

Autonomy, Debate, and Corporate Speech

By DAVID SHELLY*

By one estimate, corporations spend a billion dollars each year to run political editorials in newspapers, magazines, the broadcast media, and direct mail campaigns.¹ Mobil Oil has made itself a familiar example by spending an estimated \$3.5 million annually on political advertisements.² Its views on public issues occupy a quarter of the New York Times' Op Ed page every 14 days, making Mobil one of the loudest voices in national discourse. Other examples may be less familiar, like the collection of smaller companies that jointly purchased a full page of the Times on the eve of Operation Desert Storm to advocate continuation of economic sanctions, avoidance of "an unnecessary war," and development of a national energy policy based on conservation and alternative fuels.³ Every Sunday morning, big business corporations tell the nation their views on farm, energy, and trade policy in advertisements on the weekly network news programs; and every month, inserts in utility billing envelopes bring corporate opinions on conservation, nuclear power, or the latest regulatory proposal pending before some state or federal commission.

Legislatures and regulatory bodies have responded to this unprecedented level of corporate political advocacy by adopting a variety of restrictions. The restrictions, in turn, have provoked numerous constitutional challenges by business corporations seeking to maintain some influence in American politics. Their claims for first amendment protection reached the Supreme Court over a decade ago. In this period of changing membership and steadfast dissent, however, the more corporate speech cases the Supreme Court decides, the more unsettled first amendment doctrine becomes.

* Harry A. Bigelow Teaching Fellow and Lecturer in Law, University of Chicago. On brief in *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990), discussed in footnotes 23 and 24. I am grateful to Bruce Ackerman, Jerome Barron, Owen Fiss, Mary French, and Don Judges for inspiration and valuable comments on earlier drafts.

1. T. EDSALL, *THE NEW POLITICS OF INEQUALITY* 116 (1984) (citing 1978 Congressional Committee estimate). As Edsall takes care to note, such estimates are necessarily gross, because most spending for editorial advertisements need not be disclosed.

2. *Id.*

3. N.Y. Times, Dec. 31, 1990, at 5 (national ed.).

In its first effort, *First National Bank of Boston v. Bellotti*,⁴ the Court established one lasting principle: If corporate speech enriches public debate, there is reason to protect it regardless of whether corporations have any constitutional interest in speaking that is independent of the interests of a public audience in receiving corporate communications.⁵ This principle tells us little of significance, though, unless we know whether corporate speech enriches or impoverishes public debate.

The Court has equivocated on that issue. In *Bellotti*, the Court assumed that corporate speech enriches public debate. The Court reached the opposite conclusion more recently, however, when it found that corporate speech threatens to distort public discourse and corrupt the democratic process in *Austin v. Michigan Chamber of Commerce*.⁶ Decided by a new majority composed mostly of *Bellotti* dissenters,⁷ *Austin* shows that important parts of the Court's earlier thinking about corporate speech fail to command the support of a majority of the Justices.

The Court's unwillingness to rule on whether corporations have interests as speakers that should be protected even if their speech impoverishes public debate has created another area of uncertainty. Although the Court declined to address the issue explicitly in *Bellotti*, speaker autonomy interests appear to have influenced the decision in that case. In addition, the private interests of corporate speakers appear to have controlled the decision of a fractured Court in *Pacific Gas & Electric Co. v. Public Utilities Commission*.⁸ Again, however, the most recent decision of a new majority in *Austin* suggests that the Court's views are changing.

Two competing free speech ideals account for some of the contradictions and inconsistencies among the Supreme Court's first amendment decisions. This Article examines how each of those ideals may be applied or misapplied when invoked by corporations. Part I⁹ identifies speaker autonomy and rich public debate as distinct normative bases for protecting freedom of speech and discusses the Supreme Court's ambivalence toward them. Both ideals have influenced the Court's decisions, usually

4. 435 U.S. 765 (1978); see *infra* notes 80-93 and accompanying text.

5. As used in this article, an "audience-independent" interest in speaking is an interest in speaking that does not depend on the interests of the speaker's audience in receiving the communication.

6. 110 S. Ct. 1391 (1990); see *infra* notes 120-142 and accompanying text.

7. Justices Rehnquist, Brennan, Marshall, and White dissented from the Court's decision in *Bellotti*. Justices Blackmun and Stevens joined the *Bellotti* dissenters to form the new majority in *Austin*. For the remainder of this article, current Chief Justice Rehnquist will be referred to by his title at the time of a particular decision. Thus, in *Bellotti*, he was a Justice, not the Chief Justice.

8. 475 U.S. 1 (1986); see *infra* notes 94-118 and accompanying text.

9. See *infra* notes 25-79 and accompanying text.

converging on the protection of speech; but neither ideal has consistently prevailed in hard cases where the two conflict.

The effects of this ambivalence have been particularly profound in cases involving corporate speech. Parts II and III focus on conflicts between autonomy and debate in those cases. *Bellotti* and *Pacific Gas* reflect the declining importance of rich public debate, and the ascendance of autonomy as the paramount ideal.¹⁰ As the new decade opens, however, *Austin* suggests a renewed commitment to the ideal of rich public debate and uncertainty that corporate speech implicates the ideal of speaker autonomy in any way.¹¹

Part IV considers how recognition of corporate speech rights actually affects public debate and speaker autonomy. Part IV.A¹² shows that corporate speech can either enrich or impoverish public debate. Corporate speech can enrich debate because the views expressed on behalf of corporations may differ from the personal views expressed by corporate managers,¹³ the process of formulating corporate views for publication may influence the personal views corporate managers hold and express,¹⁴ and corporate participation in public discourse may reduce the dominance of government and the institutional press.¹⁵

The richness of public debate is not solely a function of what is said, however, it depends also on what is effectively heard. From this perspective, corporate speech may sometimes impoverish public debate. Few individuals can afford to use mass media as effectively as corporations. Concentrated wealth may therefore enable corporations to reduce the likelihood that a significant audience will hear the competing voices of individuals who lack privileged positions in government and media.¹⁶

Because corporate speech can either enrich or impoverish public discourse, the ideal of rich debate not only supports careful judicial scrutiny of measures restricting corporate speech but also provides a compelling justification for some such restrictions.

An independent corporate interest in speech autonomy, the freedom to speak or refrain from speaking without forcing or interference by others, might condemn restrictions on corporate speech even when those restrictions foster public debate. Part IV.B¹⁷ explains that the ideal of

10. See *infra* notes 80-118 and accompanying text.

11. See *infra* notes 119-42 and accompanying text.

12. See *infra* notes 147-73 and accompanying text.

13. *Infra* notes 149-54 and accompanying text.

14. *Infra* note 149 and accompanying text.

15. *Infra* notes 155-63 and accompanying text.

16. See *infra* notes 164-70 and accompanying text.

17. See *infra* notes 174-204 and accompanying text.

speaker autonomy does not support corporate speech rights, because corporations cannot speak autonomously and lack the dignity of an autonomous agent.¹⁸ The ideal of speaker autonomy rests on respect for independence in matters of conscience, a concern corporate autonomy cannot implicate because corporations lack consciousness and, hence, have no independent conscience to protect. Moreover, corporations are created as instruments for the satisfaction of people's desires. As long as people permit them to exist, corporations remain dependent on others to decide whether to speak and what to say. For these reasons, corporations lack autonomy interests worthy of first amendment protection. While the autonomy interests of corporate constituents are worthy of consideration, restrictions on corporate speech do not intrude significantly on them.¹⁹

Thus, corporate speech is normatively simpler but factually more complex than the Court has made it. The ideals of speaker autonomy and public debate do not conflict in these cases, as the Court's decisions suggest, because corporate speech does not implicate significant autonomy interests. The Court should, therefore, recognize that first amendment concern for corporate speech depends solely on the ideal of rich public debate. It should also recognize that corporate speech affects public debate in many ways, some with potential to enrich and some with potential to impoverish. Condemning those that enrich and tolerating those that impoverish on the basis of overbroad assumptions are both unacceptable alternatives. Only situation-specific analysis of how particular restrictions on corporate speech affect particular circumstances of public debate offers a doctrine of corporate speech consistent with first amendment values.

Before addressing the arguments for this position in detail, some narrowing of the subject is necessary. As the examples given at the beginning of this Article only begin to suggest, corporate speech has many variables, including the size of the firm and the purposes for which people formed it as well as the nature of the communication and the purposes for which a corporation would express its views. Editorial advertisements by large business corporations on subjects commonly regarded as public and political are the paradigm of corporate speech considered in this Article, because this is the class of corporate speech that has generated the most controversy and confusion.

When the nature and purpose of a corporation differ radically from this paradigm, as in the case of incorporated advocacy associations like

18. *See infra* notes 185-96 and accompanying text.

19. *See infra* notes 197-204 and accompanying text.

the NAACP, a different analysis is appropriate. While there is no reason to believe that the speech of large business corporations reflects the personal views of individual shareholders, incorporated advocacy organizations are formed for the very purpose of voicing the views of associated individuals. Thus, unlike ordinary corporate speech, the speech of advocacy organizations implicates the ideal of speaker autonomy in a way that ordinary corporate speech does not.²⁰ The Supreme Court's sensitivity to the special case of advocacy associations, still being refined,²¹ has kept the emerging doctrine of corporate speech from doing harm in some cases outside the paradigm.

Other cases outside the paradigm have not been resolved satisfactorily. Distinguishing between political and commercial speech, or even between political speech and commercial action, may not be tenable now that some corporations are formed for the purpose of conducting business in a way that expresses the social convictions of individual shareholders.²² The recent reversal of first amendment protection for political boycotts²³ shows insensitivity to the political-communicative aspects of commercial action and suggests that the Court will treat the realms of commerce and politics as distinct, even when they are not.²⁴

Although these complex issues will eventually arise in corporate speech cases, they do not arise from the fact that speech or communicative action emanates from a corporate source, and therefore must be left for another day. This Article focuses on business corporations' explicit

20. See *infra* notes 134-39 and 197-99 and accompanying text.

21. *Id.*

22. See, e.g., *Putting Your Money Where Your Conscience Is*, BUSINESS WEEK, Dec. 24, 1990, at 74.

23. In *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990), the Supreme Court found a per se violation of the Sherman Act in an agreement among lawyers to decline future appointments to represent indigent criminal defendants until the city council passed legislation increasing the statutory rate of compensation. The Court reversed a decision of the D.C. Circuit that recognized that boycotts have been employed since colonial times as a means of dramatic political expression, and held that the First Amendment protects boycotts undertaken for political-communicative purposes, unless the government can show that the boycotters have sufficient market power to exercise economic coercion. *FTC v. Superior Court Trial Lawyers Ass'n*, 865 F.2d 226, 248-50 (D.C. Cir.), *rev'd*, 110 S. Ct. 768 (1990).

24. In *Trial Lawyers*, the Supreme Court refused to recognize any significant communicative or political component in a boycott that focused public attention on the adequacy of indigent criminal defense representation, because the boycotters stood to profit from the boycott's success. *Id.* at 776-78. In essence, the Court treated the realms of commerce and politics as mutually exclusive: if the boycotters had a financial interest in success, the boycott could not be a matter of first amendment concern. Justice Brennan, by contrast, found that the boycotters' commercial interests (they sacrificed income by refusing appointments) made their action communicate a depth of commitment words alone could not express. *Id.* at 789-90 (Brennan, J., dissenting).

editorializing and advocacy on issues whose political character no one could deny.

I. Speaker Autonomy and Public Debate as Separate Ideals in Free Speech Jurisprudence

After two hundred years, no consensus has emerged on what the First Amendment means by "freedom of speech," not even to the extent of identifying whose interests the speech clause is meant to protect.²⁵ The Meiklejohn tradition, which dominated first amendment thinking in the courts and the academy for many years, defends free speech as an instrument for making collective self-governance possible.²⁶ In this view, the autonomy of speakers is protected not for any intrinsic or private value it might have, but because the public needs an uninhibited flow of information and advocacy reflecting a variety of viewpoints in order to make informed decisions. Zealous protection of speaker autonomy is supposed to foster a discourse robust and wide-open enough to satisfy the informational needs of the public.

Speech protected under the traditional view as facilitating collective self-governance need not be limited, as in Robert Bork's initial version, to explicitly political speech concerning governmental behavior, policies, or personnel.²⁷ Meiklejohn himself thought instrumental protection should extend more broadly to embrace other forms of expression from which voters derive knowledge, intelligence, and sensitivity to human values.²⁸ In this broad form, the Meiklejohn theory encompasses much of the

25. The First Amendment states only that "Congress shall make no law . . . abridging the freedom of speech, or of the press" *U.S. Const.* amend. I.

26. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26-27, 63-65, 88-89 (1948); see also Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245. Harry Kalven, Jr., Alexander Bickel, Robert Bork, and John Hart Ely are also identified with this tradition. See BICKEL, *THE MORALITY OF CONSENT* 62 (1975); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); J. ELY, *DEMOCRACY AND DISTRUST* 93-94 (1980); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. Recent works by Owen Fiss are part of the tradition, in that they embrace collective self-governance as the normative foundation for freedom of speech, but are also critical of the tradition for failure to fulfill its promise. See Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

27. Bork, *supra* note 26, at 27. Although Bork continues to maintain that his earlier position is theoretically sound, he recently abandoned it as too easily manipulable to encompass any and all speech. R. BORK, *THE TEMPTING OF AMERICA* 333 (1990); cf. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978) (legitimate first amendment principle protects only speech that "participates" in representative democracy).

28. Meiklejohn, *The First Amendment Is an Absolute*, *supra* note at 26; cf. Kalven, *supra* note 26, at 221 (extending theory to "matters in the public domain").

value John Milton and John Stuart Mill saw in speech as an instrument for the discovery of truth,²⁹ incorporated in the early concurring and dissenting opinions of Justices Brandeis and Holmes.³⁰

Whether given broad scope or narrow, the Meiklejohn tradition protects speakers solely because their speech has instrumental value.³¹ Traditional theorists generally assume that protecting the autonomy of speakers will foster a rich debate providing the public with needed information. Where that assumption proves false, however, the Meiklejohn tradition's consequentialist justification provides little reason to protect speaker autonomy.³² The First Amendment may even require governmental intervention to foster public debate.³³

Meiklejohn's followers have viewed the Speech Clause as a servant of democracy, in part because the Constitution is primarily concerned with establishing a structure of government.³⁴ Despite the fact that a government was fully constituted before adoption of the Bill of Rights, this view reflects an important aspect of the First Amendment. Inclusion of the right to petition for a redress of grievances makes clear that the First Amendment is concerned at least partly with the role of citizens in the structure of government, as Meiklejohn and his followers assert.

Arguing that the Speech Clause is concerned solely with the role of citizens in the structure of government is more problematic. Protection of the free exercise of religion in the same sentence as freedom of speech casts doubt on the proposition that constituting a government is all the First Amendment was meant to do.³⁵ As this suggests, the Meiklejohn tradition's exclusive focus on audience as the normative foundation for freedom of speech cannot adequately account for the breadth of values

29. See MILL, ON LIBERTY 18 (D. Spitz, ed. 1975); MILTON, AREOPAGITICA 58 (R. Jebb, ed. 1918); cf. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 31-32 (1946). For discussion of the thought of Milton and Mill, and their contribution to first amendment jurisprudence, see R. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 92-99 (1985).

30. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring).

31. As Meiklejohn put it: "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'" Meiklejohn, *The First Amendment Is an Absolute*, *supra* note 26, at 255.

32. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 627-30 (1970).

33. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Fiss, *Why the State?*, *supra* note 26, at 786; Fiss, *Free Speech and Social Structure*, *supra* note 26, at 1414-15.

34. J. ELY, *supra* note 26, at 93-94; BeVier, *supra* note 27, at 308-09; Fiss, *Why the State?*, *supra* note 26.

35. Thus, while Ely reads the Free Speech Clause as a representation-reinforcing provision, J. ELY, *supra* note 26, at 93-94, 105-16, he must acknowledge that the Religion Clauses do not fit well with his theory. *Id.* at 94.

promoted by the First Amendment. It cannot easily accommodate or explain, for example, constitutional protection against governmental compulsion to pledge allegiance to the flag.³⁶ Of course, refusal to salute the flag can be a public statement, intended and understood as an act of protest. But quietly refraining from a flag salute can also be a private act that neither communicates, nor is intended to communicate anything to any one. A tradition that focuses solely on the interests of a public audience puts private inaction at the periphery of the First Amendment, if not beyond concern altogether.³⁷

Perceiving inadequacies in the Meiklejohn view, some of the more recent theoretical scholarship has examined speech from the perspective of the speaker and found that autonomy in matters of speech has value worthy of constitutional protection regardless of whether it serves the informational needs of the public.³⁸ One branch of the new scholarship emphasizes, as above, that the Speech Clause is part of an amendment that protects religious freedom as well. Because speech, assembly, and religion are all elements of liberty grounded at least in part in individual integrity and autonomy,³⁹ the Speech and Religion Clauses can be seen in unity as safeguards of independent conscience and individual moral sovereignty.⁴⁰

36. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *See infra* notes 56-61 and accompanying text.

37. In defense of that position, one might ask how non-communicative activity or abstention could constitute "free speech." *See, e.g.*, H. KALVEN, *A WORTHY TRADITION* 254 (1988); *cf.* F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 50-52 (1982) (free speech principle must exclude non-communicative expression); Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 521 (1979) (private speech not protected). Putting the question this way involves some sleightofhand, however. By its terms, the First Amendment does not protect "free speech" but rather "freedom of speech," a phrase broad enough to embrace freedom to decide both what to say and whether to say anything at all.

38. Several relatively early works suggested that the traditional view is either too limited or altogether misguided. Thomas Emerson's recognition of individual self-fulfillment as one among several first amendment values was a catalyst for much of the literature on speaker autonomy, both for and against. *See Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-81 (1963); EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 699 (1970). In addition, Charles Fried and Ronald Dworkin criticized purely consequentialist arguments for freedom of speech in broader theoretical works on rights. C. FRIED, *RIGHT AND WRONG* 109-10 (1978); R. DWORKIN, *THE PHILOSOPHY OF LAW, (Introduction)*, 15-16 (1977); R. DWORKIN, *A MATTER OF PRINCIPLE* 385-97 (1985).

39. E. BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 59 (1989).

40. D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 165-78 (1986); *See also* D.A.J. Richards, *Toleration and Free Speech*, 17 PHIL. & PUB. AFF. 323, 330-36 (1988) ("a person has the right to use speech to develop herself or interact with others in a manner that corresponds to her values.").

Apart from this, the traditional account of the relationship between speech and democracy raises questions of its own. Democracy itself is valued not only because it respects the self-governing capacities of rational subjects⁴¹ but also because it provides a means for them to achieve individual self-realization, a broader value served by speaker autonomy whether it promotes decision making by others or not.⁴²

Moreover, it is far from clear that the Meiklejohn tradition was founded on an adequate conception of what our democracy is. Meiklejohn's paradigm was participatory majoritarianism in a small town meeting,⁴³ a vision of democracy foreign to the experience of most Americans.⁴⁴ This paradigm is both too rich, in its direct majoritarian assumptions, and too thin, in its conception of democracy as confined to the making of decisions.⁴⁵ Freedom to dissent, including the freedom silently to withhold assent, is not merely a servant of the majoritarian decision making public debate is supposed to foster, but is itself an essen-

41. This was Thomas Scanlon's answer to why speech is valuable assuming that it fulfills the role Meiklejohn saw for it. Scanlon, *Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). Following Kant and Mill, Scanlon argued that freedom of speech is necessary for citizens to recognize governmental authority while regarding themselves as equal, autonomous, rational agents. *Id.* at 214; cf. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1131-42 (1979). Although this emphasis on autonomy may have inspired reaction against the Meiklejohn tradition, Scanlon's treatment does not fit within the speaker-autonomy theories I contrast with it. In Scanlon's view, freedom of speech is necessary for prospective recipients of speech—not speakers—to recognize governmental authority while regarding themselves as autonomous, rational, and equal. See Scanlon, *supra*, at 215. In a later Article, Scanlon abandoned parts of his earlier theory and recognized that speakers as well as audiences have worthy interests in freedom of speech. Scanlon, *supra* note 37, at 521-23. Still, Scanlon's arguments for speaker interests remained dependent on "wide audience[s]" and "larger purposes," *id.* at 521, and thus did not differ significantly from the Meiklejohn tradition's reliance on audience interests alone.

42. M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11-24 (1984).

43. A MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27 (1948).

44. Meiklejohn's recognition that town-meeting democracy "is not a Hyde Park," *id.* at 23, begs the question of what democracy means and what values it can have in the impoverished urban settings of our mass society.

45. See S. SHRIFIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 72-81 (1990); cf. Holmes, "Liberal Constraints on Private Power?: Reflections on the Origins and Rationale of Access Regulation," reprinted in DEMOCRACY AND THE MASS MEDIA 31-32 (J. Lichtenberg ed., 1990); Hutchinson, *Talking the Good Life: From Free Speech to Democratic Dialogue*, 1 YALE J. L. & LIBERATION 17 (1989) (dialogue as an essential element of communitarian democracy); L. BOLLINGER, THE TOLERANT SOCIETY 50-53 (1986) (noting that some restrictions on speech forbidden by the First Amendment are consistent with majority rule in that (1) the restrictions are sponsored and adopted through democratic procedures and (2) the restrictions would not eliminate information essential for the minimal conception of democracy to continue functioning).

tial element of democracy as we know it.⁴⁶

Granting all this, recognition of the audience-independent values of speech autonomy does not require that audience interests be disregarded altogether, though some would markedly narrow their significance.⁴⁷ Whatever value we assign autonomy in matters of conscience, it hardly makes the public's interest in receiving information trivial. Because any capacity to exercise speech autonomy depends on language, values, critical habits, and information the individual acquires through social interaction,⁴⁸ speech autonomy depends as much on public debate as public debate depends on speech autonomy. Thus, instead of supplanting the

46. S. SHIFFRIN, *supra* note 45, at 72-81. As Stephen Holmes has observed, "Consent confers no authority unless the possibility of unpunished dissent is institutionally guaranteed." Holmes, *supra* note 45, reprinted in *DEMOCRACY AND THE MASS MEDIA* 31 (J. Lichtenberg ed. 1990). Given Shiffirin's rejection of Kantian theory, S. SHIFFRIN, *supra* note 45, at 110-32, it may seem odd to classify his theory as one emphasizing speaker autonomy. One might read Shiffirin as seeking to protect dissent, not dissenters, and thus as embracing a variant of the traditional view. That reading seems mistaken, however, for two reasons. First, Shiffirin treats protection against the compulsory flag salute as paradigmatic of what the First Amendment should protect without relying on any communicative effect of abstention. Second, in application, Shiffirin's eagerness to protect dissent depends on the "independence" of its source. *Id.* at 153; see also *id.* at 161 (linking autonomy with dissent); *id.* at 167 (dissent as repository of first amendment values).

47. Among the scholars focusing on speaker autonomy interests, Edwin Baker appears to take the narrowest view of the extent to which audience interests should be taken into account. According to Baker, the First Amendment protects nonviolent and noncoercive methods of obtaining information to foster self-realization by listeners, but their interests are separate from, and in no way augment, protected speaker interests. E. BAKER, *supra* note 39, at 67. The public interest in receiving product information, for example, provides no basis in Baker's view for protecting commercial speech. *Id.* at 68. David Richards, by contrast, finds grounds in independent moral sovereignty for broadly protecting the interests of audiences as well as speakers. D. RICHARDS, *TOLERATION AND THE CONSTITUTION* *supra* note 40, at 170. And the contrary assertions of one critic notwithstanding, Powe, *Scholarship and Markets*, 56 *GEO. WASH. L. REV.* 172, 179 (1987), Martin Redish's focus on self-realization not only by speakers (by developing their uniquely human faculties) but also by members of the public audience (by facilitating their life-affecting decisions). M. REDISH, *supra* note 42, at 21-22, 30. More specifically, Redish embraces majoritarian politics—and, consequently, speech fostering democratic government—as a second-best alternative to complete individual self-rule, which would preclude a functioning society. *Id.* at 23-24.

48. Recognition that important aspects of the individual are socially constituted does not require abandonment of our respect for individual integrity; it only requires abandonment of an anthropology of the self as disengaged and presocial. See D. GAUTHIER, *MORALS BY AGREEMENT* 349-50 (1986) (examining the meaning of autonomy for individuals whose very self-consciousness may be socially constituted); Walzer, *The Communitarian Critique of Liberalism*, 18 *POL. THEORY* 6, 21 (1990) (contemporary liberalism committed only to self capable of reflecting critically on socialized values); Larmore, *Political Liberalism*, 18 *POL. THEORY* 339, 349-52 (1990) (founding neutrality on equal respect for persons capable of thinking and acting on basis of reasons, whatever their source); C. TAYLOR, *SOURCES OF THE SELF* 514 (1989) (ideals of self-responsible reasons and freedom not dependent on disengaged anthropology).

Meiklejohn view, we should view the First Amendment as normatively complex, embodying both private and public ideals: one of speaker autonomy and another of public debate, sometimes complementing and at other times limiting each other.⁴⁹

The ideals of speaker autonomy and rich public debate have each informed the Supreme Court's decisions, not as parts of a coherent free speech theory, but as separate normative elements available to be invoked or ignored in different cases. Usually, the Court's theoretical ambivalence is inconsequential, because the two ideals converge on the protection of speech. Political speech, for example, is given heightened protection because a speaker's autonomy is most instrumentally valuable when it provides information of public concern.⁵⁰ Thus, in *New York Times, Inc. v. Sullivan*,⁵¹ there was no need to weigh speakers' interests in being free to utter defamatory falsehoods by mistake, because first amendment protection served the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"⁵²

Soon after *Sullivan* was decided, there were proclamations that it might signal the Court's adoption of the Meiklejohn view, not only by Meiklejohn's most influential scholarly follower⁵³ but also by Justice William Brennan, who wrote the *Sullivan* opinion.⁵⁴ Later, Justice Brennan distanced himself from Meiklejohn and his followers by insisting that the value of speech is not solely instrumental but "intrinsic" to the dignity of autonomous individuals entitled to equal respect.⁵⁵

49. For criticism of autonomy-based justifications for freedom of speech, see, for example, F. SCHAUER, *supra* note 37, at 60-72, and BeVier, *supra* note 27, at 317-22.

50. As the Court stated in *Garrison v. Louisiana*, 379 U.S. 64 (1964), "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 74-75.

51. 376 U.S. 254 (1964).

52. *Id.* at 270. Choice of ideals was not entirely without consequence in *Sullivan*. If speaker-autonomy interests had been the main concern, the Court would have had reason to hold that defamatory falsehoods are *most* protected when made with actual malice, since falsehood involves moral choice especially when intended. See S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 6-13 (1989). Libel with actual malice might, for example, express a self-defining commitment to nihilism. Instead of maintaining room for fundamental personal choices of that kind, *Sullivan* protects falsehoods that *least* express a speaker's moral autonomy, because misstatements of fact mistakenly made despite careful regard for the truth do not embody personal choice of any kind.

53. Kalven, *supra* note 26, at 221.

54. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

55. E.g., *Herbert v. Lando*, 441 U.S. 153, 183-84 n.1 (1979) (dissenting opinion); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986).

The issue nevertheless has practical significance, because autonomy does not always foster public debate. As noted above, the compulsion of a flag salute does not necessarily remove any information or advocacy from public discourse. Accordingly, recognition of the right to refrain from speaking was originally driven solely by concern for individual autonomy in matters of conscience.

In *West Virginia State Board of Education v. Barnette*,⁵⁶ the Supreme Court vindicated the claims of Jehovah's Witnesses, who challenged enforcement of state laws and school board regulations requiring students to salute and pledge allegiance to the flag. The *Barnette* Court found that compliance with the requirement conflicted with the Jehovah's Witnesses' religious beliefs.⁵⁷ Although the Free Exercise and Establishment Clauses were clearly implicated, the Court did not base its decision on them. Instead, the Court found a more general "right of self-determination in matters that touch individual opinion and personal attitude" in the First Amendment.⁵⁸ The problem with the compulsory pledge was not simply that the state required students to speak or even that it prescribed the content of their statements.⁵⁹ Rather, the compulsory pledge was problematic primarily because it required affirmation of a particular belief.⁶⁰ As Justice Jackson explained, forcing students to confess faith in a state orthodoxy "invades the sphere of intellect and spirit" that the First Amendment "reserve[s] from all official control."⁶¹

The same concerns led the Court in *Wooley v. Maynard*⁶² to protect private property from compulsory use for display of a message not welcomed by the owner. The Court invalidated a New Hampshire law requiring that license plates on private automobiles carry the state motto, which Jehovah's Witnesses challenged on grounds that the motto was repugnant to their beliefs.⁶³ Although this controversy arose from a display on private property and not from a vocal affirmation of belief, the state's invasion of conscience, not property, was dispositive. The Court emphasized, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual

56. 319 U.S. 624 (1943).

57. *Id.* at 629.

58. *Id.* at 630.

59. It seems obvious that teachers, acting as state agents, can require students to answer questions in class and that significant advantages and disadvantages follow from the correctness of their responses as determined, again, by teachers acting as agents for the state.

60. *Barnette*, 319 U.S. at 631, 633.

61. *Id.* at 642.

62. 430 U.S. 705 (1977).

63. *Id.* at 707.

freedom of mind.’”⁶⁴

Concern for individual conscience, however, has not entirely contained the Court’s protection of speaker autonomy. When the Court extended the right to refrain from expression to protect a newspaper’s editorial autonomy in *Miami Herald Publishing Co. v. Tornillo*,⁶⁵ concern for freedom of conscience played little role. The *Tornillo* Court unanimously struck down a state statute granting a right of reply in newspapers that attacked a candidate’s character or record. A candidate who sought access for a reply in the *Miami Herald* attempted to defend this statute as serving the ideal of rich public debate under conditions of scarcity unknown to the Framers. He argued that the declining number and concentrated ownership of newspapers had placed the ability to inform and shape public opinion in the hands of a few and thus artificially restricted the diversity of views in the marketplace of ideas.⁶⁶ The Court did not dispute these claims, and stated in a later case that the candidate in *Tornillo* had “substantiated” them.⁶⁷ Instead, the Court observed that the right of access might lead papers to limit their own expression⁶⁸ and—apparently independent of this concern for public debate—determined that the statute unconstitutionally limited “editorial discretion,” an autonomy interest the Court tied to liberty of the press, not individual conscience.⁶⁹

Tornillo’s recognition of an autonomy interest in editorial discretion substantially extended the right to refrain from expression,⁷⁰ but the decision has not been given an expansive interpretation in subsequent cases.

64. *Id.* at 714 (citation omitted). To the same effect, the Court stated that “the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and to refrain from speaking at all.” *Id.*; see also *Harper & Row Publishing, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (First Amendment protects “right to refrain from speaking” as an element of “freedom of thought and expression”).

65. 418 U.S. 241 (1974).

66. *Id.* at 248-50.

67. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978).

68. The Court found that a candidate’s response would consume space that the paper might otherwise devote to other material and that a paper might censor its own editorials to avoid triggering a right of reply. *Tornillo*, 418 U.S. at 256-57 & n.22.

69. The Court described its editorial discretion rationale as applicable “[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply . . .” *Id.* at 258 n.24. The only explanation given for the protection of editorial discretion is that “liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper.” *Id.* Benno Schmidt has described the *Tornillo* opinion as “apologetic” and “devoid of reasoning.” B. SCHMIDT, *FREEDOM OF THE PRESS V. PUBLIC ACCESS* 12-13 (1976).

70. Judith Lichtenberg characterizes the right of editorial autonomy recognized in *Tornillo* as “a property right in the guise of a free speech right.” Lichtenberg, *Foundations and Limits of Freedom of the Press*, 16 *PHIL. & PUB. AFF.* 329, 347 (1987).

The Supreme Court has repeatedly refused to find sanctuary in the First Amendment for autonomous control over the expressive use of non-press property unless the concerns of conscience underlying *Barnette* and *Wooley* are at stake. In *FCC v. League of Women Voters*,⁷¹ for example, the Court rejected the argument that editorializing by public broadcasters unconstitutionally compels taxpayers to support the expression of views they do not hold. The Court distinguished *Wooley* as “a case in which an individual taxpayer [was] forced in his daily life to identify with particular views”⁷²

Similarly, in *Pruneyard Shopping Center v. Robins*,⁷³ the Court rejected the argument that provisions of a state constitution creating public speech rights in private shopping centers violated the First Amendment. Like the right of access struck down in *Tornillo*, these rights responded to concentration of the ability to address significant audiences: in an increasingly suburban society, much of the audience speakers once could reach on public street corners has moved inside shopping malls owned by private companies. The *Pruneyard* Court specifically acknowledged that the state-law right of access interfered with the owner’s property rights. This interference, however, did not violate the rights recognized in *Barnette*, *Wooley*, or *Tornillo*,⁷⁴ because the state did not dictate a particular message, did not threaten public association of the owner with views expressed on its property, and neither penalized the owner for past expression nor created a disincentive for making controversial statements in the future.

Barnette and *Wooley* show that the ideals of autonomy and rich public debate do not always converge; *Pruneyard* and *Tornillo* show that the two ideals may directly conflict when the distribution of economic and natural resources gives some but not others the ability to reach a significant audience. Under those conditions, protecting the autonomy of one who wishes not to have her property used to disseminate someone else’s message may impoverish public debate.

The Court has yet to settle on whether debate or autonomy should prevail when these public and private first amendment ideals conflict. By the end of the 1960s, it appeared that the Court would subordinate speaker autonomy when it threatened public debate. In *Red Lion Broad-*

71. 468 U.S. 364 (1984).

72. *Id.* at 385 n.16.

73. 447 U.S. 74 (1980).

74. *Id.* at 85-88. The Court also suggested that *Tornillo* was limited to the institutional press, by characterizing the doctrine of editorial autonomy as “rest[ing] on the principle that the State cannot tell a newspaper what it must print.” *Id.* at 88.

casting Co. v. FCC,⁷⁵ the Court found the public's interest in receiving social, political, aesthetic, moral, and other ideas "paramount." The *Red Lion* Court vindicated that interest against a claim by broadcast licensees to editorial autonomy of the kind subsequently accorded newspapers in *Tornillo*.⁷⁶

Less than a decade passed, however, before the Court's emphasis began to shift to speaker autonomy. *Tornillo* suggested that a shift was under way, by recognizing a right of editorial autonomy that must be respected at the expense of public debate. The shift in priorities became more apparent two years later when the Court, in *Buckley v. Valeo*,⁷⁷ invalidated a statutory ceiling on independent campaign expenditures, basing its decision on *Tornillo*. The *Buckley* Court stated in terms of a bedrock principle: "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"⁷⁸

The *Buckley* Court seemed to view this maxim as instrumental in ensuring rich public debate. The Court found that restricting the autonomy of speakers to equalize their relative voices is inconsistent with the Framers' design "to secure 'the widest possible dissemination of information from diverse and antagonistic sources' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"⁷⁹ By this reasoning, the public interest in receiving diverse ideas and information might still be paramount. But as *Barnette* and *Tornillo* had shown before, the protection of autonomy would not be contained by its origins. The *Buckley* maxim soon came to stand as a seemingly insurmountable obstacle to efforts undertaken by states to enrich public debate when the ability to communicate with a significant audience has been concentrated in the hands of a few.

75. 395 U.S. 367 (1969).

76. In *Red Lion*, the Court upheld the FCC's personal attack and political editorializing rules, which required broadcast licensees to provide reasonable opportunities for response by people who were personally criticized during the licensee's presentation of public issues and by candidates the licensee opposed, or whose competitors the licensee endorsed, in political editorials.

77. 424 U.S. 1, 19 (1976).

78. *Id.* at 48-49. In *Buckley*, the Court struck down a provision of the Federal Election Campaign Act that established a \$1000 annual ceiling on independent expenditures for or against any candidate for federal office, but upheld limits on campaign contributions (and various record-keeping and reporting requirements) established by the same statute.

79. *Id.* at 49 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and *Roth v. United States*, 354 U.S. 476, 484 (1957))).

II. Decline of the Public Debate Ideal in Cases Concerning Corporate Speech

Buckley's impact was particularly profound for corporate rights under the First Amendment, as two seminal cases show. In *First National Bank of Boston v. Bellotti*,⁸⁰ the Court first recognized speech rights of corporations other than the institutional press. In *Pacific Gas & Electric Co. v. Public Utilities Commission*,⁸¹ the Court first held that non-press corporations may invoke the First Amendment to resist state statutes granting others access to corporate property for communicative purposes. Although the opinions in both cases express concern for public discourse, *Bellotti* displays an emerging ambivalence about the primacy of the public debate ideal, and *Pacific Gas* reflects the ascendance of autonomy to a position of paramount importance.

In *Bellotti*, the Court invalidated a Massachusetts statute prohibiting banking and business corporations from making expenditures to influence referenda other than those materially affecting pecuniary corporate interests.⁸² The Court treated this prohibition on expenditures as a prohibition on speech itself, because, as the Court had observed in *Buckley*, "virtually every means of [effective communication] in today's mass society requires the expenditure of money."⁸³ Recast as a prohibition on political editorial advertisements, the Massachusetts statute would obviously offend the public's interest in rich debate unless some special circumstance could be shown. Political advocacy is "at the heart of the First Amendment's protection," occupying a privileged position because "a major purpose of [the First] Amendment was to protect the

80. 435 U.S. 765 (1978).

81. 475 U.S. 1 (1986).

82. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977). The statute applied the same prohibition to candidate elections as well, but only those parts pertaining to referenda were challenged. *Bellotti*, 435 U.S. at 788 n.26. Following the defeat of two initiatives to impose a graduated income tax, the statute had been amended to specify that no issues of individual taxation would be deemed to affect corporate interests. *Id.* at 769-70 n.3. The Court suggested that this chronology was evidence of bad legislative motive, *id.* at 785, but that does not appear to have been decisive. In subsequent cases applying *Bellotti*, the Court has not discussed bad legislative motives. *E.g.*, *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980).

83. *Bellotti*, 435 U.S. at 786 n.23; *Buckley*, 424 U.S. at 19; *see also* *FEC v. NCPAC*, 470 U.S. 480, 493 (1985) ("allowing the presentation of views while forbidding the expenditure of more than \$1000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system."). In order to focus on the Court's treatment of corporate speakers, this Article assumes that the Court has been right to equate spending with speech, despite vigorous criticism of the equation by others. *E.g.*, Wright, *Politics and the Constitution: Is Money Speech?* 85 YALE L.J. 1001, 1005-06 (1976).

free discussion of governmental affairs.”⁸⁴ The issues, then, were whether corporations could assert first amendment claims at all and, if so, whether some problem related to corporate origination could provide a justification for restricting speech that would otherwise clearly be protected.

Declining to announce whether corporations have any autonomy interest in speaking that warrants constitutional protection,⁸⁵ the *Bellotti* Court explained that society’s interest in open and informed discussion is an independent concern of the First Amendment⁸⁶ that may reach farther than the individual interests of speakers.⁸⁷ Therefore, the Court held, the fact that political advocacy emanates from a corporate source cannot, without more, deprive it of first amendment protection. As the Court explained, “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

By relying on the informational value of corporate speech to conclude that restrictions demand a compelling justification, the *Bellotti* opinion begins with a public debate rationale. The manner in which justifications offered by the state were rejected suggests, however, that the Court considered the ideal of speaker autonomy more important. The state argued that its statute was needed to protect public debate and democratic processes against the distorting effects of corporate domination, because corporations could afford to drown out the views expressed by others.⁸⁹ The Court acknowledged that preserving the integrity of electoral processes is an interest “of the highest importance,”⁹⁰ but it implied

84. *Bellotti*, 435 U.S. at 776-77 (citation omitted).

85. The Court specifically affirmed the value of audience-independent speaker interests by observing that “[t]he individual’s interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion,” *id.* at 777 n.12, but it expressly avoided the question “whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons.” *Id.* at 776.

86. *Id.* at 777 n.12.

87. *Id.* at 775-76.

88. *Id.* at 777. For this reason, the Court refused to distinguish ordinary business corporations from the media corporations that make up the institutional press, whose protection under the First Amendment was already well established. The Court acknowledged the “special and constitutionally recognized role” of the press, *id.* at 781, but found that the public has an interest in hearing the views of business corporations as well. *Id.* at 782 n.18. Chief Justice Burger filed a concurring opinion focusing on the difficulty (if not impossibility, in Burger’s view) of distinguishing media corporations from business corporations. According to Burger, the distinction would be unworkable in view of the complexity of corporate structures that often locate institutions of mass media in diversified conglomerates. *Id.* at 796 (Burger, C.J., concurring).

89. *Id.* at 789.

90. *Id.* at 788-89.

that the distortion of public discourse cannot justify a restriction on corporate advocacy. Even if corporations threatened to distort public debate, the Court suggested, restrictions implemented to compensate for such distortions would violate the principle that the government cannot restrict the speech of some elements of society to enhance the voice of others.⁹¹ The *Buckley* maxim thus began to change from an instrument for promoting public debate to a cruder shield for speaker autonomy.

These aspects of the *Bellotti* opinion were gratuitous, since the decision could have been based solely on the public debate ideal. Because neither legislative findings nor record evidence substantiated the claim that corporations distort public debate,⁹² the Court had no basis to conclude that silencing corporations would do anything but reduce public discourse. The Court granted that serious issues would be presented on a different record.⁹³ Invocation of the *Buckley* maxim as an autonomy-based constraint on what states can do to promote public debate could therefore be regarded, for a time, as dictum.

Eight years later, however, in *Pacific Gas & Electric Co. v. Public Utilities Commission*,⁹⁴ the Court extended to corporations the right to refrain from forced communication. There, the record was too simple and the normative conflict too stark to conceal the subordination of public debate to the private interest of speaker autonomy. A fractured Court⁹⁵ invalidated an order of the California Public Utility Commission requiring Pacific Gas to distribute in its billing envelopes written materi-

91. *See id.* at 790-91 (citation omitted). The state also asserted that its prohibition against campaign advocacy by corporations was needed to protect shareholders from management's use of corporate resources for political purposes not related to the corporation's business and not supported by the shareholders themselves. In relation to this interest, the Court found the statute both underinclusive, because it failed to protect dissident shareholders against use of corporate funds for expression on public issues unless and until they were made the subject of referenda, and overinclusive, because it prohibited corporate expression even if it reflected unanimous shareholder agreement. This lack of fit belied the assertion that the statute was intended to protect dissident shareholders and showed that the abridgement of expression was not substantially related to the protection of dissident shareholders even if that were its purpose. *Id.* at 792-95. In addition, the Court cast doubt on whether protecting dissident shareholders is a sufficiently compelling governmental purpose to justify a restriction of political advocacy. It rejected the proposition that corporate speech coerces the support of dissident shareholders for the expression of views they abhor, because a shareholder's investment in the corporation is voluntary and may be withdrawn if the corporation's expression is offensive or wasteful. *Id.* at 794 n.34.

92. *Id.* at 789.

93. *Id.*

94. 475 U.S. 1 (1986) (plurality opinion).

95. Only a bare majority of the Justices agreed that the Commission order was unconstitutional, and they could not agree upon the reasons. Chief Justice Burger and Justices Brennan, Powell, and O'Connor formed a plurality; Justice Marshall concurred separately; and Justices White, Stevens, and Rehnquist dissented.

als submitted by another organization interested in regulations affecting the utility's customers. Although the plurality's opinion expresses concern for public debate as well as for speaker autonomy, much of its reasoning is self-refuting. Ultimately, concern for autonomy interests appears to explain the plurality's decision.

A consumer advocacy group called Toward Utility Rate Normalization (TURN) asked the Public Utilities Commission to prohibit Pacific Gas from using its billing envelopes to distribute political editorials. While proceedings on TURN's request were pending, the Supreme Court held, in *Consolidated Edison Co. v. Public Service Commission*,⁹⁶ that *Belotti* applies to regulated monopolies as it does to other corporations. The *Edison* Court therefore invalidated a prohibition like the one TURN had requested. Perhaps for this reason, the Commission in *Pacific Gas* refused to prohibit the utility from distributing its own editorials, but it ordered the utility to insert printed materials submitted by TURN into its billing envelopes four times a year.

The Commission determined that once monthly bills and legal notices were inserted in billing envelopes, any space remaining for additional materials that would not increase the cost of postage belonged to ratepayers.⁹⁷ It then allocated this "extra space" between competing speakers in a manner deemed most beneficial to the ratepayers who owned it. Finding that "ratepayers will benefit more from exposure to a variety of views than they will from only [the views] of PG&E," the Commission ordered that TURN be permitted "to use the extra space four times a year for the next two years . . . to raise funds and to communicate with ratepayers."⁹⁸ Whenever TURN did so, its insert would be required to carry a disclaimer stating that it did not express the views of the utility.⁹⁹

In assessing how the ideals of autonomy and debate influenced the Court's decision, it is crucial to understand that the Commission order left the utility free to distribute its own newsletter in billing envelopes. The utility could, without cost, use any extra space remaining after inserting TURN's materials, and it could use all extra space in the eight months of each year not allotted to TURN.¹⁰⁰ Even if TURN's materials completely exhausted extra space, the utility would not be prevented from distributing its own newsletter, because extra space was defined pri-

96. 447 U.S. 530 (1980).

97. *Pacific Gas*, 475 U.S. at 5-6.

98. *Id.* at 6 (citation omitted).

99. *Id.* at 7.

100. *Id.* at 6.

marily by surplus postage and not the physical dimensions of billing envelopes.¹⁰¹ Thus, whenever "extra space" was exhausted, the utility could include additional materials simply by paying the marginal cost of additional postage¹⁰²—a cost *Consolidated Edison* implied the utility could be made to bear.¹⁰³

Nevertheless, the Court held the Commission's access order unconstitutional. Writing for a plurality of four, Justice Powell found that Pacific Gas would likely censor itself to avoid assisting TURN in controverting whatever position the utility might take on any given issue.¹⁰⁴ The plurality held that the Commission's order impermissibly required the utility "to associate with speech with which it disagrees," in that it might "be forced either to appear to agree with TURN's views or to respond."¹⁰⁵

On close reading, what troubled the plurality was not forced association at all, for it acknowledged that the disclaimer TURN's inserts were required to carry would "avoid giving readers the mistaken impression that TURN's words are really those of [the utility]."¹⁰⁶ Instead, what might cause the utility to respond was the vehemence of the utility's disagreement with the substance of TURN's views.¹⁰⁷ Finding that the utility would "feel compelled to respond," the plurality mischaracterized the

101. *See id.* at 5-6.

102. *Id.* at 6.

103. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 543 (1980). Indeed, *Consolidated Edison* seemed to invite almost every aspect of the Commission order in *Pacific Gas*. The Court found in *Consolidated Edison* that insertion of a utility's editorials into billing envelopes does not necessarily exclude other important information, noted that an order to include other material might be permissible, and implied that the Commission could constitutionally require the utility's shareholders to bear the costs of the utility's political inserts. *Id.* at 543 & n.13.

Justice Blackmun, joined by Justice Rehnquist, dissented in *Consolidated Edison* on the grounds that eliminating ratepayer subsidization of utility editorializing would require charging *all* fixed costs of mailing bills to shareholders rather than ratepayers, which they thought no less restrictive than a total ban. *Id.* at 555 (Blackmun, J., dissenting). As they read the majority's opinion, it did not foreclose either (1) a definition of property rights under state law under which ratepayers, not utility shareholders, own billing envelopes, which would deny utilities any special claim to their use, or (2) allocation to shareholders of all costs of envelopes, postage, and mailing lists so that ratepayers would bear only the costs of printing and inserting their bills and public service announcements. *Id.* at 556.

104. *Pacific Gas*, 475 U.S. at 14.

105. *Id.* at 15.

106. *Id.* at 15 n.11.

107. *Id.* Although acknowledged not to exist, the associational problem is later employed in Justice Powell's opinion for rhetorical advantage: "Were the government freely able to compel corporate speakers to propound political messages with which they disagree, . . . the government could require speakers to affirm in one breath that which they deny in the next." *Id.* at 16. How the Commission could be read to require the utility to "affirm" anything is difficult to imagine in view of the disclaimer TURN's inserts were required to carry.

Commission's order as one that actually "forced [a] response."¹⁰⁸ The plurality then treated the order as if it forced a *particular* response: "For corporations as for individuals," Justice Powell declared, "the choice to speak includes within it the choice of what not to say."¹⁰⁹

Put charitably, the plurality's analysis is difficult to understand. The Commission order left the utility free to say anything or nothing at all. Even if Pacific Gas felt compelled to respond to TURN, it retained complete discretion to make whatever response it wished. It is possible that by engaging in a debate initiated by TURN, the utility would divert its attention and resources from advocacy on completely different issues. Overstating this as something the utility would be "required" to do, Justice Powell suggested that the resulting alteration of the utility's message would itself be an abridgement of free speech.¹¹⁰

Ultimately, the plurality's entire analysis appears to rest on concerns for autonomy in the control of private property. Because TURN's right of access was not contingent on any prior statement by the utility, self-censorship could only be motivated by the utility's desire to avoid "assist[ing]" dissemination of opposing views.¹¹¹ Even without the Commission order, any public statement by the utility risks provoking a public response from TURN—the Commission order simply enabled TURN to use the utility's envelopes for that response. Likewise, public statements by TURN and others may influence the utility's agenda whether mailed in utility envelopes or not. Thus, agenda alteration was a constitutional concern only because it might result from "a content-based grant of access to private property."¹¹²

Finally, addressing the decisive issue directly, Justice Powell explained that the Commission's order entailed use of the utility's property even though "extra space" in billing envelopes belonged to the ratepayers:

[The Commission] decided only that the ratepayers own the "extra space" in the envelope The envelopes themselves, the bills, and [the utility's newsletter] all remain [the utility's] property. The Commission's access order thus clearly requires [the utility] to use *its* property as a vehicle for spreading a message with which it disagrees.¹¹³

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

109. *Id.*

110. *Id.*

111. *Id.* at 14.

112. *Id.* at 16-17.

113. *Id.* at 17.

This use of private property to spread a message not welcomed by its owner was, according to Justice Powell, a violation of the First Amendment as interpreted in *Wooley v. Maynard*.¹¹⁴

Denying the Court a majority opinion, Justice Marshall concurred only in the judgment. He, too, viewed the Commission order as a substantial intrusion on the utility's property right.¹¹⁵ Unlike the plurality, however, he acknowledged that interference with the utility's *speech* was "very slight."¹¹⁶ In Justice Marshall's view, these rights could constitutionally be abrogated "to attain a permissible legislative object," but he found the Commission's object impermissible under the *Buckley* maxim: the state could not burden the utility's speech to enhance the voice of TURN.¹¹⁷

Remarkably absent from both Justice Powell's and Justice Marshall's opinions is any consideration of what net effect the Commission's order would have on public debate. Even if including TURN's insert would curtail the utility's own expression, as Justice Marshall anticipated, or would alter the utility's choice of issues to address, as Justice Powell believed, the Commission order might have enriched public debate by increasing the diversity of views presented to ratepayers. The Commission expressly found that its order would have this effect.¹¹⁸ Neither the plurality nor the concurrence disputed that conclusion.

Thus, while *Bellotti* signalled the Court's ambivalence about the relative importance of public debate and speaker autonomy, *Pacific Gas & Electric* can only be understood as according private interests in autonomy greater significance. At least outside the regulation of broadcasting, subversion of the normative hierarchy established in *Red Lion*, which called the public's right to receive information and ideas from diverse sources "paramount," now seemed complete.

III. Resurgence of the Public Debate Ideal

Pacific Gas completed the normative subversion suggested earlier by *Bellotti*, but neither decision firmly established the new hierarchy. A new majority, including the dissenting justices in *Bellotti* and *Pacific Gas*,¹¹⁹ recently undertook the task of reconsideration. The Court upheld a stat-

114. *Pacific Gas*, 475 U.S. at 17.

115. *Id.* at 22-23 (Marshall, J., concurring).

116. *Id.* at 24.

117. *Id.* at 24-25.

118. *See id.* at 6.

119. Justices Rehnquist, Brennan, Marshall, and White dissented from the Court's decision in *Bellotti*. Justices Rehnquist, White, and Stevens dissented in *Pacific Gas*.

ute similar to the one it struck down in *Bellotti*, calling into question much of what the *Bellotti* Court previously decided and the value accorded the autonomy of corporate speakers in *Pacific Gas*. The new decision, *Austin v. Michigan Chamber of Commerce*,¹²⁰ shows a renewed commitment to the ideal of public debate¹²¹ and a pronounced skepticism about whether restrictions on corporate speech implicate the ideal of speaker autonomy in any way.

The *Austin* Court upheld a Michigan statute that, like the statute invalidated in *Bellotti*, prohibits the expenditure of corporate funds for political advocacy. Specifically, the statute prohibits "independent expenditures" of general treasury funds in support of, or in opposition to, any candidate for state office.¹²² Unlike the statute in *Bellotti*, however, the statute upheld in *Austin* allows corporations to make such expenditures from separate, segregated funds used solely for political purposes and accumulated solely through contributions from natural persons having specified relationships with the corporation.¹²³

Austin reaffirms the central principal of *Bellotti* by acknowledging that independent campaign expenditures "constitute political expression 'at the core of our electoral process and of the First Amendment,' " and that the corporate status of a speaker cannot, without more, wholly exclude political speech from constitutional protection.¹²⁴ Therefore, as in *Bellotti*, the restriction of political advocacy could only stand if narrowly tailored to a compelling governmental interest.¹²⁵

Here, however, the new majority departed from *Bellotti*. Abandoning the skepticism displayed in that earlier case, the majority in *Austin* found this exacting standard satisfied by the compelling governmental

120. 110 S. Ct. 1391 (1990).

121. Resurgence of the public debate ideal is also suggested by *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990), which the Court decided just a few weeks after *Austin*. In *Metro Broadcasting*, the Court upheld the FCC's minority preference and distress sale policies against equal protection challenge, by finding them substantially related to the important governmental objective of broadcast diversity. In doing so, the Court reiterated its declaration in *Red Lion* that the public's right to receive information and advocacy is "paramount," and emphasized that diversity of views and information "serves important First Amendment values." *Id.* at 3010.

122. MICH. COMP. LAWS § 169.254(1) (1979).

123. MICH. COMP. LAWS § 169.255 (1979).

124. *Austin*, 110 S. Ct. at 1396 (quoting *Buckley v. Valeo*, 424 U.S.1, 39 (1976)). The Court explained that the allowance of expenditures from a segregated fund could not adequately compensate for the prohibition against expenditure of treasury funds, because substantial administrative costs and disincentives for establishing a segregated fund would burden corporate political expression even if they did not prevent it altogether. *Id.* at 1396-97. In this respect, the Court followed *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 254-56 (1987). See *infra* notes 136-38 and accompanying text.

125. *Austin*, 110 S. Ct. at 1397.

interest in preventing corporations from exercising undue influence on elections and thus "corrupting" the democratic process.¹²⁶

The ideal of public debate lies at the heart of the Court's decision and explains the different results in *Austin* and *Bellotti*. The *Austin* Court found that corporations distort the democratic process when they amass economic resources with the assistance of "special advantages" conferred under state law and then use those resources for political advocacy.¹²⁷ Because the availability of these resources reflects the economically motivated decisions of investors and customers rather than public perceptions of the corporation's political wisdom, the use of general treasury funds for campaign advocacy creates "an unfair advantage in the political marketplace" that might allow a corporation to exert an influence on elections having "little or no correlation to the public's support for the corporation's political ideas."¹²⁸ By requiring that corporate campaign advocacy be financed by contributions from natural persons, the statute ensured that such advocacy would reflect "actual public support."¹²⁹

To harmonize this reasoning with the *Buckley* maxim, the Court denied that the Michigan statute attempted to equalize the influence of speakers on elections.¹³⁰ According to the majority opinion, the decision in *Austin* was based not merely on corporations' ability to accumulate wealth but on the "unique state-conferred corporate structure" and "special advantages" conferred by state law that facilitate such accumulation.¹³¹

It is not clear whether state-conferred advantages were independently essential to the Court's reasoning or were instead an element of the Court's concern that corporate speech may not reflect public support. In an earlier opinion rehearsing the *Austin* rationale in dictum,¹³² the Court implied that while state-conferred advantages support restrictions on corporate campaign advocacy, they are not essential to the validity of

126. *Id.* at 1397-98.

127. *Id.* at 1397. The Court listed "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" as examples of special advantages. *Id.* The opinion does not elaborate on the meaning or individual significance of these examples.

128. *Id.*

129. *Id.* at 1398. Although the Court claimed to follow *Bellotti*, this analysis is drawn from the opinion of Justice White, joined by Justices Brennan and Marshall, dissenting from the *Bellotti* decision. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 at 809-12 (White, J. dissenting).

130. *Austin*, 110 S. Ct. at 1397-98.

131. *Id.*; see *supra* note 127.

132. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256-60 (1986); see *infra* notes 136-38 and accompanying text.

such restrictions.¹³³ Moreover, one of the most important advantages conferred on corporations by state law, the power to dispose of funds received in the course of business as corporate property subject to the business judgment of management rather than the desires of shareholders, accounts for the ability of corporations to speak without public support. The speech effect of this advantage is to allow corporations to engage in political advocacy without any natural person parting with her own money. Lack of personal sponsorship, therefore, may be an important link between the Court's discussion of state-conferred advantages and speech without public support.

Concern for personal sponsorship has been a common element in several of the Court's recent decisions on organizational speech. For example, expression by individuals who must part with their money to finance speech by political action committees (PACs) moved the Court, in *NCPAC v. FEC*,¹³⁴ to extend first amendment protection to PAC speech.¹³⁵ And in *FEC v. Massachusetts Citizens for Life, Inc.*,¹³⁶ the Court held that a prohibition like the one upheld in *Austin*¹³⁷ cannot be applied to a nonprofit corporation formed to promote the shared political agenda of its members. Treating the facts of *Massachusetts Citizens for Life* as a set of conditions limiting first amendment protection for incorporated advocacy organizations, the *Austin* Court explained that states cannot prohibit campaign expenditures by corporations that (1) are formed exclusively for political purposes, (2) impose no financial or other disincentive for withdrawal from membership on account of disagreement with the corporation's expression, and (3) are sufficiently independent from business corporations to preclude their use as a conduit for political expenditures of corporate treasury funds.¹³⁸

133. See *Massachusetts Citizens for Life*, 479 U.S. at 258 n.11.

134. 470 U.S. 480 (1985).

135. In *NCPAC*, the Court held facially unconstitutional a provision of the Presidential Election Campaign Fund Act that imposed a ceiling on PAC expenditures in support of a candidate who has elected to accept public financing. The Court inferred that small contributors use PACs to enhance their own voices from the fact that contributors must part with their money to finance PAC speech. *NCPAC*, 470 U.S. at 494-95.

136. 479 U.S. 238 (1986).

137. The Federal Election Campaign Act of 1971, codified as amended at 2 U.S.C. §§ 431-55, prohibits corporations from using treasury funds to make "a contribution or expenditure in connection with any [federal] election," but permits corporations to establish and administer a separate segregated fund for political purposes. 2 U.S.C. § 441b(b). In fact, the state statute in *Austin* was modeled on the federal statute in *Massachusetts Citizens for Life*. *Austin*, 110 S. Ct. 1391, 1395 n.1 (1990).

138. *Id.* at 1399. The second requirement qualifies the Court's conclusion in *Bellotti* that expenditures for corporate expression do not coerce shareholders to support the expression of ideas they do not hold. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); see *supra* note 91 and accompanying text. Shareholder support may not be coerced, but neither

In light of these decisions, *Austin* could be read as limiting the *Buckley* maxim to expression by natural persons. When the three limiting conditions of *Massachusetts Citizens for Life* are satisfied, corporate speech voices the personal views manifest in contributions, and equalizing restrictions on corporate speech therefore curtail vicarious expression by natural persons. *Massachusetts Citizens for Life* shows that the *Buckley* maxim fully applies to expression by natural persons, even if they would speak through a corporation. When the limiting conditions of *Massachusetts Citizens for Life* are not satisfied, however, there is no assurance that corporate speech gives voice to personal views. *Austin* permits states to restrict this purely corporate speech if necessary to protect public discourse and democratic processes.¹³⁹

The composition of the *Austin* majority lends some support to this interpretation. All but one of the Justices voting to uphold the statute in *Austin* had previously taken the position that corporations do not have autonomy interests to protect against restrictions intended to foster public debate. Justice Rehnquist, joined by Justices White and Stevens, argued in a dissenting opinion in *Pacific Gas* that it makes no sense to accord corporations "negative" speech rights, because the *Barnette* opinion shows them to be grounded in concern for independence in matters of conscience, and corporations cannot implicate that concern.¹⁴⁰ And in a dissenting opinion that now reads like a first draft for the new major-

may it be inferred when significant costs of withdrawal may inhibit disassociation. *Bellotti*, 435 U.S. 765. If shareholder support cannot be inferred, the government may intervene to prevent grossly unequal spending from distorting public discourse.

139. The Court also had to revisit the issue that had concerned Chief Justice Burger in *Bellotti*: whether corporate speech can be limited without interfering with the important role of the press in informing the public on political issues. *Bellotti*, 435 U.S. 765 (Burger, C.J., concurring); see *supra* note 88 and accompanying text. The Court in *Austin* found that it can. The Michigan statute exempted from its prohibition expenditures "by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial . . . in the regular course of publication or broadcasting." MICH. COMP. LAWS ANN. § 169.206(3)(d). The Court approved of this exemption despite the claim that it denies corporations engaged in other businesses equal protection of the laws.

Departing from its treatment of the issue in *Bellotti*, the *Austin* Court described the role of the institutional press in providing information, criticism, and a forum for debate as "unique" and therefore an appropriate basis for distinct treatment. *Austin* 110 S. Ct. at 1402. Application of the prohibition against independent expenditures to the press might interfere with performance of its "crucial societal role" of reporting and editorializing on newsworthy events. *Id.* Therefore, "[a]lthough the press' unique societal role may not entitle the press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." *Id.* (citation omitted) (emphasis added).

140. *Pacific Gas & Electric Co. v. Public Utils. Comm'n*, 475 U.S. 1, 32-35 (1986) (Rehnquist, J., dissenting).

ity,¹⁴¹ Justice White, joined by Justices Brennan and Marshall, argued in *Bellotti* that corporate speech does not further self-expression, self-realization, or self-fulfillment because communications by business corporations do not manifest individual freedom of choice.¹⁴² Thus, five members of the *Austin* majority had already concluded that no corporate interest in speech autonomy can overcome a statute intended to protect the public interest in rich debate.

IV. Autonomy, Debate, and Corporate Speech

Austin marks an important turning point in the Court's treatment of corporate speech and, more generally, of conflicts between the first amendment ideals of speaker autonomy and rich public debate. Reversing the treatment suggested by *Bellotti* and *Pacific Gas*, the decision in *Austin* accorded public debate greater importance than the autonomy of corporate speakers. The Court did not, however, discuss this normative balance or articulate reasons supporting it, an omission that leaves future application uncertain. If not explained and consistently applied, *Austin's* treatment of *Bellotti* may come to stand for nothing more than the refusal of dissenting Justices to acquiesce in the decisions of an unstable Court.

The Court could reconcile the two decisions by holding *Bellotti* applicable only to referenda and *Austin* applicable only to candidate election campaigns.¹⁴³ It would be difficult to defend that reconciliation on the grounds of principle, though. Only Justice Brennan's concurring opinion in *Austin* suggested it, and in response to an argument based on underinclusiveness of the Michigan statute in permitting independent corporate expenditures for advocacy other than in candidate elections.¹⁴⁴ The prohibition did not reach farther, according to Justice Brennan, first because advocacy concerning candidate elections lies at the heart of political debate, and second because *Bellotti* and *Consolidated Edison* prohibit such restrictions in other areas.¹⁴⁵

The first of these reasons suggests that the second should be modified. Campaign advocacy is central to the democratic process, as Justice Brennan recognized; but advocacy supporting the election of a candidate is no more central to democracy than advocacy related to a referendum

141. On concern that corporate speech does not reflect public support, compare *Bellotti*, 435 U.S. at 809-12 (White, J., dissenting), with *Austin*, 110 S. Ct. at 1391 (1990).

142. *Bellotti*, 435 U.S. at 804-05 (White, J., dissenting).

143. See *id.* at 788 n.26 (reserving question); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 n.7 (1982) (suggesting limitation of *Bellotti*).

144. *Austin*, 110 S. Ct. at 1392 (Brennan, J., concurring opinion).

145. *Id.*

issue to be decided directly by the people. If preventing "corruption" of the democratic process through distortion of public debate is a sufficiently compelling governmental interest to justify restriction of corporate speech in candidate elections, it should justify a similar restriction in referendum campaigns as well.¹⁴⁶

Thus, rather than attempting to reconcile *Austin* with *Belotti*, the task is now to recognize and evaluate the normative shift that has taken place. This section evaluates the new balance struck in *Austin* by examining how corporate speech implicates the ideals of autonomy and debate. It defends the seemingly paradoxical conclusions that corporate speech can at least sometimes enrich public debate, in part because corporate speech is not always reducible to the speech of individual corporate constituents, and that corporate speech does not implicate the ideal of speaker autonomy because decisions concerning whether to speak and what to say are always controlled by corporate constituents and not the corporation itself.

A. Corporate Speech and Public Debate

Public debate will exist with or without corporate speech. The issue, therefore, is how corporate speech affects the discourse that would exist in its absence. Whether that discourse is enriched or impoverished by corporate speech depends primarily on the distinctiveness of what corporations have to say and the ability of the public to receive corporate views without being deprived of the views of others. If corporations simply amplify voices of the people who run them, and give their voices such volume that people in less privileged positions cannot fairly compete,¹⁴⁷ the ideal of rich public debate would not support protection of corporate speech. If corporations express a viewpoint that differs from what corporate managers hold or would be personally motivated to express, however, public discourse could be enriched by its addition and the ideal of rich public debate would support protection.

146. See Wright, *Money and the Pollution of Politics*, 82 COLUM. L. REV. 609, 622-25 (1982) (potential for spending to distort political process especially great in referendum and initiative campaigns).

147. Most of the literature on corporate speech defends variations of this claim. 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, 1351 (1979); Friedman and May, *Corporate Rights to Free Speech*, 5 BUS. & PROF. ETHICS J. 5, 9 (1988); Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's "The Value of Free Speech,"* 130 U. PA. L. REV. 646, 663 (1982); see also Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1655 (1982).

Some have argued that it is theoretically impossible for corporate speech to be anything other or anything more than speech by persons who authorize corporate expenditures.¹⁴⁸ That view seems mistaken, though, because there is reason to believe that corporate speech can and sometimes does add an otherwise unheard view to public discourse. This follows in part from the complexity of organizational decision making. Views expressed on behalf of a large corporation may reflect participation by many people because the information needed to make decisions for a large corporation is not always possessed by any single individual.¹⁴⁹ Each participant in the process of formulating a corporate position, from the chair of the board and top corporate executive to low-level research functionaries, may subtly influence that position simply by interpreting the information she contributes. At the same time, each participant's personal views may be influenced by information contributed by others. Thus, even if corporate speech ultimately coincides with the personal views of corporate managers, it may be that their views were altered by the process of formulating an official position for the corporation to express.

Moreover, it seems implausible that the views expressed on behalf of corporations always coincide with the personal views of top managers. In addition to participation by many people, a corporation's public statements may reflect bargaining among a multiplicity of constituent groups that share a common goal in realizing profit but whose motivations and interests diverge and conflict in many other respects.¹⁵⁰ Even limiting the corporate constituency to shareholders and management, each of which may include competing factions, leaves a broad range of divergent interests. In addition, the corporation's public statements may be influenced by loyalty to employees or the power of unions representing them, by the perceived needs and attitudes of customers, by pressures exerted by creditors and investment bankers, and by the imperative of avoiding undue offense to legislators and regulators.

148. This claim has been based variously on assertions: (1) that expression is a physical act that can only be performed by people and not by corporations themselves, O'Kelley, *supra* note 147, at 1351; (2) that the entire status of a corporation is ontologically derivative, Freidman & May, *supra* note 147, at 9; see also May, *Vicarious Agency*, 43 PHIL. STUD. 69 (1983), P. WERHANE, PERSONS, RIGHTS, AND CORPORATIONS 50 (1985); and (3) that speech not directly related to a corporation's business or assets must "by definition" reflect individual, not corporate views, Freidman & May, *supra* note 147, at 15.

149. M. DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 32 (1986).

150. M. DAN-COHEN, *supra* note 149, at 18-21; Chayes, *The Modern Corporation and the Rule of Law*, in THE CORPORATION IN MODERN SOCIETY 41-43 (E. Mason ed. 1959); J. THOMPSON, ORGANIZATIONS IN ACTION 127-28, 138-39 (1967).

Formal decision-making structures and basic policies entrenched in constitutive documents or prior corporate decisions also constrain the ability of top managers to make the corporation express their personal views.¹⁵¹ Melded through these structures and policies, the disparate interests and purposes of various constituencies may give rise to an organizational view.¹⁵² And once this corporate position emerges, fiduciary duty could require corporate agents to express views on behalf of the corporation that conflict with their own views or that they would simply lack sufficient motivation to express on their own behalf.¹⁵³

In addition to the effects these constraints have on the messages produced by corporations, corporate voice can also influence the way messages are received by the public. Owing in part to our assumptions about what motivates the organizational decision making of a business enterprise, a call to stop or avoid war takes on a somewhat different content depending on whether it is presented as the official view of a well-known corporation or as the personal view of one of its executives, whose name would not command similar recognition. Similarly, in *Austin*, the prestige and presumed business expertise of the Michigan Chamber of Commerce might have influenced how readers would react to predictions of the economic effects of a candidate's election. Because context alters content, the speaker, no less than the medium, is part of the message.

Undoubtedly, corporate speech sometimes does serve only to amplify the views of one or several dominant individuals in corporate management.¹⁵⁴ But in many other cases, the melding of diverse constituent interests, the integration of information from diffuse sources, the mediation of decision-making structures, the motivating effect of fiduciary duties, and the addition identifiable sponsorship makes to content probably result in the expression of views that would not be heard if business corporations were excluded from public discourse. This alone supports some protection for corporate speech under the first amendment ideal of rich public debate.

151. Drawing upon positivist jurisprudence, Peter French stresses the importance of decision structures and long-term basic corporate policies as "rules of recognition" that determine which actions of individual constituents are attributable to the corporation itself. P. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 43 (1984).

152. P. FRENCH, *supra* note 151, at 45-46; M. DAN-COHEN, *supra* note 149, at 34-36; see also J. COLEMAN, *Foundations of Social Theory* 540 (1990).

153. See M. DAN-COHEN, *supra* note 149, at 107-08; J. COLEMAN, *supra* note 152, at 554-56. The existence of fiduciary duties has important ramifications for the ideal of speaker autonomy as well. See *infra* pp. 201-04.

154. In addition to the scholars cited *supra* note 148, Justice White took the stronger position that corporate speech always does so in his dissenting opinion in *Bellotti*. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 805-07 (1978) (White, J., dissenting).

Corporate speech can also enrich public debate, however, even when it simply amplifies views held by corporate constituents, by adding to the limited range of views given widespread dissemination. Few individuals can devote sufficient personal resources to compete with government and the institutional press for public attention. Perhaps, as others have argued, the people who authorize corporate political expenditures have substantial personal resources that could be used to make their views known if the corporations they manage did not provide an outlet.¹⁵⁵ It seems unlikely, though, that every corporation that employs mass media to disseminate its views acts at the behest of an individual who is wealthy enough to do the same on her own account and would also be motivated to do so.¹⁵⁶ Thus, although increased spending by wealthy corporate managers might partly offset restrictions on corporate speech, it cannot be expected to do so fully.

Accordingly, corporate speech may enrich public debate simply by reducing the dominance of media corporations, whose control is concentrated in relatively few hands,¹⁵⁷ and of government officials, who enjoy virtually unfettered access to the press and free use of a variety of public mechanisms for disseminating their views.¹⁵⁸ If most individuals cannot (and most who can, do not) effectively compete in a market dominated by the great institutions of press and government, competition among three loud voices will provide a more diverse discourse than a debate dominated by two, so long as the third does not merely echo the

155. See Friedman & May, *supra* note 147, at 15 (arguing that virtually all corporate speech would be replaced by identical speech by individual managers); cf. Baker, *supra* note 147, at 663 (1982).

156. Consider, for example, whether Mobil's managers would personally spend \$3.5 million a year on political advertising, as the corporation does. T. EDSALL, *supra* note 1, at 116. In any event, the proposition that identical speech by individual managers would replace all corporate speech is a self-defeating argument for restrictions because, under that assumption, public debate would be distorted in precisely the same way by wealthy individuals if not by corporations.

157. See B. BAGDIKIAN, *THE MEDIA MONOPOLY* ix, 4, 20-25 (2d ed. 1987) (twenty-nine corporations control most of the business in daily newspapers, magazines, televisions, books, and motion pictures, and trend is toward even greater concentration); STERLING & HAIGHT, *THE MASS MEDIA: ASPEN INSTITUTE GUIDE TO COMMUNICATIONS INDUSTRY TRENDS* 65-72 (1978). The fact that every member of society is geographically situated aggravates the effect of media concentration, as Benno Schmidt graphically explains. B. SCHMIDT, *supra* note 69, at 45.

158. See Gurevitch & Blumler, *Political Communication Systems and Democratic Values*, in *DEMOCRACY AND THE MASS MEDIA* 277-78 (J. Lichtenberg ed. 1990); M. YUDOF, *WHEN GOVERNMENT SPEAKS* 6-9 (1983); Shiffrin, *Government Speech*, 27 *UCLA L. REV.* 565 (1980); Emerson & Haber, *The Scopes Case in Modern Dress*, 27 *U. CHI. L. REV.* 522, 526-27 (1960).

others.¹⁵⁹

I do not mean to argue that corporate speech substantially broadens the range of issues and proposals discussed in public or considered in politics. On the contrary, whatever measure of diversity that corporations might add to the discussion of issues placed on the agenda by others, business corporations tend to confine the agenda by associating private enterprise with political democracy and thus reinforce the notion that grand issues of political and economic organization are not subject to serious reconsideration.¹⁶⁰ Removing speakers from the debate, however, is a poor strategy for broadening political agendas.

Such broadening can be accomplished, if at all, only by adding new speakers,¹⁶¹ in part because corporate speech does to some extent echo the other loud voices in public discourse. On many issues, business corporations' viewpoints would be heard and sometimes expressed by government officials even if corporations were forbidden to make public statements, because the people who manage large corporations tend to be influential political constituents.¹⁶² In addition, media organizations are usually business corporations and therefore share some of their core interests, like the sanctity of property and the basics of free enterprise. Of course, separation of media ownership and management leaves some room for independent editorial judgment. Nevertheless, editors are bound to know of, and be sensitive to, business concerns of the organizations in which they operate; and they at least occasionally bow to the direct and indirect pressures exerted by corporate owners and advertisers.¹⁶³

Nevertheless, while government and media institutions tend to share business corporations' concern for the basics of free enterprise, some room for divergence of views obviously remains. If government officials always bowed to business concerns, statutes restricting corporate speech would not be enacted. In addition, corporate ownership of media organi-

159. Cf. M. YUDOF, *supra* note 158, at 90-110, 161-64 (powerful competitors help prevent government speech from corrupting democracy).

160. C. LINDBLOM, *POLITICS AND MARKETS* 204-07 (1977).

161. *Pacific Gas* may therefore have a more important effect on public debate than either *Bellotti* or *Austin*. Unfortunately, *Pacific Gas* is not the only recent decision in which the Supreme Court has failed to protect participation in public discourse by the relatively unaffluent. See also, e.g., *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding ordinance that forbade posting of signs on public property); *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990) (approving per se condemnation of protest boycott under antitrust laws).

162. See C. LINDBLOM, *supra* note 160, at 170-200.

163. Examples are reported in B. BAGDIKIAN, *supra* note 157, at 27-45. See also Gurevitch & Blumler, *supra* note 158, at 272, 275-76.

zations and occasional business interference with editorial judgments cannot establish that press institutions typically recite only the views dictated by big business. Everyday experience defies that over-generalization.

The existence of distinct corporate views and the ability of corporations to compete with government and press for public attention support the conclusion that corporate speech can enrich public debate and therefore should at least sometimes be protected under the First Amendment. The existence of corporate voice and the desirability of a corporate competition with government and media cannot establish that corporate speech will always enrich public debate, regardless of circumstances, however. In particular, these desirable aspects of corporate speech do not refute either the state's claim in *Bellotti* that corporations drown out lesser voices or the *Austin* majority's conclusion that corporate wealth threatens thereby to distort the democratic process.

In examining these claims, it is important to avoid Meiklejohn's misleading paradigm of a shouting match in a small town meeting, where contending positions may be considered by all through simple application of Roberts Rules of Order.¹⁶⁴ Public debate in our mass society is nothing like that and, more importantly, can never be governed as if it were. For instance, it is impossible for a corporation or any other speaker to increase the volume of its advocacy enough to prevent a reader of this Article from hearing its message; that depends entirely on its author. On the other hand, no rules of order could possibly give this Article equal time to persuade Mobil's audience, for most of the people who read Mobil's editorial advertisements will never know this Article exists, much less consider the arguments presented here.

The town meeting paradigm obscures the fact that American democracy is conducted by citizens who deliberate in the midst of many debates, simultaneously conducted on all different subjects. No one can pay careful attention to all of those debates, or review everything said and written about even a few of them. Even the most active citizen can only view or hear a tiny fraction of the information and advocacy made available each day, and therefore must choose—even if unthinkingly—among the alternatives.

Once we begin to consider speech from this perspective, the familiar metaphor of drowning out begs the question it is supposed to answer: How could speech by one class of advocates interfere with communication by others, or have a disproportionate effect on ballot results, if audi-

164. A. MEIKLEJOHN, *supra* note 26, at 22-27.

ences choose to receive what they do and can usually read or listen to what they choose without interference? As an answer to first amendment objections, any answer to this question must be compatible with the existence of some vision of a functioning democracy, a requirement Justices Scalia and Kennedy accused the *Austin* majority of failing to meet.

That accusation has some force, if only because the *Austin* majority did not explain its theory of political distortion. While one can easily imagine that the extent of a corporation's advocacy might exceed public support for the ideas it expresses, it is not so readily apparent how a corporation's advocacy could exert an influence on elections that exceeds public support for its ideas.¹⁶⁵ If democracy is to have meaning, we must generally assume that speech affects voting behavior only when it persuades; and neither democratic theory nor first amendment doctrine will bear the proposition that the political process is "distorted" when campaign advocacy persuades people to vote for a political candidate.¹⁶⁶ As the Court observed in *Bellotti*, "[t]he fact that advocacy may persuade the electorate is hardly a reason to suppress it."¹⁶⁷

One overlooked circumstance answers this objection and explains how one speaker could drown out the voice of another in a society whose members choose what to hear: the choice generally cannot be made on account of the relative persuasiveness, reliability, or any other favorable attribute of available messages. Choosing on the basis of content would require some knowledge of the content of all available messages—knowledge whose unattainability is the very reason choices must be made.¹⁶⁸ Instead, we choose much of the information and advocacy that shapes our views on the basis of the medium-source that carries it, i.e., whether

165. By finding that independent expenditures do not threaten quid pro quo corruption, the Court rejected the equation of speech with corrupting influence in *Buckley*. See *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

166. See B. Holden, *Liberal Democracy and the Social Determination of Ideas*, in NOMOS XXV: LIBERAL DEMOCRACY (1983); cf. Tushnet, *Talking to Each Other*, 1984 WIS. L. REV. 129 (noting that determinist conclusions are incompatible with the most basic premises of first amendment theory). As one would expect, empirical research supports the proposition that campaign spending influences election results. See, e.g., Mastro, Costlow, & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COMM. L.J. 315, 320-27 (1980); Wright, *supra* note 146, at 622. The relationship between spending and results is too complex, however, to support simple determinist conclusions. See, e.g., Grier, *Campaign Spending and Senate Elections, 1978-84*, 63 PUB. CHOICE 201 (1989); Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory, and the First Amendment*, 29 UCLA L. REV. 505 (1982).

167. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, at 790 (1978).

168. This "fundamental paradox" led Kenneth Arrow to question whether efficient markets for information are possible, since potential buyers must base their decisions on "less than optimal criteria." *ESSAYS IN THE THEORY OF RISK-BEARING* 151-52 (1971).

it appears newspapers, magazines, or broadcast programs we read, watch, or listen to for reasons that seldom have anything to do with the content of editorial advertisements. As a result of these choices, some media reach vastly larger parts of the electorate than others, and these tend to be the most expensive for editorial and other advertisers.

By allowing access to media that less affluent competitors lack, wealth gives some advocates exposure to more voters and thereby gives them an opportunity to persuade a larger part of the electorate. Given sufficiently disproportionate access to audiences, the views of a wealthy advocate might have a greater influence on voting behavior than competing views that would persuade every citizen that considered both.¹⁶⁹ In this way, even in a society of selective audiences and rational voters, concentrated wealth could allow less persuasive speech to dilute the proportionate mass effect of more persuasive speech.

This does not fully capture the metaphor of drowning out, however, because it fails to explain how speech by one advocate could interfere with communication by another. There are at least two ways in which concentrated wealth might enable corporate speech to reduce the audience reached by less affluent advocates. First, a high level of annual consumption of space and time by corporate political editorials might influence advertising prices and thereby make access to media that reach the largest audiences unaffordable for less affluent advocates. Second, even assuming such displacement does not take place, corporate political advertising could reduce the number of people reached by other advocates as a result of selective reception of messages carried by a single medium.

Suppose, for example, that I can afford to purchase a sixteenth of a page of the local daily paper, or that my persuasiveness convinces the editors of the New York Times and several other newspapers to run my letter free of charge. Many people who receive those papers do not read them cover to cover. Their time is limited, and they probably devote some of it to broadcast programs and other media. When people receive more information than they can process, they process what they can and ignore the rest.¹⁷⁰ Once again, their choice of what to ignore cannot always be based on its content. By attracting readers' attention and occupying their limited time, a competing advocate increases the likelihood that my views will be among the material readers will ignore. Thus, a competitor may reduce the number of people who will read my views

169. See sources cited *infra* note 166.

170. Jacoby, *Perspectives on Information Overload*, 10 J. CONSUMER RES. 432, 434-35 (1984).

even without increasing my cost of access to mass media, and its ability to do so depends in part on the amount of space or time each of us can afford to display or repeat our messages.

This is not just a complaint about the existence of competition in the marketplace of ideas. Instead, it shows that competition in the marketplace of ideas is not just a competition of ideas but also a competition for attention, in which material resources can provide a dispositive advantage. This result requires refinement of the conclusion reached earlier, that the public debate ideal at least sometimes supports protection of corporate speech. The potential for corporations to express a distinctive point of view and to reduce the dominance of government and media in public discourse are not the only effects corporate speech can have on public debate. Because material resources may give corporations a dispositive advantage in competing for the attention of a public audience, concentrated wealth may enable corporations to reduce the likelihood that individual voices will be heard, however persuasive they may be. While corporate speech has the potential to enrich public debate, it also has the potential to impoverish public debate instead.

Whether corporate speech will enrich or impoverish public debate is an empirical question that usually cannot be answered without consideration of surrounding circumstances. The central empirical issues are whether the voices of government and media already drown out individual speech and therefore have no effective competitor, in which case corporate speech could make a particularly valuable contribution to public debate, and the extent to which the addition of corporate speech makes it even more difficult for individuals to be heard, in which case corporate speech has an adverse effect on public debate. Where corporate speech simultaneously does both, the empirical issues are especially difficult, because consideration of the net effect is necessary.

The answers to these empirical questions are likely to vary with the circumstances of public discourse in different communities and at different times. Individuals may have a more significant voice in debate on local issues than on national ones, or a greater opportunity to influence public affairs in some states than in others. In some states, past experience may show that corporations can and do use concentrated wealth to gain advantage in competition with individuals for audience attention; in other states, this experience may be foreign.

These variables call for situation-specific analysis. Because corporate speech can enrich public debate under some circumstances, restrictions should not be upheld on the basis of a contrary presumption. Thus, the *Bellotti* Court was rightly skeptical of the claim that corporate speech

impoverishes public debate, asserted by Massachusetts without the support of record evidence or legislative findings.¹⁷¹ It would be equally wrong, however, for the Court to presume that corporate speech enriches public debate in all circumstances. Where record evidence or legislative findings support the conclusion that corporate wealth threatens to drown out the speech of individuals, the first amendment ideal of rich debate supports restrictions, particularly those that leave some outlet for corporate points of view, as did the segregated fund exception to the prohibition in *Austin*.¹⁷²

While restrictions on corporate speech affect public debate in multiple ways, regulations like the one in *Pacific Gas* that require corporations to distribute communications by others are not as empirically complex. Because the order granting TURN access to the utility's billing envelopes did not preclude the utility from disseminating its own views as well, a decision to uphold the order would not have removed the corporate viewpoint from public discourse. By contrast, the Court's decision invalidating the access order made it more likely that corporate views would dominate public discourse on regulatory policies actually reaching people affected by them.¹⁷³ Thus, the Court's decision in *Pacific Gas* frustrated the public debate ideal more than the Commission's access order could have.

B. Corporate Speech and Speaker Autonomy

Considerations of autonomy may be dispositive when a restriction on corporate speech will foster public debate, or when subjecting corporate property like billing envelopes to expressive use will allow others to

171. See *supra* notes 85-88 and accompanying text. This Article will not attempt to document the extent to which corporations actually do drown out competing voices. Its purpose is to examine the constitutional issues restrictions raise and to identify empirical issues that are situation-specific. Several interesting factual accounts are already available. *E.g.*, Conlon, *The Declining Role of Individual Contributors in Financing Congressional Campaigns*, 3 J. L. & POL. 467, 467-80 (1987); T. EDSALL, *supra* note 1; Wright, *supra* note 146, at 614-25.

172. See *supra* note 128 and accompanying text. By saying this, I do not mean to approve of the result in *Austin*. The Court's opinion cites neither record evidence nor legislative findings to support the conclusion that corporate speech actually threatened to dominate or distort public debate. If the evidentiary and legislative record contain no such support, the Court's decision could only be based on a presumption inconsistent with the proposition that corporate speech can enrich public discourse — a proposition I have found plausible and the very reason that the Court required the state to offer a justification for its prohibition.

173. It seems safe to assume that space in utility billing envelopes covered by surplus postage was the most efficient vehicle for distributing messages to people affected by decisions of the Public Utility Commission. The Court's decision left the utility with free use of that vehicle and left TURN, which was funded by contributions, to depend on alternatives that were certain to be more costly and more likely to miss some consumers.

participate in public debate. *Bellotti* implies that the *Buckley* maxim, that the speech of some elements of society cannot be restricted to enhance the relative voice of others, precludes restrictions on corporate speech even if the restrictions would enrich public debate.¹⁷⁴ The Court, however, appears to have retrenched from that stance in *Austin*.¹⁷⁵ Whether the *Buckley* maxim applies to corporations could have been dispositive in *Pacific Gas*, but only Justice Rehnquist addressed the issue in a dissenting opinion.¹⁷⁶

One odd aspect of the *Buckley* Court's reasoning is its circularity: the concept of restricting some voices to let others be heard is "wholly foreign" to the First Amendment because the Court made it so in *Buckley*. It may well be, as the Court observed, that the Framers did not anticipate what would be required to ensure the richness of the debate, or that this could justify some restrictions on expression.¹⁷⁷ In the late eighteenth century, however, competitive imbalances did not greatly interfere with the ability of individuals to influence public affairs.¹⁷⁸ Moreover, the notion that business corporations could invoke the First Amendment would probably have been quite a novelty itself because at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign.¹⁷⁹ For these reasons, the Framers' intent tells us very little about whether a restriction of corporate speech can be justified as allowing others to be heard.¹⁸⁰

174. *First National Bank of Boston v. Bellotti*, 435 U.S.765, 790-91 (1978).

175. *See supra* notes 122-33.

176. *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S.1, 34-35 (1986) (Rehnquist, J., dissenting) (corporations lack interest in independent conscience).

177. *See* Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737 (1977).

178. *See generally* Special Project, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 879 & n.33 (1972). "When the Constitution was adopted . . . the individual could make his opinions known by giving a speech on Sunday outside the local church or by getting a printer to put up a broadside and by posting it in taverns and in other public gathering spots around town. With relative ease he could have an impact . . ." BAKER & BALL, *VIOLENCE AND THE MEDIA*, STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 3, 68 (1969) (*quoted in* B. SCHMIDT, *supra* note 69, at 38-39).

179. J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970*, 15-17 (1970); Chayes, *supra* note 150, at 34-35.

180. As applied to the First Amendment, the Framers' intent is notoriously uninformative. *See* Bork, *supra* note 26, at 22. Taken as a whole, the Supreme Court's free speech decisions bear little relation to the original understanding, which, to the extent it existed, was exceedingly narrow. Richards, *Toleration and Free Speech*, 17 PHIL. & PUB. AFF. 323, 330-31 (1988). *See generally* L. LEVY, *LEGACY OF SUPPRESSION* (1960). Thus, from an interpretivist point of view, every aspect of *Buckley*—even the recognition that campaign contributions and expenditures raise constitutional issues—was probably foreign to the First Amendment. M. PERRY, *THE CONSTITUTION, THE COURT, AND HUMAN RIGHTS* 63-64 (1982).

For purposes of this analysis, we can assume that the *Buckley* maxim operates as a safeguard of speech autonomy, not public debate. The maxim could also be viewed as protecting public debate, as the opinion in *Buckley* originally explained it,¹⁸¹ but the subsequent corporate speech decisions have applied the maxim either in lieu of considering the net effects corporate speech has on public debate¹⁸² or as an alternative ground for striking down restrictions.¹⁸³ More importantly, corporate speech that enriches public debate should be protected for that reason alone, as part IV.A explains.¹⁸⁴ Therefore, all that remains is to consider whether the *Buckley* maxim should forbid the government to restrict corporate speech that adversely affects public debate. In those cases, the maxim can only be justified on the grounds of speaker autonomy, if at all.

As explained above, corporate speech can reflect a viewpoint that differs from the views of individual managers.¹⁸⁵ This may seem to imply the existence of a corporate autonomy interest in speaking: if corporations possessed beliefs of their own and distinct corporate intentions underlay speech acts carried out on their behalf, we might be compelled to conclude that corporations have autonomy of a kind the First Amendment should protect.¹⁸⁶ We are not compelled to that conclusion, how-

181. See *supra* note 79 and accompanying text.

182. See *supra* notes 115-18 and accompanying text discussing Justice Marshall's concurrence in *Pacific Gas*.

183. See *supra* text notes 82-93 and accompanying text discussing *Belotti*.

184. See *supra* notes 147-73 and accompanying text.

185. See *supra* notes 150-53 and accompanying text.

186. "[I]t is not that something is natural or living (in a biological sense) that stimulates our convictions about rights or considerations [but rather the] possession of certain kinds of capacities . . ." P. FRENCH, *supra* note 151, at 85; cf. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 69-88 (1980). In the last decade's debate over the moral status of organizations, several philosophers have observed that if corporations can be held responsible for their actions, they must be entitled to the rights of moral agents as well, including speech rights. Typically, the claim has been made with disturbing effect by those who reach the opposite conclusion. E.g., T. Donaldson, *Moral Agency and Corporations*, 10 *PHIL. IN CONTEXT* 54, 54 (1980); Wolf, *The Legal and Moral Responsibility of Organizations*, in *NOMOS XXVII: CRIMINAL JUSTICE* 267, 271 (1985). Peter French, however, has made a sustained argument that corporations are moral agents—burdened with responsibilities and entitled to rights—because their actions are attributable to distinct corporate intentions, beliefs, and desires. P. FRENCH, *supra* note 151, at 41-46; see also French, *The Corporation as a Moral Person*, 16 *AM. PHIL. Q.* 210 (1979). French bases his argument on the independence of "corporate-policy recognitors;" that is, the basic policies entrenched in past decisions, certificates of incorporation, annual reports, and the like, whose satisfaction determines whether the decisions and actions of corporate constituents are decisions and actions of the corporation itself. Because these recognitors exist independently of the desires of individual constituents and persist notwithstanding constituents' transience, French concludes that corporate actions can properly be described as having been done for corporate reasons and, consequently, "as having been caused by a corporate desire coupled with a corporate belief and so . . . as corporate intentional." P. FRENCH, *supra* note 151, at 44.

ever, because corporate beliefs and intentions do not exist. While we sometimes find it useful to describe corporate actions in terms that project intentions, beliefs, and desires upon the organization, the description does not depend on the actual existence of any mental state, any more so than when we describe a computer chess program's play as intended to draw out our queen.¹⁸⁷ Like the computer, a corporation lacks the consciousness needed to intend or believe anything.¹⁸⁸

The absence of corporate consciousness makes first amendment solicitude for the autonomy of corporations as speakers dubious. As explained in Part I, the ideal of speaker autonomy was founded on respect for a certain kind of autonomy, independence in matters of conscience.¹⁸⁹ The Supreme Court has repeatedly refused to extend it beyond that domain unless press freedoms are at stake.¹⁹⁰

Lack of consciousness is not the only reason corporate speech cannot implicate the autonomy ideal, though. Even if one could find constitutional value in speaker autonomy beyond concern for independence in matters of conscience, the ability to make choices of some kind without forcing or interference by others is a central element of autonomy,¹⁹¹ and corporations lack this capacity. A corporation can never choose either to

187. P. WERHANE, *PERSONS, RIGHTS, AND ORGANIZATIONS* 37 (1985).

188. Cf. P. WERHANE, *supra* note 187 at 56 ("psychophysical entity" needed for intentions); Wolf, *supra* note 186, at 279 (unified consciousness needed for feelings). The evidence supporting French's positivist theory of corporate intentionality, *supra* note 186, is ambiguous at best. We know from our own experience that even agents capable of intentional actions manifest unintended behaviors and cause unintended consequences. Because French's positivist theory provides no basis for distinguishing the intended from the unintended without reference to the intentions of individuals, it is consistent with the conclusion that corporate actions are not intended at all if not intended by individual constituents.

189. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) ("right of self-determination in matters that touch individual opinion and personal attitude"); *id.* at 642 (First Amendment reserves "sphere of intellect and spirit" from official control); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (citing *Barnette*, 319 U.S. at 637).

190. See *supra* notes 71-74 and accompanying text.

191. Choice of some kind without forcing or interference is at the heart of autonomy as conceived by the range of contemporary political theorists sympathetic to the ideal, from the liberal to the libertarian. See, e.g., B. ACKERMAN, *supra* note 186, at 11; I. BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969); D. GAUTHIER, *MORALS BY AGREEMENT* 349-50 (1986); R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 501 (1981). Of course, without further definition, choice without forcing or interference is a thin conception of autonomy, perhaps too thin to be valuable in itself. But it is not necessary to consider the kinds of choices with respect to which autonomy is valued if corporations are not capable of autonomous choice of any kind. The minimal conceptual element of choice without forcing or interference captures various conceptions of autonomy that corporations can never possess, yet could be valuable and attainable by individuals, even if our ends are in some sense socially constituted, as liberalism's communitarian critics assert. Compare, e.g., M. SANDEL, *LIBER-*

speak or to refrain from speaking—managers and shareholders must always make this choice for the corporation and act out the choice they have made on the corporation's behalf.¹⁹² Embodied and active in the world only through the embodiments and actions of their constituent members,¹⁹³ corporations are incapable of autonomous action of any kind. Governmental abstinence cannot preserve the autonomy of an entity that is incapable of exercising it.¹⁹⁴

Lacking any capacity for autonomous action, corporations have no claim to be treated with the dignity of an autonomous moral agent. Unlike natural persons, corporations cannot sensibly be conceived of as having intrinsic value; they are created as a means for the satisfaction of others' desires. They remain essentially instrumental so long as others permit them to exist.¹⁹⁵ Thus, even if it were possible, it would be pointless to preserve corporate autonomy unless doing so served some social end like the enrichment of public debate.¹⁹⁶

Although corporations themselves lack autonomy and intrinsic value, the people who associate together in an incorporated organization do not. It is necessary, therefore, to consider how their interests in au-

ALISM AND THE LIMITS OF JUSTICE 114 (1982) with D. GAUTHIER, *MORALS BY AGREEMENT* 349-53 (1986).

192. Even those who argue most forcefully for corporate rights concede this point. *E.g.*, Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245, 1303, 1320 (1979).

193. Friedman & May, *supra* note 147, at 9; *see also* May, *supra* note 148, at 69.

194. Edwin Baker has also argued that speaker autonomy interests are not implicated by corporate speech, but for reasons I find unpersuasive. According to Professor Baker, business enterprises must always choose the most profit-making option available, and market mechanisms therefore control the content of corporate speech. *See* Baker, *supra* note 147, at 653. This strict determinist view fails to account for the substantial room market constraints leave for discretion when business decisions are made. Considerations of short-term profit, which may not point unambiguously to a single course of action, are complicated by competing concerns for corporate reputation, stability, growth, diversification, increasing returns to shareholders, and maintenance of management control. When these considerations diverge or conflict, dictates of the market are obscured, and considerable room remains for discretion. M. DAN-COHEN, *supra* note 149, at 20-21; I. HOROWITZ, *DECISIONMAKING AND THE THEORY OF THE FIRM* 291-318 (1970). Discretion is at its broadest when corporations decide whether to engage in political advocacy and, if so, which issues to engage and what positions to take on them. C. LINDBLOM, *supra* note 160, at 155. Therefore, the most that can accurately be said is that market forces restrain managers from consistently engaging in political activities adverse to shareholder interests. Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 996 (1984).

195. *See* Friedman & May, *supra* note 147, at 13-14; Werhane, *Formal Organizations, Economic Freedom, and Moral Agency*, 14 J. VALUE INQ. 43 (1980); M. DAN-COHEN, *supra* note 149, at 36-38, 61-74.

196. T. DONALDSON, *CORPORATIONS AND MORALITY* 43-49 (1982); *see also* D. Thompson, *Criminal Responsibility in Government*, in *NOMOS XXVII: CRIMINAL JUSTICE* 214 (1985).

tonomy might be implicated by corporate speech. Preventing people from associating together for the purpose of expressing common views restricts their autonomy and may impoverish public debate.¹⁹⁷ So long as people can associate together for this purpose, however, it is not apparent how denying their association a particular legal status, that of a corporation, whose consequences are only incidentally related to the individuals' expressive purpose, could restrict autonomy in a way that should be of first amendment concern.¹⁹⁸ Far from restricting speech-autonomy, the absence of corporate status allows individuals to associate and pursue their expressive goals unconstrained by corporate law. Moreover, expressive association is neither the nature nor the purpose of an ordinary business corporation. As *Austin* and *Massachusetts Citizens for Life* show, the exceptional case of incorporated advocacy organizations can be accommodated without extending protection more broadly to include ordinary business corporations.¹⁹⁹

I do not mean to deny that a person already in a management position in an ordinary business corporation might experience a prohibition against corporate speech as a restriction of her autonomy, in that she is prevented from expressing her strongly felt convictions on behalf of the corporation.²⁰⁰ This experience follows, however, not merely from a re-

197. The Supreme Court has protected these interests in numerous cases. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-909 (1982); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958); *NAACP v. Button*, 371 U.S. 415, 430-31 (1963); *FEC v. NCPAC*, 470 U.S. 480, 494-95 (1985); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294-95 (1981).

198. Thus, in *Massachusetts Citizens for Life*, the Court recognized that the statute allowed the organization to engage in advocacy if it assumed an unincorporated form, see *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, at 252 (1986), and viewed the statute as burdening "the corporation itself," not its members and contributors. *Id.* at 254 n.7.

199. Cf. *Schneider*, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227, 1262 (1986) (if state allows alternative forum for associational speech, the First Amendment does not require corporate speech rights). To the extent Professor Schneider suggests the broader principle that restrictions on speech can be excused if alternative means for expression exist, there is some support for his view, e.g., *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811-12 (1984), but I would not endorse it. In my view, these propositions are independently defensible: (1) corporate speech does not significantly implicate individual interests in associational speech, and (2) individual interests in associational speech are protected by *Button* and similar decisions.

200. I focus here on management rather than shareholders because the latter are too remote from individual decisions in a large business corporation and have too little personal influence over those decisions to be likely to experience a restriction on corporate actions as a restriction of personal autonomy. Some shareholders might feel vicariously responsible for reprehensible acts of their corporation, just as some citizens feel vicariously responsible for reprehensible acts of their government. The public might even associate some shareholders with reprehensible acts of their corporation, as the public associates judicial nominees with discriminatory policies of clubs in which they are members. It would nevertheless be a rare if

striction on corporate speech but also from misidentification of the corporation's speech as the manager's own. The existence of fiduciary duty shows, however, that a corporation does not speak for the people who occupy management positions, even if the corporation speaks through them.

Both law and social expectations require that people acting on behalf of a corporation do so in furtherance of its interests, not their own.²⁰¹ This duty may sometimes permit managers to have the corporation express personal views that happen to coincide with corporate interests, but only when this can be justified without reference to personal interests. When corporate and personal interests conflict, fiduciary duty may require corporate managers to authorize speech on behalf of the corporation that differs from their personal views.²⁰²

This is not a reflection of personal insincerity but an indication of the distance fiduciary duty maintains between the person acting as corporate manager and the speech she authorizes on the corporation's behalf.²⁰³ Even when the corporation's speech happens to coincide with the views of the person who authorizes it, the corporation does not speak for her. A restriction on corporate speech, therefore, cannot be reduced to a comparable restriction on the manager's speech. In this sense, the corporation is impermeable.²⁰⁴

In a limited sense, a prohibition against corporate speech does restrict the autonomy of corporate managers: like *every* restriction on corporate activity, a prohibition against corporate speech adds detail to the social and legal definition of the manager's role. This effect is not a restriction of personal autonomy in speech or conscience, however. The

not extraordinary case in which individual shareholders participated directly in formulating a position for the corporation to take on public issues and authorizing expression of a particular message on the corporation's behalf.

201. See generally ABA Section of Corp., Banking and Business Law, Comm. on Corp. Laws, *Corporate Directors Guidebook*, 33 BUS. LAW. 1591, 1599-1600 (1978); American Law Institute, PRINCIPLES OF CORPORATE STRUCTURE AND GOVERNANCE: RESTATEMENT AND RECOMMENDATIONS, Part V introductory note (T.D. No. 3, April 13, 1984), Part IV Sec. 4.01 (T.D. No. 4, April 12, 1985); 3 L. ZAJDEL, FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 850 (perm. ed. 1986). On the relationship between fiduciary duty and social norms, see Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 802-04, 829-32 (1983).

202. See *supra* note 153 and accompanying text.

203. Cf. Dan-Cohen, *Law, Community, and Communication*, 1989 DUKE L.J. 1654 (explaining insincerity in analogous situations through distance between role and self).

204. See M. DAN-COHEN, *supra* note 149, at 35. There would be an odd asymmetry in viewing the corporation's speech as the manager's own, and any restriction on the corporation's speech as a comparable restriction on the manager's, since the "corporate veil" protects the manager from liability for the corporation's acts, and this presumably includes liability for harms caused by the corporation's statements.

restriction of speech autonomy follows instead from the effect of fiduciary duty in distancing the manager from the corporation's speech. Because the corporation's speech is not the manager's own, a prohibition against corporate speech should be viewed as limiting the manager's autonomy of action in a manner not of first amendment concern.

Conclusion

Contradictions and unpredictability in Supreme Court decisions on corporate speech are attributable in part to the Court's ambivalence about whether the private interest in speaker autonomy or the public interest in rich debate should prevail when these two free speech ideals conflict. Until the Court resolves that normative issue,²⁰⁵ first amendment decisions will remain contradictory and future decisions will remain unpredictable. Decisions on corporate speech need not remain so, however, because the normative conflict in these cases is more apparent than real. Corporate speech cannot implicate the ideal of speaker autonomy, and therefore warrants first amendment protection only when it is instrumentally valuable under the ideal of rich public debate.

While corporate speech is normatively simpler than Supreme Court decisions imply, the effects of corporate speech on public debate are more complex than the Court has recognized. Due to this factual complexity, the ideal of rich public debate supports protection of corporate speech in some circumstances and restriction in others. While the possibility that corporate speech may make a unique contribution to public discourse supports careful scrutiny of statutory restrictions, judicial review should not be uniformly fatal in application. Absent evidence that incumbents sought to silence their adversaries, judicial review should respect a legislative finding, based on consideration of the particular circumstances under which public debate is conducted, that restrictions are needed to prevent corporations from reducing the likelihood that individual voices will be heard and that the restrictions will not simply increase the dominance of government and the institutional press in public discourse. Where adequate findings have not been made, it may be appropriate for courts to provoke a second look by the legislature or for the courts themselves to consider post-enactment evidence of how corporate speech and

205. There is reason to doubt that the Court will ever resolve the issue with finality. The Court is not just a committee of nine individuals, as Professor Shiffrin emphasizes in *S. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE 3* (forthcoming), but a committee whose composition is always changing. The nine agree on the bare result of cases infrequently, and unanimous agreement on a rationale is even rarer. Even if we could realistically expect them all to agree on normative theories underlying Court doctrine, now and forever, it is not obvious that we should want them to do so.

restrictions on corporate speech actually affect public debate. The choice between those alternatives is less important than the conclusion that this is not an area in which the validity of legislative judgments should ultimately be determined by judicial presumptions.

Of course, abandoning outcome-determinative presumptions sacrifices some degree of predictability. Thus, while the proposed analysis of restrictions on corporate speech might alleviate contradictions among decisions in this area, it probably would not make many decisions any more predictable than they are now. This reflects my own judgment that the substantive ideal of rich public debate is more important and more central to broader democratic ideals than the predictability of decisions in this area.

There is one class of cases in which my analysis has substantial predictive value. Statutes or regulatory orders requiring a business corporation to assist dissemination of messages not of their choosing, like the order in *Pacific Gas & Electric*, would seldom if ever be held to violate the First Amendment. So long as regulations mandating corporate speech avoid the use of contingent mechanisms that create incentives for self-censorship, there is no reason to conclude that the contribution they make to public discourse would be offset by a reduction of corporate speech.

