is imposing on the community and estimates of how those costs may grow if left unchecked.
- 3. Explain the dangers of the New Corporate Campaign to Misuse the Constitution**
  - + Give them a copy of this report.
  - + Explain that corporate interests are engaged in a coordinated effort to undermine important health and environmental protections.
  - + Explain that this legal strategy is an attempt to distort the democratic process and long-held interpretations of the Constitution.
- 4. Ask for a commitment to protect the public**
  - + Remind them that they have the authority and the obligation to regulate corporations and protect the public.
  - + Ask them if they will commit to protecting the democratic process and the people of the community by taking a stand against attempts to distort the Constitution.
  - + Offer to support them in fighting back against this strategy.

# Challenging the New Corporate Campaign to Misuse the Constitution in a Letter to the Editor or Op-Ed

Publishing an op-ed or Letter to the Editor in your local paper continues to be an important way to convey a message to elected officials and your fellow community members.

Here are some tips for writing an effective piece:

- **Be brief.** As a general rule, you will want to keep your Letter to the Editor under 200 words; however, each newspaper has its own guidelines and instructions. Op-eds are typically limited to 500-700 words. You can generally find this information online or by calling the newspaper's office.
- **Connect your community to the big picture.** The more you can tie in local issues, politics, or personalities, the more compelling and effective your letter will be.
- **Be polite.** Remember to keep your LTE polite and respectful—newspapers won't publish letters that are insulting or inflammatory.

## Key Points

- Over the past few decades business has launched a targeted, well-financed assault on laws protecting the public interest aimed at stretching constitutional protections to provide regulatory escape hatches for ordinary commercial corporations.
- Often, the targets of this assault are commonsense environmental measures supported by broad popular majorities, and the corporations claiming constitutional protections from these laws are giant multinationals. [Insert an example of a proposal in your community].
- Corporations are trying to use concepts that were intended to protect vulnerable, marginalized individuals and groups in the service of legal entities that wield incredible power and wealth. [Insert example of corporation using this argument and information about its annual revenues, ownership or examples of its lobbying power].
- Corporations are not people, and we as citizens need to make it clear that we will fight back against attempts to prevent our elected officials from protecting our health and our environment.

# Sample Letter to the Editor

## Responding to arguments about viewpoint discrimination as violation of First Amendment\*

### Dear Editor:

Rarely have we seen such a brazen attempt by a corporation to subvert the Constitution in service of protecting profits as Exxon's attempts to frame its misleading claims about the impacts of climate change on its investors, consumers, and the broader public as free speech. In response to investigations by the New York and Massachusetts attorney generals, the highest law enforcement officers of each state, Exxon has done the unthinkable by filing complaints against the attorney generals on the grounds that the investigations violate the corporation's First Amendment rights.

Unfortunately, this argument is not unprecedented. It was deployed by the tobacco industry when they were charged with fraud for deliberately misleading their customers about the dangers of smoking. The U.S. Court of Appeals for the D.C. Circuit quickly dismissed that claim with a statement of fact that should have ended the debate: "Of course it is well settled that the First Amendment does not protect fraud."

Suppressing information known to the company about the economic risks from proposed regulations or technological advances from shareholders, paying scientists or think tanks to muddy the waters of otherwise clear scientific consensus about basic facts in an attempt to mislead consumers, and publishing information that contradicts internal company analysis is not merely espousing an unpopular viewpoint. If proven, it may amount to securities fraud, deceptive trade practices, or violation of any number of consumer protection laws.

One would think that conservative intellectuals would be among the loudest defenders of the necessity of prohibiting fraud to ensure the integrity of otherwise free markets; instead conservative think tanks like the Heritage Foundation have equated the investigations of Exxon's questionable practices to the Spanish Inquisition.

Corporations are not people, and as citizens we need to make it clear that we will fight back against such cynical and dangerous attacks by corporations and those who serve them on our most sacred constitutional rights.

\*This template borrows from an excellent op-ed by former Yale Law School Dean, Robert Post, [https://www.washingtonpost.com/opinions/exxonmobils-climate-change-smoke-screen/2016/06/24/2df8b29c-38c4-11e6-9ccd-d6005beac8b3\\_story.html](https://www.washingtonpost.com/opinions/exxonmobils-climate-change-smoke-screen/2016/06/24/2df8b29c-38c4-11e6-9ccd-d6005beac8b3_story.html)

# Some Useful Quotes to Challenge the New Corporate Campaign to Misuse the Constitution

**"I hope we shall crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country."**

Letter from Thomas Jefferson to Tom Logan (Nov. 12, 1816), in 12 *The Works of Thomas Jefferson* 42, 44 (P. Ford ed. 1905).

**"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."** Chief Justice Marshall, *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819)

**"The only rights [a corporation] can claim are the rights which are given to it in that character, not the rights which belong to its members as citizens of a state."** *Bank of Augusta v. Earle*, 38 U.S. 519, 587 (1839).

**"[I]ncorporated Companies with proper limitations and guards, may in particular cases, be useful; but they are at best a necessary evil only."** James Madison, "To J.K. Paulding," March 10, 1827, in Gaillard Hunt, ed., *The Writings of James Madison* (New York: Putnam, 1900), Vol. 9.

**"The true friend of property, the true conservative, is he who insists that property shall be the servant and not the master of the commonwealth; who insists that the creature of man's making shall be the servant and not the master of the man who made it. The citizens of the United States must effectively control the mighty commercial forces which they have called into being."** Theodore Roosevelt, *The New Nationalism* (Aug. 31, 1910).

**"[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations... do not represent a manifestation of individual freedom of choice."**

*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 804-05 (1978) (White, J., dissenting).

**"The robust First Amendment freedom to associate belongs only to groups 'engage[d] in 'expressive association.' The Campbell Soup Company does not exist to promote a message, and 'there is only minimal constitutional protection of the freedom of commercial association.'" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting) citations omitted.**

**"The Court insists that the rule it lays down is consistent even with the view that the First Amendment is 'primarily an instrument to enlighten public decisionmaking in a democracy.' I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment."** *Virginia State Board of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 784 (1976) (Rehnquist, J., dissenting).

**"For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence."** *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 599 (Rehnquist, J., dissenting).

**"The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind."** *Citizens United*, 558 U.S. 310, 428 (2010) (Stevens, J., dissenting).

**"The corporate takeover of the First Amendment is at its heart the use by elite members of society of specific legal tools to degrade the rule of law."** John Coates, *Corporate Speech & The First Amendment: History, Data, and Implications*, 30 Const. Commentary 223, 269 (2015).

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**CONTAMINATING THE COURTS:  
HOW CORPORATIONS ARE  
MISUSING THE CONSTITUTION  
TO ATTACK THE ENVIRONMENT**

APRIL 19, 2018