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The author wishes to thank Professor Abner S. Greene for his patience and guidance with this project, as well as her parents, Giacomo Taruschio and Lisa Kramer Taruschio, for their support.

THE FIRST AMENDMENT, THE RIGHT NOT TO SPEAK AND THE PROBLEM OF GOVERNMENT ACCESS STATUTES

*Anna M. Taruschio**

INTRODUCTION

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[1] It has long protected speech, certain expressive acts and individual thought and belief. The First Amendment, however, does not only protect speech in its positive aspect. In *West Virginia State Board of Education v. Barnette*,[2] and later in *Wooley v. Maynard*,[3] the U.S. Supreme Court recognized that the First Amendment also protects a "concomitant"[4] negative free speech right, the right not to speak: "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all . . . ."[5] The Court's subsequent articulations of this negative right framed it as a "freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."[6] The first articulation of this negative First Amendment right heralded a line of "right not to speak" cases that present their own set of conflicts in First Amendment jurisprudence and implicate several of the theoretical bases of freedom of speech.

Courts and commentators have also recognized that the government can play an active role in expanding free speech rights and in enabling the free speech principle that the Constitution estab-

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1. U.S. CONST. amend. I.

2. 319 U.S. 624 (1943).

3. 430 U.S. 705 (1977).

4. *Id.* at 714.

5. *Barnette*, 319 U.S. at 645 (Murphy, J., concurring).

6. Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 11 (1986) (emphasis in original) (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (quoting Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (N.Y. 1968)).

lishes.[7] This active role often takes the form of "access legislation,"[8] such as state-level free speech provisions, which are often enacted to expand free speech rights further than the federal First Amendment provision.[9] Litigants often invoke the right not to speak in opposition to these access statutes, which are intended to encourage and facilitate speech. These access statutes, despite a stated purpose of expanding some individuals' affirmative rights to speak freely, often incidentally infringe on negative free speech rights in the same speech forum. Thus, an access statute or a state-level First Amendment provision, meant to open speech forums and encourage debate, can ultimately cause conflict between affirmative and negative free speech rights, by sustaining one right at the price of infringing on the other.

This Note argues that this conflict emerges from the distinct ideological justifications that underlie both the positive right to speak and the negative right not to speak. It addresses the point of conflict between these speech rights, created by access statutes which seek to further the aims of free speech. To this end, it argues that each distinct speech right is animated by a different and vital ideological justification—the "marketplace of ideas," as the positive First Amendment principle, on the one hand, and the "autonomy/self-expression" principle, as the negative one, on the other. Analyzing these two principles in First Amendment jurisprudence, this Note concludes that by close attention to the effects of government efforts to widen speech forums and to the conflicting speech princi-

7. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH 17 (1996) (noting that "fostering full and open debate—making certain that the public hears all that it should—[can be] a permissible end for the state"); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 138 (1995) (noting that "positive government acts" such as the "provision of diverse opportunities" can be among the aims of government); *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 91 (1980) (Marshall, J., concurring) (noting with approval the "healthy trend of affording state constitutional provisions a more expansive interpretation than [the Supreme] Court has given to the Federal Constitution" (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*] (discussing incorporation of the Bill of Rights to the states through the Fourteenth Amendment and noting that state courts can play an active role in protecting these rights)); *PruneYard*, 447 U.S. at 85 (noting that states can have an "interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution").

8. For examples and discussion of these kinds of access provisions, *see infra* Part II.B.1.b.

9. *See, e.g.*, Brennan, *State Constitutions*, *supra* note 7, at 491 (observing that "[s]tate constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law").

ples informing each case, the Court can achieve consistent and fair resolution of cases recognizing the right not to speak.

Part I of this Note explores the two main theoretical principles underlying protection of speech in the United States: the marketplace of ideas and autonomy/self-expression. It ends by illustrating the uses of these principles in right not to speak case law. Part II discusses the Supreme Court's right not to speak cases, beginning with a review of current Supreme Court jurisprudence in this area. It further investigates and highlights the tension that government access statutes cause between the two speech principles in each case. Part III begins by addressing and refuting a major criticism of cases in the right not to speak area: that in certain circumstances they do not trigger First Amendment scrutiny at all. This Part goes on to argue that state and local governments should be permitted to open speech forums to encourage and facilitate free speech. Finally, this Note concludes by proposing methods for accomplishing this goal that avoid the pitfalls and injustices now present in the Court's system for resolving right not to speak cases.

I. TWO FIRST AMENDMENT PRINCIPLES: THE MARKETPLACE OF IDEAS AND AUTONOMY/SELF-EXPRESSION

This Part first defines and contextualizes the two leading free speech principles underlying free speech jurisprudence in the United States. Second, it illustrates how these two free speech justifications emerge throughout right not to speak case law.

Two distinct principles have traditionally supported the primacy of free speech in liberal democratic society. The first is the belief that free speech will spark debate and thus serve as a major catalyst for political democratic discourse. This principle, first articulated by John Stuart Mill, and appropriated by American legal theorists and courts, is the marketplace of ideas. The second, competing principle is the "autonomy/self-expression" principle that stresses more individualistic values, such as individual choice and self-determination, and views free speech as critical to human emotional and intellectual fulfillment.

A. The Marketplace of Ideas

Before analyzing the marketplace of ideas in American theory and jurisprudence, it is useful to begin with some primary concepts from an earlier text, John Stuart Mill's *On Liberty*.[10] Three con-

10. JOHN STUART MILL, ON LIBERTY (Alburey Castell ed., Crofts Classics 1947).

cepts from Mill's work are fundamental to analysis of the right not to speak. The first is the central concept of liberty of thought and expression that Mill's work envisions;[11] the second is the adversarial nature of this conception of liberty;[12] and the third is its emphasis on "more speech" and corresponding low tolerance for silence.[13]

For Mill, freedom of thought and discussion was a touchstone of liberty.[14] The freedom to form, hold and voice one's opinions played a central role in social evolution toward a great, objective and discoverable truth.[15] Mill also considered this freedom essential to determining the limits of state interference in individual liberty.[16] "[T]o find that limit," Mill wrote, "and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism."[17] According to this model of liberty, government encroachment on individual freedom is a fundamental evil to be resisted.[18]

This freedom of thought and expression served several purposes for Mill. The first was truth-seeking: liberty creates and maintains an open forum where ideas, both true and false, can be voiced.[19] As a result, true ideas will prevail over false ones because, by hearing both a proposition and its refutation, people can test true ideas, thus tempering and strengthening them.[20] Second, liberty of thought and expression enables individuals to discover and correct mistakes, thus allowing society to evolve:[21] "[w]rong opinion and practices gradually yield to fact and argument."[22] Last, liberty rebuts a presumption of infallibility in deeply held ideas and beliefs.[23] This rebuttal results in healthy abandoning of outdated ideas and signals acceptance of true ideas where untrue ones earlier prevailed, while also enabling people to hold fast to ideas that were

11. *See infra* text accompanying notes 14-24.
12. *See infra* text accompanying notes 25-28.
13. *See infra* text accompanying notes 46-50.
14. *See* MILL, *supra* note 10, at 15-16.
15. *See id.* at 16.
16. *See id.* at 5.
17. *Id.*
18. *See id.* at 9-10.
19. *See id.* at 20.
20. *See id.* at 47.
21. *See id.* at 20.
22. *Id.* at 19. This idea would be echoed with characteristic eloquence sixty years later by Justice Holmes in the observation that "time has upset many fighting faiths . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
23. *See* MILL, *supra* note 10, at 52.

true from the outset, all through the test of aggressive and public debate.[24]

Next, Mill's concept of a free speech principle is adversarial.[25] By definition, this model requires that more than one voice be heard in the marketplace and even encourages these voices to conflict. If truth is to be found through the expression of different ideas and opinions, it follows that "it has to be made by the rough process of a struggle between combatants fighting under hostile banners."[26] This adversarial, almost "Darwinian"[27] model of truth-seeking helps to discern not merely that an idea is true, but also exactly why it is true: on what grounds it defends itself, and where its weaknesses lie.[28] Mill's conception of liberty thus finds little virtue in silence or unheard speech, regardless of whether the silence is imposed by the state or by the free will of the individual.[29] Within this paradigm, then, one who refuses to speak has withheld her opinion and expression from the marketplace; and all humanity has lost by not having the benefit of these ideas.[30] This paradigm therefore elevates dissent and places a premium on expression, no matter how unfounded, despicable or untrue the idea behind it may be.

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24. *See id.*

25. *See id.* at 47.

26. *Id.*

27. STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT 15 (1996).

28. *See* MILL, *supra* note 10, at 21 ("Strange it is, that men should admit the validity of the arguments for free discussion, but object to their being 'pushed to an extreme'; not seeing that unless the reasons are good for an extreme case, they are not good for any case.").

29. *Id.* at 16. Mill states that:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Id.

30. *Id.* at 48-52. As Mill observes:

> [w]hen there are persons to be found, who form an exception to the apparent unanimity of the world on any subject, even if the world is in the right, it is always probable that dissentients have something worth hearing to say for themselves, and that truth would lose something by their silence . . . . Not the violent conflict between parts of the truth, but the quiet suppression of half of it, is the formidable evil; there is always hope when people are forced to listen to both sides; it is when they attend only to one that errors harden into prejudices, and truth itself ceases to have the effect of truth, by being exaggerated into falsehood.

Id. at 48, 52.

1. *The Marketplace of Ideas in American Legal Theory*

Early American jurists and legal theorists incorporated Mill's concept of a marketplace of ideas into their framework for a free society.[31] Three aspects of this free speech principle are critical. First, the marketplace of ideas places itself almost entirely at the service of the public, rather than private, interest. The marketplace is primarily a political tool, instrumental to the ultimate goal of either truth-seeking (in Mill's model) or self-governance (in contemporary American theory).[32] Second, it serves the listener in information-sharing, promoting free discussion and trade of ideas.[33] Third, it invariably prizes "more speech" over less or none.[34]

The American concept of the marketplace of ideas eventually abandoned Mill's truth-seeking goal in favor of a more political conception of the marketplace.[35] Instead of striving after an ultimate, discoverable truth through the marketplace and its different voices, the American version of the marketplace of ideas found its justification in political terms.[36]

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31. *See, e.g.*, Whitney v. California, 274 U.S. 357 n.3 (1927) (Brandeis, J., concurring) ("If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." (quoting Thomas Jefferson, First Inaugural Address)); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6-24 (1989) (discussing the early adoption and continuing validity of Mill's marketplace of ideas to American legal theory and jurisprudence).

32. *See infra* notes 37-42 and accompanying text.

33. *See infra* notes 43-45 and accompanying text.

34. *See infra* notes 46-50 and accompanying text.

35. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88 (1948). Meiklejohn argues that:

> [n]o one can deny that the winning of the truth is important for the purposes of self-government. But that is not our deepest need. Far more essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community. The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won.

Id.

36. *See id.* Meiklejohn further notes that:

> [The First Amendment's] purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal . . . . The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counter belief, no relevant information, may be kept from them.

Id. at 88-89.

This First Amendment principle, therefore, is entirely at the service of the public: the highest aim of free speech, and of the principle that protects it, is to promote democratic self-government through discussion of political issues and rigorous public debate. Within this paradigm, "[t]o be afraid of ideas, any idea, is to be unfit for self-government."[37]

Many courts and scholars have criticized the marketplace of ideas as a viable First Amendment principle,[38] charging that the concept serves all categories of protected speech, not merely those concerning political debate.[39] While the marketplace of ideas theory today recognizes that speech may not be solely for political purposes,[40] it protects only that speech concerning public issues and debate.[41] Accordingly, one commentator has written that, "[s]peech is valued so importantly in the Constitution . . . not because it is a form of self-expression or self-actualization but rather

37. *Id.* at 27; *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969) (noting that a goal of the First Amendment is to "produc[e] an informed public capable of conducting its own affairs" (citing J. MILL, ON LIBERTY 32 (R. McCallum ed. 1947))).

38. Shiffrin and Choper cite several scholars who criticize the marketplace of ideas. *See* SHIFFRIN & CHOPER, *supra* note 27, at 15-18. Some of their arguments include: 1) that people are socialized early on to accept society's political/economic institutions and therefore that "processes of critical judgment are short-circuited," *id.* at 16 (quoting CHARLES E. LINDBLOM, POLITICS AND MARKETS 207 (1977)); 2) that different levels of economic and political influence in the marketplace can lead to market distortion, *see id.* (citing LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988)); and 3) that the marketplace of ideas under-emphasizes other important free speech values such as the value of dissent, *see id.* at 17 (citing STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990)), and the value of free speech to the individual as opposed to society as a whole, *see id.* (citing Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4-5 (1984)). Professor Vincent Blasi notes that the concept of truth-seeking is susceptible of many different meanings for different kinds of people. *See* Vincent Blasi, *Free Speech and Good Character*, 46 U.C.L.A. L. REV. 1567, 1568 (1999). For some defenses of the marketplace model, see BAKER, *supra* note 31, at 6-24, 37-46.

39. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) (noting that while a fundamental purpose of the First Amendment "was to protect the free discussion of governmental affairs," an abundance of Supreme Court cases also find that expression about "philosophical, social, artistic, economic, literary, [and] ethical matters" comprises a "nonexhaustive" list of other kinds of expression receiving "full First Amendment protection" (citations omitted)).

40. *See* MEIKLEJOHN, *supra* note 35, at 61-62.

41. *See id.* at 94.

> The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal — only, therefore, to the consideration of matters of public interest. Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment.

Id.

because it is essential for collective self-determination."[42] Thus, the marketplace concept of First Amendment liberty prizes public values promoting self-government, over individualistic ones.

Another important aspect of the marketplace of ideas is its emphasis on information-sharing and audience rights.[43] This aspect of the marketplace of ideas comes as a necessary consequence of the principle's conception and application: because the marketplace encourages free and open debate in a public forum, it follows that each member of the audience will have a wider range of ideas and information from which to choose in making his or her own decisions about the issue at hand.[44] This facet of the marketplace of ideas thus serves the public interest by encouraging multifarious voices to be heard, thereby creating a more intelligent and informed citizenry.[45]

Last, the concept of "more speech" is central to the marketplace of ideas.[46] "More speech" means that under the marketplace of ideas paradigm, more speech, never less, is the remedy for false or untrue speech. In this way, false or untrue ideas will always be countered by new and different ones, and will eventually be defeated. It follows, therefore, that one who withholds (or is forced by regulation from withholding) discussion and debate from the marketplace of ideas, refrains from the civic discourse that the theory encourages.[47] This "more speech" tenet of the marketplace of

42. FISS, *supra* note 7, at 2 ("[T]his view [the protection of free speech from encroachment by the state] is predicated on a theory of the First Amendment and its guarantee of free speech that emphasizes social, rather than individualistic, values. The freedom the state may be called upon to foster is a public freedom.").

43. *See* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 8 (1986) ("By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." (citations omitted)).

44. *See, e.g.*, BAKER, *supra* note 31, at 67 (noting that the jurisdiction behind the marketplace of ideas model of free speech is to protect "the interest in the listener's receipt of information").

45. *See Pacific Gas & Elec. Co.*, 475 U.S. at 8 ("The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack the First Amendment protects the public's interest in receiving information." (citations omitted)); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial . . . .").

46. *See generally*, BAKER, *supra* note 31, at 7-9 (discussing the "more speech" concept within the marketplace of ideas framework).

47. *See id.* at 7 (noting in discussing the marketplace of ideas that "[r]egulation of speech would only undermine the discovery and recognition of truth and impede wise, well-founded decision making").

ideas is best illustrated by Justice Brandeis' *Whitney v. California*[48] concurrence, when he argued that the state should be permitted to regulate only speech that poses a "clear and present danger" so imminent as to inhibit more speech; that is, leaving no further "opportunity for full discussion."[49] Brandeis' "clear and present danger" test derives directly from the marketplace of ideas because it allows the government to regulate that speech which poses a threat to the "more speech" principle. Thus, under the second prong of Brandeis' test, a danger is "present" if it precludes opportunity for "more speech" or further discussion.[50]

2. *The Marketplace of Ideas in American Jurisprudence*

The concept of the marketplace of ideas entered American jurisprudence as a principle of First Amendment liberty in Justice Holmes' dissent in *Abrams v. United States*:[51] "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market."[52] This principle, while subject to a great deal of criticism,[53] has consistently been used by the Supreme Court as a paradigm for positive First Amendment values.[54] In a similar vein, the Supreme Court has also manifested a concern that the First Amendment be used primarily for public and political purposes: "Speech concerning public affairs is more than self-expression, . . . it is the essence of self-government."[55] The Court has also stated that "there is practically universal agreement that a major purpose of [the First Amendment] was to protect the free dis-

48. 274 U.S. 357 (1927).

49. *Id.* at 377 (Brandeis, J., concurring).

50. *See* BAKER, *supra* note 31, at 7-8 (discussing Brandeis' *Whitney* concurrence in the marketplace of ideas context).

51. 250 U.S. 616 (1919).

52. *Id.* at 630 (Holmes, J., dissenting).

53. *See* SHIFFRIN, *supra* note 27, at 15-18; *see also* Blasi, *supra* note 38, at 1568 ("Yes, truth is important, but truth seeking is such a different activity for the true believer, the pragmatist, and the skeptic as to confound any effort to generalize regarding the priority to be accorded truth seeking, the role free speech plays in facilitating it, and the significance of the many 'market failures' that distort the flow of ideas and information.").

54. *See* BAKER, *supra* note 31, at 7 ("The marketplace of ideas theory consistently dominates the Supreme Court's discussions of freedom of speech."); *see also Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring) ("Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form.").

55. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (citations omitted).

cussion of government affairs."[56] Thus the marketplace of ideas stands as a means, rather than an end,[57] toward collective self-government and prizes public values over individualistic ones.

B. Autonomy/Self-Expression

The First Amendment principle that competes most directly with the marketplace of ideas is the one that elevates human autonomy and self-expression over other, more public values. Although this notion of autonomy/self-expression shares many concepts with general Fourteenth Amendment autonomy,[58] most courts locate this right — as it pertains to individual freedom of thought, conscience and expression — within the First Amendment.[59] Central to this concept of First Amendment freedom is the idea that the individual is free to choose her own method of self-expression.[60] As such, it is a free speech principle that views the individual conscience and self-fulfillment as an end unto itself, in contrast to the marketplace principle that views freedom of speech as instrumental to the ultimate goal of either truth-seeking or democratic self-government.[61] The autonomy principle thus sets up a First Amendment theory that focuses primarily on individual freedom.[62] In

56. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring) (citations omitted).

57. *See* FISS, *supra* note 7, at 2-3; Ingber, *supra* note 38, at 4-5 (noting that courts invoke the marketplace of ideas theory because it benefits society and not merely individual speakers, and thus "relegates free expression to an instrumental value, a means toward some other goal, rather than a value unto itself").

58. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 97 (1980) (Powell, J., concurring) (noting that the Fourteenth Amendment also protects expression and belief); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 480 (1995) (arguing that due process autonomy applies to right not to speak cases).

59. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 573 (1995) (finding it a rule of protection "under the First Amendment, that a speaker has the autonomy to choose the content of his own message").

60. *See, e.g.*, BAKER, *supra* note 31, at 52 ("[T]he first amendment values of self-fulfillment and popular participation in change emphasize the speech's *source* in the self, and make the choice of the speech by the self the crucial factor in justifying protection."); *see also* Blasi, *supra* note 38, at 1568 (noting that "liberty to express one's thoughts and to form them by unrestricted reading and listening is an essential attribute, it is said, of human autonomy—of what it means to be a self-directed person possessed of human dignity").

61. *See* FISS, *supra* note 7, at 2-3.

62. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) [hereinafter EMERSON, FREEDOM OF EXPRESSION]. In this sense, Emerson writes that:

> [F]reedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and

contrast to the marketplace of ideas, the autonomy principle considers the freedoms the First Amendment grants as ends unto themselves, promoting human intellectual fulfillment, rather than solely as means of promoting social change and growth.[63] Most proponents of this First Amendment principle thus distinguish it from the marketplace of ideas.[64]

Other First Amendment scholars define autonomy in terms of individual choice and emphasize self-determination.[65] In this context, a person is "sovereign in deciding what to believe and in weighing competing reasons for action. He must apply to these tasks his own canons of rationality, and must recognize the need to defend his beliefs and decisions in accordance with these canons."[66] Furthermore, an autonomous person is one who "cannot accept without independent consideration the judgment of others as to what he should believe or what he should do."[67] This notion of individual autonomy is not inconsistent with government regulation, but holds as its central tenet the idea that an autonomous individual is one who chooses when and how to submit to government authority.[68] Thus, the autonomy principle can be de-

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> potentialities as a human being. For the achievement of this self-realization the mind must be free. Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature.

Id.

63. *But see* FISS, *supra* note 7, at 83 (noting that "[t]he autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, as it might be in some moral code, but is rather a means to further the democratic values underlying the Bill of Rights").

64. *See* BAKER, *supra* note 31, at 24 ("This perspective, however, is quite different from that of the classic marketplace of ideas theory."); *see also* FISS, *supra* note 7, at 3 (noting that "[a] distinction is thus drawn between a libertarian and a democratic theory of speech. . . . The libertarian view—that the First Amendment is a protection of self-expression—makes its appeal to the individualistic ethos that so dominates our popular and political culture").

65. *See, e.g.*, SUNSTEIN, *supra* note 7, at 137-38 (characterizing one aspect of autonomy as simply "right—a recognition of individual dignity—to let people choose their own path"); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 216 (1972) ("An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do.").

66. Scanlon, *supra* note 65, at 215.

67. *Id.* at 216.

68. *Id.* ("An autonomous man may, if he believes the appropriate arguments, believe that the state has a distinctive right to command him . . . . What is essential to the person's remaining autonomous is that in any given case his mere recognition that a certain action is required by law does not settle the question of whether he will do it.").

fined in terms of individual choice or self-mastery, allowing individuals to be "authors of the narratives of their own lives."[69]

Last, in contrast with the marketplace of ideas principle, the autonomy theory allows and even encourages individuals to remain silent,[70] rather than promoting more speech as in the Millian[71] or American jurisprudential models.[72]

The autonomy view, that the First Amendment protects individual self-expression, therefore, conflicts with the theory of a First Amendment that protects speech as a means toward achieving self-government and which prizes individualistic values over collective ones.

C. The Marketplace of Ideas and Autonomy Principles in Right Not to Speak Case Law

This section begins discussion of the right not to speak cases and illustrates how these two First Amendment paradigms, the marketplace of ideas and autonomy/self-expression, function within each case. The autonomy and marketplace of ideas principles often conflict in right not to speak cases. The autonomy principles in these cases can be defined as those in which a speaker's interest lies either in silence or in freedom from forced association with an idea she finds repugnant.[73] Marketplace principles, on the other hand, serve the interests of those speakers who want to be able to speak freely; thus, the marketplace principle is the one that encourages more speech, enables democratic self-government, and prizes public or collective values over individual self-realization or self-expression.[74] In the discussion that follows, the argument that a case is decided based on marketplace principles means that the Court reached a result that would provide for more speech, rather than

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69. SUNSTEIN, *supra* note 7, at 138.

70. *See* BAKER, *supra* note 31, at 24 (noting that "[w]hat is important is not that everything worth saying be said . . . . [r]ather, the important concern is that society deny no one the right to speak").

71. *See supra* note 29 and accompanying text.

72. *See supra* notes 45-50 and accompanying text.

73. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 576 (1995) (observing that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised").

74. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (noting that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here").

upholding the right not to speak, which is identified more with an autonomy interest.

The first and still central articulation of the autonomy principle informing the right not to speak is found in *West Virginia State Board of Education v. Barnette*,[75] in which the Supreme Court invalidated a state law requiring elementary school students to salute the American Flag. The Court held that the Board of Education's actions "transcend[ed] constitutional limitations on [its] power and invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[76] The Court also invalidated the state's invasion on each child's "freedom . . . to be vocal or silent according to his conscience or personal inclination."[77] The Court concluded that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[78] Thus, in *Barnette* the negative free speech autonomy/self-expression values of choice, self-mastery and individual freedom of conscience, prevailed over affirmative marketplace of ideas principles. In this case, a decision based on marketplace of ideas principles would have let the Board of Education's regulation stand, and perhaps would have urged the children or families who were offended by the speech to counter it with more speech of their own.

In *Wooley v. Maynard*,[79] the Court continued to apply autonomy principles in the right not to speak context.[80] The plaintiffs, who brought suit challenging a New Hampshire law that required noncommercial vehicles to bear the state's motto, "Live Free or Die," on their license plates,[81] invoked their right not to speak under the First Amendment.[82] The Court found that New Hampshire could

75. 319 U.S. 624 (1943).

76. *Id.* at 642 (striking as unconstitutional a West Virginia Board of Education order requiring children in public schools to say the Pledge of Allegiance to the Flag).

77. *Id.* at 646 (Murphy, J., concurring).

78. *Id.* at 634.

79. 430 U.S. 705 (1977).

80. *See id.* at 715 (reasoning that the First Amendment invalidates state efforts to coerce private speech).

81. *See id.* at 707 (citing N.H. REV. STAT. ANN. § 263:1 (Supp. 1975)). The Court also noted that another New Hampshire statute made it a misdemeanor to "knowingly [obscure] the figures or letters on any number plate." *Id.* (citing N.H. REV. STAT. ANN. § 262:27(c) (Supp. 1975)).

82. *See Wooley*, 430 U.S. at 714 ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes

not compel private individuals to carry its motto, "Live Free or Die," on their family automobile's license plates.[83] "The First Amendment," the Court wrote, "protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[84] This reading of the First Amendment therefore values an individual, autonomy principle over a collective, marketplace of ideas theory. A marketplace of ideas reading of the same case would perhaps have encouraged the plaintiffs to counter the state's speech with their own.

In the years following *Barnette* and *Wooley*, the Supreme Court confronted the issue of the right not to speak in three cases involving the news media. In these cases, the Court balanced the right of the public to the free and unfettered exchange of ideas that the press promotes on the one hand, and the principles of editorial autonomy on the other.

In *Red Lion Broadcasting Co. v. FCC*,[85] the Court applied the marketplace of ideas as its principal First Amendment justification in unanimously upholding a right of reply statute requiring radio stations to supply airtime to political candidates who had been attacked by their opponents on the air.[86] The Court noted that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by government itself or a private licensee."[87] The right of reply in this case would further the "more speech" interest of the marketplace of ideas since it would enable more voices to be heard by the public.

Five years later, however, in *Miami Herald Publishing Co. v. Tornillo*,[88] on facts similar to *Red Lion*'s, the Court went in the other direction. A newspaper challenged a Florida statute requir-

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both the right to speak freely and the right to refrain from speaking at all." (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943))).

83. *See id.* at 717. The plaintiff in this case, a Jehovah's Witness, described his objection to New Hampshire's "Live Free or Die" motto thus: "Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions . . . . I believe that life is more precious than freedom." *Id.* at 717 n.2.

84. *Id.* at 715.

85. 395 U.S. 367 (1969).

86. *See id.* at 400-01.

87. *Id.* at 390 (citations omitted).

88. 418 U.S. 241 (1974) (striking as unconstitutional a Florida statute requiring newspapers to afford political candidates a right to reply to editorials that attack the candidate's personal character).

ing it to afford political candidates a right to reply to attacks on their "personal character or official record."[89] The Court invalidated the mandatory access statute.[90] In so doing, it rejected the marketplace of ideas argument proffered by the state,[91] and instead accepted the editorial autonomy argument of the newspaper.[92] The Court based its decision on editorial, not individual, autonomy, holding that the marketplace of ideas interest held out by the state in its mandatory right of reply statute could not defeat the newspaper's editorial autonomy interest in deciding what to print in its own pages.[93] The Court defined the marketplace interest in terms of the press' interest in unfettered freedom of information in the service of the public, noting that "[the First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[94]

Last in the line of media cases, in *Turner Broadcasting System Inc. v. FCC*,[95] a group of cable television operators brought suit challenging the constitutionality of a federal "must-carry" provision which required the cable networks to carry some local broadcast channels.[96] The Court swung back to a *Red Lion*-type rationale when it found the provisions constitutional.[97] It accepted a marketplace of ideas argument in noting an important governmental interest in "promoting widespread dissemination of information from a multiplicity of sources."[98] The Court also noted, however, that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself the ideas and beliefs deserving of expression, consideration, and adherence."[99] This opinion again expressed concern that autonomy not be in-

89. *Id.* at 244.

90. *See id.* at 257-58.

91. *See id.* at 257 ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." (citing Mills v. Alabama, 384 U.S. 214, 218 (1966))).

92. *See id.* at 258 (concluding that "[t]he Florida [right to reply] statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors").

93. *See id.*

94. *Id.* at 252 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)).

95. 512 U.S. 622 (1994) ("*TBS I*"), *aff'd on reh'g*, 520 U.S. 180 (1997) ("*TBS II*").

96. *See TBS II*, 520 U.S. at 180.

97. *See id.*

98. *Id.* at 189.

99. *TBS I*, 512 U.S. at 641 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 640-642 (1943)).

fringed, but this time in the wider context of cable television media.[100]

In *Abood v. Detroit Board of Education*,[101] associational freedom, another aspect of individual autonomy, prevailed over the marketplace interest asserted by a union.[102] In this case, the State of Michigan had enacted legislation permitting unions to exact dues from members that were used in part to fund a number of social and political activities that the plaintiff union members did not support.[103] The Court found the legislation unconstitutional, noting that, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state."[104] The Court accepted the "negative association" argument advanced by the union members protesting the dues on the grounds that they had been prohibited, "not from actively associating, but rather from refusing to associate" with the speech the union supported.[105]

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100. *See id.* at 627.

101. 431 U.S. 209 (1977).

102. *See id.* at 234-35.

103. *See id.* at 211.

104. *Id.* at 234-35. Similarly, in mandatory student activities' fees cases, the interests advanced by universities in support of the fees is often buttressed by marketplace of ideas values. *See, e.g.*, Carroll v. Blinken, 957 F.2d 991, 999 (2d Cir. 1992) (holding that a public university could constitutionally assess students an activities fee and noting that a valid interest advanced by the university was the stimulation of campus debate); *see also* cases cited *infra* note 105.

105. *Abood*, 431 U.S. at 234 ("The fact that appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."); *see also* Southworth v. Grebe, 151 F.3d 717 (1998), *cert. granted*, 67 U.S.L.W. 3496 (U.S. Mar. 29, 1999) (No. 98-1189) (finding that a public university's use of a portion of mandatory student activity fees to fund private organizations that engaged in political and ideological activities, speech, and advocacy violated free speech rights of students who objected to such funding); Keller v. State Bar, 496 U.S. 1 (1990) (holding that California State Bar's use of compulsory dues to finance political and ideological activities with which members disagreed violated their First Amendment right of free speech when such expenditures were not necessarily or reasonably incurred for purpose of regulating legal profession or improving quality of legal services). *But see* Glickman v. Wileman Bros. & Elliot, 521 U.S. 457 (1997) (upholding Secretary of Agriculture order requiring California fruit growers to pay dues to fund generic advertising); Lehnert v. Ferris Faculty Assoc., 500 U.S. 507 (1991) (finding that a union could constitutionally charge activities to dissenting employees if activities are "germane" to collective bargaining activity, are justified by government's interest in labor peace and avoiding "free riders," and do not add significantly to burdening of free speech inherent in allowance of agency or union shop).

Autonomy principles also prevailed in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*.[106] In this case, a privately owned utility, Pacific Gas, brought suit challenging a California Public Utilities Commission ("PUC") order that required Pacific Gas to carry the newsletter of a third party public interest group in its monthly billing statements.[107] The Court held the order unconstitutional, and found, based on autonomy principles,[108] that the PUC could not constitutionally dictate the content of Pacific Gas's speech.[109] The Supreme Court thus refused to sacrifice Pacific Gas's autonomy right to PUC's marketplace of ideas argument that having more speech available to the public always fulfills the First Amendment mandate.

The Court applied a similar analysis in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,[110] when it considered the claim of the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") to be included as marchers in Boston's St. Patrick's Day Parade.[111] The Court unanimously concluded that the speaker's choice of whether or not to voice views or opinions should remain with the speaker, and not the government.[112] Accordingly, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[113] The parade organizers therefore did not have to allow GLIB to join in the parade.[114] Furthermore, the Court reemphasized a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[115] The purpose was to "shield just those choices of

106. 475 U.S. 1 (1986).

107. *See id.* at 4.

108. *See id.* at 11 (noting that "[j]ust as the State is not free to 'tell a newspaper in advance what it can print and what it cannot,' the State is not free either to restrict [Pacific Gas's] speech to certain topics or views or to force [it] to respond to views that others may hold" (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 400 (1973) (Stewart, J., dissenting))).

109. *See id.*

110. 515 U.S. 557 (1995).

111. *See id.* at 559.

112. *See id.* at 575 ("[W]hatever the reason [to disagree with a certain point of view], it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

113. *Id.* at 576.

114. *See id.* at 580-81.

115. *Id.* at 573 (stating that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say" (quoting Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S 1, 16 (1986))).

content" that one decides are right or wrong according to individual conscience.[116]

In *PruneYard Shopping Center v. Robins*,[117] however, the Court took the opposite tack, and based its decision on marketplace principles rather than autonomy ones.[118] A California state constitutional provision provided that "[e]very person may freely speak, write and publish his or her sentiments on all subjects."[119] The Court held that, under this state-level free speech provision, the plaintiff did not have the right to exclude from its private property a group of high school students who had set up a table to petition and pass out pamphlets soliciting opposition to an anti-Zionist United Nations resolution.[120] The speakers' positive right to speak was more compelling in this instance than the shopping center's right not to speak or to be associated with the speech of the students.[121] The Court distinguished the holding in *Wooley* by observing that the message in that case was the government's own (New Hampshire's "Live Free or Die" motto).[122] In contrast, the message in *PruneYard* was that of other private speakers and there was "no danger of governmental discrimination for or against a particular message."[123] Thus, the right of the shopping center not to speak in *PruneYard* was outweighed by the marketplace principle that had motivated the state constitutional provision, namely, to strengthen affirmative First Amendment values and encourage more debate.[124]

As these cases illustrate, two First Amendment principles have achieved preeminence in American legal theory and jurisprudence in the last century: the marketplace of ideas and autonomy/self-expression. The contrast between these two paradigms is the source of the tension behind right not to speak cases. The marketplace of ideas, on the one hand, encourages more individuals to speak, be heard and engage in the free trade of ideas. The autonomy interest, on the other, allows individual speakers to either remain silent, or to not be associated with or foster speech they do

116. *Id.* at 574.
117. 447 U.S. 74 (1980).
118. *See id.* at 87-89 (rejecting the shopping center's contention that it was being compelled to affirm a belief in any position that the government had prescribed).
119. *Id.* at 79-80 n.2.
120. *See id.* at 77.
121. *See id.* at 88.
122. *See id.* at 87 (observing that in *Wooley* the message being prescribed was the government's own).
123. *Id.*
124. *See id.* at 88.

not support. In these cases, with the exception of *Barnette* and *Wooley*, the right not to speak is usually buttressed by autonomy concerns, while the positive right to speak is often justified by the marketplace of ideas principle, urging more speech.

II. RIGHT NOT TO SPEAK CASES AND THE CONFLICT WITH GOVERNMENT ACCESS STATUTES

This Part first examines present resolution of right not to speak cases, and, second, illustrates the conflict between these two speech principles created by access statutes in each case.

A. Current Method of Resolving Right Not to Speak Cases

The Supreme Court currently resolves right not to speak cases by determining whether certain factors and risks are present in each case, weighing these and balancing the burden on one speaker against the right of the other not to speak.

The Court isolates and weighs several factors in deciding right not to speak cases. First, it examines whether there is a "ventriloquism" problem, the probability that the speech in question is likely to be taken as that of the speaker, or the danger that it will be misattributed to another speaker.[125] Related to this point is the question of whether there is a practical possibility of disclaimer, that is, whether a speaker who desires that the speech not be mistakenly attributed to her can easily disclaim it.[126] Also related to the ventriloquism problem is the issue of whether avenues of dissent are open to the speaker.[127] A second factor is whether the speaker is a natural person or a corporation.[128] Third, the nature

125. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 577 (1995) ("Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade . . . the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.").

126. *See id.* at 576 (considering whether or not "there is [a] customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants").

127. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (taking into consideration that "[owners of the shopping center] can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law").

128. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 34-36 (1986) (Rehnquist, J., dissenting) (noting that "[Pacific Gas] is not an individual or a newspaper publisher; it is a regulated utility. The insistence on treating identically for

of the property interest in the speech and the forum in which it occurs, whether private or public, also affects the Court's decision.[129] Fourth, in cases involving the media in particular, the Court considers the degree of editorial control traditionally allotted to the speaker.[130]

Two threshold issues should be noted here. The first is that all cases discussed in this section are ones in which the government has attempted, through access-broadening statutes or state-level First Amendment provisions, to expand the marketplace of ideas by making more speech forums available to the public. The second is that the speakers in each case are private individuals and not government actors.

1. *The Ventriloquism Problem, the Risk of Misattribution and the Possibility of Disclaimer*

A risk of ventriloquism occurs when there is potential for a message to be misattributed to another speaker because of mistaken association with the speech. Often, the possibility of disclaiming the speech can alleviate the risk of ventriloquism. Accordingly, some right not to speak cases carry a relatively high risk of ventriloquism and a correspondingly low possibility or feasibility of disclaimer. For example, the ventriloquism problem in *Abood* lay in the central claim of the dissenting union members.[131] They invoked their right of association to avoid "compulsory subsidization of ideological activity"[132] with which they disagreed. The union members had no opportunity to disclaim except through their lawsuit, illustrating their reluctance to foster speech they did not support.

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constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same").

129. *See, e.g.*, *PruneYard*, 447 U.S. at 87 (noting that "the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please").

130. *See, e.g.*, Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622 (1994); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

131. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) (noting that "[t]he fact that the [union members] are compelled to make, rather than prohibited from making, contributions for political purposes works . . . an infringement of their constitutional rights").

132. *Id.* at 237; *see also* Southworth v. Grebe, 151 F.3d 717, 729 (7th Cir. 1998) (discussing *Abood* and compelled subsidization and concluding that while hateful speech may have "a place in our society [the] Constitution does not mandate that citizens pay for it").

Ventriloquism problems also arise in false, or mistaken, association cases. In *Pacific Gas*, for example, the Court did not explicitly consider the ventriloquism problem, but found that the PUC's order[133] impermissibly burdened Pacific Gas's right not to speak under the same kind of right of association argument that prevailed in *Abood*.[134] Under PUC's orders, the privately-owned utility would be forced to foster speech it did not support.[135] The Court held this burden on Pacific Gas unconstitutional partly because the privately-held utility was "required to carry speech with which it disagreed, and might well feel compelled to reply or limit its own speech in response."[136] Thus, the Court concluded, the access order impermissibly required Pacific Gas to associate with speech it did not support.[137] The Court further found that this kind of forced dissemination and association with "potentially hostile views" ran the risk of forcing Pacific Gas to "speak where it would prefer to remain silent."[138]

In *Hurley*, the Court found a high risk of ventriloquism and a low possibility of disclaimer.[139] Hence, the parade organizers, who received funding from the City of Boston, had a right to exclude GLIB's expressive marching.[140] Forcing the parade to include GLIB's message therefore presented an unconstitutional infringement on its autonomy interest.[141] The Court recognized a significant ventriloquism problem in *Hurley* because the parade was made up of a variety of messages, each contributing to a "common theme."[142] As such, the Court found that the "likelihood of misattribution"[143] was high because the "overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."[144] Similarly, the possibility of a disclaimer here was very low because it

133. *See supra* note 107 and accompanying text.

134. *See Abood*, 431 U.S. at 234.

135. Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 11-12 (1986).

136. *Id.* at 11 n.7.

137. *Id.* at 12.

138. *Id.* at 18.

139. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 577 (1995).

140. *Id.* at 576 (observing that "when dissemination of a view contrary to one's own is forced upon a speaker . . . [her] right to autonomy over the message is compromised").

141. *See id.* at 576.

142. *Id.*

143. *Id.* at 577.

144. *Id.*

was impractical. In fact, the Court specifically noted that "such disclaimers would be quite curious in a moving parade."[145]

In contrast, the *PruneYard* Court found, without explanation, that the risk of misattribution of the message was low,[146] presumably because the shopping center was open to the public and therefore each member of the public would naturally assume that views expressed by a table of teenagers distributing leaflets and gathering signatures were not those of the shopping center. The Court also noted the high possibility of a disclaimer or disavowal of the message by the shopping center, so that it would not be mistakenly imputed to the owner.[147] Thus, it would be reasonably feasible for a shopping center to put up signs disassociating its views from those expressed by the public.[148]

Similarly, in the *TBS* cases, the Court found that because it was usual for broadcasters to disclaim any "identity of viewpoint" between the station and the channels using the facility, there was "little risk" that audiences would mistakenly assume that the opinions expressed by the stations were those of the broadcasters.[149] The Court also noted, however, that cable networks traditionally and historically served as "conduits" and therefore, there was a low risk of ventriloquism.[150]

2. *Identity of the Speaker: Corporation or Natural Person*

Another important factor the Court considers in resolving right not to speak cases is the identity of the speaker, whether a corporation or natural person. As a general proposition, most jurists agree that corporations have positive free speech rights—that is, as corporate entities, they are entitled to speak with one corporate voice according to their preferences.[151] Justices disagree, however, on the issue of whether corporations should be accorded the same au-

145. *Id.*

146. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) ("[T]he views expressed by members of the public . . . will not likely be identified with those of the owner.").

147. *See id.* at 87.

148. *See id.*

149. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994).

150. *Id.*

151. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978) (noting that "[w]e find no support in the First or Fourteenth Amendments, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses protection simply because its source is a corporation . . . .").

tonomy rights as natural people or associations.[152] Justice Powell notes that, in *Pacific Gas*, for example, "speech does not lose its protection because of the corporate identity of the speaker."[153] Powell found that for both positive and negative aspects of speech, corporate speakers are protected by the First Amendment.[154] Justice Rehnquist's dissent in the same case, however, argued that a corporate speaker's negative free speech right of autonomy should not be protected.[155] While acknowledging that the affirmative corporate right to speak is protected by the First Amendment,[156] Rehnquist argued that protection does not extend to the right not to speak.[157] He reasoned that the right not to speak is informed by autonomy principles; because corporations have no interest in autonomy or self-expression in the way natural people do, they have no corresponding First Amendment right not to speak.[158]

Rehnquist contended that this argument was even more persuasive in the case of *Pacific Gas* because the utility company was a

152. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian, and Bisexual Group, 515 U.S. 557, 573-74 (1995); Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 8 (1986). *But see Pacific Gas*, 475 U.S. at 34 (Rehnquist, J., dissenting).

153. *See Pacific Gas*, 475 U.S at 16.

154. *See id.* ("Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next. It is therefore incorrect to say . . . that our decisions do not limit the government's authority to compel speech by corporations.").

155. *See id.* at 33-34 (1986) (Rehnquist, J., dissenting).

156. *Bellotti*, 435 U.S. at 765 (holding invalid under the First Amendment a Massachusetts criminal statute prohibiting banks or business corporations from making contributions or expenditures to influence voters). In his *Pacific Gas* dissent, Justice Rehnquist noted that *Bellotti* held that "the First Amendment prohibits the government from *directly* suppressing the affirmative speech of corporations." *Pacific Gas*, 475 U.S. at 27 (Rehnquist, J., dissenting).

157. *See Pacific Gas*, 475 U.S. at 33 ("In extending positive free speech rights to corporations [in *Bellotti*], this court drew a distinction between the First Amendment rights of corporations and those of natural persons. It recognized that corporate free speech rights do not arise because corporations, like individuals, have any interest in self-expression." (citation omitted)).

158. *See id.* at 33-34 (Rehnquist, J., dissenting). Justice Rehnquist observes that:

> Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an "intellect" or "mind" for freedom of conscience purposes is to confuse metaphor with reality . . . . The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from this "broad public forum" purpose of the First Amendment.

Id.; *see also* Greene, *supra* note 58, at 482 (arguing that autonomy rights are personal and thus should not extend to corporate entities).

regulated monopoly,[159] and thus had given up its autonomy interest to the authority that governed it. He therefore concluded that autonomy rights are "purely personal" extending only to individuals and perhaps to newspapers.[160]

3. *Nature of the Property Interest: Private or Public*

In resolving right not to speak cases, the Court also examines the nature of the property interest at stake in the litigation. In *PruneYard*, for example, the nature of the property interest was a critical factor in the Court's decision-making.[161] In contrast to the family car in *Wooley*, the Court found in *PruneYard* that the shopping center was open to members of the public "to come and go as they please"[162] and had thus acquired a public character in contrast to the private nature of the Maynard's personal property.[163] In his concurrence, Justice Powell argued that merely because property in a given situation may be public in character, the property owner did not surrender his right to decline to foster speech with which he did not agree.[164] In this sense, Powell found no meaningful distinction between the property interest advanced by the Maynards in their family car and that asserted by the shopping center owner.[165] Powell argued that "'[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee

159. *See Pacific Gas*, 475 U.S. at 34 (Rehnquist, J., dissenting) ("Any claim [Pacific Gas] may have had to a sphere of corporate autonomy was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.").

160. *Id. But see* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 574 (1995) (observing that "the rule's [that the speaker has the right to tailor the speech] benefit [is not] restricted to the press, being enjoyed by business corporations generally"); *Pacific Gas*, 475 U.S. at 8 (noting that "[t]he identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (citations omitted)).

161. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80-85 (1980).

162. *Id.* at 87.

163. *See id.*; *see also Pacific Gas*, 475 U.S. at 25 (Marshall, J., concurring) (finding that the incursion onto the PruneYard's property interest in that case was "slight" while the intrusion on Pacific Gas's property interest was greater). *But see PruneYard*, 447 U.S. at 90 (Marshall, J., concurring) (arguing that because of the prominence of shopping mall culture in this country that this case is similar to others in which shopping malls were regarded as "effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and parks"); Brennan, *State Constitutions*, *supra* note 7, at 496, n.45.

164. *See PruneYard*, 447 U.S. at 97 (Powell, J., concurring).

165. *See id.* at 97-98 n.1 ("property [does not] lose its private character merely because the public is generally invited to use it for designated purposes" (citations omitted)).

the concomitant right to decline to foster such concepts' . . . . This principle on its face protects a person who refuses to allow use of his property as a marketplace for the ideas of others."[166]

4. *Editorial Autonomy: Media Cases*

Three cases in the Supreme Court's right not to speak jurisprudence concern the media and the constitutional validity of enforced "right of access" statutes under federal, state or local laws.[167] In these cases, the Court has looked to factors distinct from those in other right not to speak cases. These include editorial autonomy,[168] spectrum scarcity[169] and monopoly concerns caused by spectrum scarcity.[170] For example, in *Red Lion* the editorial autonomy argument failed when a radio broadcaster argued that broadcasters would be "irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective" under the right of reply statute.[171] Spectrum scarcity was an important factor in that case[172] and led the Court to find the marketplace aspect more important than the autonomy right not to speak argument put forth by the radio, because there was a limited quantity of broadcasting frequencies, thus limiting speakers' access to these media.[173]

In *Tornillo*, concern for editorial autonomy prevailed over fears of monopoly in the Court's decision finding an enforced right of

166. *See id.* (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

167. *See* Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 652 (1994) (upholding as constitutional, in the cable industry context, "must-carry" provisions which required cable television channels to carry broadcast television channels); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 241 (1974) (finding unconstitutional a Florida criminal statute requiring newspapers which attacked political candidates to allow free space for reply); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400-01 (1969) (upholding as constitutional a federal law which required a radio station to provide airtime for response to personal attacks).

168. *See Tornillo*, 418 U.S. at 261 (White, J., concurring) ("[T]he First Amendment [never] permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials.").

169. Spectrum scarcity is a peculiar physical characteristic of radio that renders it more regulable because of the limited number of radio frequencies, while there are potentially unlimited newspaper and cable television outlets. *See Red Lion*, 395 U.S. at 398 ("The radio spectrum has become so congested that at times it has been necessary to suspend new applications.").

170. *See id.* at 389.

171. *Id.* at 393.

172. *See id.* at 396-401.

173. *See id.* at 380 ("Th[e] mandate to the FCC to assure that broadcasters operate in the public interest is a broad one . . . .").

access provision unconstitutional.[174] In this case, the editorial autonomy argument prevailed as it had not in *Red Lion*.[175] Evaluating a right of reply statute,[176] the Court reasoned that if the statute were upheld, newspaper editors might "conclude that the safe course is to avoid controversy . . . . Therefore . . . political and electoral coverage would be blunted or reduced."[177] Thus, the Court found that the Florida statute failed to "clear the barriers of the First Amendment because of its intrusion into the function of editors."[178] Editorial autonomy is analogous to individual autonomy in this context, in the sense that editorial decision-making must be protected under the First Amendment from government intrusion lest editorial discretion be chilled.

B. Government Access Statutes and the Conflict in Right Not to Speak Cases

This section examines the phenomenon of government access statutes in right not to speak cases. It observes that, with the exception of *Barnette* and *Wooley*, all the cases present instances of some form of access statute. These access statutes reflect a legislative deliberation by federal, state or local governments to act affirmatively to expand opportunities for free speech and debate. As such, they fulfill the positive marketplace of ideas mandate to open more speech forums, either for truth-seeking or for democratic self-government purposes.

These access statutes, this Note argues, lie at the root of the conflict between the two First Amendment principles discussed above: the marketplace of ideas and the autonomy principles.[179] This conflict emerges from the tension between the government's twin goals in these cases: to both respect negative autonomy principles and also to expand access to speech forums and facilitate robust debate through affirmative free speech marketplace principles. Accordingly, in requiring or allowing one entity to give access to a second one in the way these access provisions require, the statutes set up an opposition between the positive right to speak in one speaker, and the negative right not to speak in another. Thus, the

174. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256-57 (1974).

175. *See id.* at 261 (White, J., concurring) ("[T]his law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor.").

176. *See supra* note 167.

177. *Tornillo*, 418 U.S. at 257.

178. *Id.* at 258.

179. *See supra* Part I.

conflict between the two speech rights, one informed by positive marketplace principles, and the other by negative autonomy ones, is created by the access provisions present in each case.

Before examining this conflict in the law, a critical distinction, the one between government promotion of speech, on the one hand, and government participation in speech markets, on the other, should first be drawn.

1. *The Distinction Between Government Promotion and Participation*

The conflict that access statutes create between the autonomy principle and the marketplace of ideas is not problematic when the government is an active participant in the speech forum rather than a mere facilitator or promoter of speech. Whether the government acts as participant in a speech market or as a mere promoter is the essence of the distinction between cases like *Wooley* and *Barnette*, on the one hand, and the right not to speak cases that remain, on the other. The distinction between government "promotion" and "participation" is therefore critical to this analysis.[180] While both *Barnette* and *Wooley* are decided on autonomy/self-expression principles, and uphold a right not to speak they are not access statute cases because the government has not opened more forums for the speech of other private parties. Rather, it has sought to use the property of private individuals to promulgate its *own* message.[181] These cases therefore present examples of government participation: instances where the government seeks to enter the speech market by coercing unwilling private citizens to voice its sentiments.

Government promotion of speech, on the other hand, involves an effort on the part of state or local governments to create more opportunities for speech, make more speech forums available to more speakers and generally fulfill the positive marketplace of ideas mandate of more speech and robust public debate. Access provisions facilitate more speech in the marketplace of ideas by,

180. *See* Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 799 (1981) [hereinafter Emerson, *Affirmative Side*].

181. *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977) ("New Hampshire's statute in effect requires that [the plaintiffs] use their private property as a 'mobile billboard' for the State's ideological message — or suffer a penalty . . . ."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

for example, opening more speech forums or by legislating above the constitutional minimum prescribed by the federal First Amendment provision.[182] Far from discouraging this type of activist legislation, many Justices have applauded it as a "healthy trend of affording state constitutional provisions a more expansive interpretation than [the Supreme] Court has given to the Federal Constitution."[183] As argued below,[184] government promotion of speech in the form of access statutes implicates the conflict in right not to speak cases *after Barnette* and *Wooley*.

(a) Barnette *and* Wooley*: Government Participation in Speech Markets*

In both *Barnette* and *Wooley*, only one private speaker's interest is at stake.[185] In both cases, it is the government's message that is imposed on the reluctant speakers. Simply put, the government in these cases has dictated the required speech,[186] thereby engaging in speech itself rather than merely promoting it. Accordingly, these cases involve no positive speech right,[187] only the negative right not to speak of the private speaker. Thus, these two cases prove useful to this analysis only insofar as they highlight right not to speak autonomy and illustrate how important this "sphere of intellect and

182. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (bringing suit under a California constitutional provision protecting speech and petitioning); *Tornillo*, 418 U.S. at 241 (bringing suit under a Florida statute requiring newspapers to afford political candidates a right to reply to editorials attacking the candidate's personal character); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (bringing suit under an FCC provision which required radio stations to provide "equal time" for response to personal attacks); *see also* Brennan, *State Constitutions*, *supra* note 7, at 495 ("Of late, however, more and more state courts are construing state constitutional counterparts of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.").

183. *PruneYard*, 447 U.S. at 91 (Marshall, J., concurring); *see also id.* at 85 (noting that the State of California had an "interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution"); Brennan, *State Constitutions*, *supra* note 7, at 491 ("The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed.").

184. *See infra* Part II.B.1.a.

185. *Wooley*, 430 U.S. at 713 (citing statement of Plaintiff George Maynard: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent.").

186. *See PruneYard*, 447 U.S. at 87 (interpreting *Wooley* as "a case in which the government itself prescribed the message [and] required it to be displayed openly on [Maynard's] personal property").

187. For the purposes of this discussion, this analysis assumes that the government has no affirmative speech right in this context. A full discussion of whether, and when, the government does have this right is beyond the scope of this Note.

spirit"[188] is within the Court's First Amendment principle. They are analytically distinct from the remaining right not to speak cases and illustrate the difference between government participation in speech (*Barnette* and *Wooley*) and government promotion of speech markets and forums (those cases that remain).

(b) Government Access Statutes: Government Promotion of Speech

Each right not to speak case decided after *Barnette* and *Wooley* involves an instance of the federal, state or local government either requiring or allowing more speech forums to be opened through an access statute. Furthermore, in each case, the access statute triggers the cause of action.

In *PruneYard*,[189] the access statute took the form of a California state constitutional provision providing that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of the right."[190] In *Red Lion*,[191] the FCC imposed a fairness doctrine on radio broadcasters that required radio stations to send a "tape, transcript, or summary of the broadcast to [the opposing party] and [to] offer [him or her] reply time."[192] The Court called the FCC regulations "affirmative obligations,"[193] and noted that broadcasters must operate in the public interest.[194] In *Tornillo*, a Florida right of reply statute provided that "if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has a right to demand that the newspaper print, free of cost . . . any reply the candidate may make to the newspaper's charges."[195] In the *TBS* cases, the access statute that sparked the conflict was the FCC's must-carry provision requiring cable television operators to carry local broadcast stations on their cable networks.[196] Similarly, in *Abood* the State of Michigan had enacted access legislation permitting unions and government employers to agree to "Agency Shop Clauses," which exacted dues from mem-

188. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
189. 447 U.S. 74 (1980).
190. *Id.* at 79 n.2.
191. 395 U.S. 367 (1969).
192. *Id.* at 372.
193. *Id.* at 378.
194. *See id.* at 379-80 ("The [FCC] is specifically directed to consider the demands of the public interest in the course of granting licenses and renewing them[.]").
195. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 244 (1974).
196. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 622 (1994).

bers and which were in turn used to support a number of different activities.[197] Likewise, in *Pacific Gas* the statute granting access was the California Public Utilities Commission's order that Pacific Gas & Electric, a private utility, place the newsletter of a third party public interest group in its own billing envelopes.[198] Last, in *Hurley*, GLIB sought access to Boston's St. Patrick's Day Parade under a Massachusetts public accommodations law.[199]

These are examples of access statutes, by which the federal, state or local government goes beyond the First Amendment's negative prohibition against encroachment on protected free speech rights, and acts affirmatively in expanding opportunities for speech rights, opening up more speech forums, and encouraging debate. Generally these statutes fulfill the positive marketplace of ideas mandate that debate be "uninhibited, robust, and wide-open."[200] These state statutes also reinforce the marketplace of ideas notion that more speech, never less, is a remedy for all free speech ills.[201] Furthermore, these acts are taken in the name of affirmative marketplace values because access statutes always increase opportunities for public speech and debate.[202]

While many scholars and courts applaud and encourage these statutes,[203] many also have recognized the problematic aspects of access legislation in the context of a constitution made up of negative liberties.[204] The infringement of negative autonomy rights in right not to speak cases, this Note argues, is a manifestation of this problematic aspect of a positive liberty approach to our negative Constitution. Before an examination of the conflict this approach causes in right not to speak cases, however, it is instructive to review the fundamental political theory underlying positive and negative liberty and its application in American legal discourse.

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197. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 213 (1977).

198. *See* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 1 (1986).

199. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 575 (1995). A public accommodations law like the one in *Hurley* has an equal protection aspect to it, when contrasted with a First Amendment provision or a right to reply statute; however, as the Court put it, "once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 573.

200. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

201. *See supra* notes 46-50 and accompanying text.

202. *See supra* note 194; *see also* Fiss, *supra* note 7, at 18-19 (noting that speech regulation that tries to "preserve the fullness of debate" should be allowed, since it seeks to "further the democratic values that underlie the First Amendment itself").

203. *See generally* Brennan, *State Constitutions*, *supra* note 7.

204. *See infra* Part II.3.

2. *Positive and Negative Liberty*

The question of whether government access legislation is permissible under the First Amendment is essentially one of positive and negative liberty, a theory that recognizes that liberty has two fundamental aspects: "freedom to" and "freedom from."[205] This dual aspect of liberty is central to the question of government power and the state's ability to compel individuals:

> The first of these political senses of freedom or liberty[,] which I shall call the 'negative' sense, is involved in the answer to the question 'What is the area within which the subject—a person or group of persons—is or should be left to do or be what he is able to do or be without interference of other persons.' The second, which I shall call the positive sense, is involved in the answer to the question 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'[206]

American jurists have generally recognized that the Constitution is a source of negative and not positive liberties.[207] The Supreme Court has also recognized that the Constitution envisioned by the Founders was one of non-interference, founded on principles of *laissez-faire*.[208] Some legal scholars, however, have argued that the First Amendment in particular is a source of positive as well as negative liberties.[209] These positive liberty interpretations of the First Amendment derive from the marketplace of ideas princi-

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205. *See generally* Isaiah Berlin, *Two Concepts of Liberty*, *reprinted in* FOUR ESSAYS ON LIBERTY (1958).

206. *Id.* at 121-22.

207. *See, e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 204 (1989) (Brennan, J., dissenting) ("No one . . . has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties . . . . The Court's baseline is the absence of positive rights in the Constitution.").

208. For example, the Court in *Barnette* has noted that,

> [t]hese principles [those embodied in the Bill of Rights] grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639-40 (1943).

209. *See, e.g.*, SUNSTEIN, *supra* note 7, at 47 (observing that "the First Amendment . . . is not entirely a negative right. It has positive dimensions as well. Those positive dimensions consist of a command to government to take steps to ensure that the system of free expression is not violated by legal rules giving too much authority over speech to private people."); Emerson, *Affirmative Side*, *supra* note 180 (arguing that "[t]raditionally, the first amendment, like other provisions of the Bill of Rights, has operated primarily as a negative force in maintaining the system of freedom of expression. It has served to prevent the government from prohibiting . . . speech or

ple.[210] The First Amendment, in addition to prohibiting government from placing impermissible restraints on speech, also can be interpreted to require or enable the government to affirmatively create and maintain open speech forums.[211] It therefore can be read to contain not only a negative prohibition against government interference, but also an affirmative mandate or capacity to establish "essential preconditions for collective self-government by making certain that all sides are presented to the public."[212] Similarly, other jurists have concluded that the government's role in promoting this kind of free and open debate consists not merely in a negative "freedom from" interference, but also in affirmative "positive government acts designed to furnish the preconditions for autonomy."[213] In this sense, the positive "more speech" mandate of the First Amendment is used as a sword to ensure that more speech is available in the marketplace of ideas.[214] The other side of the coin, however, shields a speaker, enabling her to withhold her speech from the marketplace if she so desires. Government access statutes emerge, therefore, when the government, by either requiring or allowing a private actor to foster speech, seeks to create more speech forums in the name of the marketplace of ideas.[215]

These government access statutes therefore emerge from affirmative "penumbras" in the ordinarily negative prohibition of the First Amendment. In this context the historical role of the govern-

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other forms of communication . . . . There is growing concern now, however, with the affirmative side of the first amendment.").

210. *See* FISS, *supra* note 7, at 18 (noting that "[t]he state, moreover, is honoring those claims [of citizen groups for an opportunity to participate in public debate] not because of their intrinsic value or to further self-expressive interest but only as a way of furthering the democratic process. The state is trying to protect the interest of the audience—the citizenry at large—in hearing a full and open debate on issues of public importance.").

211. *See id.*

212. *Id.*

213. SUNSTEIN, *supra* note 7, at 138.

214. *See, e.g.*, Miami Herald Publ'g v. Tornillo, 418 U.S. 241, 251 (1974) ("Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation").

215. As an interesting semantic note in this context, it is instructive to observe that many state-level First Amendment provisions (examples of government access statutes) are positively worded, in contrast to the negative wording of the Federal Constitution's First Amendment prohibition against "abridging the freedom of speech." U.S. CONST. amend. I. *See* Emerson, *Affirmative Side*, *supra* note 180, at 797. *See also, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77 n.2 (1980) (bringing suit under a State of Michigan constitutional provision granting each citizen the right to "freely speak, write, and publish his or her sentiments on all subjects").

ment as a danger to be guarded against shifts: "the traditional framework rests upon the old liberal idea that the state is the natural enemy of freedom, [but] now we are being asked to imagine the state as the friend of freedom."[216]

3. *Government Access Statutes in the Right Not to Speak Context*

Imagining the state as the "friend" of free speech, however, is not without attendant problems. As one scholar has noted, positive governmental intervention in the First Amendment has a "decided tendency" to aggravate "distortions in the system."[217] Foremost among these distortions is the creation of a conflict in right not to speak cases between positive speech rights, grounded in the marketplace of ideas, and negative ones, grounded in autonomy. As Justice Powell, concurring in *PruneYard* observed, "state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions."[218]

These kinds of "questions" arise because in many instances a private speaker who would rather remain silent, or not run the ventriloquism risk of being associated with speech she does not support, is burdened either by speech mistakenly imputed to her (the ventriloquism problem) or by a pressure to respond. In *PruneYard*, for example, the government access statute was a state First Amendment provision.[219] The positive First Amendment right to speak was asserted in the name of the marketplace of ideas, which would encourage more speech in this case by allowing the students to petition and thus benefit the shoppers who heard the speech.[220] The negative autonomy right, on the other hand, was that of the owner of the shopping center, protesting the use of his private property for promulgation of someone else's message.[221] His autonomy was threatened not only by the risk of the students' message being misattributed to him, but also by the pressure to respond that being compelled to carry the message imposed. The state's affirmative legislation, the "essential precondi-

216. FISS, *supra* note 7, at 19.

217. Emerson, *Affirmative Side*, *supra* note 180, at 797.

218. *PruneYard*, 447 U.S. at 97 (Powell, J., concurring).

219. *See id.* at 79-80 n.2 ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." (quoting CAL. CONST. art. I, § 2)).

220. *See id.* at 90-92 (Marshall, J., concurring).

221. *See id.* at 85-87.

tion for self-government," therefore created the conflict between marketplace and autonomy principles that animates the case.[222]

The same two First Amendment principles were in conflict in *Pacific Gas* where PUC's access requirement ordered Pacific Gas to place TURN's newsletter in its billing envelopes.[223] Here the positive marketplace interest in expanding speech forums pertained to PUC, and through it, to TURN.[224] PUC had an interest in creating more speech in the marketplace, and TURN had an interest in promulgating its own message.[225] Pacific Gas, relying on autonomy principles, brought suit to defend its negative autonomy right not to be associated with speech it found objectionable.[226]

Last, in *Hurley*, the marketplace of ideas and the autonomy interest conflicted in the context of a positive use of the Massachusetts public accommodations law.[227] GLIB, which wanted to march as part of Boston's St. Patrick's Day Parade, asserted the marketplace interest in robust debate.[228] On the other side, the Veteran's Council that organized the parade asserted its autonomy interest in the right not to speak or be compelled to incorporate a message in its private parade with which it did not agree.[229] The Court decided in favor of the Veteran's Council on autonomy grounds, not-

222. *See id.* at 98 (Powell, J., concurring). Indeed, as Justice Powell phrased it, "even when no particular message is mandated by the State, First Amendment interests are affected by state action that forces a property owner to admit third-party speakers. In many situations, a right of access is no less intrusive than speech compelled by the State itself." *Id.*

223. *See* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 5 (1986).

224. *See id.* at 8 (noting that the Court had previously overturned statutes in which "the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed").

225. *See id.* at 6-8.

226. *See id.* at 11 (observing that "the State is not free either to restrict [Pacific Gas's] speech to certain topics or views or to force [it] to respond to views that others may hold" (citations omitted)).

227. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 561 (1995). The law prohibits "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to , or treatment in any place of public accommodation, resort or amusement" MASS. GEN. LAWS ch. 272, § 98 (1992).

228. *See Hurley*, 515 U.S. at 570 (noting that "[GLIB's] participation as a unit in the parade was . . . expressive. GLIB was formed for the very purpose of marching in it . . . in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade").

229. *See id.* at 574 (observing that "[the Parade's] claim to the benefit of this principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive").

ing that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[230]

This case, however, does not involve a government access statute like, for example, the state-level First Amendment provision in *PruneYard*; rather, the government access in this case was a Massachusetts public accommodations law, enacted after the Civil War to ensure equal access to public accommodations without regard to race.[231] Interestingly, the *Hurley* Court found that GLIB's use of the public accommodations law "had the effect of declaring the [Veteran Council's] speech itself to be the public accommodation."[232] The Court refused to accept this use of the public accommodations law as an access statute for First Amendment purposes.[233] It found instead that this use violated the Parade organizer's right not to speak, noting that "it boils down to the choice of a speaker not to propound a particular point of view."[234]

Right not to speak cases thus illustrate the conflict between marketplace principles and autonomy ones occasioned by government access statutes. In order to strike an appropriate balance of positive and negative speech interests, the remaining part of this Note argues, as a threshold matter, that violation of the right not to speak triggers the First Amendment and that the right therefore deserves First Amendment protection. This Note concludes by suggesting methods to avoid some constitutional dangers that government access legislation can create, while still encouraging this kind of access-widening legislation to promote more speech in the marketplace of ideas.

III. FUTURE RESOLUTION OF RIGHT NOT TO SPEAK CASES

Because a conflict exists between affirmative and negative free speech rights in the context of government access statutes, suggestions for resolution must reconcile these interests and not infringe either the affirmative or negative free speech rights of any one

230. *Id.* at 576.

231. *See id.* at 571. The scope of the law was later broadened to prohibit discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation . . . in the admission of any person to, or treatment in any place of public accommodation, resort or amusement." *Id.* at 572 (citing MASS. GEN. LAWS ch. 272, § 98).

232. *Id.* at 573.

233. *See id.*

234. *Id.* at 575.

speaker. This Part proposes three methods to reconcile both interests, not infringe on negative autonomy interests, and still allow government access provisions. Before examination of these methods, however, this section first seeks to dispel an objection and address a fundamental premise of right not to speak doctrine, namely, that compelled speech, by infringing on an autonomy right, triggers First Amendment protection.

A. Compelled Speech Always Triggers the First Amendment

When the government acts to broaden First Amendment liberties, it must be sensitive to the autonomy rights of those who wish not to speak or to have their property used to foster speech with which they do not agree. This Note has argued thus far that this conflict between positive and negative First Amendment values is especially apparent in the right not to speak area.[235] This argument rests, however, on the premise that compelling a speaker to "mouth" words she does not agree with or with which she does not want to associate always triggers First Amendment protection. The argument that certain kinds of compelled speech do not trigger First Amendment protection, as long as certain conditions surrounding the speech are met, has been made by Abner S. Greene.[236]

Professor Greene's argument proceeds as follows: the Free Speech Clause of the First Amendment covers both speech and certain acts that are deemed "expressive."[237] For an act to be expressive in this context, it must communicate to the reasonable observer some aspect of the speaker's "internal mental state, such as beliefs, attitudes, or convictions."[238] Within this framework, the right not to speak is the right not to reveal one's "internal mental state,"[239] or, put differently, the right not to "share with others what is 'on [one's] mind.'"[240] Greene reasons, however, that not all acts that involve speech require expression of the speaker's mind; that is, a speaker could be compelled by law to speak in the same way that she is compelled to use a left turn signal when turning.[241] Greene concludes that whether or not the speech triggers First Amendment protection depends on the perception of the rea-

235. *See supra* Part II.
236. *See generally* Greene, *supra* note 58.
237. *Id.* at 473.
238. *Id.*
239. *Id.*
240. *Id.* (citations omitted).
241. *See id.*

sonable observer. If the reasonable observer could ascertain that the speech was compelled and therefore "dissociated from the speaker, then the speech affirms nothing, declares nothing, and expresses nothing."[242] In this case, the First Amendment is not triggered. If, on the other hand, the reasonable observer would not perceive the speech as compelled, that is, would be unable to ascertain whether or not the speaker had revealed her mind, then First Amendment scrutiny is triggered.[243] Greene also adds a second prong to his test for whether First Amendment scrutiny is triggered—whether the government has left open channels of dissent.[244]

Thus, in cases in which both (1) the speech is reasonably perceived as compelled by the observer, and (2) avenues of dissent are open to the speaker, Greene argues that the "speech" no longer deserves First Amendment protection because it is not expressive.[245] In these cases, Greene suggests, the speaker is "merely following the law, which happened to involve a speech act."[246] These speech acts do not trigger Free Speech Clause scrutiny since the Free Speech Clause protects only that speech or act which is expressive.[247] Speech of this order is "externally motivated"[248] and therefore does not impermissibly burden either the speaker's or the listener's autonomy interest in any way that the First Amendment protects. Greene finds instead that a speaker's right not to speak or to be compelled to merely "mouth" insincere words, can be protected by the speaker's autonomy interest outside of the First Amendment.[249]

Contrary to Greene's arguments, however, this Note maintains that the First Amendment always protects an individual's autonomy interest. Requiring the utterance of specific speech, even if reasonably perceived as compelled, offends this autonomy interest

242. *Id.* at 475.

243. *See id.* at 473-74.

244. *See id.* at 476.

245. *See id.* at 473-78.

246. *Id.* at 474.

247. *See id.* at 473 ("For an act to be considered expressive, and thus worthy of prima facie protection under the Free Speech Clause, that act must involve (or appear to a reasonable observer to involve) the communication of the speaker's internal mental state, such as her beliefs, attitudes, or convictions.").

248. *Id.* (citation omitted).

249. *See id.* at 480-81 (arguing that an autonomy/personhood argument in this context would be similar to the autonomy arguments recognized by such cases as *Planned Parenthood v. Casey*, 510 U.S. 1309 (1994), *Roe v. Wade*, 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

for a number of reasons. First, labeling a verbal or symbolic act as "action" rather than "speech" has traditionally been a way to allow regulation of speech since it simply re-defines the "speech" as action, and therefore beyond the scope of First Amendment protection.[250] Governmental prohibitions on action are, of course, much less closely scrutinized than those on speech.[251] In this sense, reclassification of speech as action is roughly analogous to the argument that pornography is a non-cognitive form of speech, that it does not "appeal to deliberative capacities about public matters, or about matters at all," and is therefore undeserving of the same protections afforded to speech and other expressive behavior by the First Amendment.[252] As one commentator viewing speech re-classification in a different context has noted, however, this method is not always useful to First Amendment analysis since it "masks all the hard judgments that the First Amendment requires."[253] These kinds of "hard judgments" would include, for example, determining whether compelling speech adequately justifies invasion of a person's autonomy interest. In addition, as a result of this line of reasoning, the government would also be tempted to frame more arguments about compelled speech in terms of legal speech acts not protected by the First Amendment.

Second, a problem arises from Greene's assumption that, as a practical matter, a reasonable observer will always be able to judge whether the speech is compelled. For example, if the speech were

250. *See, e.g.*, Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807-08 (1993) [hereinafter Sunstein, *Words, Conduct, Caste*] (re-defining pornography as noncognitive speech because, *inter alia*, "many forms of pornography are not an appeal to the exchange of ideas, political or otherwise; they operate as masturbatory aids and do not qualify for top-tier First Amendment protection under the prevailing theories"); FISS, *supra* note 7, at 13 (critiquing Professor MacKinnon's argument against protecting pornography under the First Amendment because "pornography is not speech at all but rather action, thus denying it the privileged status accorded to speech as an especially protected liberty" (citing CATHERINE A. MACKINNON, ONLY WORDS 29-41 (1993))).

251. *See, e.g.*, FISS, *supra* note 7, at 27-28 (noting that "the state acts in . . . a regulatory manner, issuing commands and prohibitions and using the power at its disposal to enforce those directives . . . . Most First Amendment scholars have focused on the regulatory function of the state and in that context have presented the Constitution as creating a shield around the street-corner speaker, protecting the individual citizen from the menacing arm of the policeman.").

252. Sunstein, *Words, Conduct, Caste*, *supra* note 250, at 807-08. *But see* David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 126-27 (1994) ("[T]he argument that sexual speech is 'noncognitive' because it is designed to produce a physical effect is predicated on an impoverished view of sexuality.").

253. FISS, *supra* note 7, at 13.

recorded and played back at a later date, the same observer might not have the same reaction to the speech. Thus, changing the original context of the speech vitiates the basic conditions set by Greene—that a reasonable observer would know the speech was compelled and that avenues for dissent were left open. Applying these conditions therefore requires all subsequent observers to make the same assumption of non-expression that the original observers did.[254]

Third, compelled speech violates the speaker's autonomy interest because it creates a "pressure to respond," which is an unconstitutional burden on a protected speech interest grounded in the speaker's autonomy. This pressure to respond occurs regardless of whether or not the speaker agrees with the speech. Furthermore, this violation of the speaker's protected First Amendment interest is complete at the time the pressure is created; it therefore triggers First Amendment protection regardless of the speaker's response to the compulsion to speak. In this scenario, "the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner [of the property]."[255] This pressure to respond argument is grounded in the dual nature of the protection that the right not to speak affords: first, the right to disassociate oneself from speech with which one disagrees, and second, the right to control over the right to speak or not to speak at all.[256] Thus, the right not to speak comprises both the autonomy right to resist compelled speech and also the absolute right to remain silent unless and until one chooses to break that silence.

Fourth, the autonomy right in the First Amendment should not only address the public's *perception* of an individual's speech. Rather, it should afford a basic measure of human dignity, which compulsion to parrot words violates. In this sense, infringement on the right not to speak, like violation of the right against self-incrim-

254. Greene's argument assumes that observers (even those at a considerable remove in time and space) will be able to discern whether the speech was compelled. As a practical matter, however, it seems highly improbable that all subsequent observers would be able to recognize the speech as such.

255. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 (1980) (Powell, J., concurring) (noting that when a state law requires access to otherwise private property that the property owner may be "virtually compel[led] . . . to respond"); *see also* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 15-16 (1986) (observing that Pacific Gas faced a pressure to respond because the access provision forced it "either to appear to agree with TURN's views or to respond").

256. *See PruneYard*, 447 U.S. at 100 (Powell, J., concurring).

ination in the Fifth Amendment context,[257] takes away the voluntary aspects of speech and discounts, "the importance of . . . self-expressive uses of speech, independent of any expected communication to others, for self-fulfillment or self-realization."[258] Thus, defining speech that is not self-expressive as outside of the First Amendment and placing the burden on the shoulders of the reasonable observer blurs the line between speech and action to a degree that jeopardizes many sincere speech interests that lie at the core of the autonomy principle of the First Amendment.

Further, drawing the line between expressive speech and speech acts is difficult. This difficulty arises, for example, in ascertaining when non-expressive compelled speech becomes expressive. Next, it can be similarly difficult to determine when the will of the individual succumbs to government coercion of her speech. Finally, if whether speech falls within the ambit of First Amendment protection is gauged by its effect on listeners and reasonable observers, then these listeners and observers are also affected by the coercive power of the government to oblige a person to "mouth" words whose truth she does not believe.

Last, it is instructive to contrast this "captive speaker" problem with that of the captive audience. A classic captive audience problem in First Amendment theory occurs when the government compels a listener to attend to government speech with no actual or constructive means of escape, such as averting one's eyes or stopping one's ears.[259] This situation creates unconstitutional restraints on a listener's First Amendment rights.[260]

On a final note, however, Justice Rehnquist's dissent in *Wooley* suggests that Greene's argument may gain ground in the future:

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257. *See generally* William A. Nelson, *The New Inquisition: State Compulsion of Therapeutic Confessions*, 20 VT. L. REV. 951 (1996) (noting, in the context of therapeutic confession cases under the Fifth Amendment, that coerced confessions serve a rehabilitative, and not evidentiary, purpose).

258. BAKER, *supra* note 31, at 53.

259. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Lehman v. Shaker Heights, 418 U.S. 298 (1974).

260. Indeed, as one commentator has noted:

> [c]ompulsory listening is the counterpart of compulsory expression of a belief. The requirement that any person entertain a belief, opinion or idea, or be forced to listen to the government's version of events, is an affront to dignity and an invasion of autonomy . . . . Moreover, it is hardly an effective method for discovering the truth. . . . Indeed, compulsion to listen is the hallmark of a totalitarian society.

Emerson, *Affirmative Side*, *supra* note 180, at 833 (footnote omitted).

> The State has not forced [the Maynards] to "say" anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to "speech," . . . . The State has simply required that all noncommercial automobiles bear license tags with the state motto . . . ; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes . . . . What the Court does not demonstrate is that there is any "speech" or "speaking" in the context of this case.[261]

Since compelled speech always triggers the First Amendment, the government must maintain respect for the speaker's autonomy interest even as it seeks to promote discourse in the marketplace.

B. Future Resolution

Because infringement of an individual's autonomy in the form of a right not to speak violation triggers First Amendment scrutiny, this section concludes by suggesting methods for resolution of right not to speak cases that reconcile the interests of both affirmative and negative speech in the context of government access legislation. One possible method to reconcile these interests is to alleviate the "pressure to respond" created by an infringement on individual autonomy. Another is to insure that when equality principles, inherent in the First Amendment,[262] drive government access provisions, their content-neutrality is assured so that one speaker's viewpoint is not favored over another, as the First Amendment forbids. A third method is to limit autonomy rights to individuals, thereby preempting an autonomy argument in any setting where the speaker who claims an autonomy right not to speak is either a corporation or an association of speakers made up of different voices.

These arguments accept, as a threshold matter, that government access provisions benefit society.[263] They provide this benefit in a number of ways—by promoting a more vigorous system of free speech; enabling more people to hear different and conflicting voices; increasing diversity and pluralism; and perhaps most importantly, facilitating more people to participate who, because of social, political or economic disadvantages, might otherwise have

261. Wooley v. Maynard, 430 U.S. 705, 720 (1977) (Rehnquist, J., dissenting).

262. *See* Fiss, *supra* note 7, at 9-18.

263. *But see id.* at 79-81 (noting that cases like *Red Lion* and *Pacific Gas* present a "marked hostility toward the state and a refusal to acknowledge the role the state can play in furthering freedom of speech").

remained silent.[264] In sum, society accepts that the state "may have to allocate public resources – hand out megaphones – to those whose voices would not otherwise be heard in the public square."[265]

In this sense, these access provisions help the government fulfill the dual role the First Amendment has been interpreted to allow, namely, to both protect speech and to encourage it.[266] Thus, accepting the premise that government access statutes provide significant value to our system of government, this Part seeks to strike a balance between affirmative and negative speech interests against the backdrop of access legislation.

1. *The Pressure to Respond*

As noted earlier,[267] the pressure to respond is a corollary to the ventriloquism problem because it arises when a likelihood of misattribution exists, regardless of the reasonable possibility of a disclaimer. In this sense, it is a constitutional violation that is complete at the moment the pressure is created.[268] Imagine, for example, that a state passed a law requiring a store, hospital or shopping center to supply a bulletin board on which all members of the public could post signs. In this case, it would be reasonable for one to assume that the private owner of the forum shared the views expressed on the board.[269] The owner of the forum is now faced with pressure to respond. She has a choice. She can either act, for example, by posting a sign expressly disavowing the speech, or she can do nothing, thereby accepting the risk that others will mistake the speech for her own. Should the owner choose the first option, she has been forced to speak though she may have preferred to remain silent; if she opts for the second, she has been forced to voice someone else's belief.[270] In short, the mere fact that she is at liberty to disavow the offending speech and the views it espouses

264. *See, e.g.*, SUNSTEIN, *supra* note 7, at 138 (noting that among the "preconditions for autonomy" is "provision of diverse opportunities" by the government); Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 34 (1986) (Rehnquist, J., dissenting) ("The right of access here constitutes an effort to facilitate and enlarge public discussion; it therefore furthers rather than abridges First Amendment values.").

265. FISS, *supra* note 7, at 4.

266. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969) (noting that the First Amendment is aimed at "protecting and furthering communications").

267. *See supra* Part III.A.

268. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 98 (1980) (Powell, J., concurring).

269. *See id.* at 99.

270. *See id.*

comes after the pressure to respond has been created. The avenue of disavowal is therefore irrelevant to alleviating the pressure to respond because the pressure has been created at the moment the owner is faced with the choice.[271] This pressure thus constitutes an impermissible infringement on the individual's autonomy rights independent of whether the owner agrees with the speech in question.

The U.S. Supreme Court has commented on this pressure to respond in *Pacific Gas* where it stated that "[Pacific Gas] is still required to carry speech with which it disagree[s], and might well feel compelled to reply or limit its own speech in response to TURN's."[272] "This kind of forced response," the Court noted in a different context, "is antithetical to the free discussion that the First Amendment seeks to foster."[273]

Thus, the pressure to respond is a significant intrusion on the right not to speak; it forces someone to speak when they would rather remain silent or run the risk of agreeing with the offending speech. Thus, the pressure to respond transforms an intrusion on the right not to speak into compelled speech to vocalize that with which one does not agree. Adequate protection of a right not to speak, therefore, should insure that a pressure to respond is not created.

Two safety mechanisms would allow both speakers and drafters of access legislation to alleviate this pressure. The first is an "anticipatory disclaimer," which would ensure that the pressure to respond is never created. The second is to strengthen "opt-out" provisions. The second mechanism does not completely alleviate the pressure, but mitigates some of its deleterious effects.

To completely avoid creating a pressure to respond, a government access provision must place the burden of disclaimer on the positive marketplace speaker. Thus, the beneficiary of the provision would be required to announce that her ideas are unrelated to the owner or controller of the forum to which the statute has granted her access. Requiring such an "anticipatory disclaimer" would have the effect of alleviating the pressure to respond before it is created. This objective could be accomplished, for example,

271. *See id.* (citations omitted); *see also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 654 (1994) ("[B]y affording mandatory access to speakers with which the newspaper disagreed, the law induced the newspaper to respond to the candidates' replies when it might have preferred to remain silent." (citations omitted)).

272. Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 11 n.7 (1986).

273. *Id.* at 2.

simply by requiring speakers who use the property (the positive marketplace speakers) whether private or semi-private, to voice or carry a disclaimer, stating that the viewpoints expressed in the speech are solely their own and should not be attributed to the property owners.

Against this argument, it can be asserted that when only private speakers and not government actors are involved, no protected speech interest is infringed, since the First Amendment applies only to government actors. As some have suggested,[274] however, the degree to which a private owner is enabled by a government access statute to take over a historically governmental function, such as sponsoring a parade, or providing gas and electricity to consumers, is the same degree to which that private actor should be held to the same standards as the government. Therefore, the First Amendment autonomy infringement created by the pressure to respond would be actionable in the same way as if perpetrated by a "true" government actor, such as an elected or appointed government official.

The second method of attenuating the harmful effects of the pressure to respond is to strengthen the safety mechanisms by which unwilling speakers can "opt-out" by enforcing disclaimers in every context. These mechanisms do not avoid the problem of the pressure to respond entirely, but they do mitigate the effect of speech upon the owner or controller of a forum. This objective will be easier in some contexts than in others; much of the determination dovetails with the traditional and historical understanding of whether the forum is public or private.

For example, a parade often has a public character, though it can be privately sponsored.[275] Accordingly, the pressure to respond is created in this situation because the majority of the public might assume that the marchers all share one point of view, or at least that they are sponsored by the city hosting the march, and therefore that the city itself favors one message over another. To alleviate this pressure, different marching groups could carry disclaimers on their banners. As the Court observed in *Hurley*, this method of disclaimer is impractical, but it does have the effect of alleviating

274. *See* Emerson, *Affirmative Side*, *supra* note 180, at 810.

275. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 560-61 (1995). In *Hurley*, the Parade had been sponsored by the City of Boston from at least 1876 through 1947, after which it was privately sponsored by the Veteran's Council but continued through 1992 to use the City's official seal as well as to receive direct funding from the City. *See id.*

the pressure to respond created by the assumption that some parades are sponsored by the government.[276]

This pressure is more easily alleviated in contexts involving private property, on which the public is allowed for a limited purpose. In this sense, one important factor is whether the forum is traditionally a private or public one. If private, then a disclaimer must be boldly stated so it is seen, heard, or understood by those who expect otherwise because of tradition or custom.

2. *Government Access Statutes Must Insure Content-Neutrality*

Government promotion of speech should support pluralism and diversity, exemplified by the marketplace of ideas paradigm as well as by government access provisions that enable these pluralistic values. The government's opening of speech forums using access statutes relates to what many have called the "equality aspect" of the First Amendment.[277] This equality component within First Amendment jurisprudence finds its source in Fourteenth Amendment due process considerations.[278] These egalitarian considerations thus illustrate the impetus behind government creation of opportunity for speech because they present efforts to create equality in the marketplace of ideas by allowing those a voice who would otherwise be drowned out by the "louder voices" of those with greater economic, political, or social power.[279]

As discussed earlier,[280] the Court has noted an interesting distinction between government participation in speech markets and government promotion of speech. Indeed, the Court has at times stated that attempts at promotion of speech have the virtue of decreasing the risk of the government favoring or disfavoring a particular message because the state has dictated no specific message

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276. *See id.* at 576-77.

277. *See, e.g.*, FISS, *supra* note 7, at 18 (suggesting that the equality aspect of the First Amendment is occasioned by concern with access of groups to speech forums: "the concern is with the claims of those groups [who might be injured by speech regulation] to a full and equal opportunity to participate in public debate .... The state is trying to protect the interest of the audience—the citizenry at large—in hearing a full and open debate on issues of public importance."); BAKER, *supra* note 31, at 42-43 (discussing liberty and equality in the First Amendment).

278. *See, e.g.*, FISS, *supra* note 7, at 9-26 (discussing the equality component of the First and Fourteenth Amendments).

279. *See* FISS, *supra* note 7, at 12-13; Emerson, *Affirmative Side*, *supra* note 180, at 802-03 (observing that the equality aspect of the First Amendment acts as a "guarantee that some diversity will be achieved is built into the system").

280. *See supra* Part II.B.1.

of its own.[281] This situation contrasts with actual government participation in speech markets where the government has a vested interest in the content of the speech.[282]

But while access statutes do have many of the virtues outlined above,[283] they also can backfire in the sense that they can facilitate favoring one message over another. Avoidance of this kind of governmental discrimination against one speech in favor of another is a bedrock principle of First Amendment jurisprudence.[284] For example, in *Pacific Gas*, the Court found that the access requirement requiring Pacific Gas to allow TURN to insert a newsletter in its billing statement constituted an impermissible infringement on First Amendment values because it discriminated on the basis of content.[285] Here the Court observed that Pacific Gas had "the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."[286] The Court concluded that access to the billing envelopes was content-based,[287] and therefore forbidden, because access was limited to only those who opposed Pacific Gas.[288]

Similarly, in *Hurley* the Court disagreed with the state court's use of the public accommodations law. Here, the Court noted that the public accommodations law had been rendered an access statute.[289] The Court rejected this use of the statute when discussing the equality aspect of the First Amendment,[290] which is ironic, because the public accommodations law itself had its roots in equal

281. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (distinguishing Wooley v. Maynard, 430 U.S. 705 (1977), on the ground, among others, that "no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message.").

282. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

283. *See supra* notes 263-265 and accompanying text.

284. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 12 (1986).

285. *See id.* at 13-16.

286. *Id.* at 14 (citing Buckley v. Valeo, 424 U.S. 1, 49 & n.55 (1976)).

287. *See id.* at 13.

288. *See id.* The Court here used *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974), to illustrate its point, noting that in that case the right of reply was a content-based penalty. *See Pacific Gas*, 475 U.S. at 13.

289. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 573 (1995) ("[O]nce the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the [Parade's] speech itself to be the public accommodation.").

290. *See id.* at 572-73.

protection, Reconstruction-type amendments.[291] The Court noted that the effect of the public accommodation law in this instance was to discriminate against certain kinds of speech, i.e., content-based speech discrimination, because "a speaker who takes to the street corner to express his views . . . should be free from interference by the State based on the content of what he says."[292] Indeed, as the Court concluded, "[t]he very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression."[293]

Therefore, when government access provisions are used to shape the orthodoxy of a message, they can run afoul of the First Amendment's mandate to maintain content-neutrality and thus risk favoring one party's message over another's. They can therefore shape the content of a message in a way that is antithetical to the First Amendment.[294] As the Court in *Hurley* observed, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[295]

Access statutes and state free speech provisions, therefore, require exercise of great discretion lest they appear to favor one point of view over another, as in *Pacific Gas* or *Hurley*. This goal is accomplished in part by placing government access provisions under heightened scrutiny, and by awareness, under traditional First Amendment doctrine, that they are susceptible to this danger. Care should also be taken, in the right not to speak context, to protect the autonomy interests of individual speakers. By protecting and strengthening this autonomy interest, government access provisions can avoid the danger of favoring one speaker's message over that of another, as the First Amendment forbids.

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291. *See id.* at 571-73.

292. *Id.* at 579 (citing Police Dep't v. Mosley, 408 U.S. 92, 95 (1972)).

293. *Id.* ("While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.").

294. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 13-16 (1986).

295. *See Hurley*, 515 U.S. at 579.

3. *Autonomy Rights Must Pertain to Individuals*

Commentators and jurists have argued that autonomy rights should not extend to corporations.[296] Many problems that arise when government access statutes infringe on autonomy rights can be resolved if autonomy rights, here in the form of the right not to speak, are limited to individuals. Under this scheme, autonomy rights would be inapplicable to corporate speakers, as well as to those speakers that, while not corporate in nature, are composed of different viewpoints. Such a speaker might, for example, be a parade with different ideological or political contingents in it.

Justice Rehnquist's dissent in *Pacific Gas* argues that negative First Amendment rights should not be available to corporations.[297] His reasoning grows from the notion that corporations only have positive First Amendment rights because of the listeners' interest in receiving diverse information in the marketplace of ideas.[298] Therefore, negative speech rights should not extend to corporations because they have no individual speaker's interest in autonomy or self-expression.[299]

Autonomy rights, however, could also be limited to only those individuals who have a speaker's personal autonomy interest in self-expression and self-fulfillment, and therefore in a right not to speak. Under this scheme of a negative First Amendment principle, *Hurley* was decided incorrectly because it allowed the autonomy interest of the Parade organizers to exclude GLIB's message from the St. Patrick's Day Parade. As the Court reasoned, "a narrow, succinctly articulable message is not a condition of constitutional protection . . . . [A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit themes to isolate an exact message as the exclusive subject matter of the speech."[300] A "succinct" message certainly should not be a precondition of constitutional protection for

296. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 26 (1986) (Rehnquist, J., dissenting) ("I [do not] believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally."); Greene, *supra* note 58, at 482 (arguing that the autonomy right should not extend to corporations or corporate speech); BAKER, *supra* note 31, at 52 (arguing that if the speech of a corporation did not represent the views of any "relevant people" in the corporation that the liberty theory of speech, in opposition to the marketplace one, would not protect the speech).

297. *See Pacific Gas*, 475 U.S. at 33-34 (Rehnquist, J., dissenting).

298. *See id*; *see also supra* notes 43-46 and accompanying text.

299. *See Pacific Gas*, 475 U.S. at 33-34 (Rehnquist, J., dissenting).

300. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 569-70 (1995).

this kind of "associated" speech in its affirmative aspect; a positive right should be granted to a parade made up of different voices so that it can freely speak, or march, in public with a message, or messages, of its choosing.

Granting a parade the autonomy right to exclude other voices because of a personal right not to speak, however, quickly becomes a more suspect endeavor because it undermines the fundamental purpose of an access statute or free speech provision: to enhance and expand opportunities for speech. In *Hurley*, by contrast, the government access legislation resulted in exclusion of the very kind of diverse speech that these statutes were enacted to promote. Accordingly, it can be said that government access legislation runs the danger, whenever corporate or "associated" speech is present, of allowing the right not to speak to become a tool for exclusion of speech such associations find disagreeable. Such content-based regulation of expression is, of course, antithetical to the First Amendment. A solution, therefore, is to limit the autonomy right not to speak to individual speakers only.

Accordingly, a stricter definition of an autonomy right should be personal to individuals. First, only individuals possess a "sphere of intellect and spirit"[301] that autonomy and negative free speech rights protect. Second, when governments enact access legislation, they should do so to create either balance or diversity in speech forums, not to enable private organizations with often greater economic or political power in the marketplace to exclude speech they find offensive: "governmental intervention for affirmative purposes must be directed toward expanding, not contracting, the range of fact and opinion available to the community."[302] The goal of preserving an autonomy right from official control is to ensure each citizen's ability to achieve the kind of self-realization and self-expression that champions of autonomy rights find necessary to human intellectual and emotional fulfillment. Therefore, both corporations and "speech" that is composed of a multitude of voices, yet has no unified point of view, should have no right to this kind of autonomy interest.

Under this analysis, only those autonomy rights that pertain to individuals, or to groups of individuals where there is an articulable message or messages that all members of the organization share, would stand. In this context, the media cases, *Red Lion*,[303]

301. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
302. Emerson, *Affirmative Side*, *supra* note 180, at 804.
303. 395 U.S. 367 (1969).

Tornillo,[304] *TBS I*,[305] and *TBS II*,[306] would stand as decided, since the media autonomy right has traditionally been seen as equivalent to a personal one.[307] *Abood* would also stand under this scheme, because the Court in that case upheld the individual autonomy right of the union members to not be compelled to subsidize speech they found objectionable.[308] *PruneYard*, however, would be reversed because in that case the autonomy right not to speak was that of the shopping center's owner, who is an individual with an articulable point of view. *Pacific Gas* would also be reversed, in accordance with Justice Rehnquist's dissent.[309] Finally, in *Hurley*, the parade organizers would not have an autonomy right since they do not have a single unified message.[310]

These three methods, therefore, confront and resolve some problems that result from the conflict between positive and negative First Amendment rights in the context of government access provisions. They therefore seek to shape and limit government access provisions and right not to speak autonomy so as to insure that the interests of all speakers in a speech market are protected.

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304. 418 U.S. 241 (1974).

305. 512 U.S. 622 (1994).

306. 520 U.S. 180 (1997).

307. *See, e.g.*, *Tornillo*, 418 U.S. at 258 ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment."). *See also* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting) (noting that "in [*Tornillo*] the Court extended negative free speech rights to newspapers").

308. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) ("[We hold] that the Constitution requires only that such expenditures [by a union to fund expression] be financed from charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.").

309. *See Pacific Gas*, 475 U.S. at 33 (Rehnquist, J., dissenting) ("To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality.").

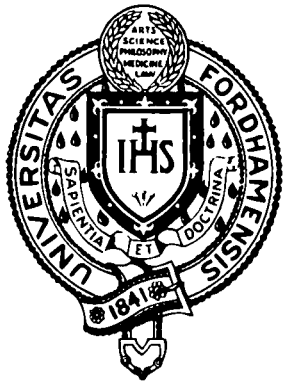
310. *But see* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U. S. 557, 574 (1995). Here the Court noted that:

> [The Parade's] claim to the benefit of this principle of autonomy to control one's own speech is . . . sound . . . . Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day.

Id.

CONCLUSION

The dual principles of promoting the marketplace of ideas and protecting individual autonomy lie at the core of the First Amendment. When the government assumes an affirmative role by opening opportunities for public speech, it places individuals' negative liberties, such as the right not to speak, at risk. This conflict cannot be avoided by analyzing compelled speech outside of the First Amendment; the autonomy promised by the Bill of Rights and repeatedly affirmed by Supreme Court jurisprudence protects the right not to speak. Scholars, jurists, and practitioners therefore should pay close attention to the right not to speak when the government pursues affirmative policies of widening access. In so doing, the government may not ignore the negative speech rights of private citizens.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