Government Compulsion of Corporate Speech: Legitimate Regulation or First Amendment Violation - A Critique of PG&E v. Public Utilities Commission

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GOVERNMENT COMPULSION OF CORPORATE SPEECH: LEGITIMATE REGULATION OR FIRST AMENDMENT VIOLATION? A CRITIQUE OF PG&E v. Public Utilities Commission

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I. INTRODUCTION

In Pacific Gas and Electric Co. v. Public Utilities Commission (PG&E),¹ five members of the Supreme Court held that the first amendment prohibits a state from compelling a privately owned, state regulated, utility company from including inserts in the company's billing envelopes which express views contrary to those of the company.² Although five Supreme Court Justices agreed on the outcome of the case, only four members of the Court managed to agree upon a rationale for the prohibition.⁴

¹ 106 S. Ct. 903 (1986).
² U.S. CONST. amend. I.
³ The Court had previously held that the first amendment prohibits a state from suppressing political inserts prepared by the utility itself. See Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). The Court in Consolidated Edison expressly declined to decide whether the state could constitutionally compel the utility to permit groups with opposing views to enclose their own inserts in the billing envelopes. Id. at 543 n.13. Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding FCC-mandated right-of-reply as applied to broadcast media). The PG&E case, thus, raised the question left open in Consolidated Edison. But see infra note 18. For an argument that the first amendment mandates a right to reply to political opinions expressed by state-created monopolies in their billing envelopes, see Comment, Public Utility Bill Inserts, Political Speech, and the First Amendment: A Constitutionally Mandated Right to Reply, 70 CALIF. L. REV. 1221 (1982). For other discussions of the PG&E case, see Harpaz, Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism, 64 TEX. L. REV. 817, 891-902 (1986); Michelman, The Supreme Court 1985 Term, 100 HARV. L. REV. 1, 182-90 (1986).
⁴ Justice Powell authored the plurality opinion, in which Justices O'Connor and Brennan joined. The plurality reasoned that the state's order triggered first amendment analysis because the order: (1) compelled the utility to associate with and, in effect, to respond to views disagreeable to it; and (2) threatened to inhibit the utility's own speech, thereby reducing the flow of information from the utility to the public. See infra notes 17-29 and accompanying text. Chief Justice Burger filed a concurring opinion expressing the view that the fact of compulsory association alone warranted first amendment analysis and invalidation of the state's
This article argues that the plurality's reasoning and result were fatally flawed for two reasons. First, the plurality mistakenly assumed that corporate entities enjoy "freedom of mind" that merits protection under the first amendment. Such an assumption finds no support either in reason or in the authorities. Second, the plurality failed to explain adequately how the regulation at issue would result in suppression of the corporation's own speech. Accordingly, the plurality's application of strict first amendment standards to the regulation was unjustified. The regulation should have been analyzed under the more lenient "rational basis" standard that governs routine regulation of corporate conduct.

In Part II below, this article summarizes the PG&E case by describing the pertinent facts (Part II (A)) and the plurality's rationale (Part II (B)). Part III, which is divided into five sections, critiques the plurality opinion. Part III(A) summarizes the critique. Part III(B) addresses the fundamental, conceptual flaw in the plurality's analysis — the plurality's presupposition that corporations enjoy a "freedom of mind" of the kind previously recognized by the Court only in cases involving state compulsion of speech by individuals. This article demonstrates that the precedents cited by the plurality for the proposition that corporations possess such a freedom are plainly distinguishable. Moreover, the plurality's presupposition cannot be squared with the many precedents that implicitly reject the presupposition.

Parts III(C) and III(D) argue that the plurality failed to explain how certain findings crucial to its reasoning and to its application of the first amendment could be derived from the facts of record. Specifically, the plurality failed to justify its finding that state compulsion of the utility would reduce the flow of information from order. See infra note 18. The Chief Justice, thus, cast a fourth vote for the plurality's first rationale; he neither addressed nor endorsed the plurality's second rationale. Justice Marshall concurred in the judgment, but filed an opinion expressing a rationale different from that relied on by the plurality. See infra note 18. Justice Rehnquist filed a dissenting opinion, in which Justices White and Stevens joined in part. See infra note 18. Justice Stevens also filed a dissenting opinion. See infra note 18. Justice Blackmun did not participate, but there is reason to believe that he would have dissented from the plurality's reasoning and result. See infra note 11.

5. See infra notes 46-83 and accompanying text.

6. This article is concerned only with business corporations operated for profit. Government compelled disclosure or dissemination of information by nonprofit corporations or associations organized for the specific purpose of achieving the political or religious goals of their members may raise distinct issues under the first amendment's freedom of speech and religion clauses or under the implied first amendment right of association. See, e.g., NAACP v. Alabama, 377 U.S. 288 (1964); Bates v. City of Little Rock, 361 U.S. 516 (1960).
the utility. Furthermore, the plurality inexplicably disregarded the significance of the mandatory disclaimer that was to appear on all third-party inserts distributed by the utility.

Finally, Part III(E) argues that since corporations do not possess freedom of mind, corporate agreement or disagreement with the speech that the corporation is compelled to disseminate is of no significance under the first amendment. As applied to corporate speech (whether that speech be classified political, commercial, or otherwise), the purpose of the first amendment is to ensure the free flow of information to the public. Accordingly, the first amendment does not prohibit compulsion of corporate speech per se. First amendment protection should be triggered only in circumstances where the compulsion has a collateral effect of suppressing or penalizing the corporation's publication of its own views. Absent such a collateral effect, government compulsion of corporate speech should be upheld if it rationally furthers a legitimate state interest. Since the PG&E plurality failed to explain how the regulation at issue would have had such a collateral effect, the regulation should have been analyzed under the "rational basis" test. Had it been so analyzed, the regulation may have been upheld.

II. SUMMARY OF THE PG&E CASE

A. The Facts

Appellant Pacific Gas and Electric Co. (PG&E or Utility), a privately owned, state regulated utility company, had long included in its monthly billing envelopes a newsletter addressed to its customers, or ratepayers. The newsletter, called Progress, discussed issues of general public interest, including political issues and matters pertaining to utility services and bills. In 1980, appellee California Public Utilities Commission (Commission), a state regulatory agency, decided that the "extra space" in the billing envelopes, which PG&E had been using to disseminate Progress, belonged to PG&E's ratepayers. The Commission then apportioned the use of

7. See supra notes 70-74 and accompanying text.
8. This article uses the phrase "government compulsion of corporate speech" and like phrases to refer to a government requirement that a corporation disclose or disseminate to the public or to the government information generated either by the corporation itself or, as in PG&E, by a source outside the corporation.
9. 106 S. Ct. at 905 n.1.
10. The Commission defined "extra space" to mean "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage
this “extra space” between PG&E and a ratepayer-advocacy organization called Toward Utility Rate Normalization (TURN). Under the apportionment, PG&E would be required to grant TURN access to the “extra space” four times each year for the succeeding two years. On those occasions, PG&E would be permitted to use any of the “extra space” not used by TURN, and would be permitted to include additional materials if it paid any resulting increase in postage.

The Commission offered the following explanation for its apportionment of the use of the “extra space”: “Our goal . . . is to change the present system to one which uses the extra space more efficiently for the ratepayers’ benefit. 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.” The plurality interpreted the Commission’s order to place no restrictions on the content of the messages TURN could disseminate in the envelope space, so long

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11. Justice Blackmun, who did not participate in the PG&E case, had earlier anticipated the sort of regulation-by-definition-of-property employed by the Commission in PG&E: “It appears that New York and other States might use their power to define property rights so that the billing envelope is the property of the ratepayers and not of the utility’s shareholders. If, under state law, the envelope belongs to the customers, I do not see how restricting the utility from using it could possibly be held to deprive the utility of its rights. See Consolidated Edison, 447 U.S. at 556 (Blackmun, J., dissenting). In PG&E, the Commission ruled that the “extra space” inside the billing envelope, not the envelope itself, belonged to the ratepayers. This distinction appeared to be important to the plurality. See infra notes 34-35 and accompanying text.

12. Access was granted to TURN in particular because the Commission found that TURN represented a significant group of PG&E’s residential customers and because TURN, through its participation in utility rate-making proceedings, had “aided the Commission in performing its regulatory function.” PG&E, 106 S. Ct. at 906. The record revealed that another organization had also sought access to the “extra space” in PG&E’s billing envelopes, but that the Commission had denied the request on the ground that “that group neither wished to participate in Commission proceedings nor alleged that its use of the billing envelope space would improve consumer participation in those proceedings.” Id. at 907 n.5. The Commission reserved the right to grant access to groups in addition to TURN. Id. at 907.

13. Id. at 906.


15. Id. at 906-07. Cf. id. at 923 (Stevens, J., dissenting). According to Justice Stevens’s reading of the record, the Commission’s order limited the content of TURN’s inserts to three specified topics. TURN would be permitted: (1) to explain its program of ratepayer representation; (2) to identify “pending and anticipated PG&E applications and other cases likely to have a significant effect on customers’ rates and services,” and (3) to solicit contributions to support TURN’s advocacy of ratepayers’ interests before the Commission. Id. Justice Stevens found the order constitutional as so limited. It bears mentioning that the Commission’s order
as TURN stated its messages were not those of PG&E.16

B. The Plurality Opinion

Justice Powell, writing for the three-member plurality,17 framed the issue as follows: "[W]hether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees."18 The plurality began its analysis by noting that PG&E's newsletter was entitled to "the full protection of the First Amendment," since it was essentially a "small newspaper," not

described the purpose of TURN's proposal to be "soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E." In adopting TURN's proposal, the Commission established elaborate procedures to govern TURN's collection, use, and accounting of funds contributed by the recipients of its inserts. See Appendix, supra note 10. These facts, which were not mentioned by the plurality, tend to corroborate Justice Stevens' reading of the order.

16. See infra note 100.
17. See supra note 4.
18. 106 S. Ct. at 905. Chief Justice Burger, in his brief concurring opinion, seemed to accept the plurality's statement of the issue. See id. at 914 (Burger, J., concurring) ("I would not go beyond the central question presented by this case, which is the infringement of [PG&E's] right to be free from forced association with views with which it disagrees."). The Chief Justice found the cases of Wooley v. Maynard, 430 U.S. 705 (1977) and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), to be dispositive of the issue. See PG&E, 106 S. Ct. at 914. (Tornillo and Wooley are discussed below. See infra notes 59-61 & 66-68 and accompanying text). Justice Marshall, in an opinion concurring in the judgment, focused not on the content of TURN's message or PG&E's possible disagreement therewith, but rather on the nature of the property to which TURN would have access, and the impact of that access on PG&E's first amendment rights. 106 S. Ct. at 914-17 (Marshall, J., concurring). Thus, Justice Marshall viewed the issue as whether a state may redefine its common law property rights so as to grant a third party access to a forum formerly used exclusively by its owner, when such access impairs the owner's ability to exercise his own first amendment rights in the forum. Id.

Justice Rehnquist, in his dissenting opinion, did not question the plurality's statement of the issue. However, he disagreed with the plurality's prediction of the impact of the Commission's order on PG&E's speech. Id. at 917-20 (Rehnquist, J., joined in part by White & Stevens, JJ., dissenting). Justice Rehnquist also disputed the plurality's assumption that corporations enjoy a "negative" right of free speech, i.e., a right not to be compelled to speak. On this argument, he stood alone. See id. at 920-22 (Rehnquist, J., dissenting). This article argues that his position was correct. See infra Part III(B).

Justice Stevens, in a separate dissent, expressly questioned the plurality's statement of the issue and criticized the plurality for concerning itself largely with "questions that need not be answered in order to decide this case." Id. at 922 & n.1 (Stevens, J., dissenting). Since Justice Stevens did not interpret the Commission's order to permit TURN to disseminate political messages, or any messages not related to fund-raising or the ratepayers' interests before the Commission, he viewed the issue more narrowly than did the plurality: "The narrow question we must address is whether a state public utility commission may require the fund-raising solicitation of a consumer advocacy group to be carried in a utility billing envelope." Id. at 922 (Stevens, J., dissenting) (emphasis added); see supra note 15.
a commercial solicitation.\textsuperscript{19} Having thus characterized the newsletter, the plurality turned to \textit{Miami Herald Publishing Co. v. Tornillo},\textsuperscript{20} which it viewed as the most closely analogous precedent.

\textit{Tornillo} involved a Florida right-of-reply statute, which provided that if a newspaper published a criticism of a candidate’s character or record, the candidate could compel the paper to publish his or her reply, in a space equal in prominence and size to the space in which the criticism had appeared.\textsuperscript{21} According to the \textit{PG&E} plurality, the statute at issue in \textit{Tornillo} “directly interfered with the newspaper’s right to speak in two ways.”\textsuperscript{22} First, the statute, in effect, penalized the newspaper for expressing certain views critical of candidates. Since the newspaper would likely refrain from publishing views that might obligate it to open its pages to outsiders, the “inescapable” effect of the statute was to dampen the vigor of public debate.\textsuperscript{23} Second, explained the \textit{PG&E} plurality, the statute at issue in \textit{Tornillo} impermissibly interfered with the newspaper’s editorial judgment “by forcing the newspaper to tailor its speech to an opponent’s agenda, and to respond to candidates’ arguments where the newspaper might prefer to be silent. . . . Since \textit{all} speech inherently involves choices of what to say and what to leave unsaid, this effect was impermissible.”\textsuperscript{24}

The plurality then explained that for first amendment purposes, a public utility is entitled to the same protections from compelled access as the institutional press:

The concerns that caused us to invalidate the compelled access rule in \textit{Tornillo} apply to [\textit{PG&E}] as well as to the institutional press. . . . Just as the state is not free to ‘tell a newspaper in advance what it can print and what it cannot,’ . . . the State is not free either to restrict [\textit{PG&E}’s] speech to certain topics or to force [\textit{PG&E}] to respond to views that others may hold. . . . Under \textit{Tornillo} a forced access rule that would accomplish these purposes indirectly is similarly forbidden.\textsuperscript{25}

\begin{itemize}
  \item 20. 418 U.S. 241 (1974).
  \item 21. \textit{Id.} at 244-45 n.2.
  \item 22. \textit{PG&E}, 106 S. Ct. at 908.
  \item 23. See id. (discussing \textit{Tornillo}).
  \item 25. 106 S. Ct. at 909 (footnote and citations omitted). The plurality found insignificant the fact that the Florida statute at issue in \textit{Tornillo} compelled the newspaper to carry the reply on its own paper, while the order \textit{sub judice} required \textit{PG&E} to disseminate a message.
The plurality particularly objected to the fact that the Commission granted access to PG&E’s billing envelopes on the basis of the content of the proposed speech. The Commission’s order “discriminates on the basis of the viewpoints of the selected speakers... Access is limited to persons or groups — such as TURN — who disagree with [PG&E’s] views as expressed in Progress and who oppose [PG&E] in Commission proceedings.” In the plurality’s view, this content-based grant of access burdened PG&E’s own expression in the same impermissible manner that the state mandated right-of-reply burdened the newspaper’s expression in Tornillo — by imposing a penalty on expression:

[B]ecause access is awarded only to those who disagree with [PG&E’s] views and who are hostile to [PG&E’s] interests, [PG&E] must contend with the fact that whenever it speaks out on a given issue, it may be forced — at TURN’s discretion — to help disseminate hostile views. [PG&E] ‘might well conclude’ that, under these circumstances, ‘the safe course is to avoid controversy,’ thereby reducing the free flow of information and ideas that the First Amendment seeks to promote.

In addition to reducing the flow of information, explained the plurality, the Commission’s order required PG&E to associate with speech with which it disagreed. This was impermissible because it forced PG&E “either to appear to agree with TURN’s views or to respond.” Given TURN’s general opposition to the utility’s views, “there can be little doubt that [PG&E] will feel compelled to respond to arguments and allegations made by TURN in its messages to [PG&E’s] customers.” In an important passage, the plurality endeavored to explain and support its objection to this “forced response” by a corporation:

That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster... For corporations as for individuals, the choice to speak includes within it the choice of what not to say. And we have held that speech does not lose its protection because of the corporate identity of the speaker... Were the government freely able to compel

printed on paper supplied by others: “Like the Miami Herald, ... [PG&E] is still required to carry speech with which it disagreed, and might well feel compelled to reply or limit its own speech in response to TURN’s.” Id. at 909 n.7.

26. 106 S. Ct. at 910 (footnote omitted).
27. Id. (quoting Tornillo, 418 U.S. at 257). This passage is further discussed in the text accompanying notes 87-94 infra.
28. 106 S. Ct. at 911-12.
corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next. It is therefore incorrect to say, as do appellees, that our decisions do not limit the government's authority to compel speech by corporations. The danger that [PG&E] will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected under our decisions in Bellotti and Consolidated Edison.99

The plurality acknowledged that government compulsion of corporate speech is a commonplace of commercial regulation, but it distinguished the Commission's order from those "requiring appellant to carry various legal notices." While the state "has substantial leeway in determining appropriate information disclosure requirements for business corporations," it exceeds that leeway when it "require[s] corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views."90

The plurality also distinguished the case at hand from PruneYard Shopping Center v. Robins.91 There, the owner of a shopping center asserted that his first amendment rights were infringed by a state constitutional provision that had been construed to require him to grant access to a group of students who sought to distribute pamphlets and to circulate a petition in his shopping center. The PruneYard Court rejected the owner's first amendment claim and upheld the state constitutional provision. The PG&E plurality distinguished PruneYard on the following grounds:

Notably absent from PruneYard was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content-based. PruneYard thus does not undercut the proposition that forced associations that burden protected speech are impermissible.99

29. Id. at 912 (footnote and citations omitted). See also Tornillo, 418 U.S. at 258.
30. 106 S. Ct. at 911 n.12. The Justices offered no clear explanation for why, notwithstanding the first amendment, the states enjoy "substantial leeway in determining appropriate information disclosure requirements for business corporations." See infra note 112.
32. PG&E, 106 S. Ct. at 910 (footnote omitted). The shopping center owner's failure to object to the content of the pamphlets had been noted by Justice Powell, the author of the PG&E plurality opinion, in his concurring opinion in PruneYard. See PruneYard, 447 U.S.
The PG&E plurality also noted that PruneYard, unlike the present case, involved privately owned property that was "peculiarly public in nature."\(^{38}\)

The plurality quickly dispensed with the Commission’s contention that because the “extra space” in the billing envelopes belonged to the ratepayers, PG&E had no constitutionally protected interest in excluding other speakers from the space. The plurality relied on Wooley v. Maynard,\(^ {34}\) in which the Court rebuffed a state’s effort to compel two of its citizens to display, on their automobile, a state-issued license plate bearing the state motto “Live Free or Die.” While the citizens had no property interest in the license plate itself, they did own the automobile on which the plate was to be affixed. Likewise, explained the plurality, “the Commission’s order requires [PG&E] to use its property — the billing envelopes — to distribute the message of another. This is so whoever is deemed to own the ‘extra space.’ ”\(^ {35}\)

Nor, in the plurality’s view, did the result in Tornillo depend on the newspaper’s property interest in the paper on which the compelled reply would be printed. “The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the newspaper disagreed. This difficulty did not depend on whether the particular paper on which the replies were printed belonged to the newspaper or to the candidate.”\(^ {36}\) In the view of the PG&E plurality the constitutionally significant fact in both Wooley and Tornillo was the “forced association with potentially hostile views,”\(^ {37}\) which, the plurality insisted, would either dampen public debate or compel a response from one who would prefer to remain silent.

Having satisfied itself that the Commission’s order burdened PG&E’s constitutionally protected speech, the plurality proceeded to test the order under traditional first amendment standards. The plurality sought to determine whether the order was “a narrowly tailored means of serving a compelling state interest.”\(^ {38}\) Two state interests were identified: (1) the interest in effective rate making proceedings; and (2) the interest in providing PG&E customers with a

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\(^{33}\) 106 S. Ct. at 910 n.8.

\(^{34}\) 430 U.S. 705 (1977).

\(^{35}\) 106 S. Ct. at 912.

\(^{36}\) Id. at 913.

\(^{37}\) Id.

\(^{38}\) Id.
variety of views. As to the former, the plurality reasoned that even if the state's interest in effective rate making proceedings was compelling, the interest could be served equally well through means that did not intrude on PG&E's first amendment rights. The state could, for example, impose on PG&E "the reasonable expenses of responsible groups that represent the public interest at rate making proceedings." 39

Nor was the Commission's order narrowly tailored to serve the second asserted state interest of ensuring the dissemination of a variety of views. The plurality explained that the criteria employed by the Commission, in selecting views for dissemination, were not content-neutral. 40 Moreover, dissemination of TURN's speech was achieved at the cost of inhibiting that of PG&E, a constitutionally impermissible trade-off. "[T]he state cannot advance some points of view by burdening the expression of others." 41

The final step in the plurality's analysis was to determine whether the Commission's order was a valid time, place, or manner regulation. The plurality curtly rejected this contention, noting that the order failed to satisfy one of the basic requirements of such a regulation — that it be neutral as to the content of the speech to be regulated. 42

III. CRITIQUE OF THE PLURALITY OPINION

A. Summary Of The Critique

The principal flaw in the plurality's analysis, and the most troubling one because it was conceptual rather than empirical, was the plurality's presupposition that artificial legal entities, such as corporations, enjoy "freedom of mind" under the first amendment. Such freedom would protect corporations from government compelled disclosure or dissemination of speech with which they disagree. This presupposition, which formed the basis for the plurality's finding of a first amendment violation, 43 finds little support either in law or in reason; indeed, it is inconsistent with the rationale for protecting corporate speech at all. Moreover, government compulsion of corporate speech is a well established means of corporate regulation. The plurality neither repudiated this practice nor reconciled it with

39. Id.
40. But see infra note 45.
41. 106 S. Ct. at 914.
42. Id.
43. See supra note 4.
the plurality's fundamental presupposition — that the first amendment protects corporate "freedom of mind."

Granting that there is no first amendment protection for corporate "freedom of mind," the question becomes whether state compulsion of corporate speech nevertheless infringes those corporate speech rights that are recognized in the law. Case law establishes that the first amendment shields both individuals and corporations from government efforts to suppress or penalize protected speech. Accordingly, if a regulation compelling a corporation to speak has a collateral effect of suppressing or penalizing the corporation's own speech, then the regulation should be analyzed under the first amendment.

Would the Commission's order in PG&E have had such an effect? The impact that the Commission's order would have had on PG&E's speech could not be known in advance. Part of the explanation for the fragmentation of the Court in PG&E lies in the Justices' differing interpretations of the Commission's order, and the resulting differences in their estimations of the impact of that order on PG&E.

While the plurality cannot be faulted simply for settling on one interpretation rather than another (assuming its preferred interpretation was fairly grounded in the language of the order), the


45. Compare PG&E, 106 S. Ct. at 910 n.9 (plurality opinion) (Commission's order leaves TURN free to advocate its position as best it can and "does not restrict the scope or content of TURN's message.") and id. at 911 (plurality opinion) ("The order on its face leaves TURN free to use the billing envelopes to discuss any issues it chooses.") (footnote omitted) with id. at 923 (Stevens, J., dissenting) (Commission's order limits TURN's insert to three specific matters; it does not sanction the "free-wheeling political debate the plurality opinion presumes."). See also supra note 15.

The plurality's construction of the order as granting TURN "open-ended" access to the billing envelopes, with no restriction on the scope or content of TURN's message, seems inconsistent with its simultaneous finding that the Commission's order was impermissibly content-based. Compare PG&E, 106 S. Ct. at 910 with id. at 910 n.9. State action is "content-based" when it treats speech favorably or unfavorably according to the subject matter of the speech. See, e.g., Carey v. Brown, 447 U.S. 455 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Police Dep't v. Mosley, 408 U.S. 92 (1972). When the government provides access to a forum solely on the basis of the speaker's identity or status, without regard to, or restriction on, the content or subject matter of the speech, is the government's action "content based"? Compare Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 & n.9 (1983) (majority opinion) (access policy based on status of speaker rather than on its views is not viewpoint discrimination) with id. at 65 (Brennan, Marshall, Powell & Stevens, J.J., dissenting) (speaker's status "has nothing to do with whether viewpoint discrimination in fact has occurred"). The PG&E plurality assumed so, without explanation. The question clearly merits a more considered treatment than it received in PG&E.
opinion failed to explain how the order, as interpreted, could have had the proscribed impact on speech.

The plurality opinion is flawed by its failure to satisfactorily demonstrate a link between the order *sub judice* and the predicted impact of that order on the Utility’s speech. First, the plurality failed to explain how the order could have resulted in a reduction in the flow of information from PG&E to its ratepayers. In fact, the order, as interpreted by the plurality, could only have increased the flow of information. Second, while the plurality acknowledged that the Commission’s order required TURN to include a disclaimer disassociating PG&E from TURN’s views, the plurality inexplicably accorded this important fact almost no weight in its analysis of the order’s likely impact on PG&E’s speech. The mandatory disclaimer ensured that the Utility would not be required to espouse, endorse, publish or even be associated with any views with which it disagreed. Accordingly, PG&E’s supposed need to respond would have been no more compelling under the Commission’s order than it would have been had TURN distributed identical inserts to the same customers via TURN’s own envelopes.

In summary, because the first amendment is not triggered by alleged infringements of so-called corporate freedom of mind and because the PG&E plurality failed to explain how the order at issue would have had the collateral effect of suppressing or penalizing the corporation’s own speech, the order should not have been subjected to first amendment analysis. The order, like other routine state regulations of corporate behavior, should have been tested under the “rational basis” standard.


The fundamental flaw in the plurality’s analysis was its presupposition that PG&E, as a corporation, possesses a “freedom of mind” and that the first amendment protects that freedom from infringement by the state. That presupposition is both unprecedented and legally untenable.

While the plurality never expressly acknowledged that it was presupposing the existence of corporate “freedom of mind,” this must be inferred from its opinion for several reasons. First, the plurality asserted that “[f]or corporations as for individuals, the choice
to speak includes within it the choice of what not to say.” By thus refusing to distinguish corporate from individual “negative” speech rights, the plurality implicitly assumed that corporations as well as individuals enjoy the “freedom of mind” that forms the basis for such rights. Second, and more importantly, the plurality viewed the “freedom of mind” cases as controlling precedents, which strongly suggests that the plurality also understood PG&E to be a “freedom of mind” case. This interpretation is further supported by the plurality’s repeated emphasis on the utility’s disagreement with the compelled speech. Indeed, the plurality distinguished PruneYard on the ground that the property owner in that case, who was required to grant access to speakers, failed to object to the views of those speakers.

The notion that the first amendment forbids the state from compelling expression of objectionable ideas or opinions originated with the Court’s decision in West Virginia State Board of Education v. Barnette. In that case, the state board of education had promulgated a resolution requiring all public school students to salute the nation’s flag and to recite a prescribed pledge of allegiance, as a regular part of the school program. Plaintiffs, members of the Jehovah’s Witnesses faith, sought an injunction to restrain application of the salute and pledge requirement to them. Plaintiffs alleged, inter alia, that in requiring them to affirm beliefs they did not hold, the state abridged their first and fourteenth amendment freedoms of speech. The Supreme Court agreed and affirmed the injunction.

The PG&E plurality understood Barnette and its progeny to

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46. 106 S. Ct. at 912.
47. See infra notes 52-68 and accompanying text. The Chief Justice relied solely on the “freedom of mind” cases. See supra note 18.
48. See, e.g., PG&E, 106 S. Ct. at 909 n.7 (“Like the Miami Herald [newspaper in Tornillo], ... [PG&E] is ... required to carry speech with which it disagreed.”); id. at 911 n.11 (discussing the possibility of PG&E’s “strong disagreement” with the substance of TURN’s message); id. at 911 n.12 (messages “expressly contrary to the corporation’s views”). See also id. at 913 n.15; id. at 914 (Burger, C.J., concurring) (stating that the “central question” in the case was whether PG&E possessed a “right to be free from forced association with views with which it disagrees” and that the plurality “need not go beyond the authority of Wooley v. Maynard” to answer the question). In its argument, PG&E had stressed its disagreement with the compelled speech, and the plurality even incorporated the fact of disagreement into its statement of the issue. See id. at 907; see also supra note 18 and accompanying text.
49. See PG&E, 106 S. Ct. at 909-10; supra notes 31-32 and accompanying text.
50. 319 U.S. 624 (1943).
51. Id. at 642.
stand for the sweeping proposition that no speaker may be compelled by government to say what he prefers not to say.\textsuperscript{53} The plurality read \textit{Barnette} too broadly. The particular interest or the specific freedom cited by the \textit{Barnette} Court as having been unconstitutionally abridged by the compulsory flag salute, was "individual freedom of mind,"\textsuperscript{54} a freedom that inanimate entities, such as corporations, cannot meaningfully be said to enjoy.\textsuperscript{55} Indeed, the issue identified by the \textit{Barnette} majority was "whether such a [flag salute] ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution."\textsuperscript{56} The many references to "individual opinion and personal attitude," "attitude of mind," "the individual's right to speak his own mind," and the like, evidence the concern for the individual that suffuses both the majority\textsuperscript{57} and concurring opinions.\textsuperscript{58}

Each of the cases that later applied the principles of \textit{Barnette} to invalidate government action under the first and fourteenth amendments also involved an individual. In \textit{Wooley},\textsuperscript{59} for example, the Court, relying heavily on \textit{Barnette}, decided that the first amendment's free speech clause prohibited a state from requiring a follower of the Jehovah's Witnesses faith to display on his automobile a state-issued license plate bearing the motto "Live Free or Die." The Court reasoned that the state had no power to invade "the sphere of intellect and spirit which it is the purpose of the First Amendment to

\begin{itemize}
\item \textsuperscript{53} See \textit{PG\&E}, 106 S. Ct. at 912 n.13 ("As we stated in \textit{Wooley}, '[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.").\textit{Id.}
\item \textsuperscript{54} \textit{Barnette}, 319 U.S. at 637.
\item \textsuperscript{55} See Harpaz, supra note 3, at 901-02 (The \textit{PG\&E} Court "failed to appreciate the important distinctions between \textit{Barnette} with its concern for intellectual individualism, and the plight of a utility forced to share its billing envelope with its opposition.").
\item \textsuperscript{56} \textit{Barnette}, 319 U.S. at 636 (emphasis added).
\item \textsuperscript{57} See id. at 631, 633, 634, 637. \textit{See also id.} at 641 (referring to the "freedom to be intellectually and spiritually diverse").
\item \textsuperscript{58} See id. at 643-44 (Black & Douglas, JJ., concurring); \textit{id.} at 646 (Murphy, J., concurring) (noting that the state action at issue restrained "the freedom of the individual to be vocal or silent according to his conscience or personal inclination"). \textit{See also T. Emerson, Toward a General Theory of the First Amendment 4-5 (1963) (suggesting that the first amendment must ultimately be justified by reference to the individual qua individual, that is, to the individual's right to develop his personhood free from governmental interference); see also Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 Iowa L. Rev. 1, 6 (1976) (free speech merits protection to the extent that it furthers the speaker's interest in self-expression).}
\item \textsuperscript{59} 430 U.S. 705 (1977). For a discussion of the background of \textit{Wooley} and the lower federal court opinion in the case, see Note, Compelled Expression: Maynard v. Wooley, 28 Me. L. Rev. 531 (1976).}
\end{itemize}
our Constitution to reserve from all official control." As in Barnette, both the reasoning and the result in Wooley reflected the Court's solicitude for the conscience and personal values of the individual.

Barnette has also been invoked by many lower federal courts in cases involving compulsory salutes or pledges to national symbols. Not surprisingly, all such cases involved the compulsion of individuals who enjoy a "freedom of mind" under the first amendment.

Similarly, in other factual contexts, the decisions that have invoked the notion of freedom of mind or belief as a basis for forbidding government compelled speech have involved individuals, not corporations. For example, in Abood v. Detroit Board of Education, a state law authorized unions and local government employers to agree to an arrangement under which every employee represented

60. Wooley, 430 U.S. at 715 (quoting Barnette, 319 U.S. at 642).
61. See Gaebler, First Amendment Protection Against Government Compelled Expression and Association, 23 B.C.L. Rev. 995, 1005 n.72 (1982) ("Although the Court did not speak specifically in terms of freedom of conscience, the injuries to individual interests in Barnette and Wooley were to this interest."). Id. The Wooley Court also relied in part on Tornillo, 418 U.S. 241, which involved the rights of a corporation, not an individual. (See supra text accompanying note 21, for the facts of Tornillo.) According to the Wooley majority, Tornillo "illustrated" the right to refrain from speaking recognized in Barnette. Wooley, 430 U.S. at 714. The suggestion that Tornillo illustrated Barnette is highly questionable, inasmuch as the Tornillo Court neither discussed nor cited Barnette. In any event, to view Tornillo as support for the proposition that corporations, as well as individuals, enjoy a "freedom of mind" is to misread the case. As discussed below, Tornillo should be understood as a traditional, restraint of speech case, rather than as a recognition of corporate "freedom of mind." See infra notes 66-68 and accompanying text.
63. See, e.g., Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion) (discharge or threat of discharge of public employees because of their refusal to affiliate with designated political party violates first amendment); Torcaso v. Watkins, 367 U.S. 88 (1961) (seeker of public office cannot be compelled to declare a belief in God); Speiser v. Randall, 357 U.S. 513 (1958) (statute requiring loyalty oath as a condition to receiving property tax exemption violates first amendment); Wieman v. Updegraff, 344 U.S. 183 (1952) (state employees cannot be required to take a loyalty oath denying affiliation with Communist Party). But see United States v. National Soc'y of Prof. Eng'r's, 555 F.2d 978, 984 (D.C. Cir. 1977), aff'd on other grounds, 435 U.S. 679 (1978) (stating, without citation or explanation, that "[t]o force an association of individuals to express as its own opinion judicially dictated ideas is to encroach on that sphere of free thought and expression protected by the First Amendment") Id.
64. 431 U.S. 209 (1977).
by the union — even if not a union member — was required as a condition of employment to pay the union a service fee equal to the dues paid by union members. A group of nonmember public school teachers instituted a class action challenging the compulsory contribution law, claiming that they objected to the political and ideological activities on which the union regularly spent a portion of their fees. The Court held that the first amendment prohibited the state from requiring any individual "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher."  

Abood provides no support for the proposition that artificial "persons" enjoy the same or a similar protection under the first amendment.

Until the PG&E case, the Court had never invoked Barnette on behalf of a corporation. Even in Tornillo, in which the first amendment was held to protect a newspaper corporation from being compelled by government to print editorial replies of third parties, the court did not rely on Barnette's "freedom of mind" rationale. Indeed, the Tornillo Court did not even cite Barnette. The Court's principal objection to the statute at issue in Tornillo was that it operated to suppress speech:

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.

Tornillo should be understood as a traditional, restraint of speech case. To derive from Tornillo the principle that corporations enjoy a constitutionally recognized "freedom of mind" comparable to that enjoyed by individuals is to misapprehend the Court's reasoning.

65. Id. at 235.
67. Id. at 257 (footnote omitted).
68. Buttressing the view that Tornillo was not a "freedom of mind" case is the fact that the result in Tornillo did not turn on the newspaper's disagreement with the replies that it was required to publish. While one may reasonably assume that the newspaper would have disagreed with at least some of the replies, the Court did not base its ruling on such an assumption. The "penalty" at issue was compulsory publication of opinions generally, not compulsory publication of objectionable or disagreeable opinions.

Although the Court did add, almost as an afterthought in the final paragraph of the opinion, that the statute unconstitutionally "intr[u]ded into the function of editors" by regulating the content of newspapers, this observation cannot reasonably be read as a recognition of
The opinions in *Barnette* and its progeny focused on individual freedoms, rather than on corporate freedoms, because they involved individuals. In these cases the Court did not address the corresponding freedoms of public utilities and other corporations. Surely, the *Barnette* line of cases does not *foreclose* the possibility that corporations (which after all do enjoy a constitutionally recognized freedom of speech) might enjoy something akin to a "freedom of mind." This "freedom of mind" would shield them, as much as an individual, from being compelled to speak against their "beliefs."

This argument must be rejected for several reasons. First and foremost, the supposed corporate right to refrain from speaking is wholly inconsistent with the rationale for affording first amendment protection to corporations. While the Court has held that the first amendment protects corporate speech under certain circumstances, the Court has never grounded such protection on any supposed right of corporate self-expression or self-development. Rather, the Court has grounded protection of corporate speech on "the informational..."
purpose of the First Amendment,” i.e. on the right of the public to receive information. The rationale for first amendment protection lies not in any consideration of the needs or interests of the corporate speaker but rather in the right of the public to hear and consider various points of view. Therefore, the corporation has no first amendment interest in withholding information from the public, absent a showing that its right to affirmatively present its own views is somehow impaired when it is compelled to disseminate the views of others.

Moreover, the suggestion that a corporation enjoys a kind of freedom of mind that protects it against being compelled to disclose or disseminate speech with which the corporation disagrees is irrec-

oncillable with the statutes and regulations that compel corporations to do precisely that. Cigarette manufacturers, for example, are required by federal law to disseminate with their products the views of a third party — the United States Surgeon General — notwithstanding that those views are controversial and objectionable to the manufacturers. Similarly, Congress has empowered cable franchise authorities to require cable television operators to allocate channel

71. Id. at 782 n.18.
73. See PG&E, 106 S. Ct. at 921 (Rehnquist, J., dissenting) (Because the Constitution protects corporate speech for its informational value to society, "the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is de minimis."). Id. Cf. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, ... [a commercial advertiser's] constitutionally protected interest in not providing any particular factual information in his advertising is minimal." (emphasis in original)); id. Virginia Pharmacy Board, 425 U.S. at 781 (Stewart, J., concurring) ("[T]he elimination of false and deceptive claims [by commercial advertisers] serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection — its contribution to the flow of accurate and reliable information relevant to public and private decision making."); id. Gaebler, supra note 61, at 1009 ("While compelled expression may infringe upon individual interests it should not be condemned as an interference with the 'free marketplace of ideas.'"). Id.
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capacity for public, educational or governmental use, and the operators are forbidden from exercising editorial control over channel capacity so allocated. In other words, the cable operators may be compelled to disseminate the views of third parties. In addition, a vast array of statutes and regulations compel corporations to disclose opinions or information generated by the corporations themselves.

The PG&E plurality failed to reconcile any of the foregoing statutes and regulations with the supposed corporate right not to speak and not to be associated with disagreeable views.

The absence of precedent for the PG&E plurality’s extension of Barnette is not surprising. The corporation owes both its existence and its powers to the state. The corporation possesses no characteristics that even remotely resemble the mind and conscience that guide human behavior and that justify recognition and protection of individual freedom of mind under the first amendment. A corporation can think and act only through its human agents. Accordingly, the corporation cannot independently experience coercion, intimidation, infringement of personal belief, or any mental state akin to those that prompted the Court to accord first amendment protection to the individual litigants in Barnette, Wooley and Abood. To extend cases premised on an individual’s freedom of conscience to nonhuman business entities is to strain the rationale of those cases “beyond the breaking point. To ascribe to such artificial entities an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor


77. See, e.g., 15 U.S.C. §§ 77a-78lll (1982) (disclosure requirements in securities registrations); id. at § 1637 (requiring creditor to disclose to consumer specified information germane to open end consumer credit plan); id. at § 1663 (requiring advertisements for consumer credit under an open end credit plan to disclose specified information); id. at § 1667a (required disclosures in consumer leases); 39 U.S.C. § 3685 (1982) (requiring disclosure of ownership, circulation, distribution, and other information by publications having periodical publication mail privileges); 12 C.F.R. §§ 226.6-.9 (1986) (implementing federal credit disclosure requirements); 31 C.F.R. §§ 103.22-.27 (1986) (compelling disclosure by financial institutions of certain currency and foreign transactions). See also infra note 112 (legal notices); PG&E, 106 S. Ct. at 923 & nn.3, 4 & 5 (Stevens, J., dissenting); Comment, Disclosure as a Legislative Device, 76 Harv. L. Rev. 1273 (1963).

78. See infra note 112.

79. “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly or as incidental to its very existence.” Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 534 (1819) (opinion by Marshall, C.J.).
Indeed, when the first amendment rights of corporations were first recognized, the Court acknowledged the common sense distinction between the corporation and the individual, and the significance of that distinction in identifying their respective constitutional rights:

Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals. . . . Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.\(^8\)

The nature, history, and purpose of the freedom of mind recognized in *Barnette* all suggest that like the privilege against compulsory self-incrimination, freedom of mind is a "purely personal" guarantee, which cannot sensibly be invoked to protect a corporation. As Justice White has explained:

> [A]n examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-

\(^8\) *PG&E*, 106 S. Ct. at 921 (Rehnquist, J., dissenting). See generally O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 Geo. L. J. 1347 (1979). To assume that a corporation possesses a mind or conscience, the freedom of which merits protection, is to commit what Professor O'Kelley calls the "category-mistake of treating corporations as either natural persons or creatures capable of physical acts such as speech or expression." See id. at 1349-51, 1382. Accord Patton & Barlett, *supra* note 72, at 498, 508-09.

\(^81\) *Bellotti*, 435 U.S. at 778-79 n.14. See *United States v. White*, 322 U.S. 694, 698-700 (1944) ("The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. . . . The framers of the constitutional guarantee against compulsory self-disclosure . . . cannot be said to have intended the privilege to be available to protect economic or other interests of [corporations] so as to nullify appropriate governmental regulations.") Accord *Bellis v. United States*, 417 U.S. 85 (1974); *Hale v. Henkel*, 201 U.S. 43, 69 (1906). See also *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (Fourteenth amendment's protection of "liberty" applies to "natural persons not artificial persons."); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 65 (1974) (quoting with approval *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1949)) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy."). Id. See generally O'Kelley, *supra* note 80. "Constitutional rights that by their very nature can only apply to a natural person have not been extended to corporations." Id. at 1382.
expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profit making corporations are not ‘an integral part of the development of ideas, of mental exploration and of the affirmation of self.’ They do not represent a manifestation of individual freedom or choice.83

In short, not only is there no legal support for the proposition that artificial entities such as corporations enjoy “freedom of mind” under the first amendment, but the proposition is flatly inconsistent with both the Court’s rationale for protecting corporate speech and the established and accepted regulatory practice of compelling such speech. The PG&E plurality’s presupposition that corporations do enjoy “freedom of mind” is untenable.

Unless, as in Tornillo,88 the corporation can demonstrate that a collateral effect of compulsion is to suppress or penalize the corporation’s own speech, cases involving government compulsion of corporate speech should not be analyzed under the first amendment. The following two sections of this article demonstrate that the PG&E plurality failed to show that the order at issue would have had the prohibited collateral effect of suppressing or penalizing the utility’s speech.

C. The Plurality Failed To Justify Its Finding That The Commission’s Order Would Reduce The Flow Of Information From The Utility

The plurality objected to the Commission’s order on the ground that it imposed a penalty on PG&E’s expression and would therefore cause a “reduc[tion] in the free flow of information and ideas that the First Amendment seeks to promote.”84 The plurality sought to analogize the Commission’s order to the right-of-reply statute at issue in Tornillo,85 but correctly recognized that the analogy was imperfect since TURN’s access was automatic and did not depend on the utility’s expression of any particular views: “The Commission’s order is not, in Tornillo’s words, a ‘content-based penalty’ in the first sense, because TURN’s access to [PG&E’s] envelopes is not conditioned on any particular expression by [PG&E].”86

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82. Bellotti, 435 U.S. at 804-05 (White, J., dissenting) (footnotes omitted).
84. PG&E, 106 S. Ct. at 910.
86. PG&E, 106 S. Ct. at 910. [citations omitted].
The following excerpt constitutes the sole explanation offered by the plurality for its finding that the Commission’s order would reduce the flow of information from the utility to its customers:

Because access is awarded only to those who disagree with [PG&E’s] views and who are hostile to [PG&E’s] interests, [PG&E] must contend with the fact that whenever it speaks out on a given issue, it may be forced — at TURN’s discretion — to help disseminate hostile views. [PG&E] ‘might well conclude’ that, under these circumstances, ‘the safe course is to avoid controversy,’ thereby reducing the free flow of information and ideas that the First Amendment seeks to promote.87

Yet, according to the plurality’s own interpretation of the order, TURN was to be guaranteed access to the billing envelopes “four times a year for the next two years.”88 Moreover, the parties were ordered by the PUC to designate, in advance of the first month of access, the specific eight months in which TURN’s inserts would be distributed by the utility.89 The plurality never explained how such automatic and guaranteed access (which the plurality inexplicably characterized as access “at TURN’s discretion”)90 was at all related to whether “[PG&E] speaks out on a given issue.”91

One possible explanation for the plurality’s conclusion was suggested in Justice Rehnquist’s dissenting opinion. Justice Rehnquist understood the plurality to be concerned that “the possibility of minimizing the undesirable content of TURN’s speech may induce PG&E to adopt a strategy of avoiding certain topics in hopes that TURN will not think to address them on its own.”92 However, the dissenting opinion also noted, “such a strategy [by the utility] would depend on any group given access being little more than a reactive organization,” i.e., an organization that would address issues only after they had been raised initially by PG&E.93 The record clearly revealed that in granting access to the billing envelopes, the Commission’s purpose was not to provide a voice to react to the utility’s pronouncements on diverse political and social issues, but to enhance ratepayer participation in rate making proceedings and to improve

87. Id. (quoting Tornillo, 418 U.S. at 257).
88. 106 S. Ct. at 906.
89. Appendix, supra note 10.
90. PG&E, 106 S. Ct. at 910.
91. Id. at 905.
92. Id. at 920 (Rehnquist, J., dissenting). The fact that the Commission reserved the right to grant access to groups in addition to TURN lends some support to this reading of the plurality opinion. See id. at 907.
93. Id. at 920 (Rehnquist, J., dissenting).
the Commission's performance of its regulatory function.\textsuperscript{94} The Commission clearly expected that the groups gaining access to the billing envelopes would affirmatively pursue these laudable ends, independent of the utility's expression of views on these or other matters.

In any event, even without access to PG&E's billing envelopes, the ratepayer-advocacy groups were free to pursue their ends and to respond to PG&E's publications. The groups could simply have published their views and solicited contributions through other media. The plurality never explained why the Commission's order, which merely opened a new avenue of communication between an existing ratepayer-advocacy group and its constituency, created any disincentive for PG&E to speak that did not already exist. In other words, the plurality failed to justify, and the facts did not support, the finding that the Commission's order would proximately cause any reduction in the flow of information from the utility.\textsuperscript{95} The best that can be said for the plurality's prediction that the Commission's order would reduce the flow of information is that it was, in Justice Rehnquist's words, "extremely implausible."

D. The Plurality Inexplicably Disregarded The Significance Of The Mandatory Disclaimer, Which Effectively Disassociated PG&E From TURN's Views

Before a claimed infringement of a first amendment right to be free from government compelled expression can be demonstrated, the plaintiff must show that he is being linked in some way to the expression at issue. This nexus between speaker and message is clear in cases where the government compels an individual to proclaim an idea verbally, for absent unusual circumstances, a person will be identified with the words that he utters.\textsuperscript{97} As the link between the speaker and the compelled message grows more attenuated, however, it becomes less likely that the message will be identified as that of the speaker, and the constitutional claim grows correspondingly weaker.\textsuperscript{98}

\textsuperscript{94} See id. at 906; see also supra note 12.

\textsuperscript{95} This argument also undermines the plurality's prediction that the Commission's order would have had the result of compelling the utility to respond to TURN's views. See infra notes 101-03 and accompanying text.

\textsuperscript{96} PG&E, 106 S. Ct. at 920 (Rehnquist, J., dissenting).

\textsuperscript{97} See, e.g., Barnette, 319 U.S. 624 (1943); See also supra note 62 and cases cited therein.

\textsuperscript{98} See, e.g., Lathrop v. Donohue, 367 U.S. 820, 859 (1961) (Harlan, J., concurring)
As the required participation becomes less direct and personal the likelihood decreases that compliance will identify the individual with the message expressed. Unless the government requires an individual to do something which reasonably identifies him with a message it is difficult to describe the government's action as compelling expression.99

The PG&E plurality conceded that the mandatory disclaimer served to "avoid giving readers the mistaken impression that TURN’s words are really those of [PG&E]."100 The plurality, nevertheless, concluded that by requiring PG&E merely to carry TURN’s inserts in the billing envelopes, the Commission forced the utility to "associate" with TURN’s hostile views. The impermissible result of this "forced association," explained the plurality, was that the utility would feel compelled to respond.101

The plurality failed to explain why the mandatory disclaimer, which admittedly disassociated PG&E from TURN’s views, would not also have negated any inference of "association" that otherwise might have been drawn from the inclusion of PG&E’s and TURN’s respective inserts in a single envelope. This form of disclaimer (which is commonplace in both the broadcast and print media and, presumably, familiar to the public) would be ineffective in disassociating PG&E from TURN’s views only if the recipients ignored TURN’s insert. In that case, of course, TURN’s other messages would also go unread, and PG&E would not be associated with them. The plurality assumed that customers would read and comprehend the substance of TURN’s insert but would not read and comprehend the mandatory disclaimer appearing on the same insert.

The plurality’s failure to credit the effect of the mandatory disclaimer also undermined its conclusion that PG&E “might well feel compelled to reply” to TURN’s inserts.102 The legally significant

99. Gaebler, supra note 61, at 1010.
100. PG&E, 106 S. Ct. at 911 n.11. The disclaimer requirement appeared in paragraph 5(e) of the Commission’s order, which provided: “All of TURN’s material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.” Appendix, supra note 10, at A-32.
101. See PG&E, 106 S. Ct. at 911 & n.11.
102. Id. at 909 n.7. Cf. PruneYard, 447 U.S. at 87-88 (The state, in granting access to shopping center by persons wishing to speak and circulate petitions therein, did not thereby compel center’s owners to subscribe to any views; owners were “free to publicly disassociate
question was whether, as a proximate result of the Commission’s order, PG&E would feel compelled to respond to the matters raised by TURN. Any compulsion the utility might feel would stem solely from the fact that views with which it disagreed were reaching the ratepayers; not from the fact that those views happened to be transmitted via the utility’s billing envelopes. The Commission’s order did no more than open a single, narrow, perhaps more efficient avenue of communication. Absent the Commission’s order, TURN legally could have spread identical messages by other media, and PG&E presumably would have felt equally compelled to respond.103

As a practical matter, TURN’s ability to compel a response

themselves from the views of the speakers or handbillers.”). Id. In his separate concurring opinion in PruneYard, Justice Powell, joined by Justice White, noted that simply preserving a property owner’s ability to disavow or disclaim the messages of others who use his property might not solve the constitutional difficulty, because the first amendment protects an individual’s “right to refrain from speaking at all.” Id. at 99 (Powell, J., joined by White, J., concurring in part and in the judgment) (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977)). The Commission’s order in PG&E avoided this difficulty by placing the burden of issuing a disclaimer on the party granted access.

In PruneYard, Justice Powell further argued, however, that “the right to control one’s own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner.” 477 U.S. at 100 (footnote omitted). He cited several examples, including a minority-owned business confronted by speakers from the Ku Klux Klan, and a church-operated enterprise compelled to grant access to speakers advocating abortions. “The strong emotions evoked by speech in such situations may virtually compel the proprietor to respond,” even though listeners do not mistake the speech’s source. Id. at 99-100. Justice Powell’s point may have merit in cases involving individual property owners. (The cases he cited to support the point, Wooley and Abood, both involved compulsion of individuals.) However, the suggestion that an artificial legal entity such as a corporation, as distinguished from its individual managers, directors and shareholders, will feel compelled by “strong emotions” to respond to unpalatable views is implausible indeed. In any event, as demonstrated in Part III(B) above, corporations, unlike individuals, do not enjoy a first amendment right to be free from compelled responses.

103. In this respect, PG&E is the mirror image of Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983) (5-4 decision). In Perry, a local board of education excluded plaintiff, a teachers’ association, from a narrow, government-owned but non-public avenue of communication — the school district’s internal mail system. The board granted a rival group access to the mail system, in recognition of the group’s status as the teachers’ official bargaining representative. In rejecting plaintiff’s first amendment challenge to the exclusion, the majority noted that plaintiff had made “no showing . . . that [its] ability to communicate with teachers is seriously impinged by the restricted access to the internal mail system.” Id. at 53. Given the “substantial alternative channels that remain[ed] open for union-teacher communication,” the effect of the exclusion on plaintiff’s ability to communicate was de minimis. Id. If exclusion from a single, narrow avenue of communication (an internal mail system) does not seriously impinge the ability to communicate, then access to a comparably narrow channel (PG&E’s billing envelopes) should not be deemed to seriously enhance the ability to communicate. TURN’s views would have been equally coercive of a response from PG&E, and PG&E’s perceived need to counter TURN’s views would have been equally compelling, had TURN not gained access to the billing envelopes.
from PG&E depended not on the Commission's solicitude but on TURN's own financial resources. Of course, granting TURN access to the billing envelopes gave TURN a "free ride," a means of mailing its messages to the ratepayers without having to deplete its own resources. However, this "free ride" resulted in no cost to PG&E since the "extra space" allocated to TURN, which was a byproduct of the billing process, was being funded by the ratepayers, not by PG&E. Moreover, the Commission ordered TURN to pay for the cost of insertion of its materials into the billing envelopes and for "all reasonable costs [PG&E] incurs beyond its usual cost of billing that result from the addition of TURN's materials." PG&E, therefore, was not being required to subsidize TURN.

But even assuming that the Commission's order did, in effect, require PG&E to subsidize its adversaries, PG&E apparently would have no basis for objecting. The plurality, in dictum, expressly sanctioned compulsory subsidization of TURN by PG&E. The plurality stated that the state's interest in fair and effective utility regulation "may justify imposing on [PG&E] the reasonable expenses of responsible groups that represent the public interest at rate making proceedings." In short, the mandatory disclaimer ensured that the respective views of TURN and PG&E would remain disassociated. PG&E's supposed compulsion to respond would be attributable solely to the substance of TURN's message, not to the Commission's action in granting access. PG&E would have been no more or less compelled to respond to TURN's inserts than it would have been compelled to answer TURN's advertisements in other media. This sort of "compulsion" to defend and justify one's views in the "marketplace of ideas" raises no first amendment problems; indeed, the first amendment was designed in large part precisely to promote such compulsion. As the plurality correctly observed, there is no consti-

104. See Appendix, supra note 10, at App. A (U.S. filed Dec. 31, 1984). PG&E's bill, together with occasional legally mandated notices, generally weighed less than one ounce per envelope. Postage for mailing the bill, however, was assessed in increments of one ounce. The Commission permitted PG&E to include the cost of postage in the rates collected from PG&E's ratepayers. As a result, the ratepayers funded more postage than PG&E needed or used. They paid for the "extra space," or perhaps more accurately the unused weight allowance, in each envelope. See id.

105. Id.

106. PG&E, 106 S. Ct. at 913.

tutional right "to be free from vigorous debate." 108

E. The Commission's Order Should Have Been Evaluated Under The "Rational Basis" Standard That is Applied To Routine Regulation Of Corporate Conduct

Since the first amendment recognizes no corporate "freedom of mind" and, accordingly, no corporate right not to speak, a corporation's agreement or disagreement with compelled speech should be insufficient to trigger first amendment analysis.109 For the same reason, neither the source of the compelled speech (whether within or without the corporation) nor the label that might be applied to the speech were it viewed in isolation (i.e., political, social, commercial, legal notice) should justify heightened scrutiny of the state's action.

The only reason for according first amendment protection to corporate speech is to ensure the free flow of information to the public.110 Corporate speech is protected not for its own sake, but for the sake of its recipients. The recipients' interests are harmed if that speech is suppressed. The first amendment, therefore, rightly bars the government from regulating corporations in such a way as to suppress their political speech or to cause the corporations to censor their political expression.111 A regulation that compels a corporation to speak, in and of itself, would not seem to pose any risk of suppression or self-censorship. Thus, absent a showing that a regulation compelling corporate speech has a collateral effect of suppressing or penalizing the corporation's own speech, such regulations should be analyzed no differently than other instances of state regulation of corporate conduct. This means that the compulsion should be upheld by the courts if it "rationally relate[s] to any legitimate end of government."112

108. PG&E, 106 S. Ct at 910.
109. See supra note 58.
110. See supra note 72.
111. See, e.g., Consolidated Edison, 447 U.S. 530; Bellotti, 435 U.S. 765; Tornillo, 418 U.S. 241 (1974). See also New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (The first and fourteenth amendments bar states from granting damage awards in civil libel action by public official against newspaper corporation for publication of advertisement critical of official, absent plaintiff's showing of actual malice.).
112. 2 R.D. ROTUNDA, J.E. NOWAK, & J.N. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 59 (1986). Accord L.H. TRIBE, AMERICAN CONSTITUTIONAL LAW 450-51 (1978). Thus, the state may constitutionally compel a corporation to disclose the legal rights and remedies available to those who conduct business with the corporation. Such compulsion rationally furthers legitimate governmental ends. While the Justices in PG&E agreed that the state may compel corporations to disclose legal notices, they offered no clear explanation for that authority. See PG&E, 106 S. Ct. at 911 n.12 (plurality opinion)
This being the case, the fact that the state’s selection of the speech to be compelled may be content-based should not necessarily invalidate the compulsion. In fact, if the validity of compulsion turns on whether the compelled speech rationally relates to a legitimate state interest, it would be entirely appropriate for the state to consider the content of any speech it proposes to compel a corporation to disseminate. Only by so doing could the state determine whether compulsory dissemination would actually further its interest. Indeed, it would be irrational for the state not to consider the content of the speech.

In the PG&E case, as demonstrated above, the plurality failed to justify its conclusion that the Commission’s order would have had a collateral effect of suppressing or penalizing PG&E’s own speech. The plurality failed to demonstrate any link between the Commission’s order and the predicted impact of that order on the utility’s speech. Specifically, the plurality failed to explain how the order could have resulted in a reduction in the flow of information from PG&E to its customers. Moreover, the plurality inexplicably disregarded the fact that all third-party speech to be disseminated by the utility carried a disclaimer that effectively disassociated PG&E from that speech. In addition, TURN’s access to the billing envelopes was guaranteed and scheduled in advance, thus minimizing the risk that the utility would censor itself to avoid triggering a response by TURN.

Accordingly, the order should not have been tested under the strict “compelling state interest” and “narrowly tailored means” requirements of the first amendment. Rather, like other regulations of corporate conduct, the order should have been analyzed under the more lenient “rational basis” test. Had the plurality applied such a test, the result may well have been to uphold the Commission’s order.

(The state has “substantial leeway” to compel business corporations to disclose “various legal notices.”); id. at 915 (Marshall, J., concurring in the judgment) (State has “compelling” interest in requiring utility to disclose nonpolitical speech that is “directly relevant to commercial transactions between the ratepayer and the utility.”); id. at 923 (Stevens, J., dissenting) (assuming, without explanation, that the state may compel the utility to disclose “warnings,” “provisos,” “disclaimers,” and “legal notices of public hearings and rate-making proceedings”).

113. Cf. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion) (Where the city had a legitimate interest in limiting access to advertising space on city-owned buses to avoid the appearance of political favoritism, the first amendment did not bar the city’s consideration of subject matter of proposed advertisements.).

114. See supra Parts III(C)&(D).
The state interest served by the order — enhancing the effectiveness of rate making proceedings — was legitimate, as the plurality seemed to recognize. The more difficult question would have been whether TURN's message would have furthered that state interest. The answer would depend on which interpretation of the order was adopted — that of the plurality or that of Justice Stevens. The Stevens interpretation was more consistent with the facts. That interpretation would have limited TURN to little more than fund-raising appeals, and TURN's messages clearly would have furthered the state's interest. On the other hand, the plurality read the order to impose few, if any, limits on the content of TURN's message. Under this interpretation, whether there would have been a nexus between TURN's messages and the state's interest could have been determined only with reference to the specific messages TURN proposed to have disseminated.

IV. Conclusion

This article has argued that there is no support in either law or reason for the premise which underlies the PG&E plurality's analysis. Namely, the plurality erred by assuming that corporations possess "freedom of mind" under the first amendment. This presupposition is inconsistent with the Court's stated rationale for affording protection to corporate speech and with well accepted regulatory practices. The authorities support the proposition that the first amendment prohibits compulsion of corporate speech only in cases where the compulsion has a collateral effect of suppressing or penalizing the corporation's expression of its own views. Absent such a collateral effect, regulations mandating speech by corporations should be analyzed no differently than other regulations of corporate behavior. If there is a rational basis for the regulation, i.e., if the compelled speech furthers a legitimate state interest, the regulation should be upheld. Had this standard been applied in the PG&E case, the result may well have been to uphold the Commission's order.

115. See PG&E, 106 S. Ct. at 913.
116. See supra note 15.
117. See id. and accompanying text.