COMMENT

PACIFIC GAS & ELECTRIC v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA: NEGATIVE FIRST AMENDMENT RIGHTS FOR CORPORATIONS

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The ideal that a great corporation is endowed with the rights and prerogatives of a free individual is as essential to the acceptance of corporate rule in temporal affairs as was the ideal of the divine right of kings in an earlier day.

—Thurman W. Arnold[1]

INTRODUCTION

For over sixty years, Pacific Gas & Electric Company ("PG&E") has published a newsletter entitled *Progress*, which contains political editorials, feature stories, and various information about utility services and bills.[2]

1. T.W. ARNOLD, THE FOLKLORE OF CAPITALISM 185 (1937). A member of President Franklin D. Roosevelt's "brain trust," Thurman Arnold headed the Justice Department's antitrust prosecutions. He later founded the influential Washington, D.C. law firm of Arnold & Porter.

2. Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California, 106 S. Ct. 903, 905 (1986) (Powell, J., plurality opinion). The facts and the procedural history of the case can be found at the beginning of the plurality opinion. *Id.* at 905-07.

PG&E distributes *Progress* in the "extra space" of its billing envelopes — that is, the portion of the envelopes that can be filled with additional materials without incurring additional first-class postage charges.

In 1980, a utility consumer advocacy group, Toward Utility Rate Normalization ("TURN"), urged the Public Utility Commission of California ("PUCC") to forbid PG&E from using the "extra space" to distribute its political editorials. TURN argued that ratepayers should not bear the expense of disseminating PG&E's political views.

The PUCC determined that the "extra space" used to distribute *Progress* was the property of the ratepayers and ordered PG&E to apportion the "extra space" between the utility and its consumers. PUCC permitted TURN to use the "extra space" four times annually for the next two years. PG&E could use any space unused by TURN during those months and could include additional materials, provided that it paid any added postage expenses.

PG&E contested the order but was denied a rehearing by the PUCC. The utility appealed to the California Supreme Court to strike down the access requirement on first and fifth amendment grounds. PG&E argued that by forcing it to mail TURN's message and solicitations along with its bill and newsletter, the state was violating the utility's first amendment right *not* to speak, to which this note will refer as a "negative first amendment right."[3] The Supreme Court first recognized that right's application to individuals in the 1943 flag salute case of *West Virginia Board of Education v. Barnette.*[4] The Court's decision in *Barnette* protected an individual's "freedom of mind"[5] by prohibiting the government from forcing one to "utter what is not in his mind."[6]

PG&E also argued that the PUCC's grant of access to TURN was a "taking" of its property without just compensation and, therefore, repugnant to the fifth amendment. The California Supreme Court rejected these arguments and affirmed the PUCC order without a written decision. PG&E petitioned the United States Supreme Court, which granted certiorari on the first amendment question only.

In *Pacific Gas & Electric Company v. Public Utility Commission of California,*[7] the U.S. Supreme Court vacated the PUCC's order granting TURN access to the billing envelope. In a plurality decision, the Court held that the order violated PG&E's first amendment rights because access inflicted a burden upon the utility's protected speech.[8] The plurality reasoned that the order would force the utility to be associated with potentially hostile views and risk

3. I. BERLIN, TWO CONCEPTS OF LIBERTY 7-19 (1958) (discussing the notion of "negative" freedom).

4. 319 U.S. 624 (1943). *See infra* text accompanying notes 20-26. For background on first amendment protection for corporate speech, see *infra* text accompanying notes 30-39.

5. *Id.* at 637.

6. *Id.* at 634.

7. 106 S. Ct. 903 (1986) (Powell, J., plurality opinion).

8. *Id.* at 910.

forcing PG&E to respond when it might prefer to remain silent.[9]

In recognizing PG&E's right not to speak, *Pacific* broke new ground in first amendment jurisprudence. The plurality opinion, two concurrences, and two dissents contain distinct indications of substratal Supreme Court uneasiness with California's determination that the "extra space" in billing envelopes was ratepayer property. The PUCC's redefinition of the property rights to the "extra space" in the billing envelopes presented a conflict between the Burger Court's "positivist" property analysis on the one hand, and its traditional "dominion" conception of property rights on the other. The Court's failure to address the implicit property issues underlying envelope access resulted in a strained first amendment analysis. In *Pacific*, then, these latent property questions may have weighed as an invisible "thumb" on the Court's decisionmaking scale.

This Comment will analyze the first amendment issues confronted in *Pacific* and the implicit property issues avoided by the Court. Part I focuses on the first amendment issues. It begins by examining the plurality's conclusion that access by TURN to the envelopes' extra space violated PG&E's negative first amendment rights. It then assesses the principles underlying the rights of individuals not to speak, in light of the protections accorded to corporate speech, to determine whether they support the plurality's finding of a negative first amendment right for corporations. Part I concludes by suggesting that the plurality should have fashioned an access standard more analogous to the standards for broadcasting or cable television than to the standard for newspapers, since the former media have more in common than newspapers with the medium of billing envelope insertions.

Part II examines the Burger Court's views on the redefinition of property rights, and its decisions in cases that link speech and property rights. Such decisions indicate that the Court may have deliberately chosen to side-step the constitutionally thorny property issues implicit in this case. The Comment concludes that the plurality had little basis in precedent or constitutional theory to extend negative first amendment rights to corporations, particularly public utilities.

I.
THE FIRST AMENDMENT ISSUES

A. Negative First Amendment Rights: The Right Not To Speak

Pacific[10] extended the first amendment protection accorded corporate speech in *First National Bank of Boston v. Bellotti*[11] to include a right not to

9. *Id.* at 911-12.

10. 106 S. Ct. 903 (1986).

11. 435 U.S. 765 (1978) (invalidating a Massachusetts ban on corporate political advocacy in public referenda, relying on the public's right to know rather than on the corporation's right to speak).

speak, or a "negative first amendment right."[12] Justice Powell's plurality opinion made clear that "speech does not lose its protection because of the corporate identity of the speaker,"[13] and that "for corporations as for individuals, the choice to speak includes within it the choice of what not to say."[14]

Powell contended that the PUCC's order would force PG&E to speak. He determined that TURN's messages within the envelopes "are hostile to appellant's interests"[15] and would "disagree with [the utility's] views as expressed in *Progress*."[16] Powell believed the PUCC order required PG&E "to associate with speech with which [PG&E] may disagree,"[17] and compelled PG&E "to respond to arguments and allegations made by TURN in its messages" to ratepayers.[18] Powell found "[t]hat kind of forced response . . . antithetical to the free discussion that the First Amendment seeks to foster."[19]

Powell's conclusion in favor of a corporate right not to speak is unsupported by the theories underlying negative first amendment rights for individuals or even positive first amendment rights for corporations. The right of individuals not to speak was first recognized in the 1943 landmark case, *West Virginia Board of Education v. Barnette*.[20] The decision upheld the right of Jehovah's Witness schoolchildren to refuse to participate in the salute to the flag and recitation of the Pledge of Allegiance. The *Barnette* decision began its analysis by stating that government censorship or suppression of expression "is tolerated by our Constitution only where the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish."[21] In considering whether the "clear and present danger" standard applies to deprive individuals of the right not to speak the Pledge, the Court wrote "[i]t would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."[22] *Barnette*, there-

12. *See* I. BERLIN, *supra* note 3, at 7-19.

13. *Pacific*, 106 S. Ct. 903 (citations omitted). For criticism of Powell's analysis of *Bellotti*, *see infra* text accompanying notes 34-39. *See* Consolidated Edison v. Public Serv. Comm., 447 U.S. 530 (1980). In *Con Edison*, the Court prevented the New York Public Service Commission from ordering utilities not to advocate nuclear power in the "extra space" within their monthly billing envelopes. The Court found this an impermissible content-based regulation of speech, especially because the regulation isolated an entire controversial topic of public debate, nuclear power. Once again, the public's right to hear a broader range of opinions on a controversial topic was the source of the right protected in *Con Edison*. This protection was for the utility's positive, not negative, first amendment rights.

14. *Pacific*, 106 S. Ct. at 912 (citations omitted). Powell relies on Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974). For an analysis of Powell's reliance on *Tornillo*, see *infra* text accompanying notes 40-45.

15. 106 S. Ct. at 910.

16. *Id.* One might quarrel with Justice Powell's assumption that TURN would always disagree with the utility.

17. *Id.* at 911.

18. *Id.* at 911-12.

19. *Id.* at 912 (citations omitted).

20. 319 U.S. 624 (1943).

21. *Id.* at 633.

22. *Id.*

fore, recognizes in individuals a right not to speak that is at least as strong as the positive right to speak.

The Court in *Barnette* found that the Pledge "requires affirmation of a belief and an attitude of mind,"[23] and "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[24] Justice Jackson stated that it was in the government's interest to adhere to "individual freedom of mind in preference to officially disciplined uniformity. . . ."[25] He could find no clear and present danger "to compel [an individual] to utter what is not in his mind."[26] "[I]ndividual freedom of mind" thus was the polestar of the right not to speak that *Barnette* recognized.

The Court's next major assertion of the negative first amendment right was in *Wooley v. Maynard*.[27] In *Wooley*, the Burger Court upheld a Jehovah's Witness couple's challenge to a New Hampshire law which required individuals to display the state's motto, "Live Free Or Die," on their automobile license plates. The Court held that it was unconstitutional for the state to "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[28] The opinion referred to the *Barnette* concern for "individual freedom of mind" in stating that "[t]he right to speak and the right to refrain from speaking are complimentary components of the broader concept of 'individual freedom of mind'."[29]

Similar to the *Barnette* decision, "individual freedom of mind" was the foundation of an individual's right not to speak in *Wooley*. Therefore, it is inapposite for Justice Powell in *Pacific* to cite both *Barnette* and *Wooley* to support a first amendment right not to speak for corporations,[30] because corporations are artificial legal entities incapable of possessing a mind, much less an "individual freedom of mind."[31] To grant negative first amendment rights

23. *Id.*

24. *Id.* at 642.

25. *Id.* at 637. *See also id.* at 641-42.

26. *Id.* at 634. Viewing the medium of "extra space" through the lens of negative first amendment rights, it becomes significant that the costs of billing envelopes and their contents are funded directly by utility ratepayers. The utility's customer essentially is forced to pay the cost of transmitting the utility's message in *Progress*, or else is deprived of her right to utility service. This violates her freedom not to be forced by the state to subsidize the expression of views with which she may disagree. *Cf.* Cahill v. Public Serv. Comm'n, No. 86-442, slip op. (N.Y. Dec. 23, 1986) (Court of Appeals, Hancock, J.), holding that the widespread practice of state-regulated utilities making customer-financed contributions to charities violated the negative first amendment rights of ratepayers by forcing customers to subsidize causes they may oppose.

27. 430 U.S. 705 (1977).

28. *Id.* at 713.

29. *Id.* at 714 (citing *Barnette*, 319 U.S. at 637).

30. *Pacific*, 106 S. Ct. at 909, 912. Chief Justice Burger relies fully on *Wooley* to sustain his analysis. *Id.* at 914 (Burger, C.J., concurring) [citation omitted].

31. *See* Dartmouth College v. Woodward, 17 U.S. 518 (1819), in which Chief Justice John Marshall articulated his view of a corporation as "an artificial being, invisible, intangible, and

to corporations for the purpose of protecting their individual freedom of mind "is to confuse metaphor with reality."[32] Recognition of a corporate right not to speak in *Pacific* strains the rationale underlying *Barnette* and *Wooley* "beyond the breaking point."[33]

The second basis for Powell's grant of a corporate right not to speak is the first amendment protection given to corporate speech in *First National Bank of Boston v. Bellotti*.[34] In *Bellotti*, the Court invalidated a Massachusetts criminal law prohibiting expenditures by banks and corporations to influence the vote on referendum proposals. Justice Powell's majority opinion ruled that a state may not confine corporate speech to specified issues, thus limiting the ability of corporations to participate in political debates.[35] Because the regulated speech in *Bellotti* was directed at influencing public opinion on general political issues, the Court noted:

> [T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.[36] If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensible to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.[37] 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.[38]

Thus, the object of the Court's first amendment concern for corporate speech was not "individual freedom of mind," but the societal value in "free discussion of governmental affairs." Yet, while *Bellotti* protected corporate speech, the Court deliberately did not address whether corporations are enti-

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existing only in contemplation of law. . . . [I]t possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence." *Id.* at 636.

32. *Pacific*, 106 S. Ct. at 921 (Rehnquist, J., dissenting).

33. *Id.*

34. 435 U.S. 765 (1978).

35. *Id.* at 792.

36. *Id.* at 776 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966) (footnote omitted)).

37. *Id.* at 777. Powell was explicit that the Court was not granting to corporations the full panoply of first amendment rights. "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the state statute] abridges expression that the First Amendment was meant to protect. We hold that it does." *Id.* at 776. Powell reiterated the Court's refusal to confer first amendment rights upon corporations: "[W]e need not survey the outer boundaries of the Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment." *Id.* at 777 (footnote omitted). Powell argued that, unlike speech rights for individuals, corporate speech was not being protected for its own sake, but for its value in widening the spectrum of opinion available in a participatory democracy. *Id.* at 777 n.12.

38. *Id.* at 776-77.

tled to positive or negative first amendment rights.[39] In sum, *Bellotti* protects corporate participation in political debate only to achieve the societal value of broader debate, not because corporations "have" first amendment rights. It does not support the assertion in *Pacific* that a corporation, particularly a public utility, has a first amendment right to speak, much less a right not to speak.

However, there is one type of corporation that does hold negative first amendment rights: newspapers. In *Miami Herald Publishing Co. v. Tornillo*,[40] the Burger Court struck down a Florida statute requiring newspapers to grant a right of reply to its criticisms of political candidates. Pointing to the possible "chilling effect" on a newspaper's news and commentary, the Court rejected the state's assertion of a compelling interest in enforcing a right of access, concluding that "[g]overnment-enforced rights of access inescapably 'dampen the vigor and limit the variety of public debate'."[41] Justice White's concurring opinion stated that "the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned."[42]

Newspapers are therefore constitutionally protected from government attempts to force them to speak. *Tornillo*, however, makes it clear that this protection is due to the special value of a free press in American public affairs.[43] Newspapers are distinguishable from other types of corporations because of the specifically enumerated "freedom of the press" within the first amendment. Historically, corporations have not played the role of newspapers as conveyors of individual ideas and opinion.[44] Nonetheless, Powell largely justifies denial of access to the billing envelope on the precedent of *Tornillo*, which grants negative first amendment rights to a unique type of corporation: a newspaper.[45]

B. Applying The Wrong Access Standards

Justice Powell characterized the envelope insertion question in terms of "compelled access."[46] Even if this is properly considered an "access" case,

39. *Id.* In footnote 13, Powell specifically raised the possibility that speech restrictions might be acceptable against corporations although unconstitutional with regard to individuals. *Id.* at 777 n.13.

40. 418 U.S. 241 (1974).

41. *Id.* at 257 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

42. *Id.* at 259 (White, J., concurring). *See* New York Times Co. v. U.S., 403 U.S. 713 (1971).

43. *Tornillo*, 418 U.S. at 258. Chief Justice Burger answered those who called for a right of access in newspapers that "the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the [First Amendment]." *Id.* at 254.

44. *Pacific*, 106 S. Ct. at 921 (Rehnquist, J., dissenting).

45. *Id.* at 908-09. ("The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to [the utility] as well as to the institutional press.") (Powell, J.).

46. *Id.* at 908. "Access" is defined as, "[F]reedom of approach or communication; or the

the plurality applies the wrong access standards in its analysis of the "extra space" medium. Access for speech purposes depends upon the property or media involved. Access to another's property for speech purposes depends upon the extent to which that property is a "public forum."[47] Access to a medium of communication for first amendment purposes is assessed according to standards suited to that particular medium.[48]

1. Powell Treats Billing Envelopes as Newspapers

In *Pacific* the Court treated the requirement that PG&E allow TURN access to the billing envelope as though it were compelling access to a newspaper. It reasoned that the utility speech allegedly affected was within a newsletter that was "[i]n appearance no different from a small newspaper."[49] By treating the extra space as though it were a newspaper, the Court ignored the ways in which billing envelopes differ significantly from newspapers as a means of communication. The opinion thus avoided the analytic approach prescribed by the Court in *Red Lion Broadcasting Co. v. FCC*, which required that the first amendment standard applied be justified according to the "differences in the characteristics of new media."[50]

2. Broadcast Media

In certain respects, utility billing envelopes more closely resemble broadcast facilities than newspaper pages. Just as the extra space containing the insertion has been determined to be ratepayer property,[51] the frequencies over which radio and television are broadcast have been defined as belonging to the public, not to licensed broadcasters.[52] While all the broadcasting hardware, from the microphone to the transmitter, may be solely the property of the licensed station owner, the airwaves used to convey the signal are public property, subject to regulation by the Federal Communications Commission.[53] Similarly, although the billing envelope and bill are unquestionably the prop-

means, power, or opportunity of approaching, communicating, or passing to and from . . . . 'Access' to property does not necessarily carry with it possession." BLACK'S LAW DICTIONARY 13 (5th ed. 1979).

47. *See* Marsh v. Alabama, 326 U.S. 501 (1946) (Black, J.). "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 506.

48. Southeastern Prods., Ltd. v. Conrad, 420 U.S. 546, 557 (1975). *See also*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

49. *Pacific*, 106 S. Ct. at 907.

50. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

51. *Pacific*, 106 S. Ct. at 906 n.3.

52. *Red Lion*, 395 U.S. at 375. "Before 1927, the allocation of frequencies was left to the private sector, and the result was chaos. . . . [B]roadcast frequencies . . . [were thus] regulated and rationalized by the government." *Id.*

53. *Id.* at 380. "This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power not niggardly but expansive,' whose validity we have long upheld." (quoting National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943)).

erty of the utility, the State of California deemed the space that would contain the insertions to be the property of the ratepayers.[54] On the other hand, the space at issue in a newspaper access case is private property belonging to and controlled by the newspaper's owners.

Public utilities themselves are also more akin to broadcasters than to newspapers. Utilities and broadcasters are imbued with a public responsibility and operate by the grace of a governmental franchise, while government licensing of newspapers has been a bete noire of the first amendment since its inception.[55] In addition, both utilities and broadcasters are granted a certain degree of protection from market forces by governmental limitations on competition, an advantage not enjoyed by newspapers.

The Court's first amendment standard for access to the broadcast media was established in *Red Lion*.[56] *Red Lion* upheld the FCC's fairness doctrine and sustained a narrow form of compelled access to the electronic news media for persons attacked in a broadcast presenting views on an issue of public importance.[57] Although the broadcasters contended that the first amendment protected their desire "to exclude whomever they choose from ever using [their] frequency,"[58] the Court rejected this claim, stating that neither a broadcasting licensee nor the government has the constitutional right to "monopolize a radio frequency to the exclusion of his fellow citizens. . . . [N]othing in the First Amendment . . . prevents the Government from requiring the licensee to share his frequency with others."[59] Thus, in *Red Lion*, the Court favored public access to information over the claimed first amendment rights of broadcasters.

Red Lion confined broadcaster autonomy rights within Congressional and FCC regulatory discretion.[60] The decision suggests an access doctrine for regulation of communications media beyond radio and television.[61] The final footnote of the decision states that access regulation which "mulitipl[ies] the voices and views presented to the public" within channels of communication

54. *Pacific*, 106 S. Ct. at 906 n.3. In fact, the entire cost of utility billing, including the envelope, postage and bill itself, is charged in full to the ratepayers (the "rate base"), and is not a charge against the utility's shareholders' earnings. *Id.*

55. *See* G. GUNTHER, CONSTITUTIONAL LAW 975 (11th ed. 1985) ("The most prominent technique of restraint in English law had been the licensing of printers and the prosecutions for seditious libel. . . . [A] barrier to licensing was at one time viewed as the major thrust of the First Amendment.") *See also* Schenk v. U.S., 249 U.S. 47, 51-52 (1919).

56. 395 U.S. 367 (1969).

57. *Id.* The FCC created the fairness doctrine early in broadcasting history and imposed on radio and television broadcasters the requirement that public issues be presented and discussed on broadcast stations, and that each side of those issues be given fair coverage.

58. *Id.* at 386.

59. *Id.* at 389. The Court weighed the competing first amendment interests, finding that it "is the right of the viewers and listeners not the broadcasters which is paramount." *Id.* at 390. (citing FCC v. Sanders Bros. Radio, 309 U.S. 470, 475 (1940); FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 361-62 (1955); Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 546 (1947)).

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

61. B. SCHMIDT, FREEDOM OF THE PRESS V. PUBLIC ACCESS 165 (1976).

might "not abridge freedom of speech and press."[62] Professor Jerome Barron, who advocates an "access-for-ideas" rationale, sees *Red Lion* not only as a broadcast case but as a media case as well.[63] Viewed from this perspective, the case recognizes a newly enunciated constitutional right to access.[64] Benno Schmidt endorses this interpretation when he writes that *Red Lion* "provided doctrinal ammunition for the argument that all media, electronic and otherwise, must be opened to those who lack the know-how or resources to gain access otherwise."[65]

Although first amendment access rights were not expanded as Barron wished, the fairness doctrine broadcast access requirements have survived through the Burger Court years. *CBS, Inc. v. Democratic National Committee*[66] upheld the broadcasters' right to refuse to accept paid public issue advertisements. However, the Court nonetheless reiterated the predominance of viewers' first amendment rights over those of broadcasters[67] and stated that the journalistic freedom of broadcasters is not as extensive as that of newspapers.[68] The Court held that a "licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.' "[69] In 1981, the Court upheld access requirements that broadcast stations make time available to legally qualified candidates for federal elective office.[70]

There is no better example of a private corporation with "public trustee" obligations than a public utility, the rates and activities of which are regulated by state agencies.[71] In exchange for regulation the utilities are granted valuable geographic monopolies and guaranteed profits by the state. Many of the same broadcast access interests arise with utility billing envelope insertions.

Radio and television are different from other media because of their limited number of broadcast frequencies. If the government did not control the allocation of these frequencies, interference and chaos would ensue.[72] The scarcity of frequencies also explains why *Red Lion* upholds access rights for differing viewpoints while *CBS, Inc. v. Democratic National Committee* per-

62. *Red Lion*, 395 U.S. at 401 n.28.

63. Barron, *Access — The Only Choice For The Media?*, 48 TEX. L. REV. 766, 769-91 (1970).

64. *Id.* at 771.

65. B. SCHMIDT, *supra* note 61, at 166.

66. 412 U.S. 94 (1973).

67. *Id.* at 102.

68. *Id.* at 117-18.

69. *Id.* at 118; *see also Red Lion*, 395 U.S. at 389.

70. CBS, Inc. v. FCC, 453 U.S. 367 (1981).

71. *See Pacific*, 106 S. Ct. at 923 nn.3 & 4 (Stevens, J. dissenting). For example, California requires that utilities notify their customers of rate increases within the billing envelope. CAL. PUB. UTIL. CODE § 454(a) (West 1975). Also, since 1919 California has required that each electric bill contain the regulations "regarding payment of bills, disputed bills and discontinuance of service." 17 Decisions of the Railroad Commission 143, 147 (1919), *quoted in Pacific*, 106 S. Ct. at 923 n. 3.

72. *Red Lion*, 395 U.S. at 375-76.

mits broadcasters to refuse to accept paid editorial advertisements.[73] The interest in having a wide range of viewpoints presented[74] does not demand that each and every individual or group who can afford to purchase airtime be so obliged.[75] Chief Justice Burger quoted Professor Meiklejohn to make the distinction that with broadcasting's limited time and space "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[76] Therefore, the Burger Court's refusal to require broadcasters to accept paid editorial advertisements does not significantly undercut *Red Lion*'s access principles.

The physical scarcity of the public utility envelopes' extra space is a characteristic shared with broadcasting airwaves, and supports an assertion of a similar first amendment access standard.[77] Only one billing is made per month and each is subject to standard first class envelope size and weight constraints. Similarly, it would be as ludicrous to grant access for anyone wishing to express opinions within the limited space of the billing envelope as it would be to give all individuals airtime on network television.

3. *Cable Television*

Cable television[78] is a medium not subject to the same constraint of physical scarcity that exists in broadcasting or billing envelopes.[79] Cable systems have the potential, often unrealized, to transmit many more signals than broadcast airwaves.[80] There seems to be no barrier of physical or electronic

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73. 412 U.S. 94 (1973).

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

75. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. at 123.

76. *Id.* at 122 (quoting MEIKLEJOHN, POLITICAL FREEDOM 26 (1948)). In *Red Lion*, 395 U.S. at 392, Justice White supports the constitutionality of requiring broadcasters to permit answers delivered by the actual individuals who hold the opinion in opposition to the broadcasters' views.

77. *See Red Lion*, 395 U.S. at 386; *see also Pacific*, 106 S. Ct. at 906-07 n.4, where the plurality cites the argument that envelope access was unnecessary because there are other means available to TURN to communicate with the ratepayers. By this reasoning, all access to television and radio under the fairness doctrine would also be unnecessary because individuals could just as well communicate their differing views via magazines, billboards, or mass-mailings. Requiring that access be permitted on the same medium guarantees that the *same* audience will have access to these views, each expressed with the same advantages and disadvantages of that particular medium. Access requirements also ensure the practical possibility that financial burdens will not prevent a multiplicity of views from being presented on that medium, even for those viewpoints whose speakers do not own their own medium of communication.

78. "Cable television" refers to systems capable of both re-transmitting television broadcast signals and transmitting a variety of programming from non-broadcast sources made possible by satellite delivery systems as well as programming originated in their own studios. *See* Berkshire Cablevision of R. I. v. Burke, 571 F. Supp. 976, 979 n.1 (D.R.I. 1983).

79. *See* Omega Satellite Prod. Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) ("[F]requency interference [is] a problem that does not arise with cable television."); Home Box Office, Inc. v. FCC, 567 F.2d 9, 44-45 (1977) ("[A]n essential precondition of first amendment theory — physical interference and scarcity requiring an umpiring role for government — is absent [in cable television].").

80. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1439 (D.C. Cir. 1985) (Wright, J.) ("Some new or recently upgraded systems have the capacity to offer more than 100 channels.

interference to operating more than one cable system in a given locality.[81] In this respect cable television is similar to newspapers.[82] Due to very large start-up costs and the nature of the cable television market, however,[83] cable operators very rarely develop competing cable systems for the same service area and have operated largely free from competition.[84]

In *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court made clear that the "economic scarcity" argument cannot constitutionally be applied to newspapers,[85] and some courts have suggested that, at least on the records before them, *Tornillo* applies equally to cable television.[86] Other courts, however, find that economic scarcity in the form of "natural monopoly" provides a constitutionally permissible justification for regulating municipal cable systems.[87] The "natural monopoly" argument is that, as a practical matter, the first cable operator to construct a cable system in a given service area enjoys a "natural monopoly" due to cable television's high start-up costs and the nature of the market, allowing that system to operate largely free from

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More currently operational systems, however, can carry far fewer, typically 12 to 36."). *See also* Home Box Office, Inc. v. FCC, 567 F.2d at 45-46; Note, *Cable Television and Content Regulation: The F.C.C., The First Amendment and The Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 135 (1976) [hereinafter *The Electronic Newspaper*] (describing potential channel capacity as "almost infinite.").

81. Home Box Office, Inc. v. FCC, 567 F.2d at 46.

82. *See* SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 92 (1971). ("Cable television, by freeing television from the limitations of radiated electro-magnetic waves, creates . . . a situation more nearly analogous to that of the [print] press."). *See also* B. SCHMIDT, *supra* note 61, at 200; *The Electronic Newspaper*, *supra* note 80, at 146.

83. *See* Meyerson, *The First Amendment and the Cable Television Operator*, 4 COM./ ENT.L.J. 1, 4-6 (1981-82).

84. Berkshire Cablevision, 571 F. Supp. 976, 986 (D.R.I. 1983); *vacated as moot*, 773 F.2d 382 (1st Cir. 1985). The cable television company challenging Rhode Island's public access requirements was outbid for the local franchise by another applicant who did not object to the conditions. *See also* Omega Satellite Prods. v. City of Indianapolis, 694 F.2d 119, 127-28 (7th Cir. 1982), where, despite claim that a city ordinance required *de facto* franchise grants, competing cable operators were deemed unlikely to attempt to establish a cable system where start-up costs produced a virtual "natural monopoly"; First Report and Order, 20 F.C.C.2d 201, 222 n.27 (1969).

85. *Tornillo*, 418 U.S. at 247-56. The Supreme Court rejected the suggestion that purely economic, rather than physical, constraints on the number of newspaper media voices available in a given community justify otherwise unwarranted intrusions into first amendment rights.

86. While *Tornillo* involved the traditional print media, the D.C. Circuit has observed no meaningful "distinction between cable television and newspapers on this point." Home Box Office, Inc. v. FCC, 567 F.2d at 46; *See also* Midwest Video, 571 F.2d 1025, 1055 (8th Cir. 1978) (dicta), *aff'd*, 440 U.S. 689 (1979) (invalidating the FCC's mandatory access and channel capacity requirements made upon cable systems); Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434, 1450 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986) (invalidating requirement that cable operators "must carry" every local over-the-air television broadcast signal).

87. *See, e.g.*, Community Communications Corp. v. City of Boulder, 660 F.2d 1370, 1378-79 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) (distinguishing *Tornillo* and finding that natural monopoly is a constitutionally permissible justification for "some degree" of cable television regulation); *Berkshire Cablevision*, 571 F. Supp. at 986; Hopkinsville Cable TV v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543, 547 (W.D. Ky. 1982).

competition.[88]

Similar factors cause most newspapers to enjoy a monopoly in their areas of distribution.[89] Nonetheless, the lack of an access requirement does not prevent individuals from expressing their opinions in that same medium, namely, in print.[90] Anyone can produce and manually distribute a relatively inexpensive printed publication, albeit without the distribution ability of a newspaper. The communicative power of cable television is out of the reach of nearly all individuals, save those who have millions of dollars to invest in an alternative cable system, and to compete for a cable franchise or broadcast license.[91]

Similarly monumental financial barriers would be faced by anyone attempting to independently communicate with a state's public utility customers. A consumer message separately mailed to the millions of public utility ratepayers in a given state would cost hundreds of thousands or even millions of dollars per mailing in postage costs alone. Without access to the billing envelope, there exists no effective and reasonably priced alternative to mailing millions of individually addressed letters to all utility customers statewide. For TURN and fledgling utility consumer advocacy groups in other states, the high cost of separately mailed communications to ratepayers would be far beyond their means.

Another scarcity distinction between cable television and newspapers is that, aside from any "natural" economic phenomena, there is a monopolistic tendency attributable to the municipal franchising process.[92] Municipalities have a substantial interest in limiting the number of cable television systems, since construction and operation requires a burden on public streets and utility facilities.[93] A government agency granting a guaranteed exclusive franchise to a cable television operator establishes what might be called a "legal" monopoly and thereby removes an important means of expression from the hands of all but a few individuals.[94]

Despite the controversy over the scarcity rationale, cable television has been subject to much greater regulation concerning access obligations than

88. *Berkshire Cablevision*, 571 F. Supp. at 986; *see* Meyerson, *supra* note 83, at 4-6; Omega Satellite Prods. v. City of Indianapolis, 694 F.2d at 127-28 ("the apparent natural monopoly characteristics of cable television provide . . . an argument for regulation of entry.").

89. *See Tornillo*, 418 U.S. at 249-54; *see also* Home Box Office, Inc, 567 F.2d at 46.

90. *See Berkshire Cablevision*, 571 F. Supp. at 986.

91. *See* Preferred Communications, Inc. v. City of Los Angeles, Cal., 754 F.2d 1396, 1405 n.8 (9th Cir. 1985), *aff'd*, 106 S. Ct. 2034 (1986). The case raises the concern that "cable's natural monopoly did prevent public use of the television medium," citing *Berkshire Cablevision*, 571 F. Supp. at 986, and questions whether cable's burden on streets and public utility facilities justified the city's creation of a legal monopoly by denying a franchise to a competing cable competitor.

92. *See* Quincy Cable TV, Inc. v. F.C.C., 768 F.2d at 1450.

93. *See* Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Omega Satellite Products*, 694 F.2d at 127; *Berkshire Cablevision*, 571 F. Supp. at 985.

94. *See Berkshire Cablevision*, 571 F. Supp. at 986.

newspapers or broadcast.[95] Yet, cable encompasses a "spectrum of communication services," while a broadcaster has just a single channel; access obligations therefore are a less severe burden for cable operators than for traditional broadcasters.[96] For a broadcast station, public access programming means forfeiting part of its finite amount of potential advertising airtime, and might cause its audience to switch the dial, thus further threatening advertising revenues.[97] Cable operators' revenues are not threatened by public access messages in this manner. Also, cable access obligations are not triggered by the cable operator's expression of viewpoints, as are fairness doctrine reply requirements at issue for broadcasters in *Red Lion*.[98] This is the "chilling effect" noted with regard to right-to-reply requirements for newspapers in *Tornillo*,[99] which seems a far less acute problem in cable television.[100] In *Red Lion*, the Supreme Court dismissed broadcastors' claims that reply rights would tend to chill their speech as "at best speculative";[101] there would seem to be even less chilling effect inherent in access requirements for cable television operators. The Supreme Court has yet to assess cable television's medium characteristics under the *Red Lion* analysis, and therefore has not yet set cable access standards.[102]

C. *Conclusion: The Court Failed to Properly Consider the Medium Characteristics Peculiar to Utility Billing Envelopes*

Access obligations of cable and broadcast television entities are justified on the basis of the particular characteristics of those media.[103] For cable television, these characteristics include the monopolistic nature of cable franchises, the strong governmental interest in regulation, and the limited ex-

95. B. SCHMIDT, *supra* note 61, at 199-200. Since 1972, the FCC has issued cable television regulations dealing with access, locally originated programming, multiple channel capacity, and two-way communications potential. *See also* Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 U. VA. L. REV. 541, 553 (1975); Community Communications v. City of Boulder, 660 F.2d at 1378-79; *Berkshire Cablevision*, 571 F. Supp. at 985.

96. B. SCHMIDT, *supra* note 61, at 212-13.

97. *Id.* at 212.

98. Cable operators are also subject to Fairness Doctrine requirements with respect to their non-access channels. *Id.* at 213.

99. *Tornillo*, 418 U.S. at 256-57.

100. *See* B. SCHMIDT, *supra* note 61, at 212-13.

101. *Red Lion*, 395 U.S. at 393.

102. City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. at 2038 (Blackmun, J., concurring, joined by Marshall and O'Connor, JJ.) ("the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether these characteristics require a new analysis.")

103. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (rejecting broadcasters first amendment autonomy objections to the FCC's Fairness Doctrine and upholding access rights to electronic media for persons attacked in a broadcast presenting views on a controversial issue of public importance); *see also* CBS, Inc. v. FCC, 453 U.S. 367 (1981) (upholding access requirements that broadcast stations make time available to legally qualified candidates for federal elective office); Community Communications v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

tent to which access would chill the expression of cable operators. These characteristics weaken the cable operator's first amendment claims to exclude public access, and do not outweigh the public's interest in receiving a wide range of viewpoints.

In broadcast television, physical, economic and legal barriers limit the number of broadcast outlets, leading government to require that the broadcast frequencies be shared with individuals holding opposing viewpoints. The fact that the actual medium of transmission, the airwaves, are deemed to be owned by the public injects a property element that undercuts broadcasters' autonomy arguments for the right to exclude opposing messages. Thus, the first amendment rights of viewers and listeners are considered paramount to the free speech rights of broadcasters in this particular medium.

However, in *Pacific*, the Court refused to consider the unique characteristics of the billing envelope medium, as its *Red Lion* doctrine directs. Instead, Powell chose to apply the *Tornillo* newspaper access standard. Justice Powell justified his application of newspaper access standards on the simplistic explanation that the utility's monthly message, *Progress*, was "in appearance no different from a small newspaper."[104] If "appearance" were the determinative factor under *Red Lion*, then broadcast and cable television, which are identical in appearance, should be subject to identical access standards. Yet previous decisions have recognized important distinguishing characteristics between broadcast and cable television and have tailored access standards accordingly.[105] Powell's "appearance" test ignores the important distinctions between public utilities and newspapers. Utilities, for example, are state-created monopolies; newspapers are privately owned. Utility ratepayers own the extra space in billing envelopes; newspaper readers do not own page space. Moreover, the financial barriers posed by alternative means of communication with ratepayers are much larger than those posed by alternative means of communication with newspaper readers. Any "appearance" of similarity between these media is thus deceiving for the purpose of setting appropriate access standards. A *Red Lion* analysis, on the other hand, recognizes the salient and distinguishing features of such media and thereby compels a more rational and comprehensive analysis for setting media access standards.

Moreover, the plurality opinion in *Pacific* is tainted by its characterization of this case as a pure "access" case. Such a characterization allowed the plurality to effectively ignore California's determination that the extra space in the billing envelope is the property of the ratepayers, not the utility.[106] If this space is not owned by the utility, then this could not be a true "access" case.

104. *Pacific*, 106 S. Ct. at 907.

105. *See supra* notes 51-102 and accompanying text.

106. 106 S. Ct. at 906 n.3. The Court noted the lower court's determination that the "extra space" belonged to the ratepayers but relegated the argument to a mere footnote.

II. IMPLICIT PROPERTY ISSUES

Justice Powell's plurality decision framed the *Pacific* case solely as a free speech conflict without an analysis of property rights. Powell merely noted that the Public Utility Commission of California "had decided that the envelope space that [PG&E] had used to disseminate *Progress* is the property of the ratepayers."[107] However, the question of envelope access necessarily requires an examination of the property interests involved. Had Powell addressed the property issues implicit in the utility billing insert controversy, he would have had to determine just which property interests were present in the use of the "extra space" and how the Constitution properly balances rights to speech and property.[108]

Justice Marshall's concurrence challenges the validity of the PUCC's assignment of a property right within the billing envelope to the ratepayers.[109] Although Marshall referred to his concurrence in *PruneYard Shopping Center v. Robins*[110] to acknowledge that the State may generally create or abrogate rights in attaining permissible legislative objectives, he asserted that California's redefinition of the property rights to the extra space in the billing envelope was for an impermissible purpose. Marshall rested this conclusion on the argument that the first amendment disallows "burdening the speech of one party in order to enhance the speech of another."[111] Marshall distinguished

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107. *Id.*

108. Justice Powell commented indirectly on the implicit property question by quoting from the dissenting opinion of one of the PUCC commissioners. *Id.* at 906-07 n.4. Powell paraphrased Commissioner Bagley's argument as suggesting "that the Commission's order had potentially sweeping consequences for various kinds of property interests." *Id.*

The quoted passage highlights Commissioner Bagley's property objections that warned of a "slippery slope" of ratepayer access for dissemination of ideas to a wide range of utility facilities including "the face of every utility-owned dam, the side of every building . . . and the bumper of every utility vehicle." That Powell footnoted this "parade of horribles," albeit spoken through the pen of the dissenting PUCC commissioner, bespeaks the possibility that such property concerns influenced his own findings. Chief Justice Burger's brief concurrence also raised the "slippery slope" property argument. *Id.* at 914. Neither Powell nor Burger seem to give much credence to the State's assignment of property rights to the ratepayers.

109. *Id.* at 916 (Marshall, J., concurring in the judgment).

110. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). In *PruneYard*, Marshall applauded the California Supreme Court's construction of the California Constitution to redefine the property rights of shopping center owners in order to grant access to third parties for the exercise of free expression. He agreed with the California court that the due process clause of the fourteenth amendment did not prevent the state from abrogating or modifying common law property rights. *Id.* at 91.

Marshall also referred to Martinez v. California, 444 U.S. 277 (1980), decided earlier in that same term. There the Court found no constitutional objection to California's abolition of a tort remedy, even if the pre-existing remedy was "a species of 'property' protected by the Due Process Clause." *Id.* at 281-82.

Marshall went on to state in his *PruneYard* concurrence that to disallow state or federal governments from revising such property rights "would represent a return to the era of Lochner v. New York." 447 U.S. at 93.

Thus there is, at the least, a hint of contradiction between Marshall's positions on state revisions of property rights in *PruneYard* and *Pacific*.

111. *Pacific*, 106 S. Ct. at 916-17.

his position in *PruneYard* from that in *Pacific* on the grounds that access to the envelope represented an intrusion onto the utility's property "that exceeds the slight intrusion permitted in *PruneYard*."[112]

There is long-standing support in public utility case law for the assertion that the billing envelope would ordinarily be considered the property of the utility. In 1926, the Supreme Court stated in *Board of Public Utilities Commissioners v. New York Telephone Co.*[113] that "[c]ustomers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or to other operating expenses, or to the capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company."[114]

In 1930, the Court noted that "the property of a public utility, although devoted to a public service and impressed with a public interest is still private property."[115] Nonetheless, the definition of property and the economic regulation necessary to promote "public welfare" remain state legislative functions which receive deference from the courts so long as the state actions have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory.[116] State legislatures empower public utility commissions with varying degrees of regulatory authority to limit utility property rights and oversee management decisions on the use of utility property.[117] For example, California's Public Utility Commission has a plenary grant of power, only limited by the utility's constitutional rights.[118]

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112. *Id.* at 917. Marshall does not explain why he considers the physical invasion in *PruneYard*, where petitioners would have been permitted to walk about the shopping center soliciting signatures, to be a "slight intrusion" while quarterly access to the billing envelope would be excessive. Justice Rehnquist, however, wrote in his dissent that he believed "that the right of access here is constitutionally indistinguishable from the right of access approved in PruneYard Shopping Center v. Robins." *Id.* at 917 (Rehnquist, J., dissenting).

113. 271 U.S. 23 (1926).

114. *Id.* at 32. *See also* Hanschen, Harris & Woo, *Consumer Access to Utility Mailings: First Amendment and Other Issues*, 5 ENG. L.J. 327, 329-33 (1985) (comment on utility billing envelope insertions authored by attorneys for Pacific Gas & Electric. Robert L. Harris argued the case for the utility before the Supreme Court).

115. United Rys. and Electric Co. of Baltimore v. West, 280 U.S. 234, 249 (1930). *See also* Missouri *ex rel.* Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 289 (1923) ("It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with general power of management incident to ownership."

116. *See generally* Nebbia v. New York, 291 U.S. 502 (1934). The Court in *Nebbia* upheld the New York legislature's establishment of a Milk Control Board to regulate milk prices, rejecting the precedents in the line of cases beginning with Lochner v. New York, 198 U.S. 45 (1905). *Nebbia* set the modern standard for state economic regulation.

117. *See* Comment, *Access to Public Utility Communications: Limits Under the Fifth and First Amendments*, 21 SAN DIEGO L. REV. 391, 397-98 (1984).

118. *Id.* at 397-98 n.50 ("California delegates to its P.U.C. the broad power to 'do all things' necessary and convenient to regulate utilities."). *See* CAL. PUB. UTIL. CODE § 701 (West 1975); CAL. PUB. UTIL. CODE § 767.5 (West 1986), which says "[T]he Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such *surplus space and excess capacity* for use by cable television corporations." CAL. PUB. UTIL. CODE § 767.5 (9)(b) (emphasis added).

The Marshall and Burger concurrences, as well as traditional utility property law, indicate that some degree of doubt remains as to the property rights involved in the extra space in the billing envelope. The state redefinition of property rights within the envelope was the result of an administrative order by the PUCC, not a determination of the California legislature or courts.[119] Because the U.S. Supreme Court had limited the question presented in *Pacific* to the first amendment issue, Powell's summary treatment of the property question may be explainable by the Court's circumscribed scope of review, and may not indicate that the ratepayers' property rights within the billing envelope have been definitively decided.[120] At the least, Marshall's concurrence[121] and Powell's "slippery slope" property footnote[122] indicate that property interests were considered in the Court's deliberations, however inadequately.

A. The Court's "Positivist" View of Property Rights

A full analysis of the Supreme Court's treatment of property rights must consider the differing conceptions of "property." The Burger Court developed a "positivist" approach to the redefinition of property rights, allowing a state to realign state-created property rights to serve legitimate state interests. The circumstances in the *Pacific* case, however, placed this view in conflict with traditional "dominion" notions of property rights, which would allow the utility to maintain dominion over the billing envelope. This inconsistency may

119. The utility, Pacific Gas & Electric, had appealed the PUCC order to the California Supreme Court, which denied discretionary review, thus affirming the PUCC decision without opinion and making no independent adjudication of the property rights involved. The U.S. Supreme Court vacated the PUCC order and remanded the case to the California Supreme Court "for further proceedings not inconsistent with this opinion." *Pacific*, 106 S. Ct. at 914.

120. *See, e.g.*, Consolidated Edison v. PSC, 447 U.S. 530 (1980) (Blackmun, J., joined by Rehnquist, J., dissenting). The dissent suggests that state laws might make billing envelopes ratepayer property. Blackmun concluded that "the State's attempt here to protect the ratepayers from unwittingly financing the utility's speech and to preserve the billing envelope for the sole benefit of the customers who pay for it does not infringe upon the First and Fourteenth Amendment rights of the utility." *Id.* at 555.

Prior to Blackmun's dissent in *Consolidated Edison*, it had never been suggested that anyone other than the sender "owned" the space in a first-class envelope. Property rights within a first-class envelope had been discussed only in the context of limiting government interference inside the envelope. *Cf., e.g.*, Bolger v. Young's Drug Products Corp., 463 U.S. 60 (1983); Blount v. Rizzi, 400 U.S. 410 (1971); Lamont v. Postmaster General, 381 U.S. 301 (1965); Milwaukee Pub. Co. v. Burleson, 255 U.S. 407 (1921) (especially the dissenting opinions of Brandeis, *id.* at 417, and Holmes, *id.* at 436). "[T]o the extent that the use of the first class mails is a privilege or right, it is a federally created privilege or right not subject to control by state authority." 255 U.S. at 418 (Brandeis, J., dissenting).

121. Marshall's synopsis admits the counterpoising effect of property on speech rights: "In the present case, California has taken from [Pacific Gas & Electric] the right to deny access to its property — its billing envelope — to a group that wishes to use that envelope for expressive purposes." *Pacific*, 106 S. Ct. at 915. Note that the language of Marshall's statement of the case cedes ownership of the envelope to the utility.

122. See *supra* note 108.

help to explain why Powell's opinion does not include a discussion of property issues.

The traditional "dominion" conception of property refers to ownership of corporeal things such as land and chattels and certain intangibles such as bills, notes, stocks, and bonds.[123] This view of property ownership was expressed by Blackstone as "sole and despotic dominion."[124]

However, modern law has begun to recognize the legitimacy of a "social" as opposed to a "dominion" view of property. The social view of property was described in Charles Reich's 1964 *Yale Law Journal* article, "The New Property."[125] The "new property" conception includes a property right inherent in claimed entitlements to government benefits, status, and other economic rights which had previously been considered "privileges." Reich contended that this government-created wealth was characterized by many of the practical, although not always the legal, aspects of property.[126] Reich's article challenged the traditional rights-privilege view of property and provided a theoretical basis for expanded procedural protection of the dispensation and retraction of state-created wealth.[127]

The Burger Court was at first receptive to the "new property" views.[128] Fairly soon, however, the Court returned to the traditional rights-privilege distinction familiar to the "dominion" view of property rights[129] by develop-

123. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 691-92 (1938). *See also* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 453 (1977); Dorsen & Gora, *Free Speech, Property and the Burger Court: Old Values, New Balances*, 1982 S. CT. REV. 195, 199 [hereinafter Dorsen & Gora].

124. 2 W. Blackstone, Commentaries 2. Blackstone wrote that private property was "sole and despotic dominion . . . over the external things of the world, in total exclusion of the right of any other individual in the universe." *Id.*

125. Reich, *The New Property*, 73 YALE L.J. 733 (1964) [hereinafter Reich]; *See also* Oakes, *Property Rights in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 587 (1981); Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984) [hereinafter Herman].

126. Reich, *supra* note 125, at 734-39. Reich contrasted "property," a legal construct, with "wealth," a creation of culture and society. "Property is a legal institution the essence of which is the creation and protection of certain private rights of wealth of any kind." *Id.* at 771.

The rights-privilege doctrine is encapsulated in Justice Holmes' famous remark that there is "no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). In that case, a policeman challenged his dismissal for violating a regulation that restricted his "constitutional right to talk politics." Holmes held that the due process clause protects only those individual interests characterized as "rights" and not those deemed mere "privileges."

127. Reich, *supra* note 125, at 734-39.

128. *See* Goldberg v. Kelly, 397 U.S. 254, (1970). The Court in *Goldberg* had to decide whether an evidentiary hearing was required before a welfare recipient's benefits could be terminated. In dicta, the Court described welfare as more closely resembling "property" than a "gratuity," *id.* at 262 n.8, and as benefits "of statutory entitlement for persons qualified to receive them." *Id.* at 262. (Note that the Court cited Reich, *supra* note 125, at 262 n.8 in its reference to "entitlement.") *See also* Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1299-304 (1975), for a discussion of *Goldberg*.

129. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). *Roth* established a two-step test

ing a new "positivist" test to define property interests. The "positivist" test is based upon the positive source of the property interest, whether it be federal, state, or local government.[130] Under the "positivist" view of property rights, an entitlement to wealth can be created by a government at any level and can be denied, without violating the due process clause, by that same government.[131] This conception, embodied in a novel test, reinvokes the rights-privileges doctrine attacked by Reich.

In determining the rights of the parties in *Pacific*, PG&E's property interests could be characterized as traditional "dominion" property rights, in line with common law views of public utility property rights. The rights of the ratepayers, on the other hand, were government-created property rights more in line with the "new property" concept of rights attaching to an entitlement to government-created wealth.

By the Court's "positivist" test, the state, as the source of state common law relating to public utility property rights, would be able to redefine those rights without violating the due process clause. In exercising its power to redefine common law public utility property rights, the state of California denied PG&E's "dominion" property right to exclude others from its billing envelope. The Court was thus confronted with the contradictions between its two conceptions of property rights. As the positive source of law, California was able to restrict PG&E's traditional "dominion" property rights to the advantage of its newly-created "new property" right of ratepayers to the extra space in utility billing envelopes.[132] In theory, this right was able to withstand the U.S. Supreme Court's positivist test for due process protection. However, the Court's distaste for California's redefinition, evidenced in Powell's footnote as well as Burger and Marshall's concurrences, may have led it to short-circuit its positivist due process test and instead attack the non-traditional property redefinition on first amendment grounds.

The cause of the Court's dilemma can perhaps be explained by the apparent inconsistency between its definition of the word "property" under the fifth

for determining procedural due process rights, first asking whether the imperiled "interest is within the fourteenth amendment's protection of liberty and property" by considering the "nature" rather than the weight of the interest at stake. If so, the courts are then to balance the nature of the government function involved against the private interest affected by the government action.

130. *Id.* at 577. After giving a broad definition of "liberty," Justice Stewart stated his positivist view of property rights, which he asserted "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

131. *Id.*

132. This comment uses the term "new property right" to describe Reich's conception of a property right to entitlements, previously considered to be "privileges." While recognizing that some others prefer "entitlement," *see e.g.* Goldberg v. Kelly, 397 U.S. at 262, the term "new property right" highlights the crucial legal evolution from "privilege" to "right," and provides a clearer contrast between the traditional "dominion" conception of property and more modern notions of legal property rights to state-created wealth.

and fourteenth amendments. When defining property under the fourteenth amendment's due process clause, the Court takes a positivist approach, assigning no constitutional content to the word "property." However, when viewing "property" in a fifth amendment "takings" analysis, the Court accords an independent constitutional content to the word "property."[133] In trying to follow positivism on the one hand and strict respect for dominion property rights on the other, the Court is necessarily thrown into a quandary when facing an otherwise encouraged state law redefinition of property.

A leading example of the Court's zealous protection of the fifth amendment definition of property is *Loretto v. Teleprompter Manhattan CATV Corp.*[134] In *Loretto,* the Court invalidated a New York statute requiring landlords to permit cable television companies to install cable facilities on the landlord's rental properties.[135] The Court articulated a *per se* rule that any governmentally authorized permanent physical occupation of property is a "taking," regardless of the degree of economic impact on the owner or the public benefit the action achieves.[136] Noting that the statute did not purport to give the tenants any enforceable property rights with respect to cable installation, Justice Marshall's majority opinion asserted that "the government does not have unlimited power to redefine property rights."[137]

One resolution of the Court's dilemma with respect to the definition of "property" under the fifth and fourteenth amendments might be a decision that "property" means the same thing under the due process clauses of both amendments. A decision utilizing the positivist approach under both amendments would allow states more latitude to restrict procedural protection for state-created benefits and property redefinitions that serve valid state purposes, and preserve the traditional rights-privilege doctrine familiar to the "dominion" view of property. This would de-constitutionalize the term "property" and avoid the excesses exemplified by the *per se* rule of the *Loretto* decision.[138] However, by ceding to the states broader authority to redefine

133. Herman, *supra* note 125, at 497 n.69 (citing TRIBE, AMERICAN CONSTITUTIONAL LAW 509 (1978) (independent constitutional content to the word "property")). Professor Herman also points out the apparent inconsistency between the definition of property in the fifth and fourteenth amendments.

134. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

135. The *Loretto* decision overruled the New York Court of Appeals determination, 53 N.Y.2d 124, 423 N.E.2d 320, 440 N.Y.S.2d 843 (1981), that running a cable across the rooftop of the plaintiff's apartment building, occupying only about one and a half cubic feet, did not represent a compensable "taking" of the landlord's property.

136. *Loretto,* 458 U.S. at 426-35.

137. *Id.* at 439, *citing* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980), for the point that "a State, by *ipse dixit,* may not transform private property into public property without compensation."

138. *See, e.g.,* Michelman, *Process and Property in Constitutional Theory,* 30 CLEV. ST. L. REV. 577, 587-88 (1981) (suggesting that some takings cases are simply examples of the Court's dissatisfaction with wholly positivist definitions and its willingness to cheat); Michelman, *Property as a Constitutional Right,* 38 WASH. & LEE L. REV. 1097, 1103-09 (1981) (definition of property for purpose of takings clause is not limited to state law definition). *See* R. EPSTEIN,

property, the Court would lose much of its ability to monitor such "new property" redefinitions.

Alternatively, were the Court to constitutionalize the meaning of property in both contexts, the door would be open for future courts' recognition of new property "rights" to state-created wealth. This would erode the rights-privilege distinction and play directly into the hands of Charles Reich's "new property" proponents.[139] Caught between Scylla and Charybdis, the Court persists in its property contradictions.

B. Speech Linked With Property

The *Pacific Gas & Electric* decision takes on more coherence when viewed with other Burger Court cases involving both free speech and property rights. In cases involving a free speech claim in conflict with property ownership rights, the Burger Court has most often ruled in favor of property.[140] Professors Dorsen and Gora go so far as to contend that the Burger Court's decisions in this area reflect an incorrect preference for property over speech rights,[141] perhaps representing a reemergence of the notion that the primary office of civil liberties is to safeguard the liberty of property and contract.[142]

PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (discussing the integrity of Constitutional text).

139. Professor Richard A. Epstein of the University of Chicago Law School and a number of other conservative legal scholars (sometimes known as "free market libertarians") argue for judicial activism to strengthen constitutional protection of property and contract rights in their attacks on rent control, zoning laws, the minimum wage, the Social Security system, and questioning the constitutionality of progressive taxation. More mainstream legal conservatives such as Justice Antonin Scalia and Federal Circuit Judge Robert A. Bork, advocating deference to democratic choice, have opposed judicial activism in protecting economic rights. Taylor, *In Defense of Property: Judicial Activists Come From the Right*, N.Y. Times (Week In Review), Feb. 8, 1987 at 24.

140. *See, e.g.*, Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972) (barring anti-war activists from distributing leaflets at privately owned shopping center); Hudgens v. NLRB, 424 U.S. 507 (1976) (no first amendment guarantees applicable to activities in large, self-contained shopping center); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (no access right to paid editorial advertising under the first amendment); Miami Herald v. Tornillo, 418 U.S. 241 (1974) (no right-to-reply in print media); FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (upholding FCC policy relying on market forces to promote programming diversity, reasoning that the first amendment does not grant individual listeners the right to have the FCC review the abandonment of their favorite programming). *But cf.* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (upholding California Supreme Court's view that California state constitution guarantees a right of access to a shopping center).

141. Dorsen & Gora, *supra* note 123, at 240-41. The authors assert that "[t]he Court's pattern of downgrading free speech when it has appeared in conflict with proprietary rights asserted by individuals, corporations, or even government, expresses an erroneous set of priorities." *Id.* at 240-41. The Court's persistence in viewing free speech as just another "value" among many presents great costs. *See also* McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182 (1959).

142. John Adams articulated this notion when he said "[P]roperty must be secured or liberty cannot exist." J. ADAMS, *Discourses on Davila*, in THE WORKS OF JOHN ADAMS 280 (C. F. Adams ed. 1851). Justice Potter Stewart, in Lynch v. Household Fin. Corp., wrote "[t]hat rights in property are basic civil rights has long been recognized." 405 U.S. 538, 552 (1972). Dorsen & Gora, *supra* note 123, at 238.

Conversely, the Burger Court frequently has found that free speech rights are enhanced in cases which present free speech claims supported by private property rights.[143] In *Spence v. Washington*,[144] the Burger Court reversed a conviction under a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols or other extraneous materials.[145] The per curium opinion supported Spence's claim for protection of symbolic speech, but took pains to emphasize not only that the flag was private property, but that it was displayed on private property, as well.[146] Without mentioning property issues, the dissenters argued "that a State may legislate to protect important state interests [i.e. a State's interest in the integrity of the American flag] even though an incidental limitation on free speech results."[147] It may well have been a concern for private property rights that moved the majority of the Court, including Justice Powell, to uphold Spence's freedom to express himself despite the counterbalancing state interest.[148]

Two other major Burger Court opinions, *First National Bank of Boston v. Bellotti*[149] and *Buckley v. Valeo*,[150] present intriguing configurations of property and speech rights which also indicate a deference to private property interests in free speech cases. In *Bellotti*,[151] with Justice Powell writing for the majority, the Court invalidated a Massachusetts criminal law prohibiting banks and corporations from spending funds to influence voters on referendum proposals.[152] Emphasizing the value of public debate and the "right to hear," the Court concluded that speech could not be stripped of first amend-

143. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977) (town's prohibition on real estate "For Sale" and "Sold" signs violated the first amendment despite town's interest in stemming "white flight"); Buckley v. Valeo, 424 U.S. 1 (1976) (striking down portions of statute setting certain limitations on expenditures in federal election campaigns); Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (striking down ordinance prohibiting showing films containing nudity in drive-in theaters whose screens are visible from a public street); Spence v. Washington, 418 U.S. 405 (1974) (reversing conviction for superimposing peace symbol on American flag). *But see* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (where the interest in neighborhood property values outweighed the theater's combined free speech and private property rights).

144. 418 U.S. 405 (1974). Note that Justice Powell, the author of the plurality opinion in *Pacific*, was one of the four Justices responsible for the per curium opinion in *Spence*.

145. *Id.* Spence had taped a peace symbol onto an American flag and displayed it to protest the invasion of Cambodia and the killings of protesting students by the Ohio National Guard at Kent State University, which had occurred several days before.

146. *Id.* at 408-09.

147. *Id.* at 417 (Rehnquist, J., dissenting).

148. *See also* Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977). In *Linmark*, the Court struck down a town ordinance which banned the posting of "For Sale" and "Sold" signs on the lawns in front of houses. The Court thereby protected this form of commercial speech conducted on a homeowner's private property.

149. 435 U.S. 765 (1978).

150. Buckley v. Valeo, 424 U.S. 1 (1976).

151. 435 U.S. 765 (1978).

152. *Id.*

ment protection merely because its source was a corporation.[153] Thus, the Court protected the free speech rights of "entities embodying the quintessential modern form of property: the 'corporation'."[154]

In *Buckley v. Valeo*, several key provisions of the post-Watergate 1974 Amendment to the Federal Election Campaign Act of 1972 were struck down as unconstitutional restrictions on free speech.[155] Limitations on total campaign expenditures, on independent campaign expenditures by individuals and groups, and on expenditures by a candidate from his personal funds were among those provisions which were struck down.[156] In *Buckley*, the Court equated wealth with ability to communicate: "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money."[157]

Although Congress had enacted the spending and expenditure limitations in part to equalize the political voice of the wealthy and the poor,[158] the Court emphasized that "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."[159] Thus, in *Bellotti* and *Buckley*, the Burger Court invalidated legislation which placed restrictions on the ability of individuals and corporations to freely use their wealth and property for communication intended to influence public debate and federal elections. Property

153. *Id.*

154. Dorsen & Gora, *supra* note 123, at 208. The authors comment that, "[i]t is difficult to avoid viewing *Bellotti* as a Magna Carta for corporate speech on public issues." *Id.* at 212. *See also* Ratner, *Corporations and the Constitution*, 15 U.S.F.L. REV. 11 (1981).

155. 424 U.S. 1 (1976).

156. *Id.*

157. *Id.* at 19.

158. *See, e.g.*, J. Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS CONST'L L.Q. 263, 309 (1980) [hereinafter Nowak] (The statutory limitations on campaign expenditures "were based on Congressional adoption of a philosophy like that of Rawls, which required equalized political voices to protect the principles of the social compact."); Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323; Wertheimer & Huwa, *Campaign Finance Reforms: Past Accomplishments, Future Challenges*, 10 N.Y.U. REV. L. & SOC. CHANGE 43, 43-47 (1980-81) (The FECA amendments of 1974 reflected the national disgust with the Watergate scandal and the excesses of the 1972 campaign.). *See generally*, Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Equality?*, 82 COLUM. L. REV. 609 (1982).

159. *Buckley*, 424 U.S. at 48-49. *See* Dorsen & Gora, *supra* note 123, at 211 ("*Buckley* stands as a potent example of wealth and speech uniting to defeat claims based on an equity principle"); Nowak, *supra* note 158, at 309 ("[The *Buckley* opinion is the] key to understanding the Burger Court's protection of speech connected to economic activity.").

In *Bellotti*, the Court similarly rejected the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others." 435 U.S. at 790.

aspects present in these two cases were critical considerations which influenced the speech analysis.

Two other cases which illustrate the subtle deference by the Court to property rights are *Zacchini v. Scripps-Howard Broadcasting Co.*[160] and *Harper & Row, Publishers, Inc. v. The Nation.*[161] In *Zacchini*, the Court held that a television station has no first or fourteenth amendment right to broadcast a performer's act against her wishes. Justice White pointed out that the State's interest "is in protecting the proprietory interest of the individual in his act in part to encourage such entertainment."[162] Thus, with the attributes of private property accorded to an entertainer's expression, the first amendment interests of the press find a lesser degree of protection under the Burger Court.

In *Harper & Row*, a publisher sued a magazine which published an article containing several hundred words taken from a copyrighted but an as-yet unpublished manuscript. The magazine asserted that the excerpts were of great public interest and that their newsworthiness should enjoy first amendment protection against Harper & Row's copyright claims. The Court rejected the magazine's first amendment defense, reasoning that "in view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas and the latitude for scholarship and comment traditionally afforded by fair use . . . [there is no reason to expand] the doctrine of fair use to create what amounts to a public figure exception to copyright."[163]

Justice O'Connor, writing for the Court, asserted that an author has a countervailing first amendment interest served by the right of first publication, citing the negative first amendment rights upheld in *Wooley v. Maynard*.[164] She reasoned that "[t]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[165] As in *Zacchini*, the Burger Court gave enhanced protection to peti-

160. 433 U.S. 562 (1977).

161. 471 U.S. 539 (1985).

162. *Id.* at 573. Justice White emphasized the proprietory interest of the performer in recognizing the intentions of state laws as an incentive "to afford greater encouragement to the production of works of benefit to the public." *Id.* at 577 (citations omitted). White supported this by quoting Goldstein v. California, 412 U.S. 546, 571 n.13 (1973) ("[T]he State has, by statute, given to recordings [of performances of musical artists] the attributes of property."). *Id.* at 577, n.13.

163. *Harper & Row Publishers, Inc.*, 471 U.S. at 560.

164. *Id.* at 559.

165. *Id.* at 558. Justice O'Connor asserts that the right of first publication serves the "countervailing first amendment value" of an author's right not to speak publicly elsewhere, but cites to Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). *Schnapper* suggests that an author's use of copyrights are not only for economic gain but also first amendment concerns. 667 F.2d at 114. This observation throws doubt upon Justice O'Connor's "economic incentive to create and disseminate ideas" rationale for preferring copyrights over freedom of the press.

Justice Rehnquist's dissent in *Pacific* lists *Harper & Row* as one of the Court's "individual freedom of conscience decisions," along with the line of *Barnette*, *Wooley* and *Miami Herald*,

tioners claiming private property rights for their expression, despite claims of counterbalancing first amendment rights by the press.

III. CONCLUSION

The Supreme Court's rejection of consumer access to Pacific Gas & Electric's monthly billing envelopes will probably have a number of important consequences for the future of modern American communications. First, the decision derailed a nationwide utility consumer movement, based in advocacy groups known as consumer utility boards ("CUBs"). Prior to the decision, CUBs had been authorized by statewide referenda, statutes, or administrative rulings in California, Illinois, Wisconsin, Oregon, and New York.[166] CUBs were organized because ratepayers had no institutionalized access to the rate-setting process. Unlike the polished and well-financed lobbying which exists in support of the public utilities, representation of rate-payers was generally *ad hoc*, decentralized, and under-financed. The growth and success of CUBs relied upon access to billing envelopes to attract the membership and financing necessary to fund an advocacy staff of accountants, engineers, lawyers, and organizers of a caliber capable of professionally analyzing and challenging utilities in rate-making procedures, thereby balancing the levels of access to the rate-making process. Without envelope access, CUBs become just another well-meaning public interest organization without the funding or means of communicating with ratepayers necessary to advocate effectively. The *Pacific* decision provided the ammunition for utilities around the nation to exclude CUBs from their billing envelopes.[167]

Second, the denial of access to billing envelopes rendered stillborn a technological communication technique that promised to revolutionize the entire consumer and public interest movement beyond the scope of public utilities. Public interest advocates, particularly Ralph Nader and his associates, looked to CUBs to establish and expand billing envelope access as an organizing tool. If CUBs could pave the way for increased citizen participation in the public utility rate-setting process, it was hoped the technique could be expanded to include greater citizen access to cable television, banking, government entitlement programs, and other computerized transmission systems. Such plans must now contend with the constitutional roadblock created by *Pacific*.

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whose rationale is strained "beyond the breaking point" by the plurality in *Pacific*. *Pacific*, 106 S. Ct. at 921 (Rehnquist, J. dissenting).

166. Brief Amicus Curiae of The National League of Cities, The National Association of Counties, The International City Management Association, The United States Conference of Mayors, and The National Governors' Association at 12-13, Pacific Gas and Electric, 106 S. Ct. 903 (1986) (in support of Appellees).

167. *See, e.g.*, Central Ill. Light Co. v. Citizens Utility Bd., 645 F. Supp. 1474 (N.D. Ill. 1986) (striking provisions in Illinois Citizens Utility Board Act granting Illinois CUB access to utility mailings); Consolidated Edison Co. of New York, Inc., v. Public Serv. Comm'n of the State of New York, 119 A.D. 2d 850, 500 N.Y.S. 2d 423 (3d Dep't 1986) (declaring unconstitutional the New York Public Service Commission's order requiring utilities to include CUB views in billing envelopes).

Most importantly, *Pacific* extends a negative first amendment right to corporations. While previous Supreme Court decisions, beginning with *Bellotti*, granted some degree of protection to corporate speech, those decisions had assiduously distinquished the rationale underlying that protection from the first amendment rights held by individuals. The *Pacific* decision makes no such distinctions. For the first time, the Court has asserted that corporations can claim the full panoply of positive and negative first amendment rights.

In granting negative first amendment rights to PG&E, the *Pacific* decision attributes emotional and intellectual qualities to a commercial organization. By extending the legal fiction that corporations are persons, the Court has "dressed huge corporations in the clothes of simple farmers and merchants and thus made attempts to regulate them appear as attacks on liberty and the home."[168] This seems to carry the mythology of corporate personality so far as to endow every corporation with an individual freedom of mind and a conscience. This incongruity is compounded because PG&E is a public utility whose very existence is dedicated to providing service to the public. Indeed, granting a negative first amendment right to a public utility might render it less accountable in meeting its duty to provide services, and perhaps affect the quality of those services.

First amendment case law does not support the assumption that corporations possess a right not to speak merely because individuals and newspapers do. The *Red Lion* line of cases demands that access standards be determined with an eye toward a particular medium's characteristics. A court should not ignore these access standards when corporate speech is at issue. Future cases about communication media which involve first amendment issues must explicitly consider the related property issues that exist, rather than engage in distorted first amendment analysis.

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168. T.W. ARNOLD, *supra* note 1, at 190.

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