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Nicholas Nesgos

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PACIFIC GAS AND ELECTRIC CO. v. PUBLIC UTILITIES COMMISSION: THE RIGHT TO HEAR IN CORPORATE NEGATIVE AND AFFIRMATIVE SPEECH

In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[1] the Supreme Court struck down a California Public Utilities Commission order[2] requiring PG&E to enclose a public interest group's[3] political messages[4] in the utility's billing envelopes. In a plurality decision,[5] the Court held that the Commission order violated the utility's affirmative and negative free speech rights.

Affirmative speech violations occur when the government restricts speech. Negative speech violations occur, by contrast, when the government forces individuals to disclose their views, or associate with views with which they disagree.[6] In *Pacific Gas* the Court found an affirmative speech violation because the Commission allowed only those parties who disagreed with PG&E's views access to the envelopes.[7] Thus, there was a danger that PG&E would "avoid controversy" by not sending out any of its own messages, thereby reducing the free flow of ideas.[8] At the same time, the Commission order requiring PG&E to share its billing envelopes with a public interest group pressured the utility to send out its own message in response. The Court found that this forced association violated the utility's first amendment right to choose what not to say and was therefore a violation of negative speech rights.[9]

This Note argues that the Court incorrectly decided *Pacific Gas* because of serious flaws in its analysis of the utility's affirmative and negative speech rights. In particular, this Note suggests that the plurality's analysis misapplies the theories of the first amendment that support extending first amendment rights to corporations.

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1 475 U.S. 1 (1986).

2 Cal. Pub. Util. Comm'n Order No. 83-12-047 (filed December 20, 1983), as modified by Decision No. 84-05-039 (filed May 2, 1984).

3 The public interest group, Toward Utility Rate Normalization (TURN), was an intervenor in a ratemaking proceeding before the Public Utilities Commission. *Pacific Gas*, 475 U.S. at 5.

4 Only one justice found that the order did not involve political speech. *See infra* notes 115-17 and accompanying text.

5 Justices Powell, Brennan, O'Connor and Burger joined the opinion.

6 *Pacific Gas*, 475 U.S. at 11.

7 By restricting access to the envelopes the Commission order restricted speech. *Pacific Gas*, 475 U.S. at 13.

8 *Id.* at 10.

9 *Id.* at 15-16.

I
BACKGROUND

A. Affirmative Free Speech Rights

The first amendment to the Constitution expressly prohibits restraints on the freedom of expression.[10] The Court has interpreted the first amendment to severely limit the government's "power to restrict expression because of its message, its ideas, its subject matter, or its content."[11] Content based restrictions on speech are subject to exacting scrutiny;[12] a court will sustain such restrictions only if they are narrowly drawn and advance a compelling government interest.[13]

The Supreme Court's decisions in affirmative speech cases have articulated three purposes underlying the first amendment.[14] First, the first amendment protects individual expression in order to enhance self-realization and freedom of conscience.[15] Government restrictions on speech inhibit an individual from fully expressing his conscience. A speaker's right to speak grew out of this first purpose.[16]

Second, the first amendment safeguards our system of democratic self-government by protecting the expression of minority views that may foster political or social change.[17] Under the self-

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10 "Congress shall make no law . . . abridging the freedom of speech, or of press. . . ." U.S. CONST. amend. I.

11 Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)); *see also* Note, *Integrating the Right of Association with the Bellotti Right to Hear*, 72 CORNELL L. REV. 159 (1986).

12 *Consolidated Edison*, 447 U.S. at 538; Buckley v. Valeo, 424 U.S. 1, 44-45 (1976).

13 *Consolidated Edison*, 447 U.S. at 540.

14 *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785-786 (1988) (discussing three major first amendment theories); Note, *supra* note 11, at 160.

15 *See Consolidated Edison*, 447 U.S. at 534 n.2; First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978); *id.* at 804-06 (White, J., dissenting); Procunier v. Martinez, 416 U.S. 396, 427-28 (1974) (Marshall, J., concurring); Cohen v. California, 403 U.S. 15, 24 (1971). *See also* T. EMERSON, TOWARDS A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1966) (citing affirmation of self as one of four goals underlying the first amendment); M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 9 (1984) (the constitutional guarantee of free speech serves the value of assuring "individual self-fulfillment.").

16 *See* Cohen v. California, 403 U.S. 15, 18-19 (1971) (first amendment protects individual's rights to express opposition to draft); Thomas v. Collins, 323 U.S. 516, 537 (1945) (first amendment protects "the opportunity to persuade to action"); *see also Bellotti*, 435 U.S. at 804-06 (White, J., dissenting) (corporate speech does not further self-realization); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (compulsory flag salute regulation "invades the sphere of intellect and spirit which it is the purpose of the First Amendment" to protect); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (first amendment rights are protected in part so "that men may speak as they think on matters vital to them"); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he final end of the State [and of the first amendment] was to make men free to develop their faculties. . . .").

17 *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-27

goverment theory, the first amendment has a purely instrumental value. It protects individual expression not for its own sake, but rather to ensure that democratic government operates smoothly. Finally, the first amendment protects expression to promote a free marketplace of ideas, on the theory that truth will prevail through competition.[18]

The Court has drawn principally on these last two theories to create a "right to hear" which protects the interests of listeners rather than speakers or proponents of speech.[19] The "right to hear" forms the basis of corporate affirmative speech rights.

1. *Corporate Political Speech*

a. *The* Bellotti *Decision.*

The Supreme Court first extended first amendment protection to corporate political speech in *First National Bank of Boston v. Bellotti*.[20] The Court in *Bellotti* declared unconstitutional a Massachusetts criminal statute that prohibited corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[21]

The *Bellotti* Court did not recognize a protected first amend-

(1948); *Cohen*, 403 U.S. at 24 ([removing] "governmental restraints from the arena of public discussion [puts] the decision as to what views shall be voiced largely into the hands of each of us"); Mills v. Alabama, 384 U.S. 214, 218 (1966) (protection of "free discussion of governmental affairs" is a major purpose of first amendment); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964) (democratic self government requires protection of free expression).

18 *See* Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas. . . ."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution"); L. TRIBE, *supra* note 14, § 12-1, at 785-86 ("'marketplace of ideas' is one of three major first amendment theories"); Note, *supra* note 11, at 161 n.9.

19 *See* Note, *supra* note 11, at 167-69 (purpose of corporate expenditure limits was to sustain individual's role in democracy); Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising"); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) ("presupposing" a willing speaker, consumers of prescription drugs can assert right to receive advertising); *Bellotti*, 435 U.S. at 777-83 (corporate political expression is protected because of the public's right to hear); *Consolidated Edison*, 447 U.S. at 533-35 (followed *Bellotti* and based first amendment protection of corporate speech on the listener's right to receive information).

20 435 U.S. 763, 776 (1978).

21 *Id.* at 768. In *Bellotti*, a group of national banking associates and business corporations attempted to publicize their views opposing a referendum proposal to amend the Massachusetts Constitution to enable the legislature to enact a graduated income tax.

ment interest in the corporation's right to speak.[22] Instead, relying on press and commercial speech precedents,[23] the Court protected corporate speech by finding a first amendment interest in the public's right to receive information.[24] In *Bellotti* it was particularly important for the public to hear the corporation's speech because political speech is "at the heart of the First Amendment's protection."[25]

The Court based the right to hear on both the "marketplace of ideas" and the "self-government" theories of the first amendment,[26] stating that "the First Amendment goes beyond protection of . . . the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[27] Further, the free dissemination of the type of speech the corporation attempted "is indispensable to decisionmaking in a democracy."[28]

By protecting the speech based on the public's right to hear and the two first amendment theories underlying that right, the majority declined to extend the full speech rights of individuals to corporations.[29] Thus, the majority believed that corporations have no inter-

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22 The relevant question, according to the majority, was whether the order "abridges expression that the First Amendment was meant to protect." *Bellotti*, 435 U.S. at 776. The source of the expression is irrelevant in determining whether the message is entitled to first amendment protection. *Id.* at 783.

23 *Central Hudson Gas*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising"); *Virginia State Board of Pharmacy*, 425 U.S. at 756-57 (consumers of prescription drugs can assert right to receive advertising where a willing speaker is available.).

24 *Bellotti*, 435 U.S. at 783. Commercial speech cases "illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.*

Almost all commentators agree that *Bellotti* is grounded in a public right to hear rather than a corporate right to speak. *See, e.g.*, L. TRIBE, *supra* note 14, at 795 (decision turned on rights of Massachusetts voters to information); Kiley, *Pacing the Burger Court: The Corporate Right to Speak and the Public Right to Hear After First National Bank v. Bellotti*, 22 ARIZ. L. REV. 427, 429 (1980) (*Bellotti* "was logically premised upon the identification of the public's right to receive information as a fundamental, underlying value of the first amendment"); Note, *supra* note 11, at 173 n.92 ("The view that *Bellotti* turns not on a corporate right to speak, but rather on a public right to hear, has wide support among commentators.").

25 *Bellotti*, 435 U.S. at 776.

26 *See supra* notes 17-18 and accompanying text.

27 *Bellotti*, 435 U.S. at 783.

28 *Id.* at 777.

29 Commentators accept the view that the Court in *Bellotti* found that corporations have no interest in self-realization or freedom of mind. *See, e.g.*, Baldwin & Karpay, *Corporate Political Speech: 2 U.S.C. § 441b and the Superior Rights of Natural Persons*, 14 PAC. L.J. 209, 223 (1983) (*Bellotti* "established that any 'right' that corporate entities might have to freedom of speech derives solely from the public's 'right to listen' "); Gray, *Corporate Identity and Corporate Political Activities*, 21 AM. BUS. L.J. 439, 442 (1984) (*Bellotti* majority did not recognize corporate right to self expression); Note, *supra* note 11, at 162 n.14

est in self-realization or freedom of mind.[30]

The Court next considered whether there was a compelling state interest in limiting the protected speech.[31] The state argued that the corporate voice would dominate campaigus and drown out competing views, thus frustrating the listeners' right to hear.[32] The Court rejected the state's contention because "there ha[d] been no showing that the relative voice of corporations ha[d] been overwhelming or even significant in influencing referenda in Massachusetts."[33] The state's assertion that the statute protected minority shareholders who might disagree with the corporate position was also unconvincing.[34] Thus, the Court, finding no compelling state interest, held that the statute was invalid.

(had the *Bellotti* Court recognized a corporate right to speak, it would have avoided such a novel and controversial approach); Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833 (1981) (the *Bellotti* Court recognized that there was no corporate "self"). The structure and langnage of the opinion in *Bellotti* also support the view that the court did not recognize the corporation's interest in self-realization. Chief Justice Burger had to *separately* concur to afford corporations the same first amendment rights as individuals. *Bellotti*, 435 U.S. at 802 (Burger, C.J., concurring).

30 The Court's decision is in accord with the general treatment of corporations under the Constitution. The Constitution does not mention the word corporation and it is unlikely that its drafters considered the rights of corporations when they wrote the Bill of Rights. *See* I. BRANT, THE BILL OF RIGHTS 351-52 (Mentor ed. 1965) ("Framers paid little or no attention to the corporation"); Prentice, *Consolidated Edison and Bellotti: First Amendment Protection of Corporate Political Speech*, 16 TULSA L.J. 599, 601-02 (1981) ("neither the Founding Fathers nor the framers of the fourteenth amendment had the rights of corporations foremost in their minds as they carried out their historic functions"). The Court has nevertheless granted corporations some constitutional protections. *See, e.g.*, Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949) (imposing tax only on some corporations denies equal protection); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (corporation protected against deprivations of property without due process of law).

The Court has consistently denied corporations any "purely personal" constitutional rights—rights dependent upon the existence of a self. United States v. White, 322 U.S. 694, 698-701 (1944). For example, the Court has denied that corporations are "citizens" for the purposes of the privileges and immunities clause, Asbury Hosp. v. Cass County, 326 U.S. 207, 210-11 (1945), and has held that the fourteenth amendment protects natural, not artificial, persons. Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907). Similarly, the court has denied corporations the right of privacy, United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950), and the privilege against self incrimination, California Bankers Ass'n v. Shultz, 416 U.S. 21, 55 (1974). *See generally* Note, *supra* note 29, at 1835 (discussion of those constitutional privileges the Court has extended to corporations).

31 *Bellotti*, 435 U.S. at 787.

32 *Id.*

33 *Id.* at 789. The Court noted that any inference of corporate contributions dominating the electoral process was refuted by the 1976 election where the voters rejected the proposed constitutional amendment.

34 The statute was underinclusive if its purpose was to protect dissenting minority shareholders. The statute prohibited corporate expenditures with respect to referenda, while permitting corporate activity with respect to the passage or defeat of legislation. *Id.* at 793.

The *Bellotti* Court expressly left open the question of whether a speaker's corporate status could justify a state regulation burdening the corporation's speech in some other case.[35] The *Bellotti* Court indicated, however, that given the proper showing, the speaker's corporate status might justify a state's interference with the speech.[36] Thus, constitutional protections of corporate speech are more tenuous than protections of individual speech. In another case, the government could legitimately assert that the speaker's corporate status gave the government a compelling interest in limiting the speech.

B. Consolidated Edison

In *Consolidated Edison v. Public Service Commission*[37] the Court struck down a New York Public Service Commission rule prohibiting utilities from using bill inserts to discuss controversial public policy issues.[38] The Supreme Court thereby extended first amendment protection to regulated utilities.[39] The majority opinion, following the reasoning of *Bellotti*, indicated that the first amendment protection of the utility's political speech was conditioned on the hearer's right to receive the information rather than on the corporation's right to speak.[40] The Court found no legitimate interest in limiting the dissemination of "controversial issues" of public policy.[41]

The Court held that the insert ban was not a narrowly drawn means of serving a compelling state interest and thus failed to survive strict scrutiny.[42] The Court rejected the Commission's claim

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35 *Id.* at 776.

36 *See supra* notes 31-34 and accompanying text.

37 447 U.S. 530 (1981).

38 *Id.* at 533-44. The case arose after Consolidated Edison (Con. Ed.), New York's electric utility, placed a pro nuclear power statement in their January 1976 billing envelopes. The Natural Resources Defense Council, Inc. (NRDC) requested that Con. Ed. enclose a rebuttal prepared by NRDC in its next billing envelope. Con. Ed. refused and NRDC asked the New York Public Service Commission to open Con. Ed.'s billing envelopes to opposing views. The Public Service Commission denied NRDC's request, instead announcing a rule prohibiting utilities from using bill inserts to discuss "controversial issues of public policy." *Id.* at 532.

39 *Id.* at 534 n.1 ("We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection . . . Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters.").

40 *Id.* at 533 ("[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source") (quoting *Bellotti*, 435 U.S. at 777). The Court noted the goal of furthering self government was also served by removing "government restraints from the arena of public discussion." *Id.* at 534 (quoting Cohen v. California, 403 U.S. 15, 24 (1971).

41 *Id.* at 544.

42 *Id.* at 540-43. The Supreme Court in *Consolidated Edison* rejected a number of the

that the ban was necessary to prevent Con. Ed. from forcing its views on a captive audience,[43] reasoning that the recipients could "escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket."[44]

The Court similarly rejected the Commission's argument that because a billing envelope can accommodate only a finite amount of material, a corporation's political message should not have preference over other inserts that promote, for example, energy conservation or safety.[45] The Court found no merit in this contention. Billing envelopes are not a scarce resource: any speaker could send messages to the public in other envelopes.[46]

Finally, the Court rejected the Commission's assertion that the ban prevented ratepayers from subsidizing the costs of policy oriented bill inserts. The Court found that the Commission had not based the order on the utility's failure to fairly allocate the costs of the inserts between shareholders and ratepayers. The ban applied even when the shareholders paid all costs of the inserts.[47]

In sum, the focus of the Court's decisions in the two corporate speech cases preceding *Pacific Gas* was the public's right to hear. This right was grounded in the "free marketplace of ideas" and "self-government" theories of the first amendment. The Court expressly declined to recognize a corporate interest in self-realization and suggested that corporate status could, in another case, justify a restriction on speech.

Public Service Commission's claims which were intended to show that the insert ban served a compelling state interest. The Court also rejected the contention that the ban was a reasonable time, place or manner restriction, or a permissible subject matter regulation. Time, place, or manner restrictions must be content neutral whereas the ban only applied to "controversial issues of public policy." *Id.* at 536-37 (relying on Erznoznick v. City of Jacksonville, 422 U.S. 205, 209 (1975)). The ban did not fit into one of the "narrow circumstances" where subject matter restrictions are permitted. *Id.* at 538 (listing commercial speech, libel, obscenity, fighting words, indecent speech as appropriately "narrow circumstances").

43 In other contexts the Court has held that advertising does impermissibly thrust the speaker's views onto the public. *See, e.g.*, Lehman v. Shaker Heights, 418 U.S. 298, 308 (1974) (passengers viewing political advertisements on public transportation); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (broadcasts from a passing sound truck).

44 *Consolidated Edison*, 447 U.S. at 542.

45 *Id.* at 543.

46 *Id.* The Court rejected any analogy between billing envelopes and broadcast frequencies, thus distinguishing the *Red Lion* case (discussed *infra* notes 63-70 and accompanying text) from the present case. The Court also noted that the Commission did not show that the presence of Con. Ed.'s bill inserts precluded the inclusion of other inserts that the Commission might order Con. Ed. to include in the billing envelopes. *Id.*

47 *Id.* at 543 n.13. Ratepayers only subsidize the costs if such costs are included in the "rate base"—a set of permissible expenditures upon which the utility may receive a designated rate of return. *See* Note, *Consolidated Edison Co. v. Public Service Commission*, 1981 WIS. L. REV. 399; 64 AM. JUR. 2D *Public Utilities* §§ 88-89 (1972).

II
NEGATIVE SPEECH

Freedom of speech includes both the right to speak freely and the right to refrain from speaking.[48] This latter right is referred to as negative speech.[49] Negative speech cases arise in two situations. First, state actions that compel individuals to carry or foster the message of another implicate negative speech rights.[50] Second, the state infringes on negative speech rights when it forces individuals to express their own views on a particular topic. In the latter case, the state does not require the individual to foster another's message, but rather to disclose his own.[51]

The Court has never articulated a precise negative speech test. However, negative speech rights, like affirmative speech rights, are not absolute. The Court has consistently balanced the government's interest in the compelled speech against an individual's first amendment interest in not speaking.[52] Unlike affirmative speech

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48 Wooley v. Maynard, 430 U.S. 705, 715 (1977) (state may not force individual to carry state motto on license plate); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (compulsory flag salute invalid); *id.* at 645 (Murphy, J., concurring); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) ("There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.") (quoting Estate of Hemingway v. Random House, Inc., 23 N.Y. 2d 341, 348, 296 N.Y.S.2d 771, 778, 244 N.E.2d 250, 255 (1968)); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650 (1985) ("compulsion to speak may be as violative of the First Amendment as prohibitions on speech").

49 Justice Rehnquist is the first member of the Supreme Court to use the phrase "negative speech." *See* Pacific Gas & Electric Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 32 (1986) (Rehnquist, J., dissenting).

50 *See Wooley*, 430 U.S. at 714-15 (when state required individual to carry state motto on license plate the state violated "negative speech" rights); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (when state "right of reply" statute required newspaper to publish others' views, state violated "negative speech" rights); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1946) (when state forces individual to recite pledge of allegiance, state violates "negative speech" rights).

51 *See, e.g.*, *Pacific Gas*, 475 U.S. at 11 ("the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold"); *Zauderer*, 471 U.S. at 651 (requirement that attorney include in his advertising "purely factual and controversial information about the terms under which his services will be available" does not violate first amendment interest in not providing such information); *Tornillo*, 418 U.S. at 258 (Florida "right of reply" statute interfered with newspaper's editorial control and judgment by forcing newspaper to allow candidates to respond to arguments where newspaper might prefer not to print a candidate's response.).

52 *See Zauderer*, 471 U.S. at 651 ("advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers"); *Wooley*, 430 U.S. at 715-16 ("Identifying . . . First Amendment protections does not end our inquiry, however. We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates."); *Barnette*, 319 U.S. at 640-41 (considering state interests in compulsory flag statute).

cases, the Court has grounded its negative speech decisions in only the self-realization theory of the first amendment.[53]

The Court has struck down, on negative speech grounds, two attempts by the government to force private persons to subscribe to or advance particular messages favorable to the government. In *West Virginia State Board of Education v. Barnette*,[54] the Court held unconstitutional a state statute requiring public school children to recite the pledge of allegiance at the start of each school day. In *Wooley v. Maynard*[55] the Court held that the state of New Hampshire could not require an individual to display the state motto, "Live Free or Die," on his car license plates. In both cases the Court found that such state action "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[56]

The Court has recognized that the principles of *Wooley* and *Barnette* do not apply where an individual may easily disassociate himself from compelled speech. In *PruneYard Shopping Center v. Robbins*[57] the Court found that speech provisions of the California Constitution that the state court construed to permit activists to solicit signatures on a shopping center's central courtyard, despite the objection of the owner, did not violate the property owner's first amendment rights under the Federal Constitution.[58] The Court found that by compelling access to the shopping center courtyard, the California Court did not violate the purposes of the negative speech doctrine as articulated in *Wooley* and *Barnette*. In *Wooley* the state itself had prescribed a message and required it to be displayed openly on appellee's property.[59] In *PruneYard*, the California Court required that the owner allow all speakers access to the shopping center.[60] Because of the varied speakers allowed into the shopping center, there was little likelihood that the views of the speakers would be identified with the owner. Unlike the students in *Barnette*, the owner of the shopping center was not required to affirm his belief in any particu-

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53 *See Wooley*, 430 U.S. at 715 (requirement that drivers carry state motto on license plates even if driver finds the motto morally objectionable "invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control") (quoting *Barnette*, 319 U.S. at 642); Abood v. Detroit Bd. of Educ., 431 U.S. 209. 235 (1977) (Union may not force member to contribute funds to disseminate ideological message with which he disagrees because "an individual should be free to believe as he will . . . one's beliefs should be shaped by his mind and his conscience rather than coerced by the state").

54 319 U.S. 624 (1943).

55 430 U.S. 705 (1977).

56 *Barnette*, 319 U.S. at 643.

57 447 U.S. 74 (1980).

58 *Id.* at 88.

59 *Wooley*, 430 U.S. at 715.

60 447 U.S. at 87.

lar message.[61] On the contrary, the owner could disclaim any association with the speech.[62] Thus, any intrusion into freedom of mind or conscience was minimal.

State sponsored media "equal access" programs have spawned two negative speech cases. In *Red Lion Broadcasting Co. v. FCC*[63] the Court upheld the FCC's fairness doctrine[64] and the corollary personal attack rule.[65] The fairness doctrine required that the media provide fair coverage to each side of important public issues. The personal attack rule permitted any speaker a chance to respond on the air to a personal attack against him. In *Red Lion* a broadcaster claimed (1) a first amendment right to refuse to give equal time to opposing views,[66] and (2) that compliance with the personal attack rule would limit its broadcasting time.[67] The Court rejected both of the broadcaster's claims,[68] finding that the peculiar characteristics of the broadcast medium justified "differences in the First Amendment standards applied to them."[69] Unlike other media, it is a physical impossibility for all those who want to use the radio frequencies to do so. The scarcity of broadcast frequencies justified government regulations designed to expose the public to diverse views.[70]

In *Miami Herald Publishing Co. v. Tornillo*[71] the Court struck down a Florida "right of reply" statute that granted equal space to political candidates to answer newspaper criticism and attacks. Under the statute, each time a newspaper printed an article that triggered the "right of reply" it would have to incur the additional costs of printing the response.[72] The newspaper faced a potential crimi-

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61 *Id.* at 88. The owner of the shopping center did not object to the activists' message.

62 *Id.* at 87. The owner of the shopping center could post signs or pass out hand bills disavowing connection with the speakers' message.

63 395 U.S. 367 (1969).

64 The FCC Fairness doctrine is no longer in force. *F.C.C. Votes Down Fairness Doctrine in a 4-0 Decision*, N.Y. Times, Aug. 5, 1987, at A1, col. 6.

65 *Red Lion*, 395 U.S. at 400-01.

66 *Id.* at 386.

67 *Id.* at 393.

68 *Id.* at 400.

69 *Id.* at 386.

70 *Id.* at 386-91. The Court made clear the limited scope of *Red Lion* in Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). There the court held that the fairness doctrine did not *require* broadcasters to accept all paid editorial advertisements, *id.* at 113, but merely required that the broadcasters coverage of important public issues fairly reflect differing viewpoints. *Id.* at 111. The Court noted that the problems in implementing an absolute right of access would inevitably implicate the government in determining *who* should be heard and when, counter to first amendment principles. *Id.* at 126-27.

71 418 U.S. 241 (1974).

72 *Id.* at 256-57. But the Court held that "[e]ven if a newspaper would face no additional costs, . . . [the] Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. . . . The choice of material to

nal penalty each time it published news or commentary within the reach of the right of reply statute.[73] Under such circumstances, "editors might well conclude that the safe course is to avoid controversy" and refuse to publish controversial stories triggering the operation of the statute.[74] The *Tornillo* Court did not distinguish *Red Lion*. Apparently, the divergent results in the two cases stem from the differences between newspapers and radio stations. While newspapers are not a scarce resource,[75] the broadcast medium can only accommodate a limited number of speakers without impeding the speech of others.[76]

Several principles emerge from the "negative speech" cases. Where the government forces an individual to recite or foster another's message, it generally violates the first amendment.[77] No first amendment violation occurs when, as in *PruneYard*, an individual can easily disassociate himself from the message and there is otherwise a facilitation of speech.[78] Finally, when, as in the media access cases, the government's attempt to facilitate speech forces a broadcaster or newspaper to choose between remaining silent on an issue or triggering access for opposing views, the Court has based its decision on the peculiar characteristics of the media in question.

III
PACIFIC GAS AND ELECTRIC CO. V. PUBLIC UTILITIES COMMISSION

A. The Facts

PG&E had distributed a newsletter in its monthly billing envelopes for sixty-two years.[79] The newsletter, called *Progress*, included political editorials and feature stories of public interest in addition to straightforward information about utility services and bills.[80]

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go into a newspaper . . . whether fair or unfair—constitute[s] the exercise of editorial control and judgment." *Id.* at 258.

73 *Id.* at 244 n.2 (failure to comply constituted a first degree misdemeanor).

74 *Id.* at 257.

75 The Court acknowledged that newspapers are not subject to the technological and time constraints of broadcasters, but noted that economic realities limit the available space in any particular newspaper subject to the statute. *Id.* at 256-57 & n.22.

76 *See* Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation*, 31 FED. COMM. L.J. 215 (1979).

77 *See supra* notes 54-56 and accompanying text.

78 *See supra* notes 56-62 and accompanying text.

79 475 U.S. 1, 5 (1986).

80 *Id.* The December 1984 issue of *Progress*, for example, included a story on how to weatherstrip homes, recipes for holiday dishes and a story on bald eagles. In the past *Progress* had discussed more controversial subjects, such as the merits of recently passed and pending legislation.

In 1980, TURN,[81] an intervenor in a ratemaking proceeding, urged the California Public Utility Commission to forbid PG&E from using billing envelopes to distribute political editorials, claiming that customers should not bear the expense of PG&E's political speech.[82] The Commission decided that the envelope space the utility used to disseminate *Progress* was the ratepayers' property.[83] Instead of prohibiting PG&E from distributing its newsletter the Commission sought to apportion this "extra space" between the utility and its customers. Thus, the Commission permitted TURN to use the extra space four times a year to communicate its own message.[84] The Commission determined that ratepayers would benefit from exposure to a variety of views. The Commission concluded that PG&E would have no interest in excluding TURN's message from the billing envelope because the utility did not own the space that TURN's message would fill.[85] In allowing TURN to include its messages in PG&E's envelopes, the Commission required TURN to state that its messages were not those of PG&E.[86] The utility appealed the Commission order to the Supreme Court,[87] arguing that the order abridged its first amendment rights.

B. The Plurality Opinion of the Supreme Court

The plurality opinion struck down the Commission's order, finding that it had two impermissible effects. The order both penalized the expression of particular points of view (an affirmative speech violation) and forced speakers to associate with speech with which they disagreed (a negative speech violation).[88] The Court found that these two effects were impermissible regardless of how the relevant property rights were defined.[89]

The plurality found that *Tornillo*[90] decided the affirmative speech question.[91] In *Pacific Gas*, as in *Tornillo*, there was a content

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81 Toward Utility Rate Normalization represented a group of residential utility customers. *Id.* at 5-6.

82 *Id.* at 5.

83 The Commission reasoned that the "[E]nvelope and postage costs and any other costs of mailing bills are a necessary part of providing utility service to the customer. . . . However, due to the nature of postal rates . . . extra space exists in these billing envelopes. . . . [t]he extra space is an artifact generated with ratepayer funds, and is not an intended or necessary item of rate base." *Id.* at 5 n.3 (quoting Appendix to jurisdictional statement A-2 to A-3).

84 *Id.* at 6.

85 *Id.*

86 *Id.* at 7.

87 *Id.* The California Supreme Court first denied discretionary review.

88 *Id.* at 9 (Justice Powell wrote the plurality opinion).

89 *Id.*

90 *See supra* notes 71-76 and accompanying text.

91 *Pacific Gas*, 475 U.S. at 9-12.

based access rule. Only parties who disagreed with PG&E had access to the envelopes.[92] Thus, each time the utility chose to speak the Commission could force the utility to spread opposing views. Under these circumstances PG&E might conclude that "the safe course is to avoid controversy" and refuse to speak, thereby reducing the flow of information and ideas.[93]

The plurality attempted to distinguish both *PruneYard* and *Red Lion*.[94] In *PruneYard* the access right was not content based. Nor was there any concern that access to the area might affect the owner's exercise of his right to speak.[95] The Court found *Red Lion*, which sustained a limited government-enforced right of access, also inapposite. Billing envelopes do not present the same constraints that justified the result in *Red Lion*. Broadcast frequencies are a scarce resource. One person's use of a frequency necessarily limits another's ability to do so. However, everyone is "free to send correspondence to private homes through the mails."[96]

Next, the plurality found that the access order impermissibly required PG&E to associate with speech with which it disagreed. TURN's speech could place the utility in the position of either appearing to agree with TURN's views or having to respond to TURN's positions.[97] The Court found that the presence of a disclaimer did not alleviate the problem of forced response. Thus, the Court held that "[f]or corporations as for individuals, the choice to speak included within it the choice of what not to say."[98]

The Commission's finding that the "extra space" in the envelope belonged to the ratepayers did not alter the plurality's view. The plurality noted that the Commission had not held that the customers owned the *entire* billing envelope.[99] The envelopes themselves, the bills and *Progress* all remained the utility's property. Thus, the order required PG&E to use its property as a vehicle for spreading a message with which it disagreed.[100]

The Commission advanced two state interests to justify the order: (1) enhancing effective ratemaking and (2) promoting free

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92 *Id.* at 10-11 & n.7.

93 *Id.* at 14 (quoting Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259 (1974)).

94 *See supra* notes 63-76 and accompanying text.

95 *Pacific Gas*, 475 U.S. at 12.

96 *Id.* at 10 n.6 (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 543 (1980)).

97 *Id.* at 15-16 (citing PruneYard Shopping Center v. Robbins, 447 U.S. 74, 98-100 (1980)).

98 *Id.* at 16.

99 *Id.* at 17.

100 *Id.* at 17-18.

speech by exposing ratepayers to a variety of views.[101] The Court found that these interests were neither compelling nor narrowly tailored. First, the order was not a narrowly tailored means of enhancing effective ratemaking. The state could assist TURN in its efforts to represent community interest at ratemaking proceedings in ways that do not violate the first amendment. The Court suggested that the state could impose the cost of public interest group participation at rate making hearings on the utility, rather than allowing groups, like TURN, to solicit funds through leaflets in billing envelopes.[102] Second, the Court cited *Bellotti* for the broad proposition that a state's interest in promoting speech can never be served by an order that is not content neutral.[103]

C. The Concurring Opinions

Chief Justice Burger joined the opinion, but completely based his decision on the utility's right to be free from forced association with opposing views. Justice Burger therefore felt that *Wooley v. Maynard* resolved the issue in the case.[104]

Justice Marshall concurred in the judgment, but did not join the opinion. Justice Marshall framed the issue as to what extent the Federal Constitution limits a State's ability to redefine common-law property rights. He distinguished the definition of property rights in *PruneYard* from the definition of those rights in *Pacific Gas*.[105] First, in *PruneYard*, there was limited intrusion onto the property. The property in *PruneYard* was a business establishment; it was already open to the public. There was no markedly greater intrusion by allowing the activists to solicit signatures. The property in *Pacific Gas* was a billing envelope. The utility had never granted public access to its billing envelopes.[106] Thus the order significantly intruded on the utility's property rights. Second, the owner in *PruneYard* never alleged that the order hindered his expression. In *Pacific Gas*, on the other hand, the state gave TURN a right to speak that limited the utility's ability to use its property as a forum for exercising its own first amendment rights.[107]

D. The Dissents

In a forceful dissent Justice Rehnquist argued that the plurality

101 *Id.* at 19-20.
102 *Id.* at 19 & n.16.
103 *Id.* at 19-20.
104 *Id.* at 21 (Burger, C.J., concurring).
105 *Id.* (Marshall, J., concurring).
106 *Id.* at 22.
107 *Id.* at 23-24.

opinion had erred in analyzing both negative and affirmative speech rights.[108] The *Bellotti* case, he argued, established only that the government may not *directly* suppress the affirmative speech of corporations. In *Pacific Gas* the government action did not directly suppress the utility's speech but rather "only *indirectly* and *remotely* affect[ed] a speaker's contribution to the overall mix of information available to society."[109] He argued that "[w]hen the potential deterrent effect of a particular state law is remote and speculative, the law simply is not subject to heightened First Amendment scrutiny."[110]

Justice Rehnquist disagreed with the plurality's decision to extend negative speech rights to corporations.[111] He argued that negative speech rights are desigued only to protect freedom of thought and expression. Thus, only natural persons are entitled to such protection. "To ascribe to [corporations] an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality."[112] Distinguishing *Tornillo*, he stated "[c]orporations generally have not played the historic role of newspapers as conveyers of individual ideas and opinion."[113] Justice Rehnquist explained that both *Bellotti* and *Consolidated Edison* recoguized that corporate free speech rights are unrelated to self expression.[114]

In a separate dissent Justice Stevens claimed that the plurality misconstrued the Commission order. He argued that the order only allowed TURN to use the extra space to solicit funds. Thus, there was no danger of TURN engaging in wide political debate which could chill PG&E's speech or force it to associate with repuguant ideological views.[115] Justice Stevens analogized the order to constitutionally sound Securities and Exchange Commission regulations that require management to transmit proposals of minority shareholders in shareholder mailings.[116] He found the order here no more impermissible.[117]

IV
ANALYSIS

A. Affirmative Speech

The plurality opinion in *Pacific Gas* held that the Public Utility

108 Justice Rehnquist was joined by Justices White and Stevens.
109 *Id.* at 27 (Rehnquist, J., dissenting).
110 *Id.* at 30.
111 *Id.* at 32.
112 *Id.* at 33.
113 *Id.*
114 *Id.*
115 *Id.* (Stevens, J., dissenting).
116 *Id.* at 38 n.4 (citing Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)).
117 *Id.*

Commission's access order restrained speech by allowing access to billing envelopes only to a group that disagreed with the utility. The Court argued that this selective access chilled the utility's speech just as the "right of reply" statute chilled the newspaper's speech in *Tornillo*. In *Tornillo* the Court found that the "right of reply" statute inhibited the newspaper from writing on issues that might trigger replies.[118] The Court in *Pacific Gas* suggested that the utility, like the newspaper in *Tornillo*, "must contend with the fact that whenever it speaks out on a given issue it may be forced . . . to help disseminate hostile views."[119]

The plurality opinion overlooked a critical distinction between the "right of reply" statute in *Tornillo* and the access order in *Pacific Gas*. In *Pacific Gas* TURN was awarded access to the billing envelopes four times a year regardless of what the utility printed in its newsletter.[120] The utility could not stop TURN from writing on particular subjects by not mentioning them in *Progress*. For example, the utility's failure to discuss nuclear power in an issue of *Progress* could not stop TURN from making trenchant anti-nuclear remarks in its communications with the ratepayers. At most, by refraining from a particular topic the utility might avoid suggesting a subject to its competing speaker.[121] In *Tornillo*, by contrast, the newspaper could avoid triggering the "right of reply" statute by altering the content of the newspaper. Given the differences between the right of reply statute and the Commission's access order, it is difficult to uncover any constitutionally significant infringement on the utility's speech in *Pacific Gas*.

Tornillo is also distinguishable from *Pacific Gas* because in *Tornillo* the newspaper's decision to speak out on certain topics could trigger a penalty. Under the statute the newspaper was responsible for the costs of printing and laying out its opponent's editorial response which was an added cost over and above the normal costs incurred in publishing the daily newspaper. In *Pacific Gas*, by contrast, the order did not require the utility to pay the costs of TURN's communications. TURN would merely use the "excess space" in the envelope, incurring no additional postage costs.[122]

A more fundamental flaw in the plurality's decision was its failure to take account of the differences between the first amendment rights of corporations as distinguished from individuals. In both

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118 *See supra* text accompanying notes 71-76.

119 475 U.S. at 14. *See* Harrison, *Public Utilities and the First Amendment: The Economics and Ideology of Pacific Gas & Electric*, 38 U. FLA. L. REV. 319, 333 (1986).

120 Toward Utility Rate Normalization v. Pacific Gas & Electric Co., 70 Pub. Util. Rep. 4th 183 (Cal. P.U.C. 1983).

121 *See* Harrison, *supra* note 119, at 332.

122 *Pacific Gas*, 475 U.S. at 31-32 (Rehnquist, J., dissenting).

Bellotti and *Consolidated Edison*, the Court grounded corporate first amendment protection solely in the listener's "right to hear." The Court did not give the corporation any "right to speak."[123] The Court used the "marketplace of ideas" and "self-government"[124] theories of the first amendment to support the right to hear doctrine.[125]

The right to hear protects expression in order to provide listeners with full information. The Court should focus on the listener's interest in corporate speech cases. Thus, the listener's right to hear should not protect corporate speech that itself impedes the public's ability to receive diverse views.[126]

In *Pacific Gas* the plurality failed to focus on the listener's rights. The Commission's order would have *increased* the diversity of views presented to the ratepayers. The plurality disposed of this issue by citing *Bellotti* for the proposition that "the State cannot advance some points of view by burdening the expression of others."[127]

Bellotti, however, is distinguishable from *Pacific Gas*. *Bellotti* involved a direct restriction on any corporate speech on a particular topic.[128] Listeners were completely denied corporate views on certain issues. Further, in *Bellotti*, there was no evidence suggesting that the restriction on corporate speech would facilitate speech by other members of society.[129] In *Pacific Gas*, by contrast, the restriction on the utility's speech was, at most, slight. The order did not prohibit the utility from speaking on certain topics, which would have frustrated the listeners' rights. Instead, the order prevented the utility from speaking at certain times in the billing envelope's "extra space." Further, an increase in the diversity of views presented in the envelopes accompanied the slight restriction on the utility's speech. Unlike *Bellotti*, there was evidence in *Pacific Gas* that the listeners would have access to a greater diversity of views as a result of the state action.

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123 *See supra* text accompanying notes 20-47.

124 *See supra* text accompanying notes 14-19.

125 *See supra* text accompanying notes 10-47.

126 Nevertheless, the right to hear may occasionally demand some slight restrictions on speech where the overall effect is to facilitate speech. *See* L. TRIBE, *supra* note 14, § 12-19, at 946 (right to hear "carries the implication that government, while it may not close the market[place of ideas], may move to correct its defects and regulate its incidental consequences"); Note, *supra* note 11, at 166 (Right to hear "may occasionally demand restrictions on expression."); Baldwin & Karpay, *supra* note 29, at 217-18 (the protections the right to hear provides speaker is "subordinate to the listener informational interests."); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (upholding "equal time" regulation in the interests of ensuring listeners and viewers access to a diversity of views).

127 475 U.S. at 20.

128 475 U.S. at 27 (Rehnquist, J., dissenting).

129 *See supra* notes 31-36 and accompanying text.

The *Pacific Gas* plurality opinion frustrated the listeners' right to hear, thereby frustrating the purposes underlying that first amendment right. By restricting the public's ability to hear other views, the Court decreased competition in the marketplace of ideas and impeded the public's ability to make informed electoral choices.

The plurality opinion also erred by dismissing the state's interest justifying the "burden" on the utility's speech. The Commission argued that the order advanced the state's interest in effective ratemaking, justifying the slight intrusion on the utility's speech.[130] In response, the plurality noted that although "[t]he State's interest in fair and effective utility regulation may be compelling . . . the State can serve that interest through means that would not violate [PG&E's] First Amendment rights . . . ."[131] The plurality suggested that the commission could "impos[e] on [Pacific Gas] the reasonable expenses of responsible groups that represent the public interest at rate making proceedings."[132]

The plurality did not articulate why its suggestion would not itself violate the first amendment. If the Commission forces the utility to contribute funds to support the advocacy of a public interest group at public hearings, the Commission violates the utility's negative speech rights because the utility must support speech with which it disagrees.[133] The plurality could have avoided this problem by arguing that negative speech rights do not attach to corporations. But the plurality also argued that corporations are entitled to negative speech rights.[134]

B. Negative Speech

The plurality in *Pacific Gas* argued that the Commission's order placed the utility in a negative speech dilemma. Because the utility was required to carry the speech of the public interest group the utility "may be forced either to appear to agree with TURN's views or to respond."[135] It further suggested that "[t]his pressure to respond 'is particularly apparent when the owner has taken a position opposed to the view being expressed on his property.' "[136]

A close analysis of the actual facts of *Pacific Gas* suggests, however, that such a dilemma could not arise. In *Pacific Gas* the order required the ratepayer group, TURN, to state that its views were not

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130 475 U.S. at 19.

131 *Id.* at 19.

132 *Id.*

133 *See* Abood v. Board of Education, 431 U.S. 209 (1976) (forced support of union political activity held unconstitutional).

134 *Pacific Gas*, 475 U.S. at 16.

135 *Id.* at 15.

136 *Id.* at 15-16 (quoting *PruneYard*, 447 U.S. at 100).

those of the utility.[137] The speaker (TURN) informed the listeners that the utility was not the source of the speech. Thus, one side of the dilemma appears to be missing. The utility did not need to speak in order to disassociate its message from the speech. While it may have desired to speak to compete with the ratepayer group in the "marketplace of ideas," it did not need to respond to avoid mistaken association.

The fact that the order required TURN to disassociate its message from the utility distinguishes *Pacific Gas* from the negative speech cases holding that forcing an individual to disclose his own views on a topic violates the first amendment. In *Tornillo*, for example, the right of reply statute did not require the person responding to disassociate his views from the newspaper. Thus, the newspaper had to disclose its views in order to avoid association with the speaker invoking the statute. Similarly, in *Wooley* and *Barnette* the burden was on the subject of the compelled speech to indicate that he did not share the views he was required to foster. And in *PruneYard*, the Court did not find a first amendment violation in part because the shopping center owner could avoid association with the speaker's expression.[138]

The fact that the utility may have desired to argue the issues raised by the ratepayer group should not trigger a constitutional claim. Whenever one's opponent speaks on an issue one may desire to counter such views. But that kind of "pressure to respond" is surely not unconstitutional. In fact, the first amendment is designed to promote precisely that kind of pressure.[139] It increases the diversity of views available to listeners and increases the competition in the "marketplace of ideas in which truth will ultimately prevail."[140]

The plurality attempted to buttress its claim by stating that "[t]his pressure to respond is 'particularly apparent when the owner has taken a position opposed to the view being expressed on his property.' "[141] In *Pacific Gas*, however, the plurality assumed for the purposes of its analysis that the excess space in the envelope was the *ratepayers'* property.[142] Thus, any increased pressure to respond could only result from the proximity of the ratepayers' property to the utility's. Again, however, this kind of pressure is not unconstitutional. No cases hold that one property owner may curtail an adja-

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137 *Id.* at 7.

138 *See supra* text accompanying notes 57-78; *see also* Harrison, *supra* note 119, at 338.

139 *See* cases cited *supra* notes 18-19 and accompanying text.

140 *Red Lion*, 395 U.S. at 390.

141 475 U.S. at 15-16.

142 *Id.* at 25.

cent property owner's speech to avoid pressure to respond to his views.

The plurality's negative speech analysis is marred by a more fundamental error. The plurality never explains how the "right not to speak" can attach to corporations whose first amendment protection derives solely from listeners' "right to hear." In both *Bellotti* and *Consolidated Edison* the Court emphasized that the listeners' rather than the speakers' rights were violated by the restrictions on corporate speech.[143] When a corporate speaker feels pressure to disclose his own views on a topic it seems clear that it will not violate those listeners' rights. On the contrary, the listeners seem to benefit from exposure to the corporate view. *Bellotti* and *Consolidated Edison* indicate that when corporations disclose their views to the public there is increased competition in the marketplace of ideas and the public is better able to make informed electoral choices. Thus, the plurality's decision to accord negative speech rights to corporations seems incongruent with the theory underlying corporate first amendment rights.

Further, regardless of whether a corporation has a right to be free from pressure to disclose its views, there is nothing in *Bellotti* and *Consolidated Edison* to indicate that a corporation has a right to be free from forced association with views with which it disagrees. The first amendment theory underlying negative speech doctrine is the notion that forced association with views repugnant to a person's convictions violates the "freedom of mind or conscience" that the first amendment seeks to foster.[144] Thus, in both *Wooley* and *Barnette* the Court refused to force individuals to foster government dictated messages that were repugnant to the individual's moral and political beliefs. A corporation, however, has no convictions which forced association with another's message would assault.[145] Thus, the principles underlying negative speech rights do not apply to corporations.

CONCLUSION

This Note has argued that *Pacific Gas* was wrongly decided on both affirmative and negative speech grounds. In both instances the Court misapplied precedent. More importantly, however, the Court lost sight of the source of corporate first amendment protection: the listener's right to hear. As a consequence the Court frustrated a

143 *See supra* notes 20-47 and accompanying text.

144 *See supra* note 52.

145 *See supra* notes 29-30 and accompanying text. The Court in *Bellotti* expressly declined to accord corporations the full first amendment rights of individuals precisely because corporations lack convictions.

legitimate government attempt to facilitate the public's ability to hear diverse views.

Nicholas Nesgos