

THE CONSCIENCE OF CORPORATIONS AND THE RIGHT NOT TO SPEAK

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INTRODUCTION

The right to refrain from speaking is part of a broader concept the Supreme Court describes as “individual freedom of mind.”¹ But do corporations have protection from compelled speech under the freedom of mind concept? It is bizarre to ascribe human characteristics to corporations, yet the Court has held that newspaper publishing corporations are protected by the freedom of mind concept from state-imposed requirements that interfere with their ability “to decide what to print or omit.”² In reaching this conclusion, the Court ignored the corporate identity of the publishing company and instead emphasized the burden on editors.³ Later cases rejecting a First Amendment distinction between press and non-press corporations, such as *Citizens United v. FEC*,⁴ raise the question whether the Court should also ignore the corporate form of non-press entities and instead assess a law’s burden on management, employees, and shareholders. Stated differently, do non-press corporations have standing to assert that compelled speech vio-

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1. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)) (internal quotation marks omitted).

2. *Id.*

3. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 244, 257 (1974) (arguing that law requiring newspapers to publish replies by candidates whom they had criticized would cause editors to conclude “the safe course is to avoid controversy”).

4. 558 U.S. 310, 351 (2010) (citing *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 707 (1990) (Kennedy, J., dissenting)) (noting that the speech of media corporations is not entitled to greater protection than that of other corporations).

lates the “freedom of mind” of the humans affiliated with the corporation?

Although the first principle of corporate law is that for-profit corporations have a legal identity separate from their shareholders, management and employees,⁵ in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,⁶ the bakery downplayed its corporate identity when challenging the commission’s decision that refusing to design a custom wedding cake for a same-sex couple violated the state’s antidiscrimination law.⁷ *Masterpiece* emphasized the law’s burden on the First Amendment rights of Jack Phillips, a co-owner and cake designer who was described as “a cake artist.”⁸ Compelling Phillips to create a cake for a same-sex wedding forces him to “speak” in violation of his sincerely held religious beliefs.⁹ Conversely, Colorado downplayed Phillips’s artistry by asserting the commercial conduct of the bakery Phillips owned with his wife was at issue; “a business’s decision of whom not to serve is not ‘speech.’”¹⁰

During the oral argument of *Masterpiece Cakeshop*, only Justice Sotomayor probed the link between Phillips’s beliefs and the corporation’s actions. Noting that “the seller of the cakes is not

5. See *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (“[I]ncorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.” (citing *United States v. Bestfoods*, 524 U.S. 51, 61–62 (1998); *Burnet v. Clark*, 287 U.S. 410, 415 (1932))); see also *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006) (“[I]t can be said [that] the whole purpose of corporation and agency law . . . [is] that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation’s contracts.”).

6. 138 S. Ct. 1719 (2018).

7. *Masterpiece* describes itself as a “small Colorado corporation” owned by Jack and Debra Phillips. Brief for Petitioners at ii, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

8. Petition for a Writ of Certiorari at i, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111). The corporate identity of *Masterpiece Cakeshop* was completely absent from the petitioner’s framing of the question. The petitioners wrote that the question presented was whether “applying Colorado’s public accommodations law to compel *Phillips* to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.” *Id.* (emphasis added).

9. *Id.* at 13–14.

10. Brief for Respondent Colorado Civil Rights Commission at 19, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

Mr. Phillips, it's Masterpiece Corporation," and that corporations are separate entities from their shareholders, Justice Sotomayor asked "who controls the expression here, the corporation or its shareholders?"¹¹ Masterpiece's attorney Kristen Waggoner emphasized that in the context of a closely held corporation, Phillips and Masterpiece Cakeshop were in effect the same as both are "speaking when they're creating" cakes.¹² Justice Sotomayor interrupted, again asking "But who makes a decision for the corporation?"¹³ Waggoner responded that the shareholders in a small, family-held corporation would decide.¹⁴ "And that's exactly what's at stake in this case. Mr. Phillips owns Masterpiece Cakeshops [sic]. He designs most of the wedding cakes himself"¹⁵ In other words, forcing Masterpiece Cakeshop to create and sell a wedding cake that expresses a message in support of a same-sex marriage "violates Mr. Phillips's religious convictions."¹⁶

The case presented novel and difficult questions about the definition of speech¹⁷ and whether a closely held corporation's decisions, animated by a co-owner's personal beliefs, may be exempt from generally applicable laws.¹⁸ The Court side-

11. Transcript of Oral Argument at 99, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

12. *Id.* at 100.

13. *Id.*

14. *Id.* at 101.

15. *Id.*

16. *Id.* at 105.

17. During oral argument, the Justices pursued at length the distinction between selling an existing cake and the sale of a custom-designed cake, *id.* at 5–10, whether the actions of others contributing to a wedding, such as florists, hair stylists, jewelers, and makeup artists, could be regarded as "speech," *id.* at 10–20, and how to define "speech" where the creation, such as food, has a utilitarian function, *id.* at 35–42. Justice Kennedy's opinion noted the free speech aspect of the case was "difficult" but was an "instructive example" of the proposition that new contexts can deepen our understanding of the meaning of constitutional freedoms. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

18. First Amendment experts were sharply divided on how to answer these questions. Compare Brief of Floyd Abrams et al. as *Amici Curiae* in Support of Respondents at 3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing First Amendment does not protect a right to choose customers based on sexual orientation), with Brief of *Amicus Curiae* The First Amendment Lawyers Association in Support of Petitioners at 12, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing First Amendment prohibits state action compelling creation of artistic works, including wedding cakes).

stepped these questions and instead found that the commission showed clear hostility to Phillips's sincere religious beliefs in violation of the Free Exercise Clause.¹⁹ The Court's acknowledgement of the beliefs of a shareholder in *Masterpiece Cakeshop* mimics *Burwell v. Hobby Lobby Stores, Inc.*²⁰ where the Court held the religious beliefs of the shareholders of three closely held corporations justified exempting those corporations from a mandate to provide contraceptives to employees.²¹

The issues raised in *Masterpiece Cakeshop* were not unique to that business; other businesses have also raised conscience-based objections to the enforcement of state antidiscrimination laws and the Court has avoided the substantive questions in those cases as well.²² Thus, the conflict between conscience and antidiscrimination laws remains unresolved. For example, in the aftermath of the *Masterpiece Cakeshop* decision, Phillips and his bakery settled with Colorado regarding a transgender woman's claim of discrimination,²³ but the woman initiated a

19. *Masterpiece Cakeshop*, 138 S. Ct. at 1729. While the Colorado proceedings against *Masterpiece* were ongoing, the state commission found that three other bakers acted lawfully in declining to create cakes that demeaned same-sex marriages. *See id.* at 1730. The Court found the treatment of these conscience-based objections "sen[t] a signal of official disapproval of Phillips' religious beliefs." *Id.* at 1731.

20. 573 U.S. 682 (2014). *Hobby Lobby* did not involve free exercise rights under the First Amendment, but protections afforded under the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997). *Hobby Lobby*, 572 U.S. at 687–88.

21. *Hobby Lobby*, 572 U.S. at 733–36.

22. *See Klein v. Or. Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019) (petition granted, judgment vacated, and case remanded for further consideration in light of *Masterpiece Cakeshop*); *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (petition granted, judgment vacated, and case remanded for further consideration in light of *Masterpiece Cakeshop*). Recently, on remand the Washington Supreme Court found there was no religious animus in the state's treatment of the *Arlene's Flowers* case and reaffirmed its earlier ruling *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), rejecting First Amendment defenses raised by a florist who refused to create custom floral arrangements for a same-sex wedding. *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1209, 1212, 1224–31 (Wash. 2019). Attorneys for *Arlene's Flowers* announced they would ask the United States Supreme Court to review the state supreme court's 2019 ruling. David Gutman, *Washington Supreme Court rules once more against Richland florist who refused flowers for same-sex wedding*, SEATTLE TIMES (June 6, 2019, 9:34 PM), <https://www.seattletimes.com/seattle-news/politics/washington-supreme-court-rules-once-more-against-richland-florist-who-refused-flowers-for-gay-wedding/> [<https://perma.cc/Z283-BVUC>].

23. Shortly after the Supreme Court issued its ruling in *Masterpiece Cakeshop*, the Colorado Civil Rights Division found there was sufficient evidence to support a

lawsuit on her behalf because of Phillips's refusal to design a cake that reflected her transgender status.²⁴ Justice Kennedy's assurance in *Obergefell v. Hodges*²⁵ that "those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction" their opposition to same-sex marriage, and presumably other contentious social changes,²⁶ is unfulfilled, unless advocacy is defined as having little or nothing to do with the operation of a business.

Conscience arguments were also presented in two other October 2017 Term cases, *Janus v. American Federation of State, County, and Municipal Employees*²⁷ and *National Institute of Family and Life Advocates v. Becerra* (NIFLA).²⁸ *Janus* involved an individual who was forced to contribute to a public sector union whose positions on public policy he opposed.²⁹ The Court

transgender woman's claim that the bakery's refusal to create a custom cake for the anniversary of her gender transition violated the state's antidiscrimination law. Determination, *Scardina v. Masterpiece Cakeshop, Inc.*, Charge No. CP2018011310 (Colo. Civil Rights Div. Aug. 14, 2018). Masterpiece Cakeshop and Phillips filed suit against various Colorado officials, contending that the division's action violated the freedom of religion and free speech rights of both Masterpiece and Phillips. Complaint at 39–45, *Masterpiece Cakeshop, Inc. v. Elenis*, No. 18-cv-02074-WYD-STV (D. Colo. Aug. 14, 2018). On January 4, 2019, Judge Daniel dismissed the defendant's motion that the suit should be dismissed in its entirety on four different abstention grounds. Order at 3, 53, *Masterpiece Cakeshop*, No. 18-cv-02074-WYD-STV (D. Colo. Jan. 4, 2019). Colorado Attorney General Cynthia Coffman's motion to dismiss the claims against her was denied, *id.* at 16, 53, as was the defendant's motion to dismiss the suit for lack of standing. *Id.* The plaintiffs' claims for compensatory, punitive, and nominal damages against the director and members of the division were dismissed, *id.* at 53, as were the claims against Governor John Hickenlooper. *Id.* In both the complaint and Judge Daniel's order, the First Amendment rights of Masterpiece Cakeshop and Phillips were treated as identical. Following Judge Daniel's ruling, the parties settled; Masterpiece Cakeshop and Phillips agreed to dismiss their lawsuit and the civil rights division agreed to dismiss its action. Elise Schmelzer, *Masterpiece Cakeshop, state of Colorado agree to mutual ceasefire over harassment, discrimination claims*, DENVER POST (Mar. 5, 2019, 9:37 PM), <https://www.denverpost.com/2019/03/05/masterpiece-cakeshop-colorado-mutual-ceasefire-over-claims/> [<https://perma.cc/7Z9Y-YWQC>]. Colorado Attorney General Phil Weiser stated, "The larger constitutional issues might well be decided down the road, but these cases will not be the vehicle for resolving them." *Id.*

24. Complaint, *Scardina v. Masterpiece Cakeshop, Inc.*, No. 2019CV32214 (Denver City & Cty. Dist. Ct. June 5, 2019).

25. 135 S. Ct. 2584 (2015).

26. *Id.* at 2607.

27. 138 S. Ct. 2448 (2018).

28. 138 S. Ct. 2361 (2018).

29. *Janus*, 138 S. Ct. at 2461.

found compulsory union dues to be unconstitutional because “individuals are coerced into betraying their convictions.”³⁰ Justice Alito, writing for the *Janus* majority, stated that “[c]ompelling individuals to mouth support for views they find objectionable” violates the “cardinal” command against government-mandated orthodoxy first set out in *West Virginia State Board of Education v. Barnette*.³¹

In *NIFLA*, the Court struck down a California law requiring clinics that primarily serve pregnant women to provide certain notices, such as the availability elsewhere of state-funded abortions.³² The petitioners in *NIFLA*, nonprofit corporations operating pro-life pregnancy clinics as a form of advocacy,³³ asserted that the state-mandated disclosure violated *their* consciences,³⁴ a novel argument Justice Thomas’s opinion for the Court ignored.³⁵ Justice Kennedy, though, in a concurring opinion joined by Chief Justice Roberts and Justices Alito and Gorsuch, conflated the nonprofit corporations with the individuals who work or volunteer at the clinics.³⁶ Justice Kennedy wrote that the law requires pro-life centers “to promote the State’s own preferred message advertising abortions.”³⁷ “This compels *individuals* to contradict their most deeply held beliefs.”³⁸ Justice Kennedy added, “Governments must not be allowed to force *persons* to express a message contrary to their deepest convictions.”³⁹

30. *Id.* at 2464.

31. *Id.* at 2463 (referencing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[N]o 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.”)).

32. 138 S. Ct. at 2368, 2378.

33. The petitioners in *NIFLA* were “formed primarily to advocate and implement their core pro-life values as well as to express these views publicly and privately.” Brief for Petitioners at 20, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140).

34. *Id.* at 13–14.

35. Justice Thomas did write a concurring opinion in *Masterpiece Cakeshop* emphasizing the impermissible burden Colorado imposed on Phillips’s beliefs by forcing him to create wedding cakes for same-sex couples. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1742–43 (2018) (Thomas, J., concurring in part and concurring in the judgment) (explaining that the creation of custom wedding cakes is expressive).

36. See *NIFLA*, 138 S. Ct. at 2378–79 (Kennedy, J., concurring).

37. *Id.* at 2379.

38. *Id.* (emphasis added).

39. *Id.* (emphasis added).

That Justice Kennedy's concurring opinion in *NIFLA* would use nearly identical language as that in Justice Alito's *Janus* opinion is conspicuous because the *NIFLA* petitioners were corporations. The Court has held that nonprofit advocacy corporations have standing to assert the rights of their members,⁴⁰ but Justice Kennedy did not cite any precedent regarding the nexus between nonprofit corporations and their members. And because the Court in *Hobby Lobby* dismissed the distinction between nonprofit and closely held for-profit corporations,⁴¹ a significant question raised by Justice Kennedy's *NIFLA* concurring opinion is whether a for-profit corporation, which lacks a conscience, may assert harm to the consciences of its shareholders.

The *Janus* and *NIFLA* majority opinions show two quite distinct tracks for assessing compelled speech claims. *Janus* is grounded in harm to freedom of conscience; *NIFLA* emphasizes the risks of content regulation. The latter analytical option, utilized by the Court in some earlier non-press corporate speech cases,⁴² downplays corporate identity and employs traditional content-based analysis such as assessment of tailoring. As shown later in this Article, *NIFLA*'s overriding theme is that the government harms the marketplace of ideas when it compels speech. Stated differently, government efforts to promote a

40. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) ("Petitioner is the appropriate party to assert [the rights of association of its members] because it and its members are in every practical sense identical."); see also *infra* Part IV.B. Because of the range of entities organized as nonprofit corporations, see HOWARD L. OLECK & MARTHA E. STEWART, *NONPROFIT CORPORATIONS, ORGANIZATIONS, & ASSOCIATIONS* 106–69 (6th ed. 1994), not all nonprofits would be treated like the NAACP for First Amendment purposes. See, e.g., *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548–49 (1987) (holding that because Rotary Clubs do not take positions on public questions, membership to women does not interfere with members' right of expressive association).

41. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 709–10 (2014) (stating that the principle of protecting the religious freedom of a corporation to advance individual religious freedom applies equally to nonprofit and closely held for-profit corporations); see also *Citizens United v. FEC*, 558 U.S. 310, 327, 372 (2010) (refusing to carve out an exemption for nonprofit advocacy corporations, and instead holding facially unconstitutional a federal statute that made it illegal for all corporations—including nonprofit advocacy corporations—to expressly advocate for the election or defeat of federal candidates).

42. See, e.g., *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 533–44 (1980) (finding ban on utility bill inserts discussing controversial issues to be content discriminatory).

well-informed public do not justify interfering with speaker autonomy.

Before *NIFLA*, the conflict between a well-informed public and compelled non-press corporate speech was addressed in *Pacific Gas & Electric Co. v. Public Service Commission (PG&E)*.⁴³ Justice Powell's papers, along with the papers of Justices Blackmun, Brennan, Marshall, and Byron White, reveal he had to finesse references to the Court's compelled speech precedents to omit references to conscience in his *PG&E* opinion. The analytical track utilized by Justice Thomas in *NIFLA* has its genesis in *PG&E*. This Article puts *NIFLA* in context by exploring the dialogue within the Court as it was creating the compelled speech doctrine for non-press corporations in *PG&E*.⁴⁴

Part I of this Article provides a summary of the Court's struggles with non-press corporate speech cases and presents the thesis that "forward thinking" government efforts to fine tune the flow of information by compelling corporate speech should be rejected, not on the basis of conscience, but because these efforts promote government-defined orthodoxy. Part II

43. 475 U.S. 1 (1986).

44. Although corporations have frequently challenged restrictions on their commercial speech, *see, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 560 (1980), corporate status has not been a factor in the Court's commercial speech cases. Further, the Court distinguishes comments on public issues from statements made "in the context of commercial transactions." *Id.* at 562 n.5. The former are fully protected and the latter receive diminished protection. *Id.* This Article focuses on fully protected expression by corporations.

California sought to justify the licensed notice disclosure in *NIFLA*, *see infra* notes 221–222 and accompanying text, under the ruling in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which upheld compelled disclosures of factual, noncontroversial information in the commercial speech of professionals. *Id.* at 651–52. The *NIFLA* Court found *Zauderer* to be inapplicable because the licensed notice "in no way relates to the services that licensed clinics provide." *NIFLA*, 138 S. Ct. at 2372. Moreover, abortion is "anything but an 'uncontroversial' topic." *Id.* As for the unlicensed notice, *see infra* note 223 and accompanying text, the Court said that assuming *Zauderer* was the appropriate standard, the notice was unduly burdensome and poorly tailored. *Id.* at 2377–78.

For a recent application of *NIFLA* in the context of compelled commercial speech, *see Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 750, 753 (9th Cir. 2019), which held that an ordinance requiring health warnings in certain sugar-sweetened beverage advertisements likely violates the First Amendment. *See also The Supreme Court 2017 Term—Leading Cases*, 132 HARV. L. REV. 277, 351 (2018) (arguing that *NIFLA* foreshadows greater protection for commercial speech).

takes a close look at the right to receive expression in *First National Bank of Boston v. Bellotti*.⁴⁵ Justice Powell's papers reveal that framing the case in terms of the rights of listeners presented a less complicated path to a majority than if his opinion had addressed the nature of corporations. Part III explains why Justice Powell eliminated conscience from his *PG&E* opinion and created a methodology for compelled speech cases involving non-press corporations that does not require veil piercing or derivative rights analysis. Part IV contrasts Justice Thomas's *NIFLA* opinion with Justice Kennedy's concurring opinion. Although Justice Kennedy's veil piercing is appropriate in the setting of a nonprofit advocacy corporation, the question of which for-profit corporations have standing to assert harm to the consciences of shareholders should be avoided. Analyzing compelled corporate speech cases within the content-based framework raises fewer questions than if conscience arguments are addressed.

I. THE COURT STRUGGLES WITH CORPORATE IDENTITY

The Court has been repeatedly criticized for its analysis in non-press corporate free speech cases,⁴⁶ but *NIFLA*'s aversion to content discriminatory regulation and preference for speaker autonomy offers a theory for corporate speech cases that allows courts to abstain from deciding which corporations are eligible for insider reverse veil piercing,⁴⁷ as the oral argument in

45. 435 U.S. 765 (1978).

46. See, e.g., Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1020 (1998) (arguing that the Court's "constitutional doctrine remains studiously ignorant of state and federal law regulating corporations"). Similarly, after canvassing the Court's approach to corporate constitutional rights since the nineteenth century, Professors Margaret Blair and Elizabeth Pollman conclude the Court "has not carefully analyzed its legal theory of corporate rights, nor has it expressly articulated a framework for thinking about corporations that could guide its decision making in a consistent way." Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1679 (2015); see also Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 364 (2015) ("[M]any scholars have observed [that] the Supreme Court has failed to articulate a theory for corporate rights, relying instead on what could (at best) be described as 'case-by-case adjudication' and (at worst) as something less charitable." (footnote omitted)).

47. Insider reverse veil piercing allows a shareholder of a closely held corporation to ask a court to disregard the corporation's separate legal personality. See Michael J. Gaertner, Note, *Reverse Piercing the Corporate Veil: Should Corporation*

Masterpiece Cakeshop reveals, along with the *Hobby Lobby* opinion, the Court would rather not confront the complexities of insider reverse veil piercing.⁴⁸ Discounting the corporate identity of a speaker in compelled speech cases permits the Court to emphasize concerns broader than harm to conscience.

The Court, however, has a spotty and confusing record in discounting corporate identity in free speech cases. Cases where corporate identity was front and center, such as *Bellotti*,⁴⁹ contrast sharply with those where corporate identity was treated as irrelevant, such as cases involving speech by religious corporations,⁵⁰

Owners Have It Both Ways? 30 WM. & MARY L. REV. 667, 667 (1989) (“Under the reverse pierce, the corporation owner and the corporation become one legal entity . . .”). There is significant criticism of veil piercing. See, e.g., Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1037–38 (1991) (describing the doctrine as incoherent). This doctrine, however, is limited to close corporations. See Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 9 (1997) (concluding based on his empirical analysis of piercing cases, that piercing occurs only in corporate groups or close corporations of fewer than ten shareholders; it does not occur in publicly held corporations).

48. In a range of cases challenging the contraceptive mandate of the Affordable Care Act, lower courts reached disparate results on whether corporations had standing to assert the free exercise rights of their owners. Professor Stephen M. Bainbridge concluded that none of the courts offered a coherent doctrinal justification for their holdings, so he proposed a three-pronged test to determine whether reverse veil piercing was appropriate. Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2d 235, 240, 246 (2013). But see *Amicus Curiae* Brief of Corporate and Criminal Law Professors in Support of Petitioners at 16–18, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (No. 13-354) (arguing reverse veil piercing should not be applied). The Court in *Hobby Lobby* did not follow Professor Bainbridge’s test, it merely announced a derivative rights conclusion: “When rights, whether constitutional or statutory are extended to corporations, the purpose is to protect the rights” of shareholders, officers, and employees. 573 U.S. 682, 706–07. Protecting “the free-exercise rights of corporations like *Hobby Lobby* . . . protects the religious liberty of the humans who own and control those companies.” *Id.* at 707. As discussed above, only Justice Sotomayor asked about the petitioners’ reverse veil piercing argument in *Masterpiece Cakeshop*. *Supra* text accompanying notes 11–16.

49. See also *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (holding that the requirement that non-press corporations channel candidate-related advocacy through PACs is justified by advantages conferred by the corporate form).

50. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 448–61 (2011) (finding a damage award against a minister, two of his daughters, and Westboro Baptist Church, Inc. unconstitutional); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Stratton*, 536

press corporations,⁵¹ and corporations in the business of communication such as theatrical productions.⁵² The distinction between non-press corporations and those engaged in communication lacks consistency. In *Consolidated Edison Co. v. Public Service Commission*,⁵³ the Court only two years after *Bellotti* found a restriction on public utility bill inserts to be content discriminatory, employing standard content-based analysis⁵⁴ with no consideration of the utility's corporate status. *NIFLA* again signals that the Court prefers to address speech restrictions as speech restrictions without the added complexity of considering corporate law.

PG&E and *NIFLA* confront two entirely different types of corporations, a publicly traded utility and a nonprofit advocacy group; yet the opinions are linked by aversion to content-based regulation. Together, these cases illustrate that the Court has sufficient analytical tools embedded in its content-based framework to protect speaker autonomy without deriving rights for a corporation from the humans associated with the corporation or addressing the complexities of insider reverse veil piercing.

Both *PG&E* and *NIFLA* entailed "forward thinking" governmental efforts to promote a well-informed public. These cases

U.S. 150, 160–69 (2002) (finding unconstitutional a municipal ordinance requiring a permit before door-to-door canvassing could occur).

51. As Professor Michael McConnell writes, "The vast majority of the Court's press cases involve for-profit corporations . . . and no one, even in dissent, has ever suggested that corporate status mattered in those cases." Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 417 (2013).

52. See, e.g., *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 558–62 (1975) (holding that a corporation "promoting and presenting theatrical productions" successfully asserted harm to its First Amendment rights); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497–506 (1952) (finding that a corporation engaged in the business of distributing motion pictures successfully challenged New York motion picture licensing statute).

53. 447 U.S. 530 (1980).

54. *Id.* at 537–40. The Court, per Justice Powell, held that the restriction limited the means by which Consolidated Edison could participate in public debate. Justice Powell's analysis focused on the content discriminatory effects of the prohibition and spent little effort discussing public utilities or their rate structures. *Id.* at 534 n.1 (stating that Consolidated Edison's status as a government monopoly "does not decrease the informative value of its opinions on critical public matters"). *But see id.* at 549–51 (Blackmun, J., dissenting) (addressing Consolidated Edison's monopoly status and rate structure).

show the danger of using the public's right to receive expression as justification for compelled speech. In the context of corporations, the right to receive expression had its most important application in *Bellotti*, where the Court found a restriction on the speech of non-press corporations unconstitutionally restricted the flow of information to the public.⁵⁵ The right to receive expression was used by Justice Powell in *Bellotti* as a way of avoiding the question of whether corporate First Amendment rights were coextensive with those of individuals; Justice Powell did not intend to signal that governments could compel speech to promote a well-informed public. Justice Powell's *PG&E* opinion is a clear rebuke to governmental efforts that sacrifice speaker autonomy in the interest of a well-informed public. To reach that conclusion, Justice Powell had to shift the concern from harm to conscience to what he termed "broader" concerns, defined as the harm posed by government intervention in speech markets.⁵⁶ In doing so, Justice Powell's *PG&E* opinion creates an analytical track that allows the Court to assess compelled speech requirements without confronting issues of conscience. Stated differently, *PG&E* takes the fact of incorporation out of compelled speech analysis.

II. BELLOTTI

Forty years after glibly announcing in *Grosjean v. American Press Co.*⁵⁷ that newspaper publishing corporations had liberty rights under the Fourteenth Amendment,⁵⁸ the Court in *First*

55. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781–83 (1978).

56. See *infra* note 180.

57. 297 U.S. 233 (1936).

58. *Id.* at 244. In *Grosjean*, the Court announced, without elaboration, that corporations are persons within the meaning of the Equal Protection and Due Process Clauses. *Id.* This holding was a significant development in corporate rights because the Court had held earlier that corporations did not have liberty rights. See ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 253–54 (2018). Professor Charles O'Kelley regards *Grosjean* as relying on the Field rationale, which "requires that corporations be allowed to assert the constitutional rights necessary to protect their business to the same extent as if they were unincorporated." Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after First National Bank v. Bellotti*, 67 *GEO. L.J.* 1347, 1360 (1979). Professor O'Kelley argues that under this rationale, a court "does not need to deal with the corporate status of a party asserting first amendment rights, as long as the corporation asserts the

National Bank of Boston v. Bellotti ruled by a 5-4 vote that the speech of non-press business corporations could not be restricted to matters affecting corporate property.⁵⁹ The informative value of speech, Justice Powell wrote for the majority, did not depend upon the identity of its source.⁶⁰

Bellotti arose when the Attorney General of Massachusetts informed several corporations, such as the First National Bank of Boston, that he intended to bring criminal prosecutions if they followed through on their plans to spend money opposing a 1976 referendum allowing a graduated income tax on individuals.⁶¹ A Massachusetts statute specified that business corporations could only make expenditures or contributions to influence the vote on ballot propositions that “materially” affected their financial interests.⁶² An amendment specified that no question solely concerning the taxation of individuals shall be deemed to affect the financial interests of a corporation.⁶³ The amendment was added after voters on multiple occasions refused to approve a graduated income tax.⁶⁴

The Massachusetts Supreme Judicial Court rejected a constitutional challenge to the statute, ruling that business corporations do not have First Amendment rights coextensive with

rights in connection with a form of expression that is a part of the corporation’s business.” *Id.* at 1362. Although a newspaper cannot speak, its business requires individual speech and the newspaper corporation may be held legally responsible for the speech of its agents. *Id.* at 1360. Thus, it is entitled to protection under the Field rationale. *Id.*

59. 435 U.S. 765, 766–67, 795 (1978).

60. *Id.* at 777.

61. *Id.* at 769.

62. *See id.* at 769 n.3 (describing the history of the statute). The statute provided for fines against corporations and fines and imprisonment against officers, directors, and agents of corporations. *Id.* at 768; *see also* Francis H. Fox, *Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending*, 67 KY. L.J. 75, 77–80 (1979) (describing judicial interpretations of the statute).

63. *Bellotti*, 435 U.S. at 768. For a discussion of the legislature’s repeated efforts to get voter approval of a constitutional amendment allowing a graduated income tax, and corporate opposition, *see* Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston*, 36 LAW & HIST. REV. 943, 951–62 (2018).

64. Fox notes that each of the four times the legislature passed the proposed amendments concerning a graduated income tax by “top-heavy majorities, but each time the people voted them down by substantial margins.” Fox, *supra* note 62, at 78 n.21.

those of natural persons or associations of natural persons.⁶⁵ The state court held a corporation's property and business interests are entitled to Fourteenth Amendment protection and as an incident of that protection, a corporation may assert First Amendment protection only for speech about a political issue materially affecting its business, property, or assets.⁶⁶

After the Supreme Court heard oral argument, it voted 8-1 on November 11, 1977, to find the amendment unconstitutional.⁶⁷ Chief Justice Burger, concerned that a broad statement of corporate speech rights would undermine laws preventing corporations from participating in candidate elections, initially assigned the opinion to Justice Brennan, who had strongly argued during the conference discussion that only the amendment needed to be addressed.⁶⁸ Justice Brennan, however, quickly concluded that both aspects of the statute had to be addressed and that he would sustain the constitutionality of the general prohibition; a decision invalidating the general prohibition "must inevitably call into question the constitutionality of all corrupt practices acts."⁶⁹

65. *First Nat'l Bank of Boston v. Att'y Gen.*, 359 N.E.2d 1262, 1270 (Mass. 1977).

66. *Id.*

67. Justice Powell's notes for the conference of November 11, 1977, show Justice White as the sole dissenting vote. See Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *First Nat'l Bank of Boston v. Bellotti* (Nov. 11, 1977) [hereinafter *Bellotti* Conference Notes] (on file with the Harvard Journal of Law & Public Policy). Justices Brennan and Stevens said the Court should invalidate only the amendment, fearing that a broader ruling would undermine the corrupt practices acts that prevented corporate expenditures in candidate elections. *Id.* Chief Justice Burger, Justice Blackmun, and then-Justice Rehnquist also focused on the amendment, although not addressing corrupt practices acts. *Id.* At the conference, Chief Justice Burger contended the amendment went "too far." *Id.* However, after the conference he wrote to Justice Brennan that he "had begun to have misgivings about the case, particularly on its potential for undermining the well established Corrupt Practices Act's limitations." Letter from Warren E. Burger, Chief Justice, U.S. Supreme Court, to William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court (Dec. 6, 1977) [hereinafter Dec. 1977 Letter] (on file with the Harvard Journal of Law & Public Policy).

68. Chief Justice Burger assigned the opinion to Justice Brennan because "when a case is to be narrowly written, it should be written by the judge 'least persuaded.'" Burger, Dec. 1977 Letter, *supra* note 67.

69. Memorandum from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to the Justices' Conference 4 (Dec. 1, 1977) (on file with the Harvard Journal of Law & Public Policy).

Justice Powell was assigned the opinion after he wrote to the Justices' Conference that the case "involves only the expression of views on public issues" not support or opposition to political candidates.⁷⁰ "No problem of 'corruption' is involved at all, using that term in the context of the Corrupt Practices Acts."⁷¹ His later opinion noted the appellants were not challenging laws restricting corporate participation in candidate elections and argued that corporate speech regarding ballot propositions does not create the problem of "political debts."⁷² A corporation's right to speak on issues of public interest "implies no comparable right in the quite different context" of candidate election campaigns.⁷³

In spite of Justice Powell's efforts to confine *Bellotti* to ballot propositions, a generation later the Court would reject the distinction between ballot propositions and candidate elections in *Citizens United*. That decision relied heavily upon the concepts set out in *Bellotti*.⁷⁴

A. *The Right to Receive Expression*

The appellants in *Bellotti* argued that the key point of the First Amendment is to protect the right of the listener to receive expression.⁷⁵ In language that Justice Powell's opinion would mimic, the appellants wrote that from the listener's perspective, "it is of little or no significance whether the source of the information is a media or non-media source. It is the right to receive the message which counts."⁷⁶ Justice Powell's papers reveal that from the very outset of his consideration of the case

70. Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to the Justices' Conference 2 (Dec. 6, 1977) (on file with the Harvard Journal of Law & Public Policy).

71. *Id.*

72. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

73. *Id.*

74. *Citizens United v. FEC*, 558 U.S. 310, 347 (2010) (holding that a ban on corporate independent expenditures in candidate elections is unconstitutional under *Bellotti*'s central principle that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity" (citing *Bellotti*, 435 U.S. at 784-85)). *Citizens United* led to an extensive body of work on political speech by corporations. For a collection of that literature, see WINKLER, *supra* note 58, at 405 n.5.

75. Brief for Appellants at 41-42, *Bellotti*, 435 U.S. 765 (No. 76-1172).

76. *Id.*

during the summer of 1977, the right to receive expression was central to his analytical framework. For example, in an August 1977 memo written after Justice Powell had reviewed the briefs, he noted that regardless of whether a corporation's rights are "co-extensive with or different from the rights of individuals," the case raised the question of whether the statute impinged upon the right to receive information referred to in recent cases.⁷⁷

Justice Powell's clerk Nancy Bregstein prepared a bench memorandum for Justice Powell, concluding the statute to be unconstitutional, but admitting that the "harder task is to choose the best ground or grounds for invalidating the statute."⁷⁸ If one places predominant emphasis on the view that corporations are unique because of their artificial existence and their status as creatures of state law, "it is not difficult to conclude that their rights are not infringed" by the Massachusetts statute.⁷⁹ If, on the other hand, one conceives of the problem as one of "what is prohibited rather than *who* is guaranteed a certain right, . . . then the fact that appellants are corporations takes on a different significance."⁸⁰ Bregstein recommended that the central question in the case should not be whether corporations have First Amendment rights, but whether the law "abridges a kind of expression that the First Amendment was

77. Memorandum, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, No. 76-1172, *First National Bank of Boston, et al. v. Bellotti, Attorney General* 6-8 (Aug. 9, 1977) [hereinafter No. 76-1172, *Bellotti*] (on file with the Harvard Journal of Law & Public Policy). The cases he cited on page six of the memo are *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977); and *Procurier v. Martinez*, 416 U.S. 396 (1974). Powell, No. 76-1172, *Bellotti, supra* at 6. On page eight, he added *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Powell, No. 76-1172, *Bellotti, supra* at 8. All of these cases except *Procurier* were cited in the opinion as illustrating the importance of the right to receive information. See *Bellotti*, 435 U.S. at 783.

78. Bench Memorandum from Nancy Bregstein, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 5 (Sept. 13, 1977) [hereinafter *Bellotti* Bench Memo] (on file with the Harvard Journal of Law & Public Policy).

79. *Id.* at 1. This conclusion derives from "either of two minor premises: that corporations do not have First Amendment rights, or that the scope of their First Amendment rights may be defined by their creator, the state." *Id.* at 2.

80. *Id.* at 2.

meant to protect.”⁸¹ Bregstein said it “puts the cart before the horse to inquire *first* whether a particular speaker ‘has’ First Amendment rights. The better approach is to look first at the speech itself, and then to determine whether the identity of the speaker makes any difference.”⁸² Justice Powell wrote “Yes” in the margin beside this argument.⁸³

After Justice Powell was assigned the opinion in December 1977, Bregstein wrote a memorandum recommending that “The opinion need not address whether corporations’ . . . First Amendment rights are ‘coextensive’ with those of individuals.”⁸⁴ She suggested the heart of the opinion would be the following: “It would be antithetical to the First Amendment to judge whether speech is protected by looking to its *source*. This may be why there is little discussion in the cases of whether corporations ‘have’ First Amendment rights, even when those rights have been afforded corporations. Speech presumptively is protected”⁸⁵

Hence, from the first draft to the published opinion, Justice Powell emphasized that the First Amendment “goes beyond the 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.”⁸⁶

Justice Powell’s opinion for the Court shifted the analysis away from the interest in self-expression, which would have required confronting whether corporations can speak, and instead focused on the “informational purpose of the First Amendment.”⁸⁷ Thus, the most memorable passage in *Bellotti* is

81. *Id.* at 11.

82. *Id.* at 14.

83. *Id.* Similarly, he also wrote “Yes” in the margin and underlined a passage stating freedom of speech is “concerned as much with society’s interest as it is with the individual.” *Id.* at 12.

84. Memorandum from Nancy Bregstein, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 1–2, (Dec. 29, 1977) (on file with the Harvard Journal of Law & Public Policy).

85. *Id.* at 9.

86. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *see also* Lewis F. Powell, Jr., First Typescript Draft of First Nat’l Bank of Boston v. Bellotti Opinion 26 (Jan. 19, 1977) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy) (emphasizing that the public has an interest in access to discussion, debate, and dissemination of information and ideas).

87. *Bellotti*, 435 U.S. at 782 n.18.

the following: “The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”⁸⁸ Additionally, the paramount danger Justice Powell perceived in *Bellotti* was government action that interferes with the ability of audience members to make informed political choices; that is, the self-governing function of free speech.⁸⁹ Massachusetts had “single[d] out one kind of ballot question—individual taxation—as a subject about which corporations may never make their ideas public.”⁹⁰ Legislatures are “constitutionally disqualified from dictating . . . the speakers who may address a public issue,” especially where the suppression “suggests an attempt to give one side of a debatable public question an advantage.”⁹¹

B. Counting to Five

Justice Powell’s *Bellotti* opinion can be criticized for its failure to address questions such as whether human behavior—speech—can be attributed to corporations⁹² and its naïve reliance on “procedures of corporate democracy” to protect dissenting shareholders.⁹³ Justice Powell clearly understood that human beings—management—controlled corporate speech, as he expressed to then-Justice Rehnquist in a private correspond-

88. *Id.* at 777.

89. Justice Powell wrote “[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.” *Id.* at 791; *see also id.* at n.31 (“Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves”).

90. *Id.* at 784.

91. *Id.* at 784–85; *see also id.* at 793 (“The fact that a particular kind of ballot question has been singled out . . . suggests . . . the legislature may have been concerned with silencing corporations on a particular subject.”).

92. *See O’Kelley, supra* note 58, at 1351 (stating that speech is a human act and is the product of human thought; to believe that a corporation is capable of physical acts is a “category-mistake”).

93. *See Bowie, supra* note 63, at 967 & nn.147–50 (citing literature criticizing the concept of corporate democracy); Piety, *supra* note 46, at 376–78 & nn.82–88 (same); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 363–64 (2015) (citing *Bellotti*, 558 U.S. at 362) (asserting that stockholders are not well positioned to constrain managerial use of corporate funds for political purposes they disfavor).

ence,⁹⁴ so it is intriguing that his only reference to management making speech decisions is in a footnote where he discussed the chilling effect created by the statute's "materially affecting" requirement.⁹⁵

Justice Powell looked beyond corporations and framed the case as one involving harm to the public. A related theme was the danger created by legislation determining the participants in public dialogue. By framing the case in this manner, the path to five votes was easier than if it had been framed as a discussion of the nature of corporations.

The corporations faced an uphill battle at the Supreme Court. Their application for a stay of enforcement of the statute in 1976 was denied by the Court.⁹⁶ Justice Blackmun's papers reveal that only Justice Powell voted to grant that application.⁹⁷ When the Court again considered the case at its April 18, 1977, conference, it postponed a decision on jurisdiction and asked the parties for briefs addressing the issue of mootness.⁹⁸ Four justices at that time voted to dismiss for a lack of a substantial

94. Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court 2 (Apr. 17, 1978) (on file with the Harvard Journal of Law & Public Policy) (noting that "management believes the corporation must speak out to protect the long term viability of its business"). During the *Bellotti* oral argument, the attorney for the appellants stated the following in response to a remark that a corporation cannot have opinions: "I had rather say that whatever positions or opinions the corporation may have must really be those of some individuals who are acting in their representational capacity." Transcript of Oral Argument at 7, *Bellotti*, 435 U.S. 765 (No. 76-1172), reprinted in 101 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 265, 273 (Philip B. Kurland & Gerhard Casper eds., 1979). This meant "management." *Id.*

95. *Bellotti*, 435 U.S. at 785 n.21 (stating that valuable information would remain unpublished because management would not be willing to risk the substantial criminal penalties resulting from uncertainty about whether a court would agree that particular referendum issue affected the corporation's business). He also referred to management decisions when he stated that Massachusetts had failed to explain why the interests of shareholders were entitled to greater solicitude in this context than in many others involving controversial management decisions. *Id.* at 794 n.34.

96. *First Nat'l Bank of Boston v. Bellotti*, 429 U.S. 876 (1976).

97. On a memo about the application prepared by Justice Blackmun's clerk, Richard Willard, Justice Blackmun wrote that all the Justices except Justice Powell voted to deny the application. Memorandum from Richard K. Willard, Law Clerk, U.S. Supreme Court, to Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court 4 (Oct. 4, 1976) (on file with the Harvard Journal of Law & Public Policy).

98. *First Nat'l Bank of Boston v. Bellotti*, 430 U.S. 964 (1977).

federal question.⁹⁹ After the Court heard oral argument, Justice Powell was the only Justice who argued at the Court's November 11, 1977, discussion of the case that both provisions of the statute were unconstitutional.¹⁰⁰ Thus, when the opinion was reassigned to Justice Powell after Justice Brennan's announcement that he could not find the general ban on corporate expenditures to be invalid, it was clear there was little support for a broad statement of corporate First Amendment rights.

To be sure, there was a well-established body of cases where the Court found infringement on the speech of corporations in the communication business, such as newspaper publishing,¹⁰¹ but as Justice Powell wrote in the margin of a memo from one of his clerks, "Court has never held [corporations] are included in [First Amendment] freedoms—but this has been assumed."¹⁰² The nature of corporations had been confronted in cases involving other constitutional rights, such as the privilege against self-incrimination,¹⁰³ but the Court in the First Amendment context had never explicitly confronted issues such as Massachusetts's argument that a corporation was a legal fiction that did not possess the "peculiarly personal rights" of human owners and managers.¹⁰⁴ Ignoring this question and focusing on the rights of listeners, which had been established in earlier cases, presented a less complicated path to a majority.

A perverse aspect of a right to receive expression is its use by the government to compel speech to promote a well-informed

99. Bregstein, *Bellotti* Bench Memo, *supra* note 78, at 2 (stating the four votes to "DFWSFQ" (dismiss for want of a substantial federal question) show others have adopted the premise that corporations do not have First Amendment rights or that their First Amendment rights may be defined by the state). Conference notes kept by Justices Brennan, Blackmun, and Powell show the four were Chief Justice Burger and Justices Brennan, Marshall, and Stevens. *See, e.g.*, Conference Notes, William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, *First Nat'l Bank of Boston v. Bellotti* (Feb. 24, 1977) (on file with the Harvard Journal of Law & Public Policy).

100. Powell, *Bellotti* Conference Notes, *supra* note 67.

101. *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971); *see also* cases cited *supra* note 52.

102. Bregstein, *Bellotti* Bench Memo, *supra* note 78, at 3.

103. *Wilson v. United States*, 221 U.S. 361, 372-86 (1911); *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906).

104. Brief for the Appellee at 14, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (No. 76-1172).

public.¹⁰⁵ Justice Powell's *Bellotti* opinion is clear that the government may not limit "the stock of information from which members of the public may draw,"¹⁰⁶ but a right to receive expression that is not strongly grounded in a theory of speaker autonomy supports government efforts to enhance the presentation of different views.¹⁰⁷ It is one thing for the government to add its voice to the public debate,¹⁰⁸ it is quite another when the government compels a private speaker to present a government-mandated message or to serve as a platform for the speech of government-favored speakers. Although the latter actions do not restrict speech in the *Bellotti* sense of limiting the range of views available to the public, these actions nonetheless interfere with the freedom of speakers and promote government-prescribed orthodoxy. The Court addressed a government policy designed to expose the public to divergent views in *PG&E*, and Justice Powell developed a significant limitation on the right to receive expression that strengthens the First Amendment rights of corporations.

III. *PACIFIC GAS & ELECTRIC*

Pacific Gas and Electric Co. v. Public Utilities Commission (*PG&E*) began as a dispute over a utility company publishing political statements in *Progress*, its newsletter included in its monthly billing envelopes.¹⁰⁹ A group called Toward Utility Rate Normalization (*TURN*), which had intervened in ratemaking proceedings, asked the California utility commission to prevent *PG&E* from including political editorials in the bills, but the commission instead ordered *PG&E* to periodically include the

105. See William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303, 306 (noting the right to receive expression has been important in two distinct types of cases: "where the government restricts communication between private parties" and where the government "seek[s] to enhance the flow of expression by limiting the exercise of 'private censorship'").

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

107. Lee, *supra* note 105, at 343.

108. See, e.g., *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (stating that instead of compelling private speakers to publish information the state believes to be useful to the public, the state could itself publish the information, and that this "procedure would communicate the desired information to the public without burdening a speaker with unwanted speech").

109. 475 U.S. 1, 5 (1986) (plurality opinion).

expression of TURN in its billing envelopes.¹¹⁰ In those months when TURN was given access to the envelopes, PG&E could include its own newsletter only if it paid additional postage.¹¹¹ The commission maintained that it is “reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E.”¹¹² The utility company countered that it had a First Amendment right not to spread a message with which it disagrees.¹¹³

Justice Powell and his clerk William Stuntz readily concluded that corporations like PG&E have a negative First Amendment right not to disseminate the views of other speakers.¹¹⁴ The difficulty was finding precedents to support this position because PG&E did not have a conscience, nor was it a newspaper publisher. Thus, Justice Powell, Stuntz, and the other Justices engaged in an extensive dialogue about how to fit a corporation like PG&E into the framework established by cases involving newspaper publishers and individuals raising conscience-based objections to compelled speech. To understand this dialogue, it is necessary to briefly explain the precedents Justice Powell relied upon in his *PG&E* opinion.

A. *Miami Herald v. Tornillo and Wooley v. Maynard*

In the landmark *Pentagon Papers* case,¹¹⁵ the Court emphasized freedom to publish.¹¹⁶ Freedom *not* to publish was added to the protections afforded the press in *Miami Herald Publishing*

110. *Id.* The regulatory commission maintained that the “extra space” remaining in the billing envelope after inclusion of the bill and any required notices was the property of the rate payers. *Id.* at 5–7. TURN was given access to the space four times a year. *Id.* at 6. The commission reserved the right to grant other groups access to the envelopes, but had denied one group because its speech was not related to ratemaking proceedings. *Id.* at 7 & n.5.

111. *Id.* at 6.

112. *Id.* (internal quotation marks omitted). TURN argued government action increasing the range of sources of information for consumers promotes an “informed citizenry.” Brief for Appellees TURN, et al. at 39, *PG&E*, 475 U.S. 1 (No. 84-1044).

113. Reply Brief of Appellant PG&E at 18–19, *PG&E*, 475 U.S. 1 (No. 84-1044) (arguing that the speech of PG&E could not be restricted to enhance the relative voice of TURN).

114. See *infra* note 155.

115. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

116. *Id.* at 714.

Co. v. Tornillo,¹¹⁷ where the Court rejected a Florida statute granting candidates access to a newspaper that had attacked them.¹¹⁸ The extension of negative speech rights to newspaper corporations in *Miami Herald* basically ignored that corporations were involved;¹¹⁹ at no point in the consideration of the case did any member of the Court comment on the corporate status of the appellant.¹²⁰ As Justice Blackmun wrote in a personal memo he prepared summarizing the case, despite the possibility that the Florida statute encouraged speech:

We are, however, dealing with newspapers here. Much as I detest their deficiencies and their slanting of news, particularly in the East (Washington and New York), the fact is that it has never been the province of the Government to insure that the newspapers present the news fairly. For better or worse, by the First Amendment, we have opted for the free press. This means "free" and not government control of the press.¹²¹

Even Justices White and Rehnquist, the fiercest opponents of First Amendment protection for speech by non-press corporations, contended there was something special about press corporations.¹²² One sees the special regard for newspapers in

117. 418 U.S. 241 (1974).

118. *Id.* at 256–58.

119. As Justice Rehnquist admitted in *PG&E*, this extension occurred "without much discussion." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

120. In particular, the available notes of the Court's April 19, 1974, conference discussion of *Miami Herald* are bereft of any mention of the corporate ownership of the newspaper. All of the Justices voted to reverse the lower court and many agreed with Chief Justice Burger's statement that, "telling a paper what to publish is not too different from saying what not to publish." Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Miami Herald Publ'g Co. v. Tornillo* (Apr. 19, 1974) (on file with the Harvard Journal of Law & Public Policy); see also Conference Notes, Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, *Miami Herald Publ'g Co. v. Tornillo* (Apr. 19, 1974) (on file with the Harvard Journal of Law & Public Policy) (reporting Chief Justice Burger's belief that what must be published was equal to what cannot be published).

121. Memorandum, Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, *No. 73-797—Miami Herald Publ'g Co. v. Tornillo* 6–7 (Apr. 15, 1974) [hereinafter *Miami Herald Memo*] (on file with the Harvard Journal of Law & Public Policy).

122. For reasons ranging from their historic role as conveyors of ideas, *PG&E*, 475 U.S. at 33 (Rehnquist, J., dissenting), to freedom being essential to the conduct of their business, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting), or because shareholders have invested in "an enter-

Chief Justice Burger's opinion in *Wooley v. Maynard*,¹²³ which described *Miami Herald* as illustrative of the "freedom of thought" that protects both the right to speak and the right to refrain from speaking at all.¹²⁴ Although a newspaper is a vehicle for humans to express thoughts, the newspaper itself is incapable of thought.¹²⁵ Yet Chief Justice Burger described the statute at issue in *Miami Herald* as depriving a "newspaper of the fundamental right to decide what to print or omit."¹²⁶ Chief Justice Burger's references to the *Miami Herald* newspaper were really references to the humans making editorial decisions.¹²⁷ This language was identical to that used by the newspaper's attorneys who wrote, "Conscientious newspapers will be reluctant to print anything concerning impending elections if in doing so they become obligated to provide free space for 'replies' that may be antithetical to the newspapers' views."¹²⁸ Given this venerated treatment of newspapers, it was not surprising that Massachusetts sought to defend its restriction on the

prise engaged in the business of disseminating news and opinion." *Id.* at 805. (White, J., dissenting).

123. 430 U.S. 705 (1977).

124. *Id.* at 714 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34, 637 (1943)). Justice Brennan also referred to *Wooley* and *Miami Herald* as based on the concept of individual freedom of mind. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (quoting *Wooley*, 430 U.S. at 714).

125. As Justice Scalia wrote in his *Citizens United* concurring opinion, "The power to publish thoughts, no less than the power to speak thoughts, belongs only to human beings, but the dissent sees no problem with a corporation's enjoying the freedom of the press." *Citizens United v. FEC*, 558 U.S. 310, 392 n.7 (2010) (Scalia, J., concurring); see also McConnell, *supra* note 51, at 417.

126. *Wooley*, 430 U.S. at 714. He was more to the point in quoting a passage from *Miami Herald* referring to the decisionmaking of editors. *Id.* (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974)).

127. Similarly, Justice White in a concurring opinion in *Miami Herald* used language that ascribed decisionmaking to the newspaper, while obviously referring to editors. 418 U.S. at 261 (White, J., concurring) (stating that the Florida law "runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor"). Justice Blackmun also used similar language in a case memo he prepared, stating that "the statute would force the private newspaper to print material it does not want to print." Blackmun, *Miami Herald Memo*, *supra* note 121, at 5.

128. Jurisdictional Statement at 29, *Miami Herald*, 418 U.S. 241 (No. 73-797), reprinted in 78 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 181, 218 (Philip B. Kurland & Gerhard Casper eds., 1975).

speech of “business corporations” in *Bellotti* in part because communication by corporate members of the press was entitled to greater protection than the same communication by entities such as banks.¹²⁹

In *Wooley v. Maynard*, two Jehovah’s Witnesses covered the motto “Live Free or Die” on the license plates of their cars because the motto was “at odds” with their deeply held religious beliefs.¹³⁰ The district court ruled that the covering up of the motto was protected symbolic speech,¹³¹ but the Court passed on that issue and instead ruled that the government may not force individuals to display ideological messages on their private property.¹³² An individual’s freedom of mind, Chief Justice Burger wrote, includes the right not to “be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”¹³³

Initially, the Court voted 7-2 on May 27, 1976, to summarily affirm the district court’s ruling,¹³⁴ prompting a draft dissent by Justice Rehnquist who feared the majority’s reasoning represented an unwarranted extension of the Court’s symbolic speech cases and imperiled federal statutes which prohibit defacing the words “In God We Trust” on currency.¹³⁵ Justice Rehnquist’s advocacy of setting the case down for oral argument was successful and the Court voted 6-3 to note probable

129. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781, 782 n.18 (1978). The *Bellotti* Court did not address the possible application of the Massachusetts statute to the press because none of the litigants contended to be members of the press, and this issue was not addressed by the lower court. *Id.* at 781 n.17. However, the Court announced that the press “does not have a monopoly on either the First Amendment or the ability to enlighten.” *Id.* at 782.

130. *Wooley*, 430 U.S. at 707–08, 707 n.2.

131. *Maynard v. Wooley*, 406 F. Supp. 1381, 1386 (D.N.H. 1976).

132. *Wooley*, 430 U.S. at 713.

133. *Id.* at 715.

134. Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Wooley v. Maynard* (May 27, 1976) (on file with the Harvard Journal of Law & Public Policy). All of the Justices except Justices Blackmun and Rehnquist voted to summarily affirm the lower court’s judgment. *Id.*

135. William H. Rehnquist, First Typescript Draft of *Wooley v. Maynard* Dissenting Opinion 1 (June 10, 1976) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

jurisdiction at its June 17, 1976, conference.¹³⁶ After hearing arguments, the Court voted 7-2 to affirm with Chief Justice Burger advancing the idea at the conference that the state cannot compel citizens to convey a message contrary to their religious views.¹³⁷

Chief Justice Burger's first draft opinion for the Court had a section arguing that the covering of the motto was not symbolic speech but alternatively found that the individuals may not be forced to disseminate state-mandated ideological messages.¹³⁸ The treatment of symbolic speech prompted Justices Stewart, Brennan, and Marshall to inform Chief Justice Burger that they would not join that part of his opinion.¹³⁹ Chief Justice Burger then canvassed the Justices' Conference, asking for a "show of hands" on deleting the symbolic speech section;¹⁴⁰ Justices Stewart, Brennan, Marshall, Powell, and Stevens voted for de-

136. Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Wooley v. Maynard* (June 17, 1976) (on file with the Harvard Journal of Law & Public Policy). Justices Brennan, Stewart, and Marshall voted to summarily affirm. *Id.*

137. Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Wooley v. Maynard* (Dec. 1, 1976) (on file with the Harvard Journal of Law & Public Policy) (noting that Chief Justice Burger stated that a "license plate may be somewhat different from compelling 'speech' in other ways. But the objection here is based on *religious* grounds[, and the] state can't compel this"); *see also* Conference Notes, William J. Brennan, Jr., *Wooley v. Maynard* (Dec. 1, 1976) (on file with the Harvard Journal of Law & Public Policy) (noting that Chief Justice Burger said the state cannot compel messages).

138. Warren E. Burger, First Printed Draft of *Wooley v. Maynard* Opinion 6-9, (Mar. 10, 1977) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

139. Letter from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 11, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from Thurgood Marshall, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 11, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from Potter Stewart, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 10, 1977) (on file with the Harvard Journal of Law & Public Policy). Justice White informed Chief Justice Burger that he was considering a partial dissent on the issue of affirming the lower court's injunction and that he had "not come to rest with respect to" the symbolic speech section. Letter from Byron R. White, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 14, 1977) (on file with the Harvard Journal of Law & Public Policy).

140. Memorandum from Warren E. Burger, Chief Justice, U.S. Supreme Court, to the Justices' Conference (Mar. 16, 1977) (on file with the Harvard Journal of Law & Public Policy).

letion.¹⁴¹ Justice Rehnquist wrote to Chief Justice Burger that deletion of the symbolic speech section meant the Court was not addressing the issue that the district court decided but was deciding the case on a First Amendment issue that the district court never considered.¹⁴²

The right not to speak in *Wooley* is derived from *West Virginia State Board of Education v. Barnette* where public school students were required to salute the flag of the United States while reciting the Pledge of Allegiance.¹⁴³ Jehovah's Witnesses, who regard the flag as a graven image, refused to participate in the flag salute, and the Court found "individual freedom of mind" was preferred over "officially disciplined uniformity."¹⁴⁴ The Bill of Rights, "which guards the individual's right to speak his own mind," does not allow public authorities "to compel him to utter what is not in his mind."¹⁴⁵

Chief Justice Burger's *Wooley* opinion admitted that the compelled flag salute was "a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree."¹⁴⁶ Justice Rehnquist, in a dissenting opinion joined by Justice Blackmun, criticized Chief Justice Burger's attempt to put this case in the ambit of *Barnette*, noting that there was no affirmation of belief in *Wooley*; the state was not placing citi-

141. Letter from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 16, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from Thurgood Marshall, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 17, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 17, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 17, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from Potter Stewart, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 16, 1977) (on file with the Harvard Journal of Law & Public Policy).

142. Letter from William H. Rehnquist, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 16, 1977) (on file with the Harvard Journal of Law & Public Policy).

143. 319 U.S. 624, 626 (1943).

144. *Id.* at 629, 637.

145. *Id.* at 634.

146. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

zens in the position of “asserting as true” the state-mandated message.¹⁴⁷

Justice Rehnquist, however, did not criticize Chief Justice Burger’s use of *Miami Herald* as an illustration of the “individual freedom of mind.” In fact, none of the Justices objected to Chief Justice Burger’s reference to *Miami Herald*. Certainly the opinion drafts were closely scrutinized and Chief Justice Burger was open to changes requested by Justices. For example, Justice Stewart threatened to withdraw his *Wooley* vote because Chief Justice Burger’s early drafts used language stating that a sufficiently compelling interest justified infringement of First Amendment rights.¹⁴⁸ Justice Stewart said he could not agree that any governmental interest could ever justify “infringement” of First Amendment rights.¹⁴⁹ Where “free expression must be subordinated to strong societal policies,” Justice Stewart argued, “there is no infringement of First Amendment rights.”¹⁵⁰ Chief Justice Burger told Justice Stewart that he was “quite willing to modify” the language and rewrote it to secure Justice Stewart’s vote.¹⁵¹

During the Court’s consideration of *Wooley*, Justices Stevens and Blackmun questioned the importance of the case. Justice Stevens wrote to the Justices’ Conference that he could not get over “the fact that the case really involves nothing more than

147. *Id.* at 721 (Rehnquist, J., dissenting).

148. Letter from Potter Stewart, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Apr. 14, 1977) (on file with the Harvard Journal of Law & Public Policy).

149. *Id.*

150. *Id.* Justice Stewart and Justice John Harlan for many years carried on a continuing off-the-record dialogue on this subject. *Id.* Justice Stewart said of Justice Harlan, “While he thought, probably quite rightly, that my view was no more than semantic and probably circular, he nonetheless came to agree with it.” *Id.*

151. Letter from Warren E. Burger, Chief Justice, U.S. Supreme Court, to Potter Stewart, Assoc. Justice, U.S. Supreme Court (Apr. 14, 1977) (on file with the Harvard Journal of Law & Public Policy). The modified language appears as the first and second sentences in Part (4)B. *Wooley*, 430 U.S. at 715–16 (“Identifying the Maynards’ interests as implicating 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.” (citing *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968))).

the masking of two license plates.”¹⁵² Justice Blackmun, in a memo prepared just for his use, wrote the following:

Sometimes I wonder how important cases of this kind are, and I am appalled at the amount of energy that is expended processing them. This seems to me to be an aberration case that is not very important. Yet, in all fairness it may not be a foolish case and could prove to be a very significant one so far as rights to free speech are concerned.¹⁵³

As will be shown, *Wooley* has become a key part of the right not to speak and in particular played a critical role in *PG&E*.

B. Writing the *PG&E* Opinion

At the Court’s October 11, 1985, conference, the Justices voted 5-3 to reverse the utility commission order.¹⁵⁴ Justice Powell voted to reverse for the following reasons: (1) regulated corporations have First Amendment rights to disseminate their own views under *Bellotti* and *Consolidated Edison*, (2) *Miami Herald* and *Wooley* recognized a “negative” First Amendment right, and (3) counsel for the utility commission admitted at oral argument that the purpose of the order was to afford an opportunity for rate opponents of *PG&E* to have a forum.¹⁵⁵ Chief

152. Memorandum, John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to the Justices’ Conference (June 10, 1976) (on file with the Harvard Journal of Law & Public Policy).

153. Memorandum, Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, *No. 75-1453—Wooley v. Maynard* 4 (Nov. 29, 1976) (on file with the Harvard Journal of Law & Public Policy).

154. Justice Blackmun did not participate, but he did take notes of the conference discussion. Conference Notes, Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n* (Oct. 11, 1985) [hereinafter *PG&E* Conference Notes] (on file with the Harvard Journal of Law & Public Policy).

155. Justice Powell used notes he had prepared after hearing oral argument. Post-Argument Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n* (undated) (on file with the Harvard Journal of Law & Public Policy). In an earlier memo, Stuntz suggested the access rule was neutral “in the sense that *any* group interested in speech about utility/energy issues is free to apply to use the space.” Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 5 (Oct. 2, 1985) (on file with the Harvard Journal of Law & Public Policy). After counsel’s admission at oral argument, Stuntz wrote to Justice Powell “it appears that the only goal of the access program is to permit groups that *oppose* *PG&E* in ratemaking proceedings to raise money by using *PG&E*’s billing envelope. So characterized, the case looks almost easy (and your clerk’s initial views almost dumb).” Memorandum from William Stuntz, Law Clerk, U.S. Supreme

Justice Burger and Justices Brennan and O'Connor agreed with Justice Powell that the utility company had First Amendment rights but could not agree on the relevant precedents or principles.¹⁵⁶ According to Justice Powell's notes, Chief Justice Burger said that compelling PG&E to transmit the "views of others is too troubling" and that "*Miami Herald* is close—but not controlling. Same is true of *Wooley*."¹⁵⁷ Justice Brennan remarked that *Miami Herald* and Justice Powell's concurring opinion in *PruneYard Shopping Center v. Robins*¹⁵⁸ "make clear there is negative [First Amendment right]."¹⁵⁹ Justice O'Connor said there was "no clear answer" but that the utility commission's order was "a form of 'forced association.'"¹⁶⁰ Justice Marshall also voted to reverse, but Justice Powell's notes merely say "On first amend."¹⁶¹ Justices White, Stevens, and Rehnquist voted to af-

Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 2 (Oct. 11, 1985) (on file with the Harvard Journal of Law & Public Policy).

156. As Stuntz wrote to Justice Powell on October 29, after looking at Justice Powell's notes and talking with a few clerks in other chambers, it "isn't clear that the other Justices who voted to reverse agreed on this (or any other) rationale." Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 1-2 (Oct. 29, 1985) (on file with the Harvard Journal of Law & Public Policy).

157. Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n* (Oct. 11, 1985) [hereinafter *PG&E* Conference Notes] (on file with the Harvard Journal of Law & Public Policy); see also Conference Notes, William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n* (Mar. 25, 1985) [hereinafter *PG&E* Conference Notes] (on file with the Harvard Journal of Law & Public Policy) (recording that Chief Justice Burger said a requirement like this, whether addressed to a corporation or individual, is "most suspect").

158. 447 U.S. 74, 96-101 (1980) (Powell, J., concurring in part and in the judgment). The Court ruled that individuals who engaged in expressive activities in a privately owned shopping center did not violate the First Amendment rights of the center's owner. *Id.* at 88 (majority opinion). Justice Powell's concurring opinion said that although the record in *PruneYard* did not show that the access burdened the owner's First Amendment rights, there could be circumstances where an impermissible burden occurred. *Id.* at 98-101 (Powell, J., concurring).

159. Powell, *PG&E* Conference Notes, *supra* note 157. Justice Blackmun also recorded Justice Brennan as stating the order was a "trespass" on PG&E's negative First Amendment rights. Blackmun, *PG&E* Conference Notes, *supra* note 154.

160. Powell, *PG&E* Conference Notes, *supra* note 157.

161. *Id.* Notes taken by Justices Blackmun and Brennan do not elaborate on Justice Marshall's reasoning. See Blackmun, *PG&E* Conference Notes, *supra* note 154; Brennan, *PG&E* Conference Notes, *supra* note 157.

firm, arguing that corporations have limited rights that were not violated in this case.¹⁶²

1. *Grappling with the Precedents*

To understand Justice Powell's opinion, it is important to separate the issue of TURN's access to PG&E's billing envelopes (the forced association issue), from the impact of that access on PG&E's publication of *Progress* (the forced response issue). Justice Powell described *Progress* as "no different from a small newspaper" with a blend of energy saving tips, stories about wildlife conservation, and commentary on political issues.¹⁶³ PG&E's publication of *Progress* explains in part the opinion's reliance on *Miami Herald*. TURN's access to the billing envelopes explains the reliance on *Wooley*.

The parties "hotly debated" the applicability of *Wooley* and *Barnette*, the flag salute case.¹⁶⁴ After Justice Powell was assigned the opinion on October 14, he and his clerk William Stuntz grappled with *Wooley* in particular. PG&E, as Stuntz wrote to Justice Powell, "cannot sensibly be said to have a 'conscience' or 'deeply held beliefs' in the sense that the individual claimants in *Wooley* and *Barnette* did."¹⁶⁵ In early drafts of the opinion, Stuntz wrote that it was not necessary to determine whether *Wooley* and *Barnette* provide an "independent basis for prohibiting a state-compelled access to corporate property for purposes of disseminating speech. In our view, the Commission's order is invalid not because it infringes on any right of con-

162. Blackmun, *PG&E* Conference Notes, *supra* note 154; Brennan, *PG&E* Conference Notes, *supra* note 157; Powell, *PG&E* Conference Notes, *supra* note 157.

163. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 5 & n.1, 8 (1986) (plurality opinion).

164. William Stuntz, First Typescript Draft of *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n* Opinion 13 (Oct. 29, 1985) (unpublished draft) [hereinafter *PG&E* First Typescript Draft] (on file with the Harvard Journal of Law & Public Policy).

165. Bench Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, for Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 22 (Sept. 27, 1985) (on file with the Harvard Journal of Law & Public Policy); *see also* Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 7 (Oct. 2, 1985) (on file with the Harvard Journal of Law & Public Policy) (arguing that the freedom of conscience interest is "simply not applicable to a large, publicly traded corporation").

science or belief, but because it constitutes a forced association that impermissibly deters protected speech.”¹⁶⁶

Stuntz relied most heavily on *Miami Herald*, explaining to Justice Powell that simply arguing that sharing envelope space was impermissible begs the question why a publicly traded business corporation has a right not to associate with the speech of others.¹⁶⁷ Stuntz asserted that under *Miami Herald*, a viewpoint-based access scheme can be seen as deterring the property owner from speaking out.¹⁶⁸ “It doesn’t matter who owns the extra space, nor does it matter that PG&E is a corporation rather than an individual.”¹⁶⁹ Justice Powell agreed that no other opinion was as helpful as *Miami Herald*.¹⁷⁰

The draft opinion circulated to the Justices’ Conference on November 14, explicitly stated that the Court was not deciding whether *Wooley* and *Barnette* were applicable.¹⁷¹ Justice Rehnquist responded with a draft dissenting opinion, remarking that “the majority expressly disavows any reliance on the argument that corporations, like individuals, have a right not to speak against their ‘consciences.’”¹⁷² Further, Justice Rehnquist argued that *Miami Herald* was inapplicable: “PG&E is not an individual or a newspaper publisher; it is a regulated

166. Stuntz, *PG&E* First Typescript Draft, *supra* note 164, at 14. Justice Powell deleted the references to conscience in this passage so that the emphasis was on forced association. William Stuntz & Lewis F. Powell, Jr., Second Typescript Draft of *Pac. Gas & Elec. Co. v. Pub. Utils.* Comm’n Opinion 13 (Nov. 9, 1985) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy). He wrote the following in the margin on the second draft: “Bill—I think one can read *Wooley* and *Barnette* broadly enough to lend support to our view. I’d not argue this, but I don’t want to imply that these cases are limited to conscience.” *Id.*

167. Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 3–4 (Oct. 29, 1985) (on file with the Harvard Journal of Law & Public Policy).

168. *Id.* at 4.

169. *Id.* at 5.

170. Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William Stuntz, Law Clerk, U.S. Supreme Court 2 (Oct. 30, 1985) (on file with the Harvard Journal of Law & Public Policy).

171. Lewis F. Powell, Jr., First Printed Draft of *Pac. Gas & Elec. Co. v. Pub. Utils.* Comm’n Opinion 5 n.4 (Nov. 14, 1985) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

172. William H. Rehnquist, First Printed Draft of *Pac. Gas & Elec. Co. v. Pub. Utils.* Comm’n Dissenting Opinion 1 n.1 (Dec. 6, 1985) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

utility. 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.”¹⁷³ Justices White and Stevens quickly joined Justice Rehnquist’s dissent,¹⁷⁴ but Justice O’Connor joined Justice Powell’s opinion.¹⁷⁵

2. *Accommodating Justice Brennan*

After reading both Justice Powell’s and Justice Rehnquist’s draft opinions, Justice Brennan wrote a seven-page letter to Justice Powell, admitting he had struggled with the “difficult”

173. *Id.* at 7.

174. Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Dec. 10, 1985) (on file with the Harvard Journal of Law & Public Policy); Letter from Byron R. White, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Dec. 9, 1985) (on file with the Harvard Journal of Law & Public Policy). Both Justices White and Stevens, however, expressed reservations about Justice Rehnquist’s later drafts and did not join Part II of his dissenting opinion. *See* Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Jan. 31, 1986) (on file with the Harvard Journal of Law & Public Policy); Letter from Byron R. White, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Jan. 31, 1986) (on file with the Harvard Journal of Law & Public Policy).

175. Letter from Sandra Day O’Connor, Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Nov. 22, 1985) (on file with the Harvard Journal of Law & Public Policy). Justice Marshall joined the Court’s judgment but did not join Justice Powell’s opinion, finding that the order exceeded the right of access to private property that was permissible under *PruneYard*. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 21–26 (1986) (Marshall, J., concurring in the judgment). Justice Powell sought to get Justice Marshall to join his opinion, writing that he did not see any tension “between our two opinions.” Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Thurgood Marshall, Assoc. Justice, U.S. Supreme Court (Jan. 21, 1986) (on file with the Harvard Journal of Law & Public Policy). He added, “Your view that the First Amendments [sic] rights of corporations are not identical to those of individuals is also consistent with my opinion. I purposely placed reliance on cases involving corporate and not individual speech: *Bellotti*, *Consolidated Edison*, and of course *Tornillo*.” *Id.* Justice Marshall rejected Justice Powell’s overture, stating that he particularly disagreed with Justice Powell’s application of *Miami Herald*, adding that he did not “believe that the concerns applicable to regulation of the press are so easily expanded to cover a non-media corporation.” Letter from Thurgood Marshall, Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Jan. 22, 1986) (on file with the Harvard Journal of Law & Public Policy).

issues raised by the case.¹⁷⁶ *Miami Herald* was not the appropriate analytical framework for the case; the “cardinal defect” of the order “is that it compels PG&E both to associate with, and carry the messages of, a speaker with which it may violently disagree. . . . My sense is thus that the case is most readily analyzed” under *Wooley* and Justice Powell’s *PruneYard* concurring opinion.¹⁷⁷ It was not necessary “to delineate the precise scope of a corporation’s right not to speak,” but the commission’s order was “well beyond the line of permissible regulation.”¹⁷⁸

Stuntz opposed Justice Brennan’s idea of relying on *Wooley* because it would “needlessly expose us to the argument that (i) *Wooley* rested on individuals’ freedom of conscience, while (ii) a large, publicly traded corporation like PG&E has no ‘conscience’ to protect.”¹⁷⁹ Justice Powell responded that despite his full agreement that “*Wooley* can be viewed as essentially a ‘freedom of conscience’ case, it may not be unreasonable (as an accommodation to WJB’s views!) to recognize that by analogy it also supports our position.”¹⁸⁰ Justice Powell concluded by telling his clerk that “as often happens where the views of five Justices must be met to obtain a Court, the author of an opinion has to make some accommodations.”¹⁸¹ He asked Stuntz to make changes to “satisfy WJB without detracting significantly from the soundness of our opinion.”¹⁸²

Stuntz deleted the section that expressly declined to apply *Wooley* and *Barnett* to the case and added language from *Wooley*

176. Letter from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 1 (Dec. 17, 1985) (on file with the Harvard Journal of Law & Public Policy).

177. *Id.* at 1–2.

178. *Id.* at 6.

179. Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 2 (Dec. 17, 1985) (on file with the Harvard Journal of Law & Public Policy).

180. Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William Stuntz, Law Clerk, U.S. Supreme Court 2 (Dec. 18, 1985) (on file with the Harvard Journal of Law & Public Policy). Justice Powell added, “Although *Wooley*’s primary focus was on freedom of conscience, the decision has broader First Amendment relevance where a state forces one to carry a message with which a speaker may disagree.” *Id.* at 2–3.

181. *Id.* at 3.

182. *Id.* at 3–4.

concerning a right not to speak.¹⁸³ When Justice Powell shared these changes with Justice Brennan he commended Justice Brennan for suggesting that *Wooley* “lends support to our position.”¹⁸⁴ He added:

I have thought it unwise, however, to rely on *Wooley* as a primary authority, and thereby invite a strong dissent. The section of *Wooley* that discusses the Maynards’ right not to speak ties that right to “freedom of thought” and “freedom of mind,” and does not rely in its holding on the Maynards’ affirmative right to speak. In this case, we tie appellant’s affirmative right to be free from forced association with TURN to appellant’s affirmative right to speak. *Tornillo* is plainly the single most relevant authority to such an analysis.¹⁸⁵

The changes made to Justice Powell’s opinion satisfied Justice Brennan and he joined it on December 26.¹⁸⁶ Chief Justice Burger joined the opinion on January 10 but added a concurring opinion stating that *Wooley* was sufficient authority to decide this case.¹⁸⁷

183. These and other changes are outlined in Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Proposed Changes for *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n 1* (Dec. 20, 1985) (on file with the Harvard Journal of Law & Public Policy), sent by Justice Powell to Justice Brennan along with a letter. Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court (Dec. 20, 1985) [hereinafter Dec. 1985 Letter] (on file with the Harvard Journal of Law & Public Policy). On Justice Powell’s copy of the Fourth Printed Draft of the *PG&E* opinion, circulated to the Court on December 23, 1985, Justice Powell wrote on the first page “These changes include many suggested by WJB. See my letter and memo to him.” Lewis F. Powell, Jr., Fourth Printed Draft of *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n Opinion 1* (Dec. 23, 1985) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

184. Powell, Dec. 1985 Letter, *supra* note 183, at 2.

185. *Id.* (citations omitted).

186. Letter from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Dec. 26, 1985) (on file with the Harvard Journal of Law & Public Policy).

187. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 21 (1986) (Burger, C.J., concurring). Chief Justice Burger initially prepared a concurring opinion that disagreed with the notion that the order was a “penalty” for PG&E’s earlier publication of its newsletter. Letter from Warren E. Burger, Chief Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Dec. 20, 1985) (on file with the Harvard Journal of Law & Public Policy). On January 8, 1986, Chief Justice Burger noted that Justice Powell’s fourth draft met “most of my problems.” Letter from Warren E. Burger, Chief Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Jan. 8, 1986) (on file with

Justice Rehnquist revised his dissenting opinion to address the new references to *Wooley*, calling the analysis flawed.¹⁸⁸ “This Court has recognized that natural persons enjoy negative free speech rights because of their interest in self-expression; an individual’s right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience.”¹⁸⁹ He continued, “Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point.”¹⁹⁰ Stuntz proposed adding material to make clear that the opinion was not giving corporations “conscience” rights, but Justice Powell felt that addition was unnecessary.¹⁹¹

C. Understanding PG&E

Justice Powell’s *PG&E* opinion can be read in two distinct ways. First, the opinion sets out a corporate right to be free from state-imposed burdens on expression. A related but ancillary point concerns the freedom of a corporation to control its property for expressive purposes, including the power to grant or deny access to third parties.¹⁹² Second, the opinion limits the

the Harvard Journal of Law & Public Policy). Chief Justice Burger added, “I don’t want to jeopardize a Court for your opinion so I had decided to join, but still point out that it is sufficient to decide the case on the basis of compelled association, relying entirely on *Wooley v. Maynard*.” *Id.*; see also Warren E. Burger, First Printed Draft of *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n* Concurring Opinion (Jan. 10, 1986) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

188. William H. Rehnquist, Third Printed Draft of *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n* Dissenting Opinion 7 (Jan. 28, 1986) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

189. *Id.*

190. *Id.* at 8. Justice Rehnquist added, “To ascribe to such artificial entities an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality.” *Id.*

191. Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 2–3 (Jan. 31, 1986) (on file with the Harvard Journal of Law & Public Policy). Justice Powell wrote that he would prefer not to make any further change unless Justice Brennan was concerned. *Id.* at 3.

192. Although the utility commission maintained that the “extra space” within the billing envelopes belonged to the ratepayers, the envelopes, the bills, and PG&E’s newsletter remained PG&E’s property. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 17 (1986) (plurality opinion). Thus, the access order required PG&E “to use *its* property as a vehicle for spreading a message with which it dis-

power of government to promote diverse views, especially when those actions are viewpoint-based.

Although Justice Powell began the First Amendment analysis by referring to both *Bellotti* and *Consolidated Edison* as cases in which the state sought to abridge *speech* in ways that harm the “public’s interest in receiving information,”¹⁹³ the rhetoric shifted quickly when addressing *Miami Herald*. The Florida statute harmed the *newspaper* by forcing it “to tailor its speech to an opponent’s agenda, and to respond to candidates’ arguments where the newspaper might prefer to be silent.”¹⁹⁴ Justice Powell wrote that the same concerns that invalidated the compelled access rule in *Miami Herald* “apply to appellant as well as to the institutional press.”¹⁹⁵ The state is not free, Justice Powell wrote, to force PG&E “to respond to views that others may hold.”¹⁹⁶

This shift was more than rhetorical. Unlike *Bellotti*, where Justice Powell avoided discussing the rights of corporations, *PG&E* sets out a corporation’s right to be free from state-imposed burdens on expression. PG&E, therefore, had both a right to control how its property is used by others for expressive purposes (the forced association issue) and a right to define what it communicates to the public through an outlet such as *Progress* (the forced response issue). To Justice Powell, the forced association provoked a forced response; because TURN had been given access “to create a multiplicity of views in the envelopes, there can be little doubt that appellant will *feel* compelled to respond to arguments and allegations made by TURN in its messages to appellant’s customers.”¹⁹⁷ Although Justice Powell was well aware of the danger of ascribing a conscience

agrees.” *Id.* To Justice Powell, the implications of the order were extensive; extra space could be found “on billboards, bulletin boards, and sides of buildings, and motor vehicles.” *Id.* at 18 n.15; *see also id.* at 6 n.4 (quoting dissenting Public Utilities commissioner who noted the sweeping ramifications of the order).

193. *Id.* at 8.

194. *Id.* at 10. Although the *Miami Herald* was owned by a corporation, the dominant actors in the Court’s opinion were editors. *See supra* notes 3, 120–121, 127 and accompanying text.

195. 475 U.S. at 11 (plurality opinion).

196. *Id.*

197. *Id.* at 16 (emphasis added).

to a corporation on the forced association issue, he discussed the forced response issue as if he were describing a natural person.

There was also a chilling effect caused by the viewpoint-based access mandated by the utility commission.¹⁹⁸ The public was not given access to the envelopes. Rather, access was limited “to persons or groups—such as TURN—who disagree with appellant’s views as expressed in *Progress* and who oppose appellant in Commission proceedings.”¹⁹⁹ Thus, PG&E “must contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views.”²⁰⁰ As in *Miami Herald*, the “safe course is to avoid controversy.”²⁰¹

Apart from the impact of the access order on PG&E’s speech, Justice Powell also criticized the commission’s order on the ground that it compelled PG&E to be a courier for messages with which it disagreed. Justice Powell relied in part on *Wooley*, absent any reference to conscience, for the idea that the right to speak necessarily includes the right not to speak.²⁰² Justice Powell wrote that if the government were “able to compel corporate speakers to propound political messages with which they disagree, [the First Amendment’s] protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next.”²⁰³

198. *See id.* at 14.

199. *Id.* at 13. Justice Powell stated that TURN was free “to use the billing envelopes to discuss any issue it chooses” and if it argued in favor of legislation that could harm PG&E, the company may be “forced either to appear to agree with TURN’s views or to respond.” *Id.* at 15. This statement reflects the views he stated in his concurring opinion in *PruneYard*. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 98–99 (1980) (Powell, J., concurring in part and in the judgment). Moreover, a 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.” 475 U.S. at 15 n.11 (plurality opinion).

200. 475 U.S. at 14 (plurality opinion).

201. *Id.* (quoting *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257 (1974)) (internal quotation marks omitted).

202. *Id.* at 16 n.13 (“[A] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.” (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977))) (internal quotation marks omitted).

203. *Id.* at 16.

Although Justice Powell sought to read *Wooley* as resting on broader concerns than “individual freedom of mind” at issue in *Barnette*,²⁰⁴ implicit in his analysis is management’s disagreement with the ideas of TURN. Stated differently, although a corporation is incapable of thought, its management may deploy corporate resources to promote certain ideas, and under Justice Powell’s theory, refuse to allow those resources to be used to promote ideas management finds repugnant.

Justice Powell was not the first to look through a corporation and see the humans making choices about speech. As noted above, Chief Justice Burger’s *Wooley* opinion described *Miami Herald* as illustrative of the “freedom of thought” that protects “both the right to speak freely and the right to refrain from speaking at all.”²⁰⁵ Chief Justice Burger’s references to the newspaper’s “fundamental right to decide what to print”²⁰⁶ were surely about the humans making editorial decisions. It is striking that Justice Rehnquist attacked Justice Powell for extending freedom of conscience decisions to PG&E, but accepted the idea that newspapers have freedom of thought.²⁰⁷

Justice Rehnquist also criticized Justice Powell for departing from the “right to receive” rationale of *Bellotti*, stating that because “the constitutional protection of corporate speech” rests on “the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views” is “*de minimis*.”²⁰⁸ To Justice Powell though, the commission’s viewpoint-based order distorted the marketplace. The key statement from his opinion is the following: “By protecting those who wish to enter the mar-

204. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

205. *Wooley*, 430 U.S. at 714. Justice Brennan also referred to *Wooley* and *Miami Herald* as based on the concept of individual freedom of mind. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

206. *Wooley*, 430 U.S. at 714.

207. 475 U.S. at 35 (Rehnquist, J., dissenting) (noting that PG&E is not an individual or a newspaper).

208. *Id.* at 33–34. This rationale was especially true in the case of PG&E, a regulated monopoly. “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.” *Id.* at 34. *But see id.* at 17 n.14 (plurality opinion) (quoting *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 534 n.1 (1980)) (noting that status as a regulated monopoly does not decrease the informative value of its speech).

ketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."²⁰⁹ Stated differently, the freedom of a corporation cannot be burdened to enhance the voice of its opponents.

Justice Powell's *PG&E* opinion is the foundation for the ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,²¹⁰ in which the Court unanimously held that the organizers of the St. Patrick's Day-Evacuation Day Parade in South Boston had a First Amendment right to exclude a gay, lesbian, and bisexual group (GLIB) from the parade.²¹¹ Forcing the parade organizers to include GLIB "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."²¹² Quoting *PG&E*, the *Hurley* Court said the principle of speaker autonomy simply meant that "one who chooses to speak may also decide 'what not to say.'"²¹³ Although the Court could have referred to the burden on the consciences of the individuals comprising the unincorporated association that organized the parade,²¹⁴ it did not do so. Instead, it announced that the principle of speaker autonomy applied to the press, business corporations, and "ordinary people engaged in unsophisticated expression."²¹⁵

209. *Id.* at 8 (plurality opinion) (citing *Sazbe v. Wash. Post Co.*, 417 U.S. 863–64 (1974) (Powell, J., dissenting); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

210. 515 U.S. 557 (1995).

211. *Id.* at 560–61, 580–81.

212. *Id.* at 573.

213. *Id.* (quoting *PG&E*, 475 U.S. at 16 (plurality opinion)); see also *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) (noting that the term "freedom of speech . . . necessarily compris[es] the decision of both what to say and what *not* to say"). *Riley* involved a challenge by a coalition of professional fundraisers, charitable organizations, and potential donors to a law requiring that professional fundraisers disclose to potential donors the percentage of charitable contributions collected during the previous twelve months that were actually turned over to a charity. 487 U.S. at 785–87. Discussion of the corporate identity of some of the challengers was strikingly absent from the Court's discussion of the case. The papers of Justices Blackmun, Brennan, Marshall, Powell, and White do not reveal any consideration of corporate status.

214. The parade organizer, the South Boston Allied War Veterans Council, was comprised of individuals elected from various South Boston veterans groups. *Hurley*, 515 U.S. at 560.

215. *Id.* at 574; see also *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213–21 (2013) (holding that nongovernmental organizations may not be forced to adopt a particular belief as a condition of receiving government funding).

The principle of speaker autonomy having priority over the right to receive expression would be again before the Court in *NIFLA*, but with an unusual conscience argument.

IV. *NIFLA*

According to its author, the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT),²¹⁶ was part of California's legacy of "forward thinking."²¹⁷ The law was designed to promote well-informed "personal reproductive health care decisions,"²¹⁸ but the Supreme Court found the law "targets"²¹⁹ pro-life pregnancy centers that seek to discourage women from seeking abortions.²²⁰

FACT required licensed facilities, whose primary purpose was to offer "family planning or pregnancy-related services,"²²¹

216. CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West Supp. 2018), *invalidated in part by* Nat'l Inst. of Family & Life Advocates v. Beccerra, 138 S. Ct. 2361 (2018).

217. *Reproductive FACT Act: Hearing on AB 775 Before the Assembly Comm. on Health*, 2015–2016 Reg. Sess. 3 (Cal. 2015) [hereinafter *Hearing on AB 775*].

218. Reproductive FACT Act, 2015 CAL. LEGIS. SERV. ch. 700, § 2 (AB 775) (West) (codified at CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West Supp. 2018)).

219. *NIFLA*, 138 S. Ct. 2361, 2378 (2018). Although Justice Thomas did not conclude the law was viewpoint discriminatory, *id.* at 2370 n.2, his use of the term "targets" is tied to his finding that the law was underinclusive, which raises the risk of viewpoint discrimination.

220. The author of FACT noted that "unfortunately" there were nearly 200 licensed and unlicensed "crisis pregnancy centers" whose goal "is to interfere with women's ability to be fully informed and exercise their reproductive rights . . . [and] aim to discourage and prevent women from seeking abortions." *Hearing on AB 775* at 3, *supra* note 217. Several amici who supported California asserted that crisis pregnancy centers engage in deceptive and misleading tactics. *See, e.g.*, Brief for the City and County of San Francisco, et al. as *Amici Curiae* in Support of Respondents at 6–18, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140); Brief for *Amici Curiae* Equal Rights Advocates, et al. in Support of Respondents at 7–20, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140). At oral argument, California abandoned the assertion that the unlicensed disclosure requirement was to prevent women from being misled. *See infra* note 223.

221. HEALTH & SAFETY § 123471(a). For example, one of the petitioners, Pregnancy Care Center (PCC) is licensed as a free community clinic. Petition for a Writ of Certiorari at 5, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140). "Medical services provided by PCC include: urine pregnancy testing, ultrasound examinations, medical referrals, prenatal vitamins, information on STDs, information on natural family planning, health provider consultations, and other clinical services. Non-medical services . . . include: peer counseling and education, emotional support, maternity clothing, baby supplies, support groups, and healthy family support."

to disseminate onsite a government-drafted notice stating that California has “free or low-cost access to comprehensive family planning services” including abortion.²²² Unlicensed facilities, which do not offer medical services, were required to distribute to clients onsite and in any print and digital advertising a notice that the facility was not licensed as a medical facility.²²³ Because the unlicensed facility provision of FACT was not attacked on freedom of conscience grounds, this discussion focuses on the licensed facility requirement, which was attacked as a burden on the conscience of clinics.

FACT exempted those licensed clinics enrolled in the State’s Family Planning, Access, Care, and Treatment (PACT) program of family planning and comprehensive reproductive health care including the provision of abortifacients,²²⁴ but the petitioners, incorporated as nonprofit religious organizations to

Id. at 5–6. The staff includes “two doctors of obstetrics and gynecology, one radiologist, one anesthesiologist, one certified midwife, one nurse practitioner, ten nurses, and two registered diagnostic medical sonographers.” Nat’l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 831 (9th Cir. 2016).

222. HEALTH & SAFETY § 123472(a)(1). The notice could be posted “in a conspicuous place,” printed and distributed to all clients, or distributed digitally at the time of check in. HEALTH & SAFETY § 123472(a)(2).

223. HEALTH & SAFETY § 123472(b). Unlicensed facilities do not have a licensed medical provider and consequently do not offer medical services, but merely offer “pregnancy-related services” such as over-the-counter pregnancy tests. HEALTH & SAFETY CODE § 123471(b). One of the petitioners, Fallbrook Pregnancy Resource Center (FPRC), “provides free pregnancy test kits that women administer and diagnose themselves, educational programs, resources and community referrals, maternity clothing, and baby items.” Petition for a Writ of Certiorari, *supra* note 221, at 5–6.

Although California’s brief argued that the unlicensed disclosure “ensures that women who seek state-licensed, professional medical care are not unwittingly diverted to facilities unable to provide it,” Brief for the State Respondents at 18, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140), at oral argument counsel for the state denied that the law’s justification was that women were being misled. *See* Transcript of Oral Argument at 44–45, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140). Writing for the Court, Justice Thomas held that California had not demonstrated any justification for the notice that is more than “purely hypothetical.” *NIFLA*, 138 S. Ct. at 2377. Further, the law covered a “curiously narrow subset of speakers.” *Id.* Finally, because the law required that the notice appear in multiple languages, in some instances as many as thirteen different languages, it “drowns out the facility’s own message.” *Id.* at 2378.

224. HEALTH & SAFETY § 123471(c)(2). The law also did not apply to physicians in private practice, general practice clinics, and a wide variety of clinics, such as student health centers operated by public institutions of higher education, not licensed in the state. HEALTH & SAFETY § 123471(c)(1).

advocate pro-life beliefs,²²⁵ “cannot in good conscience participate in the Family PACT program.”²²⁶ The petitioners vowed to never disseminate the state-mandated message and sought a preliminary injunction before FACT’s effective date.²²⁷ The district court’s denial of the motion was affirmed by the Ninth Circuit, concluding the licensed notice was a permissible regulation of “professional speech.”²²⁸

Unlike the law at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²²⁹ that required physicians to communicate government-mandated information to patients,²³⁰ FACT did not refer to physicians or other individuals. Rather, FACT specified that “facilities” shall disseminate the required notice,

225. Petition for a Writ of Certiorari, *supra* note 221, at 5. The petitioners were the National Institute of Family and Life Advocates (NIFLA), PCC, and FPRC. *Id.* NIFLA provides legal counsel, education, and training to more than 1,400 pro-life pregnancy centers. *About NIFLA*, NIFLA, <https://nifla.org/about-nifla/> [<https://perma.cc/Z3GR-VCN7>] (last visited Sept. 30, 2019). As a faith-based nonprofit, NIFLA “seeks to advance the cause and culture of life in America” and “envisions achieving an abortion-free America.” *Id.* “FPRC is committed through Christian advocacy to strengthen the hearts and lives of moms feeling inadequate to carry their babies to birth.” *Hope Clinic for Women*, FPRC, <http://www.fprcforlife.com/About-FPRC/Hope-Clinic-for-Women> [<https://perma.cc/G35V-GDPN>] (last visited Sept. 30, 2019); *see also supra* note 223. PCC describes itself as a “front line ministry supported by local churches and donors.” *Church/Group Volunteer Opportunities*, PREGNANCY CARE CLINIC, <http://www.supportpcc.com/get-involved/church-involvement/> [<https://perma.cc/2V6G-4T2S>] (last visited Sept. 30, 2019); *see also supra* note 221. As summarized by Heartbeat International, pro-life pregnancy centers are “the service arm of the pro-life movement.” Brief of Heartbeat International, Inc. as *Amicus Curiae* in Support of Petitioners at 8, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140) [hereinafter Brief of Heartbeat International].

226. Petition for a Writ of Certiorari, *supra* note 221, at 9.

227. *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 833 (9th Cir. 2016).

228. *Id.* at 844.

229. 505 U.S. 833 (1992).

230. *See* 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 3205 (West 2015). This law requires oral disclosures by a physician to a woman concerning the nature of the abortion procedure, the probable gestational age of the unborn child, and the medical risks associated with carrying the child to term. *Id.* (a)(1). In addition, the physician or someone delegated by the physician must inform the woman that printed materials are available which describe, among other things, the unborn child and list agencies which offer alternatives to abortion. *Id.* (a)(2). Physicians who violate this law face suspension or revocation of their medical licenses. *Id.* (c). A plurality of Justices in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, found these requirements did not interfere with the First Amendment right of physicians not to speak. 505 U.S. at 884.

which meant the nonprofit corporations eligible for licenses to operate primary care clinics.²³¹ Furthermore, although the law at issue in *Casey* threatened physicians with suspension or revocation of their licenses for violating the Pennsylvania law, only “facilities” were subject to FACT’s civil penalties.²³² California, though, argued that some physicians were *indirectly* subject to FACT because every licensed clinic had to be directed by a licensed physician who under a separate state regulation was responsible for supervising all interactions between patients and clinic employees.²³³ Thus, California argued the licensed disclosure provision was a permissible burden that “occurs as part of the overall ‘regulation’ of physicians in ‘the practice of medicine.’”²³⁴

Although California’s argument opened up the possibility of arguments about the law’s impact on the conscience of those physicians who were clinic directors, the petitioners chose to challenge the law on the grounds that it violated *their* consciences.²³⁵ Thus, one of the issues raised in the case was whether human traits, such as a conscience, can be found in a nonprofit corporation. At the outset, it is important to reiterate that the petitioners were not arguing FACT burdened the conscience of the individuals who work or volunteer at the clinics. The petitioners’ argument ascribed a conscience to the nonprofit corporations operating the clinics.

None of the Justices, however, addressed the idea of a nonprofit corporation having a conscience. Justice Kennedy’s concurring opinion sidestepped the petitioners’ conscience argument by emphasizing that “[g]overnments must not be allowed to force *persons* to express a message contrary to their deepest convic-

231. See CAL. HEALTH & SAFETY CODE § 1204(a)(1) (West Supp. 2018) (specifying that “community” and “free clinics” are operated by tax-exempt nonprofit corporations and that no natural person shall operate these clinics).

232. *Id.* § 123473.

233. CAL. CODE REGS., tit. 22, § 75027 (2019).

234. Brief for the State Respondents, *supra* note 223, at 34 (quoting *Casey*, 505 U.S. at 884).

235. Petition for a Writ of Certiorari, *supra* note 221, at 9. Despite the petitioners’ lack of any reference to the conscience of physicians, they did agree that FACT was “indirectly” applicable to physicians practicing at certain clinics. Brief for Petitioners, *supra* note 33, at 32 n.14.

tions,”²³⁶ which presumably meant the clinics’ employees and volunteers.²³⁷ Justice Thomas’s opinion for the Court ignored the conscience arguments and applied traditional content-based analysis, finding the law was improperly drawn. The content-regulation issues will be discussed first.

A. Content-Based Analysis

The Ninth Circuit, in affirming the lower court’s refusal to grant a preliminary injunction, ruled the notice was “professional speech” defined as “speech that occurs between professionals and their clients in the context of their professional relationship.”²³⁸ Although the appellate court drew heavily upon cases involving the regulation of physician speech,²³⁹ the “professional” it was referring to was the clinic.²⁴⁰ Hence, it did not matter if the licensed notice was disseminated by receptionists in the waiting room or by nurses or doctors in the examining rooms: “All the speech related to the clinics’ professional services that occurs within the clinics’ walls, including within in [sic] the waiting room, is part of the clinics’ professional practice.”²⁴¹

The Ninth Circuit’s extraordinarily broad conception of professional speech was rejected by the Court. As in other Roberts

236. Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

237. Justice Breyer’s dissenting opinion found that other state regulations made FACT applicable to “medical professionals.” *Id.* at 2385 (Breyer, J., dissenting). He believed the notice was permissible under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); see *supra* note 230. He wrote, “If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?” *NIFLA*, 138 S. Ct. at 2385 (Breyer, J., dissenting). For the argument that disclosure requirements are pervasive and do not violate the First Amendment, see Brief of Members of Congress as *Amici Curiae* in Support of Respondents at 7–17, *NIFLA*, 138 S. Ct. 2361 (2018) (No. 16-1140).

238. Nat’l Inst. of Family & Life Advocates v. Harris, 839 F.3d. 823, 839 (9th Cir. 2016).

239. *Id.* at 837–39.

240. *Id.* at 840 (referring to “the professional nature of the licensed clinics’ relationship with their clients”).

241. *Id.* at 840. One may question the Ninth Circuit’s treatment of a clinic as a “professional.” See, e.g., *Amicus Curiae Brief of Pregnancy Care Centers in Texas in Support of Petitioners* at 24–25, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140) (arguing that a pregnancy center is not a person).

Court decisions that have rejected new categories of unprotected speech,²⁴² the Court in *NIFLA* emphasized that there was no precedential support for the concept of “professional speech.”²⁴³ Most importantly, the FACT requirement went far beyond the permissible regulation of the practice of medicine recognized in *Casey*. Justice Thomas wrote:

The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed. If a covered facility does provide medical procedures, the notice provides no information about the risks or benefits of those procedures.²⁴⁴

Justice Thomas referred to the “dangers” associated with content-based regulations of professional speech, such as the risk that the government is actually seeking to suppress unpopular ideas.²⁴⁵ In language that has powerful implications for other compelled speech cases, Justice Thomas stated that “people lose when the government is the one deciding which ideas should prevail.”²⁴⁶

Justice Thomas found it telling that many other facilities that provide services to pregnant women were not required to provide the licensed notice.²⁴⁷ Shifting to intermediate scrutiny to assess whether the law was “sufficiently drawn” to serve the interest in “providing low-income women with information about state-sponsored services,” Justice Thomas concluded that the law’s exemptions made it “wildly underinclusive.”²⁴⁸ There was no evidence to support, for example, the exemption of

242. See, e.g., *United States v. Alvarez*, 567 U.S. 709, 715–22 (2012); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790–99 (2011); *United States v. Stevens*, 559 U.S. 460, 468–72 (2010).

243. *NIFLA*, 138 S. Ct. at 2371–72.

244. *Id.* at 2373; see also Brief *Amici Curiae* of the American Association of Pro-Life Obstetricians and Gynecologists, et al. in Support of Petitioners at 18–20, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140) (explaining why the mandated disclosure lacks the elements necessary for informed consent).

245. *NIFLA*, 138 S. Ct. at 2374.

246. *Id.* at 2375.

247. *Id.* at 2374.

248. *Id.* at 2375 (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802 (2011)) (internal quotations marks omitted).

Family PACT providers from the licensed notice. “If the goal is to maximize women’s awareness of these programs,” Justice Thomas wrote, “then it would seem that California would ensure that the places that can immediately enroll women also provide this information.”²⁴⁹ The exemptions “demonstrate[d] the disconnect” between the Act’s stated purpose of informing women and its actual scope.²⁵⁰

The petitioners attacked the exemptions in FACT, arguing the law targeted pro-life centers because of hostility to their pro-life views.²⁵¹ Although Justice Thomas did find the exemptions would likely be ruled unconstitutional, and raised the *risk* of viewpoint discrimination,²⁵² he expressly declined to rule on whether FACT was viewpoint discriminatory because the law was unconstitutional either way.²⁵³ In his concurring opinion, Justice Kennedy wrote that “the apparent viewpoint discrimination here is a matter of serious constitutional concern.”²⁵⁴ Justice Kennedy added, “This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression.”²⁵⁵

Finally, Justice Thomas noted that California could inform women through a variety of methods, such as state-funded advertising campaigns, without “co-opt[ing] the licensed facilities to deliver its message for it.”²⁵⁶ Although Justice Thomas maintained that this portion of the opinion applied intermediate scrutiny, he gave no deference to the California legislature’s judgment about the necessity of reaching women at licensed

249. *Id.* at 2376.

250. *Id.*

251. See Brief for Petitioners, *supra* note 33, at 8–10, 31–34; Reply Brief for Petitioners at 4–5, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140).

252. *NIFLA*, 138 S. Ct. at 2376 (“Such “[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” (quoting *Brown*, 564 U.S. at 802)).

253. *Id.* at 2370 n.2.

254. *Id.* at 2378 (Kennedy, J., concurring). Justice Kennedy feared that finding the law viewpoint discriminatory might lead some legislators to infer that “if the law were reenacted with a broader base and broader coverage it then would be upheld.” *Id.* at 2379. (Kennedy, J., concurring).

255. *Id.* at 2379. (Kennedy, J., concurring).

256. *Id.* at 2376.

clinics.²⁵⁷ This portion of *NIFLA* reads just like *Riley v. National Federation of the Blind of North Carolina, Inc.*,²⁵⁸ in which Justice Brennan, applying strict scrutiny, found that North Carolina had “more benign and narrowly tailored options” available²⁵⁹ than requiring “that professional fundraisers disclose to potential donors . . . the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity.”²⁶⁰ Justice Brennan wrote that the state itself could publish the information: “This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation.”²⁶¹

The overriding theme in Justice Thomas’s opinion, like that of *PG&E*, is the impermissible harm to the marketplace of ideas when the government alters the content of a speaker’s speech.²⁶² Stated differently, the autonomy of speakers is more important than the rights of listeners. Justice Thomas’s opinion does not engage in any substantive analysis of corporate free expression rights or the distinct status of nonprofit advocacy corporations. Indeed, Justice Thomas’s opinion does not even acknowledge that the petitioners were corporations; instead, it repeatedly refers to “clinics” or “licensed facilities” affected by the law.²⁶³ *NIFLA* fits with other First Amendment cases, such as *Consolidated Edison* and *Riley*, where the Court focused not on the corporate status of the speaker, but on the dangers of content regulation. If the Court is serious about the dangers of

257. *See id.* at 2375–76. California argued that despite statewide marketing campaigns and other methods to reach vulnerable populations, “many eligible Californians do not know about their publicly funded healthcare options.” Brief for the State Respondents, *supra* note 223, at 5. Pregnancy requires time sensitive decisions, and California argued the licensed notice enhanced awareness of public health programs. *See id.* at 6.

258. 487 U.S. 781 (1988).

259. *Id.* at 800.

260. *Id.* at 795.

261. *Id.* at 800.

262. *See NIFLA*, 138 S. Ct. at 2371 (“By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly ‘alters the content’ of petitioners’ speech.” (quoting *Riley*, U.S. at 795)).

263. *See, e.g., id.* at 2368–72, 2374–76.

compelled speech, the principles applied in *NIFLA* would allow abortion providers to challenge state-mandated disclosures.²⁶⁴

By ignoring the petitioners' conscience arguments,²⁶⁵ Justice Thomas avoided examining the nexus between a nonprofit corporation and its members. Justice Kennedy's brief concurring opinion, though it maintained the law was harmful to individual conscience, raised more questions than answers about which for-profit corporate speakers could assert harm to the conscience of shareholders.

B. Freedom of Conscience

Nonprofit advocacy corporations have standing to assert harm to their members,²⁶⁶ but the petitioners' briefs are striking in that there is no discussion of the burden of the licensed notice on the conscience of individuals, such as physicians, nurses, or volunteers.²⁶⁷ Instead, the petitioners stressed that FACT "forces licensed centers to utter speech that violates their conscience."²⁶⁸ In terms that humanize the nonprofit corporations operating the clinics, the briefs repeatedly refer to "individual freedom of mind."²⁶⁹ For example, the petitioners said the Act "intrudes

264. See, e.g., *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014), cert. denied, *Walker-McGill v. Stuart*, 135 S. Ct. 2838, 2838 (2015) (holding that North Carolina statute requiring "physicians to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions" is unconstitutional compelled speech).

265. Only in the most cursory way did Justice Thomas describe the anti-abortion mission of the petitioners. He quoted the author of a report commissioned by the California State Assembly who described crisis pregnancy centers as run by "pro-life (largely Christian belief-based) organizations" whose goal is to oppose abortion. *NIFLA*, 138 S. Ct. at 2368 (citation omitted) (internal quotation marks omitted); see also *id.* at 2371 (petitioners are "devoted" to opposing abortion). Given that the licensed notice altered the content of the petitioners' speech, see *supra* note 262, an extended discussion of the petitioners' beliefs was unnecessary to his analysis.

266. *Supra* note 40.

267. In contrast, the amicus brief filed by Heartbeat International, a nonprofit whose mission is to support the pro-life cause, emphasized the burden FACT placed on the staff and volunteers of pregnancy centers. See Brief of Heartbeat International, *supra* note 225, at 20 ("[C]ompelled speech violates the deeply held religious beliefs and/or moral convictions of the staff and volunteers of pro-life centers.").

268. Reply Brief for Petitioners, *supra* note 251, at 6.

269. E.g., Brief for Petitioners, *supra* note 33, at 24 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

upon private thought by mandating that Petitioners mouth ideas that contradict their own convictions."²⁷⁰ "This creates duplicity of thought and mental conflict for Petitioners . . ."²⁷¹

If one replaces individuals for clinics, the petitioners' arguments read much like Justice Alito's *Janus* opinion finding compulsory union dues unconstitutional because individuals are coerced into betraying their convictions.²⁷² But by contending that the clinics had consciences, the petitioners were making an assertion that was dismissed out of hand by Justice Stevens when he wrote the following in *Citizens United*:

[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.²⁷³

Justice Stevens's view, though, does not acknowledge that there can be such a close nexus between a nonprofit advocacy corporation and its members that the corporation and its

270. *Id.* at 24.

271. *Id.* at 25. Similarly, the Cato Institute argued that the licensed disclosure burdens the freedom of conscience of pregnancy centers because it "forces them to promote services they morally oppose." Brief for the Cato Institute as *Amicus Curiae* in Support of Petitioners at 12, *Nat'l Inst. of Family & Life Advocates v. Beccerra*, 138 S. Ct. 2361 (2018) (No. 16-1140).

272. *Janus v. Am. Fed'n of State, Cty., and Mun. Emps.*, 138 S. Ct. 2448, 2463–64 (2018).

273. *Citizens United v. FEC*, 558 U.S. 310, 466 (2010) (Stevens, J., dissenting); see also *Greenwood*, *supra* note 46, at 1067 ("[A] corporation is directed not to balance conflicting political and moral goals but rather to pursue one end—profit maximization—without considering alternative or competing goals."); Strine & Walter, *supra* note 93, at 384 (arguing that for-profit corporations are fundamentally different from human beings in terms of their range of concerns; unlike human beings, "corporations must have only one end that motivates their political spending: what will produce the most profit for them in the purely monetary sense"). For a different point of view, see Justice Alito's *Hobby Lobby* opinion which countered the Third Circuit's holding that business corporations "do not, *separate and apart from the actions or belief systems of their individual owners or employees*, exercise religion." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014) (quoting *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013)) (internal quotation marks omitted). Justice Alito wrote, "All of this is true—but quite beside the point. Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all." *Id.*

members are in essence identical. Thus, the *NIFLA* petitioners' conscience argument makes more sense if the petitioners are regarded not as a corporation or a clinic, but as an association of individuals who share a pro-life view. In effect, incorporation does not diminish the First Amendment protections of the humans who use the corporate-owned clinics as vehicles for advocacy.

This conclusion may have been what Justice Kennedy meant in his brief concurring opinion that embedded respect for speaker autonomy into a bold rejection of California's assertion that its law was "forward thinking." Without acknowledging that the petitioners were corporations, Justice Kennedy warned of the dangers inherent when government intervenes in the marketplace of ideas:

[I]t is not forward thinking to force individuals to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable." It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions.²⁷⁴

Justice Kennedy could have omitted the references to individuals and still forcefully rejected compelled speech, à la *PG&E*, without tying it to freedom of conscience. But his references to conscience pierce the corporate veil without acknowledging the most important precedent supporting such action, *NAACP v. Alabama*,²⁷⁵ in which the Court viewed the NAACP and its members as identical.²⁷⁶

The NAACP, a nonprofit membership corporation, engages in expressive activities that make a "distinctive contribu-

274. *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (quoting *Wooley*, 430 U.S. at 715).

275. 357 U.S. 449 (1958).

276. *Id.* at 458–59.

tion . . . to the ideas and beliefs of our society."²⁷⁷ During the 1950s, the NAACP, one of the principal advocates of desegregation, angered Alabama officials by actions such as supporting the boycott of the segregated Montgomery bus system.²⁷⁸ Alabama's attorney general, seeking to oust the NAACP from the state, filed suit against the NAACP and received a court order compelling the group to reveal the names and addresses of all its Alabama members.²⁷⁹ The NAACP refused and was held in contempt and fined \$100,000.²⁸⁰

Before the Supreme Court, the NAACP argued that it "may assert, on behalf of its members, a right personal to them" to be protected from disclosure of the membership lists.²⁸¹ The Court agreed because the NAACP and its members "are in every practical sense identical."²⁸² The NAACP "is but the medium through which individual members seek to make more effective the expression of their own views."²⁸³ Given the "manifestations of public hostility" members of the NAACP had previously experienced when their membership had been revealed in the Jim Crow era, the Court concluded compelled disclosure "is likely to affect adversely the ability of *petitioner and its members* to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."²⁸⁴

277. *NAACP v. Button*, 371 U.S. 415, 431 (1963). One of the NAACP's activities, litigation, was described by the Court as "a form of political expression." *Id.* at 429.

278. *NAACP v. Alabama*, 357 U.S. at 452.

279. *Id.*

280. *Id.* at 454.

281. *Id.* at 458.

282. *Id.* at 459.

283. *Id.* The Court said there was a reasonable likelihood that the NAACP would be adversely affected by disclosure of its membership lists. *Id.* at 459–60. This was a "further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members." *Id.*

284. *Id.* at 462–63 (emphasis added); see also *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961) (noting that economic reprisals followed disclosure of membership lists); *Bates v. City of Little Rock*, 361 U.S. 516, 523–24 (1960) (noting that the record shows public identification of NAACP members has been followed by "harassment and threats of bodily harm"). In a later case involving a Virginia law affecting the solicitation of legal business, the Court held that in addition to asserting the associational rights of its members, the NAACP could assert the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringement of their con-

Justice Harlan's opinion in *NAACP v. Alabama* emphasized the "nexus" between the corporation and its members.²⁸⁵ That case, along with others involving the NAACP, show the Court's sensitivity to an organization facing hostility from the government because it was challenging government-enforced norms. Similarly, because California is often described as having the "gold standard" for abortion rights,²⁸⁶ the *NIFLA* petitioners are directly in conflict with government norms.

Moreover, like the NAACP, there is a tight nexus between the clinics and their supporters; the mission-oriented nonprofit corporations are a vehicle through which individuals with shared religious beliefs act upon those beliefs.²⁸⁷ For example, the Pregnancy Care Clinic challenging the law in *NIFLA* does

stitutional rights. *NAACP v. Button*, 371 U.S. 415, 428 (1963). "We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities" curtailed by the statute. *Id.*; see also *In re Primus*, 436 U.S. 412, 427–28 (1978) (describing the similarities between the NAACP and the ACLU).

285. 357 U.S. at 458–59; see also *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 309 (1964) ("This case, in truth, involves not the privilege of a corporation to do business in a State, but rather the freedom of individuals to associate for the collective advocacy of ideas."). Although both Justices White and Rehnquist wrote dissenting opinions in *Bellotti*, both accepted the idea that corporations such as the NAACP had First Amendment protection. Justice White acknowledged that "there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 805 (1978) (White, J., dissenting). In his separate dissent, Justice Rehnquist read *NAACP v. Button* as meaning that, "where a State permits the organization of a corporation for explicitly political purposes, this Court has held that its rights of political expression, which are necessarily incidental to its purposes, are entitled to constitutional protection." *Id.* at 825 n.5 (Rehnquist, J., dissenting) (citing *Button*, 371 U.S. at 415).

286. Lee Romney, *The Abortion Wars: New class of abortion providers helps expand access in California*, L.A. TIMES, (Oct. 23, 2014, 6:30 AM), <https://www.latimes.com/nation/la-na-abortion-california-20141023-story.html> [https://perma.cc/M8G8-QLSV] (quoting the president of National Abortion Federation describing California as "'the gold standard' for access to abortion").

287. As Heartbeat International stated in its amicus brief, the staff and volunteers of pregnancy centers "work and volunteer at pregnancy centers for the very purpose of living out their pro-life convictions." Brief of Heartbeat International, *supra* note 225, at 21; see also Brief of Twenty-Three Illinois Pregnancy Care Centers as *Amici Curiae* in Support of Petitioners at 2–12, *Nat'l Inst. of Family & Life Advocates v. Beccerra*, 138 S. Ct. 2361 (2018) (No. 16-1140) (describing the mission statements of pregnancy care centers).

more than offer medical services; it is a “front line ministry” that also offers religiously-based parenting classes and support groups.²⁸⁸ The staff and volunteers “are trained to present the gospel to the women and men who come to the clinic.”²⁸⁹ For purposes of compelled speech analysis, the nonprofit Pregnancy Care Clinic and its supporters are identical. Thus, in a sense, Justice Kennedy’s comments in *NIFLA* are not out of place in a case where the petitioners, although organized as nonprofit corporations, are in effect a community of believers.²⁹⁰

Given that *PG&E* established that speaker autonomy, rather than conscience, is a sufficient basis for judicial hostility to compelled speech, Justice Kennedy could have disregarded any reference to conscience without blunting the forcefulness of his concurring opinion.²⁹¹ By referencing conscience, however,

288. *Church/Group Volunteer Opportunities*, *supra* note 225.

289. *Id.* Pregnancy Care Clinic’s website states:

Pregnancy Care Clinic is a front line ministry supported by local churches and donors. We ask that your church add us to your list of missionaries that your congregation supports in prayer, financial giving, and involvement. Our volunteers are trained to present the gospel to the women and men who come to the clinic. Once they have accepted Christ, we begin a discipleship program with them and contact a partner church to hand them off to. It is our goal to see these new Christians firmly planted in their own church home.

Id. For additional discussion of the services beyond pregnancy counseling offered by pregnancy care centers, see Brief of 13 Women and The Catholic Association Foundation as *Amici Curiae* in Support of Petitioners at 32–34, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140).

290. In *Burwell v. Hobby Lobby Stores, Inc.*, Justice Ginsburg dissented, contending that Justice Alito did not recognize that for-profit corporations are unlike religious organizations that “exist to foster the interests of persons subscribing to the same religious faith.” 573 U.S. 682, 754 (2014) (Ginsburg, J., dissenting). She criticized the majority’s inability to perceive the “distinction between a community made up of believers in the same religion and one embracing persons of different beliefs.” *Id.*

291. Another way of attacking the compelled speech requirement without referencing conscience comes from Justice Rehnquist’s dissenting opinion in *Bellotti*. Drawing upon *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), where Chief Justice Marshall wrote that a corporation “possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence,” *id.* at 636, Justice Rehnquist maintained that “when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting). Similarly, when the state charters a corporation for explicitly political purposes, such as the NAACP, “the rights of political

Justice Kennedy's concurrence is susceptible of two distinct readings. Read narrowly, Justice Kennedy's concurring opinion merely reiterates that nonprofit advocacy corporations have standing to assert harm to affiliated individuals. Read broadly, the harm of compelled speech is not confined to nonprofits and may be challenged by closely held for-profit corporations on behalf of their shareholders. The latter reading has far-reaching implications for the ongoing compelled speech litigation involving Masterpiece Cakeshop and Arlene's Flowers.²⁹² To pierce the veil for these entities, though, would raise a host of significant questions about which corporations could assert the beliefs of their shareholders.²⁹³ By not defining when reverse veil piercing is appropriate, Justice Kennedy's concurring opinion raises more questions than it answers.²⁹⁴

expression, which are necessarily incidental to its purposes, are entitled to constitutional protection." *Id.* at 825 n.5 (citing *NAACP v. Button*, 371 U.S. 415, 428–29 (1963)). Because the petitioners in *NIFLA* were incorporated as religious organizations to advocate pro-life beliefs, dissemination of a state-mandated message about the availability of abortion, runs counter to their purpose. Professor Kent Greenfield asserts that asking what rights are incidental to the very existence of a corporation is the proper analysis of corporate constitutional rights. Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 322 (2015).

292. For the ongoing litigation involving Masterpiece Cakeshop and Arlene's Flowers, see *supra* notes 22–24. Although Justice Alito did not define "closely held" corporations in *Hobby Lobby*, the ownership structure of Masterpiece Cakeshop and Arlene's Flowers resembles that of the litigants in *Hobby Lobby*. Masterpiece Cakeshop has two shareholders. See *supra* note 7. Arlene's Flowers, Inc. is solely owned by Barronelle Stutzman. Petition for a Writ of Certiorari at ii, *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (No. 17-108). The *Klein* case does not present veil piercing arguments as it involves an unincorporated bakery. See Petition for Writ of Certiorari at i, *Klein v. Or. Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019) (No. 18-547) (describing bakery owned by Melissa and Aaron Klein).

293. See Brief of Amici Curiae Corporate Law Professors in Support of Respondents at 12, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) ("The Court should not assume it can disregard this principle of separateness with closely held companies such as Masterpiece Cakeshop and not cause significant uncertainty, infighting, and litigation with regard to other companies.").

294. Similarly, commentators have criticized the *Hobby Lobby* opinion for not specifying the meaning of "closely held." See, e.g., Stephen Bainbridge, *What is a "close corporation" for purposes of the new Hobby Lobby rule?*, STEPHEN BAINBRIDGE'S J.L. RELIGION POL. & CULTURE (July 1, 2014), <https://www.professorbainbridge.com/professorbainbridgecom/2014/07/what-is-a-close-corporation-for-purposes-of-the-new-hobby-lobby-rule.html> [<https://perma.cc/P3B5-S47P>]; see also *Hobby Lobby*, 573

Although Chief Justice Roberts recently declared that he has replaced Justice Kennedy as the Court's "most aggressive defender" of First Amendment rights,²⁹⁵ and that he believes business corporations have views on public issues,²⁹⁶ it is unlikely he will push veil piercing as a First Amendment doctrine. Compelled speech cases such as *Masterpiece Cakeshop* present sufficiently complex issues, such as whether designing a custom cake is protected artistic expression, which can be answered without the added complexity of veil piercing. Stated differently, the content-based analysis of *PG&E* and *NIFLA* focuses the Court on harm to speaker autonomy irrespective of corporate identity and presents a less problematic analytical track than veil piercing.

CONCLUSION

Throughout its consideration of the First Amendment rights of corporations, the Court has varied the significance it ascribes to corporate identity. *Citizens United* heralds the marginalization of corporate identity to a majority of the Roberts Court,²⁹⁷ and *NIFLA* adds further emphasis to this doctrine. Justice Thomas's *NIFLA* opinion does not even acknowledge the petitioners' statuses as corporations, signaling that the case was a pure free expression case, rather than an intersection of corporate and First Amendment law.

In *Bellotti*, corporate status was front and center in the Court's deliberations, but Justice Powell's opinion avoided addressing the nature of corporations, instead adopting an unsatisfying rationale—listener's rights—that unwittingly opens the door to compelled speech cases such as *PG&E*. In constructing

U.S. at 757 (Ginsburg, J., dissenting) (warning that the logic of *Hobby Lobby* "extends to corporations of any size, public or private").

295. Tony Mauro, *Roberts Declares Himself First Amendment's 'Most Aggressive Defender' at SCOTUS*, NAT'L L.J. (Feb. 13, 2019, 1:56 PM), <https://www.law.com/nationallawjournal/2019/02/13/roberts-declares-himself-first-amendments-most-aggressive-defender-at-scotus> [<https://perma.cc/DDX2-YEN4>].

296. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1890 & n.5 (2018) (citing the views of Ben & Jerry's Corporation on campaign finance reform and other issues).

297. *Citizens United v. FEC*, 558 U.S. 310, 342–43 (2010) (rejecting the argument that the political speech of corporations or other associations should be treated differently under the First Amendment).

his *PG&E* opinion, Justice Powell downplayed conscience and created a compelled speech doctrine that emphasizes speaker autonomy, regardless of whether the speaker is a business corporation, the press, or an individual. Justice Powell's *PG&E* opinion lays the foundation for *NIFLA* by removing any concern for conscience from compelled speech cases involving corporations.²⁹⁸

Justice Thomas's *NIFLA* opinion does not present the complex questions about veil piercing that Justice Kennedy's concurring opinion raises.²⁹⁹ The methodology used by Justice Thomas, anchored in the Court's longstanding aversion to content discriminatory regulation, focuses the Court's attention on matters it has more competence addressing than veil piercing. In the context of a nonprofit advocacy corporation, veil piercing is an appropriate way of protecting the members, but there are complex line-drawing questions when the shareholders of for-profit corporations seek to pass their beliefs to the corporation.³⁰⁰

Despite the shifting rationales and methodologies of *Bellotti*, *PG&E*, and *NIFLA*, these cases display a consistent aversion to laws that cast certain corporate speakers in a disfavored status. "Forward-thinking" government efforts to fine-tune the flow of information by compelling private speech should be rejected, not on the basis of conscience, but because these efforts promote government-defined orthodoxy.³⁰¹ The First Amendment, "[p]remised on mistrust of governmental power,"³⁰² requires

298. As *Janus* shows, the Court is still open to conscience arguments in compelled subsidy cases involving individuals.

299. That is not to say that Justice Thomas's opinion does not raise questions. His opinion said it was not questioning the legality of "health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." *Nat'l Inst. of Family & Life Advocates v. Beccerra*, 138 S. Ct. 2361, 2376 (2018). Justice Breyer found that this disclaimer "would seem more likely to invite litigation than to provide needed limitation and clarification." *Id.* at 2381 (Breyer, J., dissenting).

300. See *supra* notes 293–294.

301. Indeed, one may say that the value of speaker autonomy mandates that compelled speech cases are not resolved "in favor of those in authority." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636 (1943).

302. *Citizens United*, 558 U.S. at 340; see also *id.* at 335 (stating that the FEC's business is to censor); *id.* at 349 (holding that the "assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure"); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 482 (2007) ("[W]e give the benefit of the doubt to speech, not censor-

that decisions about what views are voiced are best left in “the hands of each of us,”³⁰³ including those who use corporate resources to speak.

ship.”); *Matal v. Tam*, 137 S. Ct. 1744, 1769 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (stating that it is not entrusted to the government’s benevolence to define what trademarks are offensive to some portion of the public).

303. *Cohen v. California*, 403 U.S. 15, 24 (1971).