"The Corporate Conscience" and Other First Amendment Follies in *Pacific Gas & Electric*

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I. INTRODUCTION

The Supreme Court case of *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[1] decided eighteen years ago, produced arguably the sloppiest First Amendment analysis in modern times. The case dealt the consumer movement a severe blow,[2] but only three Justices who participated in the decision remain on the Court, and

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

2. Prior to the decision, there was a growing nationwide movement to create citizen utility boards. *See* Michael de Courcy Hinds, *Citizen Utility Boards Hunt Industry White Elephants*, N.Y. TIMES, June 6, 1982, at 8BE. The decision devastated that movement.

two of them dissented.[3] This combination of circumstances suggests the value of revisiting the Court opinion.[4]

The case involved a state-regulated utility, the Pacific Gas & Electric Company (PG&E). For many years, PG&E distributed a newsletter in its monthly billing statements containing assorted information of practical value to the company's customers, such as tips on conservation and information about bills and services, as well as political editorials and news stories.[5] In a ratemaking procedure before the California Public Utilities Commission (Commission), which regulates PG&E, a group called Toward Utility Rate Normalization (TURN) argued that ratepayers should not be forced to bear the expense of PG&E's political speech.[6] TURN urged the Commission to forbid PG&E from using billing envelopes to distribute political editorials.[7] Instead, the Commission chose a different remedy—permitting TURN to insert its own materials into the mailing, four times a year, in order to raise funds and communicate with ratepayers.[8] TURN was required to display a bold statement that its message was not that of PG&E.[9]

PG&E brought suit, asserting that the Commission's order violated PG&E's First Amendment right not to help spread a message with which it disagreed.[10] After the California Supreme Court denied discretionary review of the order, the United States Supreme Court heard the case and held that the mandatory insert was unconstitutional.[11]

This Article argues that the Court's opinion was flawed in various respects, especially in applying the First Amendment right *not to speak* to a commercial corporation. Such a holding has no grounding in any valid policy and does not follow from the Court's stated rationale for protecting corporate speech. Indeed, the Court's misguided analysis undercuts core First Amendment interests.

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3. Justices Rehnquist and Stevens (along with Justice White) dissented. Of the Justices in the majority, only Justice O'Connor remains on the Court. *Pac. Gas & Elec. Co.*, 475 U.S. at 2.

4. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47 (1977) (noting that despite the principle of stare decisis, the need to straighten out muddled law that produces harmful consequences justifies reconsideration of Court precedent).

5. *Pac. Gas & Elec. Co.*, 475 U.S. at 5.

6. *Id.*

7. *Id.*

8. *Id.* at 5–6. The Commission found that the envelope space used to disseminate the newsletter was property of the ratepayers, and there was "extra space" in the newsletter. *Id.* at 6. "Extra space" was defined as follows: "'the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost.'" *Id*. (quoting the Commission's opinion).

9. *Id*. at 7.

10. *Id.*

11. *Id*.

II. THE CORPORATE CONSCIENCE

The Court found that the Commission order mandating a TURN insert in PG&E's mailings "impermissibly requires appellant to associate with speech with which appellant may disagree."[12] Appellant "may be forced either to appear to agree with TURN'S views or to respond,"[13] and the required disclaimer on TURN's message "does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message."[14]

One might think that TURN's message, coupled with the predicted response by PG&E, would promote a robust debate and thus further First Amendment values, but the Court saw another First Amendment value trampled in the process. Here is the heart of its analysis, replete with revealing case citations:

> That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. [Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985)]. See also Wooley v. Maynard, [430 U.S. 705, 714 (1977)]. For corporations as for individuals, the choice to speak includes within it the choice of what not to say. [Miami Hearld Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)]. And we have held that speech does not lose its protection because of the corporate identity of the speaker. [First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)]; [Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n, 447 U.S. 530, 533 (1980)]. The danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected under our decisions in *Bellotti* and *Consolidated Edison*.[15]

This analysis clearly conflates different aspects of the First Amendment. The First Amendment serves two essential purposes—what might crudely be called its public purpose and its private purpose.[16] The First Amendment serves the public by promoting the kind of vigorous debate about public issues necessary for a vibrant democracy.[17] In addition, the

12. *Id*. at 15.
13. *Id*. (citation omitted).
14. *Id*. at 15 n.11.
15. *Id*. at 16 (footnote omitted).
16. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) (noting "the role of the First Amendment in fostering individual self-expression [and] also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas") (footnote omitted).
17. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting the First Amendment's role in serving the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

First Amendment protects individuals' interests in privacy, expression, and growth.[18] Sometimes, the protection of free speech serves both goals simultaneously, but other times it does not.[19] The two goals are analytically distinct[20] and the Court usually treats them that way. Thus, for example, when the Court affirmed the right to possess pornographic materials in one's home, it did not contend that doing so would enrich public debate.[21] Conversely, when the Court protected the publication of the Pentagon Papers, it made no claim that it did so to promote the interests of individuals.[22]

Unfortunately, in the passage from *Pacific Gas* quoted above, the Court mixed the private and public aspects of the First Amendment. The Court observed that corporations retain free speech rights, but failed to note the explicit rationale for that doctrine (as set forth in the very cases the Court cited—*Bellotti* and *Consolidated Edison*): to promote public debate.[23] The Court haphazardly intermingled its assertion of a corporation's right to speak with a more specific First Amendment right—protection from coerced association. The latter right, however, was developed in cases unrelated to corporate speech and for reasons unrelated to promoting public debate.[24] Protection from coerced speech and association derives from the other principal First Amendment rationale—protection of individuals. Specifically, it protects individual autonomy and conscience, or what some commentators have called "personhood"[25] or "self-realization."[26] The paradigmatic cases, explicitly

18. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 787 (2d ed. 1988) (noting the First Amendment's role in promoting and protecting "personal growth and self-realization") (footnote omitted).

19. *See* Thomas H. Dupree, Jr., Comment, *Exposing the Stealth Candidate: Disclosure Statutes After* McIntyre v. Ohio Elections Commission, 63 U. CHI. L. REV. 1211, 1232 (1996) ("Often the self-governance conception collides with the First Amendment's goal of protecting self-expression.").

20. *See* Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 761 (1995) ("[The] two [First Amendment] values are differently situated with respect to different kinds of speech; applying both elements to all forms of speech is mistaken.").

21. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

22. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

23. *See* Nicholas Nesgos, Note, Pacific Gas & Electric Co. v. Public Utilities Commission*: The Right to Hear in Corporate Negative and Affirmative Speech*, 73 CORNELL L. REV. 1080, 1095 (1988) ("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.").

24. Significantly, in the cases affirming a corporate right to free speech, the Court explicitly acknowledged that this right does not stem from any interest in self-expression. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 & n.12 (1978); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 534 n.2 (1980).

25. *See* TRIBE, *supra* note 18, § 15-4, at 1312–14.

26. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

relied on by the Court in *Pacific Gas*, are *West Virginia State Board of Education v. Barnette*[27] and *Wooley v. Maynard*.[28] In *Barnette* and *Wooley*, respectively, the Court struck down a statute requiring a compulsory flag salute[29] and a statute requiring the compulsory display of the New Hampshire's state slogan, "Live free or die," on license plates.[30] In these cases, the Court sought to protect "the sphere of intellect and spirit"[31] and "individual freedom of mind."[32]

The profound differences between those cases and *Pacific Gas* should be apparent. In *Barnette*, the state required individuals to speak a message that violated their consciences. In *Pacific Gas*, the state merely required a corporation to share envelope space with the offending message.[33] Both *Barnette* and *Wooley* protected against the state's coercing citizens to voice an officially prescribed orthodoxy.[34] In *Pacific Gas*, no such coercion took place; a corporation was merely forced to compete in the marketplace of ideas with a public interest group.[35] In *Barnette* and *Wooley* the state imposed "[c]ompulsory unification of opinion,"[36] whereas in *Pacific Gas* the state sought to achieve diversity of opinion. *Barnette* and *Wooley* protected "intellectual individualism,"[37] whereas *Pacific Gas* did nothing of the sort. *Barnette* and *Wooley* involved a daily affirmation of a state-mandated message, "in a manner akin to brainwashing, to suppress individual initiative and

27. 319 U.S. 624 (1943).
28. 430 U.S. 705 (1977).
29. *Barnette*, 319 U.S. at 642.
30. *Wooley*, 430 U.S. at 706–07, 717.
31. *Barnette*, 319 U.S. at 642.
32. *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).
33. *See* Leora Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 822 (1986) (noting that the *Barnette* Court recognized "the right to be free of government efforts to force individuals to say what they do not believe").
34. *See Barnette*, 319 U.S. at 642 ("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.").
35. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 239 (2000) (Souter, J., concurring) (rejecting application of *Wooley* and *Barnette* to university student activity funding mechanism because, although the latter forced people to subsidize speech with which they disagreed, it did not "require an individual to bear an offensive statement personally . . . let alone to affirm a moral or political commitment").
36. *Barnette*, 319 U.S. at 641.
37. *Id*.

to bring individual thought into line with the state's chosen ideology."[38] Once again, nothing like this transpired in *Pacific Gas*. No government message or official ideology was at issue, nor was anyone compelled to say anything.[39]

Barnette and *Wooley* are flimsy precedent for protecting a for-profit utility from sharing envelope space with a group that represents ratepayers. Not only is the spirit-intellect-mind rationale inapposite in the *Pacific Gas* case,[40] but a bold disclaimer (not readily available in the other cases) solves any problem of coerced association.[41]

Nevertheless, in *Pacific Gas* the Court randomly applied the "freedom of conscience" rationale to corporations.[42] The Court ignored Justice Rehnquist's powerful contention, in dissent: "Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point."[43] As Rehnquist explains: "To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality."[44]

It gets worse. In this case, importing the freedom of conscience into a situation where it did not plausibly apply defeated the rationale for protecting corporate speech in the first place—the promotion of public debate.[45] The Court's ruling prevented the kind of public give and take

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38. Harpaz, *supra* note 33, at 851.

39. Indeed, Justice Marshall, whose separate concurrence gave the Court its fifth vote, acknowledged that "interference with appellant's speech is, concededly, very slight." Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 24 (1986) (Marshall, J., concurring).

40. It should be obvious that requiring an individual to salute a flag that represents something he may despise is a far cry from requiring a public utility to provide space for a pro-ratepayer message it might dispute or find threatening to its profits.

41. The importance of the availability of a disclaimer was recognized by the Court in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). Because the owner of a shopping mall was free to post disclaimers disavowing any connection to the message of specific speakers, his First Amendment rights were not violated by California's requirement that there be a right of access to the mall for the purpose of speech and petitioning. *PruneYard* is discussed *infra* notes 71–73 and accompanying text. *See also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994).

> [T]here appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator . . . and it is a common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility.

Id. (citations omitted). In *Pacific Gas*, the party required to yield access (PG&E) did not even need to make a disclaimer; TURN was required to state that its message did not reflect the views of PG&E. *Pac. Gas & Elec. Co.*, 475 U.S. at 6–7.

42. *Pac. Gas & Elec. Co.*, 475 U.S. at 32–33 (Rehnquist. J., dissenting).

43. *Id*. at 33.

44. *Id*.; *see also* Bezanson, *supra* note 20, at 739; ("[A corporation's speech] is an artifact. It has nothing to do with liberty and no necessary relationship to freedom, a term that is meaningless outside the context of individuals.").

45. *See Pac. Gas & Elec. Co.*, 475 U.S. at 34 (Rehnquist, J., dissenting) ("The

(in PG&E's newsletter) that allegedly underlies the extension of free speech to corporations.[46]

What makes the case particularly unsettling is its disconnectedness to opinions past and future.[47] As Justice Rehnquist observed, two constitutional rights closely analogous to the right to refrain from speaking—the right to remain silent and the right to privacy—"have been denied to corporations based on their corporate status."[48] In revealing dicta years after *Pacific Gas* was decided, the Court unself-consciously described the right not to speak as preventing "government control over the content of messages expressed by *private individuals*."[49]

Is there any valid precedent for the *Pacific Gas* decision? One case cited by the Court at least superficially offers support. In *Miami Herald Publishing Co. v. Tornillo*,[50] the Court did protect a corporation's right not to speak. The Court struck down a state statute requiring newspapers to provide space for public officials to reply to attacks. The Court argued that the statute endangered a free press because its effect would be to penalize newspapers for exercising their speech rights by forcing them to devote space they might not wish to devote.[51]

Although the Court in *Pacific Gas* leaned heavily on *Tornillo*, the cases are radically different. First, in *Pacific Gas*, speech by PG&E exacted no penalty: TURN would be given access to four envelopes regardless of what PG&E said.[52] Second, and related, the Court's prediction that PG&E would repress speech to head off a response was farfetched.[53] In *Tornillo*, the scenario of self-censorship was predictable;

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right of access here constitutes an effort to facilitate and enlarge public discussion; it therefore furthers rather than abridges First Amendment values."); Nesgos, *supra* note 23, at 1096 ("[T]he listener's right to hear should not protect corporate speech that itself impedes the public's ability to receive diverse views."); Bezanson, *supra* note 20, at 739 ("Institutional speech, therefore, should be protected by a separate and distinct framework of principle resting expressly on its value.").

46. *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 189 (1986) (stating that the Court "erred by unthinkingly extending its instrumental protection of corporate speech to encompass a case in which public debate was not really threatened by the commission's order" and that "[r]ather than protecting public debate . . . the Court clearly restricted the flow of information").

47. *See id.* at 182 ("[T]he Court . . . departed considerably from its historic rationale for protecting corporate speech.").

48. *Pac. Gas & Elec. Co.*, 475 U.S. at 34.

49. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (emphasis added).

50. 418 U.S. 241 (1974).

51. *Id*. at 256–57.

52. *Pac. Gas & Elec. Co.*, 475 U.S. at 6–7.

53. *Id*. at 31 (Rehnquist, J., dissenting).

a newspaper might well refrain from attacking an official, knowing that it would be obliged to publish his reply.[54] The editors might refuse the point-counterpoint either because they did not wish to give the official a forum or because they did not wish to devote that much space to the matter.[55] Neither rationale applied in *Pacific Gas*. TURN would be free to say what it wanted regardless of what PG&E said or did not say, and space was simply not a consideration because TURN's inserts did not increase the cost of mailings.[56] Thus, the risk of self-censorship rested solely on the slim possibility that, by raising a certain issue, PG&E would call TURN's attention to an issue it otherwise might ignore.[57]

Third, and most importantly, *Tornillo* involved a newspaper whose very existence lies at the heart of the First Amendment.[58] The Court itself saw its decision as preventing "intrusion into the function of editors."[59] To require a newspaper to publish something is a risky incursion into public debate.[60] As noted, a predictable response would be for the newspaper, on some occasions, to withhold saying something rather than give a public official the opportunity to respond. This, in turn, would deprive the public of core political speech.[61] By contrast, if a utility is cowed into silence by the prospect of rebuttal from a ratepayer protection group, comparatively little is lost.[62] Indeed, as

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54. *Id*. at 9–10.

55. Indeed, the Court explicitly cited the statute's effect on editors' allocations of scarce newspaper space. *Tornillo*, 418 U.S. at 257 n.22, 258.

56. *Pac. Gas & Elec. Co.*, 475 U.S. at 5–6.

57. *See id*. at 31 (Rehnquist, J., dissenting) (noting that the plurality said "the possibility of minimizing the undesirable content of TURN's speech may induce PG&E to adopt a strategy of avoiding certain topics," but observing that "this is an extremely implausible prediction"); *see also* Nesgos, *supra* note 23, at 1095 ("The utility could not stop TURN from writing on particular subjects by not mentioning them in [its newsletter]. . . . At most, by refraining from a particular topic the utility might avoid suggesting a subject to its competing speaker.") (footnote omitted).

58. *See* Bruce W. Blakely, *Public Utility Bill Inserts, Political Speech, and the First Amendment: A Constitutionally Mandated Right to Reply*, 70 CAL. L. REV. 1221, 1257 (1982) ("The print media has historically been granted an independence from government that does not extend to other information sources.").

59. *Tornillo*, 418 U.S. at 258.

60. Indeed, government control of the media is an almost universal characteristic of authoritarian regimes.

61. *See Pac. Gas & Elec. Co.*, 475 U.S. at 33 (Rehnquist, J., dissenting) ("Corporations generally have not played the historic role of newspapers as conveyers of individual ideas and opinion."); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 797 n.1 (1970) (Burger, C.J., concurring) ("It may be that a nonmedia corporation, because of its nature, is subject to more limitations on political expression than a media corporation whose very existence is aimed at political expression.").

62. *See* Blakely, *supra* note 58, at 1258 ("[S]ince utilities are not engaged in the business of informing the public, as are the media, the policy concerns that require media independence from government (so that the media can perform their job of informing the public and guarding against governmental abuse), do not apply to utilities.").

noted, TURN could say whatever it wants because all that is lost is a commercial corporation's self-serving commentary.

Also, the freedom of conscience-spirit rationale, developed in *Barnette* and *Wooley*, could be extended to *Tornillo* with some plausibility. The raison d'etre of many newspapers involves the expression of certain perspectives or ideas.[63] Moreover, newspapers are sometimes closely linked in the public mind to one or a few individuals—the editor or publisher.[64] Such individuals sometimes start a newspaper precisely to correct what they perceive as an imbalance in coverage. Requiring them to give access to certain parties or viewpoints, therefore, might undermine the very purpose of their enterprise.[65]

In short, there is an enormous difference between the right of a newspaper to publish what it wants and the alleged right of a commercial corporation to promote publication of what it wants.[66] As Justice Rehnquist aptly put it: "The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same."[67]

It does not follow that newspapers are the only organizations to which a right of conscience might plausibly be imputed. There are various organizations, such as labor unions and political action committees, that

63. As an empirical matter, a newspaper is not a profit-making enterprise in the same way a utility almost invariably is. One rarely starts a utility to promote a certain viewpoint, and one often starts a newspaper for precisely that reason and with little expectation of profit.

64. *See* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 36–37 (1976) (noting that corporate speech should be protected only when it represents "the *personal* values of the owners or stockholders" or expresses management's "personal prejudices or values"). Of course, where that is the case, management and shareholders can and should speak for themselves. In general, it seems safe to say that most corporate speech is directed at profit-making rather than expressing a political perspective. *See id*. at 6 n.25.

65. One may respond that requiring a utility to provide space for the ratepayer group will, in effect, undermine the utility's purpose of maximizing profit, but such a response acknowledges that the interest protected is not a First Amendment interest at all. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 67 (1996) ("[PG&E's] economic loss is of no constitutional significance, however, certainly not under the First Amendment."). The state can directly reduce the profit of a legally protected monopoly, and it is surely far less inimical to the utility's interests when the state requires the dissemination of information that *might* reduce the utility's profit.

66. Indeed, in a subsequent case the Court characterized the "essential proposition" of *Tornillo* as follows: "The First Amendment protects the editorial independence of the press." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 653 (1994).

67. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 35 (1986) (Rehnquist, J., dissenting).

people join to enhance their voices or otherwise express themselves.[68] If such groups assume the corporate form, one need not disqualify them from full First Amendment protection,[69] but these should be the exceptions, not the norm,[70] and are readily distinguishable from a for-profit utility company.

III. THE DISCOUNTED DISCLAIMER

The Court's failure to distinguish *Tornillo* was no more strained than its attempt to differentiate *PruneYard Shopping Center v. Robins*.[71] The Court felt an understandable need to distinguish *PruneYard*, which had been decided just six years earlier.[72] In that case, the owner of a shopping center wished to deny access to a group of students who sought to distribute pamphlets in the center's common area.[73] The Court held that the owner had no such right.[74]

Like the utility in *Pacific Gas*, the shopping center owner could have seen dissemination on his premises of messages with which he disagreed as a violation of his First Amendment rights, but the Court rejected the owner's claimed First Amendment right, in part, because he was free to disavow any messages he disapproved of by posting a disclaimer.[75] The Court distinguished *Barnette* on that very ground, as well as the related fact that the right of access did not compel the shopping center owner to

68. Such groups are typically not-for-profit, which provides a relatively easy basis of distinguishing them from utilities like PG&E.

69. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 808 n.8 (1978) (White, J., dissenting) ("[N]ewspapers and other forms of literature obviously do not lose their First Amendment protection simply because they are produced or distributed by corporations."); Bezanson, *supra* note 20, at 822 ("Sometimes, of course, speech produced by organizations will trace its value to the dissemination of the views of individuals—the amplification, in effect, of the freedom of individuals to speak. If this is so, it is best understood as individual speech, not institutional speech.") (footnote omitted).

70. *See* Bezanson, *supra* note 20, at 822–23 ("In most cases, however, the speech of organizations is not traceable to the expressive intentions of the members who comprise them. . . . In such cases, the human concept of freedom has no bearing on the reasons that might support protecting the speech.").

71. 447 U.S. 74, 87–88 (1980).

72. *See* William Burnett Harvey, *Private Restraint of Expressive Freedom: A Post-*PruneYard *Assessment*, 69 B.U. L. REV. 929, 933 (1989) (noting that *PruneYard* was a "crucial step" in the Court's First Amendment jurisprudence).

73. The right to access had been established by the California Supreme Court's interpretation of its state constitution. Robins v. PruneYard Shopping Ctr., 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74 (1980).

74. *PruneYard Shopping Ctr.*, 447 U.S. at 88.

75. *See id.* at 87 ("[A]ppellants 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.").

affirm his belief in government orthodoxy.[76]

In his *Pacific Gas* dissent, Justice Rehnquist rightly called *PruneYard* and *Pacific Gas* "very similar."[77] The plurality in *Pacific Gas* did not acknowledge the similarity.[78] Instead, it offered dubious distinctions between the two cases. First, the Court observed: "Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets."[79] Oddly, the Court implied that *PruneYard* turned on poor argumentation by counsel for the shopping center owner, who apparently neglected to mention the obvious fact that California's right of access would result in the dissemination of some messages with which the owner disagreed. If the Court's analysis above is taken at face value, *PruneYard* stands for a remarkably slender proposition: The California right of access trumps a shopping center owner's right to exclude messages that he finds unacceptable.

The Court also observed that, in *PruneYard*, unlike in *Pacific Gas*, the claimed access right was not "content-based,"[80] but that is a distinction without a difference as far as the shopping center owner was concerned. Just like the utility in *Pacfic Gas*, the shopping owner was forced by a government decree to assist in disseminating messages he would rather not disseminate (and, in some cases, no doubt, with which he disagreed).[81] In *PruneYard*, the Court found that the state interest in promoting debate, and the availability of a disclaimer by the owner, sufficed to justify the imposition.[82] In *Pacific Gas*, it held otherwise. The factual

76. *Id*. at 88 ("*Barnette* is inapposite because it involved the compelled recitation of a message containing an affirmation of belief. . . . Appellants are not similarly being compelled to affirm their belief in any governmentally prescribed position or view.").

77. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 28 (1986) (Rehnquist, J., dissenting).

78. Justice Marshall, in concurrence, did concede a "similarity" between the cases. *Id*. at 22. (Marshall, J., concurring). His effort to distinguish them is discussed *infra* notes 90–95 and accompanying text.

79. *Pac. Gas & Elec. Co.*, 475 U.S. at 12.

80. *Id*.

81. The speech in question in *PruneYard* involved a United Nations resolution against Zionism. *PruneYard Shopping Ctr*., 447 U.S. at 77. While there is no indication whether the store owner did in fact agree with the message promulgated by the speakers, this is clearly the kind of controversial speech that some people would find offensive. Inevitably, the owner of the shopping center would be helping to display some messages with which he disagreed.

82. *See id.* at 85 n.8 (noting that the California Supreme Court could legitimately conclude that the "access to appellants' property in the manner required here is necessary to the promotion of state-protected rights of free speech and petition").

differences between the two cases do not justify the different outcomes.[83]

The Court's strained distinction of *PruneYard* culminated in an insecure double negative: "*PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible."[84] Surely, *PruneYard* established that some forced associations do not burden protected speech in an impermissible manner.[85] The Court failed to explain why what was permissible in *PruneYard* was impermissible in *Pacific Gas*.

Justice Marshall was apparently troubled by the Court's distinction of *PruneYard* because he wrote a separate concurrence solely to attempt a stronger distinction. He explained the "[t]wo significant differences"[86] between the grants of access in *PruneYard* and *Pacific Gas*. The first was that the right of access in *PruneYard* "did not permit a markedly greater intrusion onto the property than that which the owner had voluntarily encouraged, nor did it impair the commercial value of the property."[87]

This alleged difference has two component parts: (1) Distributing pamphlets is not much more intrusive than shopping, and (2) it will not reduce the owner's profits. These are empirical claims, and it seems fair to suggest that the owner was in a better position to judge each claim than was Justice Marshall. The owner obviously felt that the distribution of pamphlets was intrusive or bad for business.[88] With respect to the latter claim in particular, one wonders how Justice Marshall could know whether the presence of pamphleteering would discourage prospective shoppers.[89] A stronger foundation for *PruneYard* is the public interest in

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83. This would include one other factual distinction that the Court in *Pacific Gas* cited, half-heartedly, in a footnote: "In addition, the relevant forum in *PruneYard* was the open area of the shopping center into which the general public was invited. This area was, almost by definition, peculiarly public in nature. . . . There is no correspondingly public aspect to appellant's billing envelopes." *Pac. Gas & Elec. Co.*, 475 U.S. at 12 n.8 (citations omitted). In reality, a shopping center consists of stores and a parking lot. It is not inherently public or private. If it becomes public, it does so by virtue of the actions of various actors, including the owner, the legislature, and the courts. The owner in *PruneYard* sought to keep his property somewhat private. His efforts failed because of legislative and judicial determinations about the value of a robust debate contemplated by the First Amendment.

84. *Id*. at 12.

85. *See* R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755, 799 (1999) (stating that *PruneYard* limits the reach of the argument against forced association).

86. *Pac. Gas & Elec. Co.*, 475 U.S. at 22 (Marshall, J., concurring).

87. *Id*. (citations omitted).

88. Indeed, in *PruneYard* itself the Court acknowledged that the right of access "interfere[d] with [the] commercial functions" of the shopping center, though it opined that the owner could minimize these by time, place, and manner regulations. *PruneYard*, 447 U.S. at 83.

89. *See infra* note 108 (discussing the inappropriateness of courts making empirical guesses).

a robust debate outweighing minor harm to an entrepreneur's bottom line—a rationale that surely applies in *Pacific Gas*.

Justice Marshall observed that shopping centers, like parks and streets, are places where much public activity already takes place, and "[a]dding speech to the list of those activities did not in any great way change the complexion of the property."[90] However, "[t]he same is not true in this case."[91] To say no more, Justice Marshall was here engaged in the dubious task of protecting the integrity (or "complexion") of an envelope.[92]

Justice Marshall's second distinction of *PruneYard* is no more convincing. He claimed that the shopping center owner's speech was in no way hindered, whereas "[b]y appropriating, four times a year, the space in appellant's envelope that appellant would otherwise use for its own speech, the State has necessarily curtailed appellant's use of its own forum."[93] Just two sentences later, Justice Marshall says that "the interference with appellant's speech is, concededly, very slight."[94] So what he heralded as a "significant difference" between *PruneYard* and *Pacific Gas* turns out, a few short paragraphs later, to rest on a "very slight" interference with free speech rights.[95] It is well settled that a strong governmental interest can trump a tiny individual interest.[96]

The Court's treatment of *Tornillo* and *PruneYard*, taken together, suggests the bankruptcy of its opinion.[97] The utility company bears a far

90. *Pac. Gas & Elec. Co.*, 475 U.S. at 23 (Marshall, J., concurring).

91. *Id*.

92. This concern for the dignity of an envelope, like the plurality's attribution of conscience to a for-profit corporation, is part of a bizarre pattern in which the Court ascribes human qualities to nonhuman entities. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 748–49 (1999) (protecting the "dignity" of states).

93. *Pac. Gas & Elec. Co.*, 475 U.S. at 24 (Marshall, J., concurring).

94. *Id*.

95. Justice Marshall went on to argue that even such a slight interference cannot be permitted in light of what he characterized as the state's justification—"subsidization of another speaker chosen by the State." *Id*. That, in fact, was the state's means, not its justification. Its justification was to promote a fairer ratemaking process and richer debate. Later in his opinion, Justice Marshall acknowledged as much, but claimed that the means chosen by the state were insufficiently tailored to those ends. *Id*. at 25; *see infra* notes 107–108 and accompanying text (discussing the means compared to the ends issue).

96. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 500–01 n.* (1975) (Douglas, J., concurring) (noting the "now-familiar process of balancing and accommodating First Amendment freedoms with state or individual interests").

97. Less central, but equally indefensible, is the Court's treatment of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which the Court struck down a state statute permitting an agency shop arrangement whereby all employees represented by a labor union, even nonunion members, had to contribute to the union as a condition of

greater resemblance to a shopping center owner than to a newspaper,[98] but the Court distinguished it from the latter and likened it to the former.[99]

IV. THE STATE INTEREST

The Court acknowledged in *Pacific Gas* that, notwithstanding any burden on protected speech, the Commission's order would be valid if it served a compelling state interest.[100] The Court further seemed to acknowledge that the two proffered state interests—providing "fair and

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employment. *Id*. at 209, 241–42. In *Pacific Gas*, the Court cited *Abood* for the proposition that "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." *Pac. Gas & Elec. Co.*, 475 U.S. at 11–12. This refers to the fact that, in *Abood*, the Court rejected the idea that the forced contribution was acceptable because the nonunion member was free to deduct from his fee the costs of specific union activity that he opposed. However, the Court did so because, first, it was unfair to "place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union," *Abood*, 431 U.S. at 241, and second, objecting to specific expenditures might subject him to economic reprisal or physical coercion. *Id*. at 241 n.42. To apply these concerns to the situation in *Pacific Gas* involves an enormous stretch. "Monitoring" TURN's speech merely required reading the inserts that appeared in PG&E's own envelopes, and the corporation had no ground to fear any reprisals or coercion. In *Abood*, the Court protected David (a dissident employee) from Goliath (a powerful union). In *Pacific Gas*, the Court protected a powerful corporation that needed no such protection.

98. In this connection, Justice Stevens, dissenting in *Pacific Gas*, made a noteworthy observation:

> The messages that the utility disseminates in its newsletter are unquestionably intended to advance the corporation's commercial interests, and its objections to the public interest group's messages are based on their potentially adverse impact on the utility's ability to obtain rate increases. These commercial factors do not justify an abridgment of the utility's constitutionally protected right to communicate in its newsletter, but they do provide a legitimate and an adequate justification for the Commission's action in giving TURN access to the same audience that receives the utility's newsletter.

Pac. Gas & Elec. Co., 475 U.S. at 39 n.8. (Stevens, J., dissenting). Stevens's observation usefully reminds us that while some of PG&E's speech in its newsletters may have been somewhat political, both the speech itself and, more importantly, PG&E's objections to TURN's access, were commercially motivated. Although Stevens did not make this point, PG&E's profit motive undercuts its improbable claim of a right to conscience—PG&E pursued economic growth, not personal growth.

99. In *PruneYard* itself, if not in *Pacific Gas*, the Court appreciated the salience of *Tornillo*, that is, it recognized the difference between the speech of a newspaper and other businesses. The Court noted that *Tornillo* "rests on the principle that the State cannot tell a newspaper what it must print." PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980). The Court in *PruneYard* further noted that the statute in *Tornillo* could inhibit public debate by deterring editors from publishing controversial political statements and quoted the *Tornillo* Court's important statement that the statute was an "'intrusion into the function of editors.'" *Id*. (quoting Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974). The Court concluded that "[t]hese concerns obviously are not present here," *id*., an observation it could have and should have repeated in *Pacific Gas*.

100. *Pac. Gas & Elec. Co.*, 475 U.S. at 19.

effective utility regulation" and "promoting speech by making a variety of views available to appellant's customers"—were compelling.[101] However, the Court rejected the means chosen to achieve these goals.[102]

The Court claimed that the state could achieve fair and effective utility regulation through a means that did not burden PG&E's First Amendment rights, by "awarding costs and fees."[103] The Court pronounced it unproblematic for the state to impose on the appellant the "reasonable expenses of responsible groups that represent the public interest at ratemaking proceedings."[104] However, the Court found "'no substantially relevant correlation between the governmental interest asserted and the State's effort' to compel appellant to distribute TURN's speech in appellant's envelopes."[105]

Unfortunately, the Court maintained silence on the empirical question at the heart of this analysis—whether alternative mechanisms, such as imposing costs and fees, would indeed create a fair and effective ratemaking process.[106] What if the insert mechanism was far more effective than alternatives at capturing the attention of ratepayers?[107] Because the Court ignored this question, its determination of a less restrictive alternative was empty.[108]

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101. *Id*. at 19–20.
102. *Id*. at 20.
103. *Id*. at 19 (footnote omitted).
104. *Id*.
105. *Id*. at 19 (quoting Shelton v. Tucker, 364 U.S. 479, 485 (1960).
106. *See* Robert B. Leflar & Martin H. Rogol, *Consumer Participation in the Regulation of Public Utilities: A Model Act*, 13 HARV. J. ON LEGIS. 235, 235–37 (1976) (discussing the inadequacy of alternative measures to promote a fairer ratemaking process).
107. This is probably the case, as evidenced by the fact that citizen utility boards that relied on inserts have not found ample replacements, but the Court apparently rejected, *sub silentio*, the judgment of California's regulative agency that the insert was the best means to promote a fairer process and richer debate.
108. *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 679 (1981) (Brennan, J., concurring) ("[C]ourts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation."). Conceding that the state-mandated insert served its ostensible purpose, the Court rejected it because it was not sufficiently narrowly tailored to that purpose. This kind of analysis requires courts to "make[] a primarily empirical judgment about the means." Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2419 (1996). However, in *Pacific Gas*, such an analysis was barely undertaken. It consisted of two sentences proposing a possible alternative without any consideration of whether that alternative would be remotely effective. As the Court itself has recognized, the government need not choose an alternative that "fall[s] short of serving [the] compelling interests." Burson v. Freeman, 504 U.S. 191, 206 (1992).

The Court was equally cavalier in its treatment of the other state interest—promoting a richer, more diverse debate.[109] The Court stated, first, that this interest "is not furthered by an order that is not content neutral."[110] This claim is manifestly false. Before the Commission order, ratepayers heard only the voice of PG&E; by virtue of the Commission order, they also heard the contrary voice of TURN. Whether or not one approves of this means of promoting diverse viewpoints, surely the Commission order did exactly that.

The Court opined, in addition, that "the State cannot advance some points of view by burdening the expression of others,"[111] but, as we have seen, the notion that the Commission order burdens the expression of others requires imputing a "conscience" or "personhood" or "self-realization" to a commercial utility.[112]

V. CONTENT NEUTRALITY CONFUSED

As suggested above, the Court found it highly problematic that the Commission's order was not content-neutral. The Court observed the following:

> The order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers. Two of the acknowledged purposes of the access order are to offer the public a greater variety of views in appellant's billing envelope, and to assist groups (such as TURN) that challenge appellant in the Commission's ratemaking proceedings in raising funds. Access to the envelopes thus is not content neutral. The variety of views that the Commission seeks to foster cannot be obtained by including speakers whose speech agrees with appellant's. Similarly, the perceived need to raise funds to finance participation in ratemaking proceedings exists only where the relevant groups represent interests that diverge from appellant's interests.[113]

This analysis is unconvincing. Government plays favorites all the time. Practically every piece of legislation favors some groups over others, and many involve the selective subsidizing of speech.[114] Although the

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109. It should be noted that, from the standpoint of the consumer movement, citizen utility boards are not only about resisting rate increases. They are also about environmental preservation and citizen empowerment. *See generally* Leflar & Rogol, *supra* note 106, at 236–37 (discussing the various functions of a residential utility consumer action group).

110. *Pac. Gas & Elec. Co.*, 475 U.S. at 20.

111. *Id*.

112. *See supra* notes 12–70 and accompanying text.

113. *Pac. Gas & Elec. Co.*, 475 U.S. at 12–13 (citation omitted).

114. *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991) ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect."); *see also* FISS, *supra* note 65, at 46 (1996) ("[S]tate allocations necessarily entail such [content] judgments.").

case law is muddled,[115] one way to read it is that the doctrine of "content neutrality," or prohibition against "viewpoint discrimination," prevents the *denial* of speech based on government disapproval of a particular message, not the *promotion* of a certain group's speech.

Regan v. Taxation with Representation of Washington[116] involved a challenge to an Internal Revenue Code provision exempting from taxation nonprofit groups that do not engage in lobbying. The plaintiff, a nonprofit advocacy group that engaged in lobbying, argued that its ineligibility for the exemption resulted from an impermissible content-based distinction, but the Court found that Congress simply "chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare."[117] In making this choice, "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for [appellant's] lobbying."[118] The Court rejected the contention that "strict scrutiny applies whenever Congress subsidizes some speech, but not all speech."[119]

Appellant also objected to the denial of the exemption coupled with a separate code provision permitting taxpayers to deduct contributions to veteran's groups, though such groups are permitted to lobby. In effect, Congress had subsidized the lobbying of veterans' groups, but not other nonprofit groups. The Court found this differential treatment acceptable, absent any "indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect."[120]

Likewise, in *Buckley v. Valeo*,[121] the Court upheld a statute establishing taxpayer funding of presidential campaigns in different amounts depending on whether the party was "major" or "minor" and providing funds for political candidates who enter primary campaigns but not those who do not.[122] These measures were permissible because they aimed "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and

115. *See* Eric J. Cleary, Note, *In* Finley*'s Wake: Forging a Viable First Amendment Approach to the Government's Subsidization of the Arts*, 68 FORDHAM L. REV. 965, 967–68 (1999) (stating that case law on viewpoint discrimination is "unclear and inconsistent").
116. 461 U.S. 540 (1983).
117. *Id*. at 544.
118. *Id*. at 546.
119. *Id*. at 548.
120. *Id*.
121. 424 U.S. 1 (1976).
122. *Id*. at 87–88, 143–44.

enlarge public discussion."[123]

The Commission order in *Pacific Gas* would seem to merit the same treatment as the statutes upheld in these cases. It, too, promoted rather than restricted speech.[124] Though its subsidy was not universal, it derived from a content-neutral goal. The Court accused the Commission of a "kind of favoritism,"[125] but failed to explain adequately how the favoritism differed from that in *Buckley* or *Regan*. Its effort to distinguish those cases consisted of a single sentence: "Unlike these permissible government subsidies of speech, the Commission's order identifies a favored speaker 'based on the identity of the interests that [the speaker] may represent,' . . . and forces the speaker's opponent—not the taxpaying public—to assist in disseminating the speaker's message."[126]

This two-pronged attempted distinction falls flat. There was no evidence that the Commission allocated space to TURN based on its agreement with TURN's message. Rather, the Commission sought to promote a fairer ratemaking process and a more balanced presentation of views. To achieve these objectives, it could only select certain speakers (just as funding only "major" parties in *Buckley*, or "nonlobbying" groups in *Regan*, involved a selection), but it in no way endorsed the views of those speakers (any more than *Buckley* or *Regan* involved such an endorsement).[127] Again, as in *Buckley* and *Regan*, no speech was suppressed.[128]

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123. *Id*. at 92–93.

124. Dicta in other cases, both before and after *Pacific Gas*, further supports the notion that the prohibition against viewpoint discrimination applies to the suppression rather than promotion of speech. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 475 (1997) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.") (footnote omitted); Rust v. Sullivan, 500 U.S. 173, 194 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.") (citation omitted).

125. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 14 (1986).

126. *Id*. at 15 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. at 765, 784 (1978)) (alteration in original).

127. Perhaps the case of *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987), decided after *Pacific Gas*, may be thought to provide retroactive support for *Pacific Gas*. In that case, the Court struck down a state sales tax scheme that exempted certain kinds of magazines (for example, sports and religious publications). *Id*. at 223, 233. While the Court held that the scheme was content-based, and therefore subject to strict scrutiny (which it could not withstand), it made no effort to distinguish *Regan*. *Id.* at 231–33; *see id*. at 236 (Scalia, J., dissenting) (arguing that *Regan* was controlling). The Court may have reached the correct result in any case because it is far from clear that, given the very weak justifications for the differential tax treatment of different kinds of magazines, the policy would survive even rational relation review.

128. *See id*. at 237 (Scalia, J., dissenting) ("The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general

The second point, that opponents in *Buckley* and *Regan* were not forced to disseminate the message in question, involves legerdemain. The presence of coercion is relevant in connection with the alleged right not to speak, but here it merely muddles matters. The fact that TURN's speech was disseminated in PG&E's envelope has no bearing on whether it constituted an impermissible content-based subsidy. The Court sloppily imported an aspect of one First Amendment doctrine (the right not to speak) to a separate issue (viewpoint discrimination) for no apparent reason.

In short, the effort to distinguish *Regan* and *Buckley* was unconvincing. To be sure, in certain contexts the Court has held that the government may not permit some speakers, but not others, to take advantage of a public subsidy depending on the viewpoints espoused. In *Board of Regents v. Southworth*,[129] the Court held that "[w]hen a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others."[130]

In *Pacific Gas*, unlike *Southworth*, the government's goal transcended an open discussion; it included a fairer ratemaking process. Moreover, in *Pacific Gas*, the case was not brought by a party that had been denied the use of the envelope space.[131] Rather, it was brought by a corporation

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rule, have any significant coercive effect."). Justice Scalia proposed, quite reasonably, an exception "when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern—a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue of foreign policy." *Id*.; *cf*. Speiser v. Randall, 357 U.S. 513, 515, 528–29 (1958) (holding unconstitutional a California rule conditioning tax exemption on a statement that one does not wish to overthrow the government). What was at stake in *Pacific Gas* was clearly not the government's trying to stack the deck in a political debate, but to expose consumers of a state-regulated utility to information in a way that would make the ratemaking process fairer and more efficient.

129. 529 U.S. 217 (2000).

130. *Id.* at 233.

131. Indeed, the "Commission reserved the right to grant other groups access to the envelopes in the future." *Pac. Gas & Elec. Co.*, 475 U.S. at 7 (footnote omitted). The Court noted that the commission had "already *denied* access to at least one group based on the content of its speech." *Id*. at 7 n.5. However, that group "neither wished to participate in commission proceedings nor alleged that its use of the billing envelope space would improve consumer participation in those proceedings." *Id*. (citation omitted). This denial hardly constitutes viewpoint discrimination. To the contrary, it suggests that the commission based access to envelope space not on viewpoint but on creating a fairer ratesetting process.

that, thanks to the largesse of the government,[132] fully disseminated its message.[133]

The essence of viewpoint discrimination is the government's endorsement or rejection of a particular view.[134] In *Pacific Gas*, the government "placed no limitations on what TURN or appellant could say in the envelope."[135] It did not know what TURN would say; it knew only that TURN represented ratepayers, not the utility, and thus figured to provide a counterweight.[136] No one would deny that the state had the authority to strip PG&E of its monopoly power over the sale of energy. Instead, the state took the far less intrusive step of reducing PG&E's control over the ratesetting process. That, rather than the endorsement of any particular viewpoint, is what the Commission order was about. As such, it was very much in the spirit of the First Amendment.[137]

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132. *See* Blakely, *supra* note 58, at 1245–46.

> The state is directly connected with the utility bill inserts system. The state creates the monopolized medium by conferring and protecting a utility's monopoly status. This monopoly status enables the utility to utilize at no cost a comprehensive customer list. . . . An additional subsidy accrues to the utility in the form of lower postage, materials, labor, and administrative costs.

Id.

133. The *Southworth* Court stated that the analysis would be "altogether different" if this were a case where the university itself, or its agents, were the speakers, because "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate." 529 U.S. at 235. In *Southworth*, the speech in question—students at one university voicing views to fellow students—was far removed from government. In *Pacific Gas*, the speech more closely resembles the situation alluded to in the Court's dicta. California enhanced the voice of a speaker in order to promote a fairer governmental process. If the public objects (if it believes for example, that TURN's activity distorts rather than enhances the ratemaking process), it can hold its elected officials, such as those who appoint or confirm commission members, accountable.

134. *See* Berner v. Delahanty, 129 F.3d 20, 28 (1st Cir. 1997) (stating that the "essence of viewpoint-based discrimination" is the state picking among similarly situated speakers "in order to advance or suppress a particular ideology or outlook.") (citations omitted); *see also* United States v. Kokinda, 497 U.S. 720, 736 (1990) (characterizing viewpoint discrimination as that which is "'intended to discourage one viewpoint and advance another'") (quoting Monterey County Democratic Cent. Comm. v. United States Postal Serv., 812 F.2d 1194, 1198–99 (9th Cir. 1987).

135. *Pac. Gas & Elec. Co.*, 475 U.S. at 7. The sole exception was that TURN was required to state that its message was not that of PG&E. *Id*.

136. *See* FISS, *supra* note 65, at 83 ("The state, through regulation, was trying to enhance the robustness of public debate, not impose an orthodoxy, and had chosen a means seemingly well fitted to serve that end.").

137. *See* City of Madison v. Wis. Employment Relations Comm'n, 429 U.S. 167, 175–76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees.") (footnote omitted). Indeed, given the government's protection of PG&E's monopoly status, one could argue that not allowing competing access to the billing envelope is viewpoint discrimination in favor of PG&E. *See* Blakely, *supra* note 58, at 1249–57.

As one commentator puts it, content neutrality "should not be reified."[138] It guards against the government deliberately skewing debate, but should not be applied when the state "is simply acting as a fair-minded parliamentarian, devoted to having all views presented."[139]

VI. RECIPROCITY

As the foregoing suggests, the Court also made an important error of omission—the failure to recognize the significance of the fact that PG&E is a state-protected monopoly. One commentator persuasively argues that utility companies:

> even more than corporations in other regulated industries, are granted special monopoly powers by the state in order to further the public interest. Because of their monopoly position, they are less like individuals than are nonmonopoly companies and are more like a branch of the government that granted them monopoly status. Utility companies should therefore be bound to respect the dictates of government officials seeking to further the public interest.[140]

The Court showed no recognition of this principle of reciprocity, or its corollary that government has special justification, indeed an obligation, to regulate state-protected monopolies more closely than other businesses. The latter principle has been recognized by at least some Justices.[141]

The Court decision seemed premised on "the spectre of government control of everyone's speech rights,"[142] but the feared slippery slope would have to be awfully slippery and steep to lead from the Commission order in *Pacific Gas* to any truly worrisome government intrusion into private speech.[143] As noted, the order aimed at and was likely to achieve more speech, without in any way compromising individual freedom.

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138. FISS, *supra* note 65, at 21.

139. *Id*.

140. *The Supreme Court, 1985 Term—Leading Cases*, *supra* note 46, at 189–90; *see also* Blakely, *supra* note 58, at 1228 ("By lending its authority to the monopoly, the state is obligated to scrutinize the monopoly's activities for potential violations of the public's interests or the Constitution.") (footnote omitted).

141. *See* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 550 (1980) (Blackmun, J., dissenting, joined by Rehnquist, J.) ("This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching.").

142. *The Supreme Court, 1985 Term—Leading Cases*, *supra* note 46, at 190.

143. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169 (1990) ("Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.").

The Court's solicitousness seems even more misplaced when we recognize that the corporation it protected already enjoyed monopoly status guaranteed by the state.[144] In short, the Court gave protection from the government to a party that already receives the essential blessings of the government,[145] and struck a blow against the public interest enshrined by the First Amendment.

VII. CONCLUSION

Any bad First Amendment decision should concern us because of its potential ramifications beyond its particular context. In this case, the application of the right of conscience to commercial corporations (to pick the foremost, but far from the only, error in the Court opinion) involves far-reaching consequences. The fact that this corporation was a state-protected monopoly, and that the protection given it undercuts the state's effort to promote public debate, only compounds the problem. Moreover, the Court's sloppy First Amendment analysis produced a decision that dealt a severe blow to the consumer movement.[146] Such a movement should rise or fall in the political arena. It should not be felled by the judicial branch wielding a First Amendment axe with little precision or dexterity.[147]

144. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 34 (1986) (Rehnquist, J., dissenting) ("Any claim it may have had to a sphere of corporate autonomy was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.").

145. State-protected monopolies typically receive not only immunization from competition, but are also a promised "fair rate of return." Leflar & Rogol, *supra* note 106, at 239.

146. This was far from its only negative consequence. *See* FISS, *supra* note 65, at 66 ("Although the context seems highly specialized, the significance of *Pacific Gas & Electric* for state regulation of the press was immediately recognized.") Shortly after the decision, and relying on it in part, the FCC declared its opposition to the fairness doctrine, which had provided more balanced radio coverage of public issues. *Id*.

147. *See, e.g.*, Lampf v. Gilbertson, 501 U.S. 350, 362 n.8 (1991) (cautioning against "judicial policymaking").