10-1979

Consolidated Edison of New York, Inc. v. Public Service Commission of New York

Lewis F. Powell Jr.

Could the Commission prescribe a utility for using voter registration lists for a mail campaign to present the views - pro or con - on nuclear energy - to the public? Would be just about same people as those who receive bills.

Discuss with view to Grant. Hold

Resp., Pub. Service Comm. of N.Y., prosecuted - by regulation - the inclusion in customers' bills the utility's views on "controversial matter of public policy".

N.Y. C/appeals sustained Reg on ground that utilities are regulated & state Comm. can tell it what to do or not do in its billing.

Court also makes a silly argument about "captive audience".

Reg. applies even when stockholders bear the cost of enclosing the material. I suppose this means, the expense would be disallowed for determining rates (i.e. rate of return on investment)

PRELIMINARY MEMORANDUM

Summer list 25, sheet 1

No. 79-134-ASX

Appeal from N.Y. Ct. of App. (Cooke)

CONSOLIDATED EDISON CO. of N.Y., Inc.

v.

PUBLIC SERVICE COM'N, STATE of N.Y.

State/Civil

Timely

SUMMARY: The case presents a First Amendment challenge to the prohibition of all customer bill inserts that express a utility's view on "controversial matters of public policy."

FACTS: The Public Service Com'n of N.Y. directed all public utilities subject to its jurisdiction to "discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the

See Back Page -

In opposition to motion to dismiss, appellant argues that there is no "forced subsidy," (Abood v. Bd. of Ed., 431 U.S. 209) from ratepayers for the billing inserts. Adds little - DOS

utility's position on controversial matters of public policy." The principal justification for this policy was the Com'n's belief that

> "using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism."

HOLDING BELOW: The N.Y. Ct. of App. rejected Con. Ed.'s challenge to the PSC's directive. The court found the administrative action well within the PSC's broad control over utility bills and their contents. It discerned no transgression of First Amendment values in what was viewed essentially as a time-place-and-manner regulation since the PSC policy left open numerous alternative means of communication, fostered the important governmental interest of protecting members of a "captive audience" from the expression of views with which they might not agree, and did not discriminate against persons of any particular viewpoint. The court maintained that the regulation, properly viewed, was not content oriented since it "endeavors, in an objective and evenhanded manner, to limit billing insert materials to the innocuous and noncontroversial."

CONTENTIONS: Appellant utility asserts that its First Amendment right to communicate on issues of public importance has been significantly impaired. The regulation is assertedly content oriented and is supported by no important governmental interest.

The PSC counters that the regulation is a permissible

subject matter restriction, that it imposes only a minimal burden on Con. Ed., that it fulfills important governmental interests, and is sufficiently specific to survive due process scrutiny.

DISCUSSION: My approach to this case differs markedly from that of the N.Y. Ct. of App. First, I would inquire whether a utility company has any First Amendment interest in using customer bills as a mode of expression. I find none whatever. Transmission of the customer bill is a function in which the utility is totally regulated by law. We may assume arguendo that the corporation acting on behalf of its investors has a First Amendment interest in otherwise expressing its views through the mails, or through other medium. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Nevertheless, an absolute prohibition on insertion in the customer bill of any information other than essential billing material would offend no First Amendment values. See Greer v. Spock, 424 U.S. 828 (1976)(no public right of access to Fort Dix).

The question, then, reduces to whether the First Amendment is offended by the manner in which the PSC has granted affirmative authorization to use the customer bill as a forum for the expression of views.

The only bona fide contentions are those of discriminatory application and vagueness. Appellant's status as a public utility dissipates the discriminatory application argument. The utility has an absolute monopoly on access to its customers' bills. There is no viewpoint other than the utility's in favor of which application of the PSC regulation could discriminate. The utility has complete control over what

views it expresses in the allowed insert material, and if it is displeased with the slant of the material that the PSC allows to be enclosed in the bill, the utility has the option to curtail all use of the billing insert and to send its views to the customer under separate cover.

The vagueness contention is also without merit. There may be ambiguity to the phrase "controversial matters of public policy," but is is simple enough for the utility to ask the PSC whether a proposed insert transgresses the policy. There is no prospect of the utility finding itself subject to penalty for an offense committed without adequate notice.

Varying approaches may be taken to this problem, and the N.Y. Ct. of App. chose to tackle the First Amendment analysis that would be required if the utility could claim, ab initio, some protected right of access to use the customer bill as a mode of expression. On its own terms, the lower court's reasoning appears to be flawed. The regulation does appear to be content oriented, though, as noted, it would survive concerns about discriminatory application by virtue of the utility's monopoly status. Further, it seems unlikely that the government could claim the "captive audience" rationale as an "important governmental interest" in this context. The government may intrude to protect privacy interests when requested to by the unwilling recipient of material through the mails, but it may not interdict all such communication on the basis of objection by a subclass of recipients. Compare Rowan v. Post Office Dep't, 397 U.S. 728 (1970)(upholding statute permitting postmaster, at the request of the addressee, to refuse to deliver "pandering" or "sexually provocative"

advertisements) with Lamont v. Postmaster General, 381 U.S. 301 (1965) (holding unconstitutional a statute requiring postmaster to intercept all foreign mailings of "communist political propaganda" and deliver same only at the express request of the addressee).

The case does not seem to present a new First Amendment question and may be resolved without inquiring into the First Amendment rights of corporate entities, but the approach of the N.Y. court seems incorrect under the circumstances of this case.

There is a motion to dismiss or affirm.

9/4/79 Friedman Ops. in JS App.

This is a more interesting case than the memo lets on. Although I am not much taken with the idea that a corporation has First Amendment rights, if it does have them, I am not sure why they are destroyed by the presence of regulation. When the government tells a corporation that it may not operate freely in the marketplace, it includes a corollary promise to protect that corporation's property by guaranteeing a rate of return. This contract, if you will, has nothing to do with the other rights of the corporation. A utility has a valid interest in seeking to influence government policy - especially since utilities are controlled by that policy. I detect underneath this case a contest between regulated and regulator for the ear of the public, and I am reluctant on First Amendment grounds to endorse an asymmetrical access to the public, and on policy grounds I would wonder if in fact better regulation might result from a testing of regulatory ideas in the intellectual marketplace. Moreover, I don't see how telephone consumers may be viewed as a "captive audience" in the same sense as bus riders subjected to a public address system —

How?

Join 3, ? — DOS

September 24, 1979

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 79-134

CONSOLIDATED EDISON CO. NY

vs.

PUBLIC SERV. COMM. OF NEW YORK

Also motion to dismiss or affirm.

Vote

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

JS 3/12/80

BENCH MEMORANDUM

To: Mr. Justice Powell

Re: No. 79-134, Consolidated Edison Co. v. Public Utilities Commission, and No. 79-565, Consolidated Hudson Gas & Electric Corp. v. Public Utilities Commission

1. ISSUES PRESENTED. In No. 79-134, the question is whether the resp may constitutionally prohibit utilities from communicating their views to consumers on "controversial matters of public policy" by means of bill inserts. In No. 79-565, the question is whether the resp may constitutionally prohibit utilities from engaging in advertising which promotes the use of electricity.

2. DISCUSSION.

A. No. 79-134. The background of this case is not

extensive. After receiving communications from public interest groups who claimed that the petr's use of bill inserts to promulgate its views on the use of nuclear energy was unfair, resp prohibited petr from exposing its views on "controversial matters of public policy" through bill inserts. As their name suggests, bill inserts are placed in the bills that petr sends out to each of its customer. The New York Court of Appeals upheld the prohibition. The court reasoned that the ban was a reasonable time, place, and manner restriction that merely prevented the petr from using one avenue of speech. The court stated that petr had alternative avenues of expression, that consumers constituted a captive audience, that the bill inserts intrusively entered consumers' homes, and that the restriction was not content oriented because it prohibited all discussion on controversial public issues rather than only one side of a controversial public issue.

As an initial matter, there can be no question that the First Amendment protects the petr's speech even though it is a corporation. First National Bank v. Bellotti, 435 U.S. 765, 785-786 (1978). If, as the state court found, the ban on bill inserts is a valid time, place, or manner restriction, then the resp need only show that it is a reasonable regulation. If the ban is not a time, place, and manner restriction, then the state must demonstrate a substantial state interest that justified the suppression of speech.

The applicable analysis

I do not believe that the restriction is a valid time, place, or manner regulation. A time, place or manner restriction must not be based upon the content of communication. Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93-94 (1977); Erznozik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Police Department v. Mosely, 408 U.S. 92, 99 (1972). Thus, the classic example of a valid time, place or manner restriction would a municipal ordinance prohibiting the use of soundtrucks in residential areas between midnight and 6 a.m. Cf. Kovacs v. Cooper, 336 U.S. 77 (1943). Although the regulation surely infringes some speech, it is not based on either the subject matter nor the point of view of the speaker. This regulation, by contrast, is content based. Petr is free to promulgate bill inserts discussing non-controversial public matters, but is not free to discuss controversial issues of public importance.

Resp contends, however, that this Court has allowed some content-related restrictions. See Young v. American Mini Theaters, 427 U.S. 50 (1976); Greer v. Spock, 424 U.S. 828 (1976); Lehmann v. Shaker Heights, 418 U.S. 298 (1974); Rowan v. Post Office, 397 U.S. 728 (1970). In my view, none of these cases support the classification of the bill insert ban as a time, place, or manner restriction. Indeed, three of the cases can be distinguished easily. In Rowan the Court held constitutional a statute allowing a person to remove his name from a mailing list. I suppose that Rowan would support a

regulation that would prohibit petr from sending bill inserts to consumers who had informed petr that they did not wish to receive the inserts. Rowan merely recognizes that the right of Free Speech does not encompass the right to speak to compel persons to listen. But Rowan demands that an individual unequivocally remove his name from a mailing list. Rowan neither gives the resp the right to decide whether consumers are unwilling readers, nor rests on the use of content-neutral time, place or manner restrictions. Both Greer and Young involved content-related restrictions that were justifiable because they were supported by a substantial governmental interest unrelated to the suppression of speech. In Greer, the recognized interest was military discipline; in Young the governmental interest was the prevention of the deterioration of commercial neighborhoods, see 427 U.S. at 80 (Powell, J., concurring)

The more difficult case to distinguish is Lehmann v. Shaker Heights, from which you dissented. That case presented the question whether a city that operates a public transit system and sells advertising space for car cards was required to accept paid political advertisements. In a plurality opinion, Justice Blackmun concluded that the car cards were not a public forum, and, therefore, the city did not have to afford equal access to all advertisers. Justice Douglas concurred in the judgment on the ground that the subway riders were a captive audience. These rationales are inapplicable to this case. First,

neither opinion justified the ban as a time, place, and manner restriction. Second, the plurality explictly distinguished billboard from newspaper or radio advertisements because "[t]he radio can be turned off, but not so the billboard or street car placard." 418 U.S. at 302. Justice Douglas asserted the same distinction. 418 U.S. at 308. Insofar as the distinction is relevant here, the bill inserts are more like a newspaper ad, which can be easily disposed of, than like the billboard in a subway car, which can less easily be avoided. Your opinion for the Court in Erznoznik v. City of Jacksonville, specifically treated Lehmann as a case involving captive audiences, but not time, place or manner regulation. 422 U.S. at 209. In sum, I do not believe that the resp's order constitutes a content-neutral time, place, or manner restriction.

Consequently, the bill insert ban cannot be upheld unless the resp asserts a substantial interest that justifies the suppression of speech. First National Bank v. Bellotti, 435 U.S. at 786. In my view, none of the resp's asserted interests rise to this magnitude. The resp contends that the consumers are a captive audience that need not be subjected to petr's political views. But the consumers are perfectly free to dispose of the bill insert or to avoid reading those portions of the bill insert devoted to political views. A person is not "captive" simply because he must avert his eyes from objectionable material. See Erznozik v. City of Jacksonville,

422 U.S. at 208-211; Cohen v. California, 403 U.S. 15, 21 (1971). Second, resp argues that this communication is intrusive because it violate the privacy of the home. Yet receipt of a bill insert is surely no more intrusive than constitutionally protected door-to-door soliciation. See Village of Schaumberg v. Citizens for A Better Environment, No. 78-1335, slip op. at 18 (Feb. 20, 1980); Martin v. Struthers, 319 U.S. 141 (1943). Third, resp argues that petr has an alternative means of communication. But the presence of an alternative means does not by itself constitute a compelling state interest in favor of suppression of speech. Nor is the existence of an alternative forum sufficient to justify suppression of speech on other grounds. Schneider v. State, 308 U.S. 147, 163 (1939). Fourth, resp argues that there is only a limited amount of space in each billing envelope, and space must be saved for more important messages. Limited resources will justify a infringment on First Amendment interests, see Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), but the resp has filed to make a sufficient showing that space is so limited as to justify its restriction.

Resp also contends that the absolute ban is necessary to prohibit consumers from being forced to subsidize petr's views. If the petr pays for only the cost of the bill insert, presumably it will get a free ride on the cost of the envelope and postage. But the resp has made no effort in this case to allocate the costs of the mailing between consumers and the

free ride on postage

shareholders. Accordingly, this Court is in no position to decide whether an allocation can be made that would not force consumers to subsidize petr's speech. Even if such an allocation could not be made, it is not obvious that a free ride would justify suppression of petr's speech.

The silly free ride argument

The resp argues that such subsidization of petr's speech is prohibited by the rule of Abood v. Detroit Board of Education, 431 U.S. 209 (1977), in which the Court held that a union may not compel a teacher to contribute to the support of an ideological cause he may oppose in order to retain public employment. I believe that Abood may not necessitate such a result. In that case, the union's viewpoint could not have been transformed into a "public forum." For example, it would destroy the effectiveness of a union lobbyist to force him to support a piece of legislation 75% of the time, and oppose it 25% of the time. The only method of protecting the dissident members was to allow them to demand the refund of their dues. But whenever a taxpayer contributes toward the construction of a public forum open to speakers of different viewpoints, he is, in some sense, forced to support some views in which he may not believe. Yet, the public forum doctrine demands equal access, not suppression of views. See Lehmann v. Shaker Heights, 418 U.S. at 316 (Brennan, J., with whom Stewart, Marshall & Powell, JJ., joined). It is possible, therefore, that consumer subsidization of bill inserts would transform them into a public forum to

which equal access must be given. I do not believe, however, that the possibility of consumer subsidization is a substantial state interest that justifies the prohibition on consumer inserts. In sum, I conclude that the prohibition on consumer inserts in an unconstitutional suppression of speech. Jose's conclusion

Petr also argues that the resp's order is void of vagueness. Under my analysis, this issue need not be reached. Assuming, however, that the ban on bill inserts does not violate the First Amendment, then I believe that the order is not unconstitutionally vague. The order proscribes discussion of "controversial matters of public policy." This standard is no more vague than the standard that requires broadcast station to present opposing viewpoints on "controversial issues of public importance." In Red Lion, supra, the Court held that standard was not constitutionally vague. 395 U.S. at 395-396. The Commercial Speech Case

× × ×

B. No. 79-565. In addition to the ban on bill inserts, resp has banned "promotional advertising" by electric utility companies. The New York Court of Appeals held that the prohibition is constitutional. The court recognized that promotional advertising is a form of commercial speech subject to some constitutional protection. Relying upon ✓ Ohralik v. Ohio State Bar Ass'n, 436 U.S. 444 (1978), the court upheld the ban. The court noted that the petr is a regulated monopoly and stated that "it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in

'informed and reliable' decisionmaking." The court also justifed the ban because of its ameliorative effect on the consuptiom of energy during the current energy crisis.

The ban on promotional advertising quite clearly affects commercial speech. In four major opinions, this Court has enunciated the protections due commercial speech. In Virginia States Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) the Court held that that the State could not prohibit pharmacists from advertising the prices of prescription drugs. In concluding that the advertising of prices was protected the Court noted upon the pharmacists' economic interest, and identified the consumers' interest in alleviating pain and enjoying the basic necessities of life, and society's interest in promoting the effecient allocation of resources. In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Court relied upon a similar survey of interests to hold that the truthful advertising of prices at which routine legal services will be performed is also protected by the First Amendment.

In Ohralik v. Ohio State Bar Ass'n, your opinion for the Court held that an attorney's attempts to solicit customers in person was not protected by the commercial speech doctrine. The Court noted that in-person solicitation may convey helpful information, but that it also places pressure on the customer to accede to the lawyer's wishes. Moreover, the state had a compelling state interest in preventing in-person solicitation.

The Court noted the ABA's contention that a prohibition on solicitation reduces the likeliehood of overreaching, protects the privacy of persons, and avoids situations where a lawyer's judgment will be clouded by his pecuniary self-interest. In Friedman v. Rogers, 440 U.S.1 (1980), your opinion for the Court held that a Texas ban on the use of tradenames by optometrists did not violate the First Amendment. The Court recognized that the commercial speech doctrine does not protect misleading or deceptive speech, and upheld the judgment of the Texas Optometry Board that the use of tradenames left a misleading impression of competition.

The common theme of all four cases is that commercial speech which increases the ability of consumers to make informed judgments is protected, but speech which attempts to take advantage of consumers is not. Thus, the Court has upheld the promulgation of price information through advertisements in Virginia State and Bates, but held that the commercial speech doctrine does not protect trade practices which may harm the consumer, Ohralik, or may be misleading, Friedman. In this case, there is no claim that the speech is either misleading or is conveyed in a manner that would overreach the will of the consumer. Thus, the specific rationales behind Ohralik and Friedman do not apply.

Nevertheless, it is not certain that the protections of Virgina State and Bates apply. In both cases, the Court relied

on the consumers' interest in making economically rational decisions, and society's interest in rational distribution of resources. And in both cases, the Court treated the State attitude essentially as misguided paternalism in attempting to keep helpful information away from consumers. In neither case, did the State suggest that the transaction itself, either the purchase of the drugs or retention of an attorney, was an economic transaction that should not be encouraged.

Different from all four of recent commercial speech cases

This case is substantially different. First, electric utilities are a regulated monopoly. Thus, the petr's different is slightly different from the position of sellers in Virginia State and Bates. Because the petr is a monopoly it does not have as strong an interest in promoting its product as commercials enterprises that operate in a free market. Additionally, the consumer of electrical power has no strong interest in learning what petr charges for electricity because he cannot transfer his business to a different utility if prices are too high. Even if the consumer chooses to compare the desirability of electrical energy with alternative energy sources, the comparison will never wholly replicate a free market because the price of electricity is set by a regulatory commission and not by market forces. Second, society's interest in effecient allocation of resources has already been displaced by the decision to regulate electrical utilities as monopolies. Because the government has replaced the free market as the regulator of petr's economic

success, society has a less compelling interest is insuring the free flow of promotional advertising. Of course, the electrical utilities do not monopolize energy resources, and there may be some competition between electrical utilities and oil or natural gas companies. But except for those people who are deciding what form of heating system to place in a house or are buying a new house, I believe the competition is very limited. Most persons deciding whether to put in an air conditioner or to buy a new household appliance will not be able to choose among energy sources. It seems to me, therefore, that the consumer's interest and the societal interest in promoting the use of electicity is not as strong as ensuring the flow of price information in a free market.

Moreover, in this case the State interest rests on a more substantial basis than fears that consumers will misuse information. In this case, unlike Virginia State and Bates, the State believes that the economic transaction, the use of more power, should be discouraged. In this sense, the case resembles those in which the State attempts to serve a legitimate non-speech-related interest through a means that infringes upon speech. See Procunier v. Martinez. In light of the national energy crisis, I believe that the State has a substantial interest in discouraging the use of electricity. Of course, the State could choose a more direct means of accomplishing this end. For example, the State could simply prohibit the petr from

providing service to new customers, or it could demand that existing supplies of power be rationed. But the State presumably hopes that voluntary economic activity will obviate the necessity for such prohibitions, and believes that a ban on promotional advertising will cut down on consumer demand.

I believe that this is a close case, because it demands a balancing of First Amendment interests in the promulgation of commercial speech against the State's interest. I lean to the view, however, that the ban is lawful. Because of the position of the petr as a natural monopoly, neither the petr, consumers nor society have the same interest implicated in Virginia State and Bates. Moreover, the State has a strong interest in conserving scarce natural resources. Thus, I would be inclined to affirm.

It has been argued that the commercial speech doctrine as a whole is fatally flawed, and that Virignia State rests upon economic due process grounds. See Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1 (1979). Although I would not be prepared to concede that no first amendment interests are protected by the decision in Virginia State, I agree with the authors that the Court's opinion "emphasized the adverse economic effects of Virgnia's ban against drug advertising." Id., at 25. Consequently, I would be reluctant to apply the commercial speech doctrine in this case in which efficient allocation of resources will not be

significantly improved by promotional advertising, and in which the State has a legitimate interest in promoting energy conservation.

Petr claims that the prohibition is void for vagueness and violates equal protection. I believe that neither contention is compelling. Although the phrase "promotional advertising" may be susceptible of varied meanings, I do not believe the phrase is so standardless that "men of common intelligence must guess at its meaning." Connolly v. General Construction, 269 U.S. 385, 391 (1926). Furthermore, the resp has stated that it will advise the petr whether specific advertisements fall within the ban. Although such pre-clearance might be unconstitutional as applied to "pure" speech, it is permissible as applied to commercial speech. Cf. Ohralik, 436 U.S. at 456. The prohibition is said to violate equal protection because other energy users are not prohibited from advertising their services. I do not believe the strict First Amendment-Equal Protection standard of Police Department v. Mosely need apply to this case. Here, the resp only has responsibility to regulate electrical utilities and it its decision rests upon a rational basis. I do not believe the order violates equal protection.

3. SUMMARY. The question in No. 79-134 is whether the resp may constitutionally prohibit utilities from communicating their views to consumers on "controversial matters of public policy" by means of bill inserts. Because the prohibition is not

content-neutral, the ban on bill inserts cannot be justified as a valid time, place or manner regulation. None of the asserted governmental interests, including the protection of captive audiences and intrusiveness into private homes, is substantial enough to justify suppression of political speech. In No. 79-565, the question is whether the resp may constitutionally prohibit utilities from engaging in advertising which promotes the use of electricity. This prohibition affects commercial speech, which is afforded some, but not all, of the protections of "pure" speech. Although the question is close, I am inclined to believe the ban is justifiable. Because petr is a regulated monopoly, the interests in encouraging an efficient free market which were relied upon in Virginia State are not as convincing here. Furthermore, the resp has a strong interest in discouraging excess energy usage.

79-134 CONSOLIDATED EDISON v. PUBLIC Argued 3/17/80

Block (for Petr.)

No definition of "controversial matters".

Ded not appeal from the "promotional advertising" ban that is in the same order. Central Hudson has appealed from this (next case).

Fed. Election Campaign Act forbids endorsing candidates in elections.

Altho some stockholders may disagree Bellotti assumed this. There has been no complaint by stockholders.

Schiff (gen counsel for N.Y. Utility Comm)

Responding to C.J., agreed that Con. Ed could not include an article by Adm. Rickover on nuclear energy.

Reverse 7-2 (P.S. tentative)

79-134 Consolidated Ediwon v. Public Service Conf. 3/19/80

Utility's speech no different from Gen Motors

The Chief Justice Reverse

Q - Whether a public utility's speech may be regulated.?

∴ State interests not persuasive: audience not "captive", stockholders pay expense

Commission is that of "Big Brother".

Commission's order vague & overbroad.

Term "controversial" is inherently vague.

300,000 stockholder would react vs. mgt. using bill inserts to advocate political ~~[illegible]~~ candidates.

State must show compelling interest.

Mr. Justice Brennan Reverse

Not a time, place or manner regulation.

This is a content regulation.

No showing of compelling state interest.

Can't ban circulating of controversial views.

Mr. Justice Stewart Reverse - tentative

A utility may be regulated far more strictly than non-monopolies: This ~~is~~ is in a sense a time, place & manner reg.

Under Bellotti, state leg. could not do this to non-utilities.

Extremely close case - tentatively for reversal

Mr. Justice White *Reverse*

Could regulate (i.e. require or prohibit) many things in billing. But this is in one thing that can't be regulated.

Not a commercial speech case.

Reg. is over-broad.

Mr. Justice Marshall *Reverse*

This is censorship.

Would decide case on overbreadth.

Mr. Justice Blackmun *Affirm*

Agree this is not content neutral, but case is close to *Lehman* + *Red Lion*

Cost factor is irrelevant

Billing is "property" of rate payers & utility has no interest in this property

Mr. Justice Powell *Reverse*

Clearly an invalid restraint on speech content ("controversial issue of public interest")

No substantial state interest to contrary.

Not a valid time, place or manner regulation.

Mr. Justice Rehnquist *Affirm*

Lehman is closest case.

Regulated utility ~~—~~ subject to severe regulation

Not facially invalid

Mr. Justice Stevens *Reverse*

Not easy case.

Some subject matter may be excluded.

There is a prior restraint.

If Comm. required "equal time" for differing views, case would be much closer. We should "stay away" from this issue.

lfp/ss 4/28/80

MEMORANDUM

TO: Jon DATE: April 28, 1980

FROM: Lewis F. Powell, Jr.

79-134 Consolidated Edison

Your draft of 4/23, that I reviewed Saturday with some care, is impressive. It reflects a vast amount of careful work, and a thorough understanding of the First Amendment cases.

Although we - and most of the Justices - view this as an easy case in terms of the right answer, it is not as easy case to write. The difficulty stems primarily, I believe, from the multiplicity of the grounds or arguments advanced in support of the Commission's action. I must say that trying to sort these out into some consistent pattern of analysis, rather than a piecemeal and multitudinous bit-by-bit analysis, is quite difficult.

I will use this memorandum as a mode of "thinking outloud" about the draft, and as to possible ways to tighten it up. I may not proceed in a logically, as I have made no outline of the draft.

I start with the Conclusion:

> "The State action is neither a valid time, place nor manner restriction, a permissible subject matter regulation, nor a prohibition justified by a compelling state interest."

I bear in mind these three broad possible justifications for the regulation, as I now go through your analysis.

I

This part states the case well and with commendable brevity.

II

The first paragraph disposes of any thought that corporate speech is not protected. There is no reference in this paragraph to the fact that Con Ed is a regulated monoply. You do touch on this later. At some point in the opinion, I think perhaps we should address this specifically, perhaps saying near the end of the opinion that apart from the specific arguments advanced by the Commission, it asserts no per se right to control speech by virtue of petitioner's monoply.

The remainder of Part II is a summary of basic First Amendment doctrine, with the focus on the type of pure speech at issue here. These paragraphs are quite good.

The draft of Part II concludes by noting that we must consider "whether the state can demonstrate" that its regulation is a permissible regulation on speech.

III

This part (p. 6-8) addresses the time, place or

manner argument.

Subject to my Rider A, p. 8 (revising the paragraph on that page), Part III looks good to me - subject to what is said hereinafter.

IV

At this point, I would expect the draft to move directly to the second principal argument advanced by the Commission. On the basis of the conclusion in Part VI, I would expect this to argue that the Commission's ban is permissible subject matter regulation, and this portion of the draft does move into that argument.

But I don't quite follow the combination of the lead paragraph at the bottom of page 8 and the discussion of authorities on page 9. The draft comes to "subject matter regulation" in subpart A (p. 10), when it mentions obscenity, libel, and commercial speech. The paragraph also mentions Chaplinsky. I have thought of it as essentially a time, place or manner speech, although perhaps it falls into the subject matter category also. Apart from this minor point, the two paragraphs under subpart A dispose neatly of the subject matter distinctions or exceptions that are mentioned. Subpart B of Part IV discusses the exception that allows subject matter regulation on the use of government property or facilities. I have not checked the Commission's briefs,

but if it relies seriously on the property cases, perhaps we must meet the argument. I view it is as quite frivolous for the reasons you state. I would prefer not to dignify the argument by devoting so much attention to it. There is no use of government property or facilities here. As you note, even though regulated, Consolidated Edison is a private company and the only "property" used are its envelopes. Subject to your views, Jon, I am inclined to dispose of such reliance as the Commission may make on this argument, in a footnote simply identifying the specific cases cited by the Commission and noting they are wholly inapposite.

On page 14, at the very end of the discussion of the "property or facilities" argument, the draft notes the legitimate state interest in regulating a public utility's activities. I would think, however, that the reference to the state interest in regulating a utility monoply perhaps should be left to the last paragraph before the final conclusion in our opinion. The state regulatory interest unlies each of the separate arguments advanced by the Commission; it is not simply related to the property and facilities point.

V

This Part presents an analytical problem for me that you can clarify. The discussion here is directed to the

"compelling state interest" argument that I met in Bellotti. Returning again to the summary sentence on page 19 (the regulation is not a valid, time, place or manner restriction, a permissible subject matter regulation, nor a prohibition justified by a compelling state interest). Do you view the "compelling state interest" argument as separate from the other two categories of cases? I suppose one could say - although I do not recall the cases being analyzed this way - that a time or place restriction is valid when supported only by a compelling state interest. Similarily, perhaps the same could be said for some of the "subject matter regulation" cases. I suppose the truth is that the numerous First Amendment cases cannot be cabined easily into separate compartments analytically.

The specific arguments considered in Part V seem to be more or less of a "hodge podge". They include "captive audience", "limited resources", and "subsidizing" of the cost of bill inserts. Without having reread the cases, I do not recall that many of them cited turned specifically on compelling state interest analysis. In any event, I do not view any of these particular arguments as having the slightest merit. And however we treat them I hope we can condense the present draft. For example, certainly the "subsidizing" point could be dispatched in a brief footnote.

The "limited resource" argument is irrelevant to this case in any realistic sense, and also could be allocated to a footnote. Yet, I hope we can find some way to cut the footnotes back. I would like to avoid the appearance of writing a First Amendment law review as the Court has done this on numerous occasions - though not as well as you could do it.

* * *

I am sure, by the time you reach this point, you are wondering what I would suggest. In truth, I am not sure and think we should talk about it. Tentatively, I think I would be inclined to consider a restructing along the following lines.

Leave Parts I and II substantially as they are. If, in reworking the remainder of the opinion, there is a case that we want to be sure to emphasize, it could be moved perhaps into Part II.

Rather than divide the basic argument into Parts III, IV and V, what would you think of simply having a Part III, with perhaps two or three subparts. At the beginning of Part III, we might state that a number of arguments are advanced by the Commission and the Court below in support of the regulation. If true, we could say that we commence with the time, place or manner argument as being the one most

seriously urged. After a preliminary sentence, we could put this argument in subpart A.

Subpart B could include each of the other specific argument, either in the text or in footnotes. Perhaps all of these could be characterized as arguments in which the Commission or the Court below attempts to support the regulation as a valid exception to otherwise permissible speech, or as you have stated it in the conclusion "a permissible subject matter regulation".

Unless the Commission talks about the "subject matter distinctions" mentioned on page 10 of the draft, I would be inclined to omit reference to them - at least in the text. This leaves the following arguments: that regulating the use of a utility's billing envelope is analogous to regulating the use of government property or facilities; and the "captive audience", "limited resources", and "subsidized" argument now in Part V. My recollection is that these last three arguments, together with the time, place or manner argument, were the centerpieces of the Commission's brief and oral arguments - plus the overalll contention that the state's interest in regulating an electric monopoly is compelling. If my recollection is correct I would address these specific arguments in Part III - putting all of them in the text (contrary to my suggestion about footnotes), and

concluding - perhaps in a brief Part IV - as I did in Bellotti that neither the record in this case nor the authorities relied upon by the Commission justifies any conclusion that this regulation of speech content is compelling.

If you care to try it, Jon, would it be helpful for you in light the foregoing observations, and particularly your own far greater understanding of this case, to prepare a skeleton outline of a possible revision of the draft. We could use it for the basis of discussion.

L.F.P., Jr.

ss

INSERT TWO NO. 79-134 Add to Footnote 12

The Commission stated that even if costs were allocated, utilities would be able to monopolize the billing process in order to present their positions on public issues. But the Commission expressly rejected the suggestion of the NRDC that it regulate this "monopoly" by imposing an equal access requirement on the billing envelopes. Accordingly, ~~we do not consider whether a~~ such no question is presented here.

Commission order forcing Consolidated Edison to present balanced views on public issues in its bill inserts would violate the First Amendment. See Miami Herald v. Tornillo, 418 U.S. 241 (1974); Red Lion Broadcasting v. Federal Communications Commission, 395 U.S. 367 (1969).

Jon - As I have said I don't think Red Lion is remotely relevant here.

Full

lfp/ss 4/28/80 Rider A; p. 5 (Con Ed)

The national need to ensure an adequate energy supply for the future is not disputed. There are, however, strongly held differing views as to whether - and to what extent, if at all - nuclear power should be relied upon as an energy source. In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of such power for the generation of electrical energy and discounted its danger. Appellees oppose the resort to this energy source, believing that its potential danger to health and life outweighs the contribution to energy independence. The Commission thus had undertaken, by the exercise of its regulatory power, to limit the means by which Concolidated Edison may participate in the public debate on this issue of national interest and importance.

It is clear, therefore, that the speech inhibited

by the Commission's regulation is that most clearly entitled to the fullest protection of the First Amendment. Yet, this conclusion does not end our inquiry. See First National Bank of Boston v. Bellotti, supra, at 786. There are circumstances in which even political speech may be regulated. (Jon: cite cases). We therefore now consider whether in this case the state can demonstrate that its regulation is permissible.

The Commission's prohibition is not a permissible time, place, or manner regulation because it makes no pretense of being content-neutral. Indeed, it has undertaken to regulate speech because it does address a controversial issue of public policy. The Commission would allow bill inserts that present certain kinds of information to consumers, such as energy conservation measures, but forbids the use of inserts that discuss public controversies. The Commission, with commendable candor, justifies its ban precisely on the ground that consumers of electricity will benefit from receiving "useful" information but may be harmed by receipt of the prohibited information. See App. to Jurisdictional Statement, at 43a, 66a-67a.

IV

We now turn to a second justification for its ban.

Stated broadly, it is contended that its action is a permissible subject matter regulation. It is true that in narrowly focused circumstances we have recognized exceptions to the general prohibition against subject matter restrictions.

Jon: If I understand that outline of your draft, it is substantially as follows: Part II disposes, in a paragraph, of the "corporate speech" question.

The Commission makes two further arguments. It observes that a billing envelope can accommodate only a limited amount of information, and that the public interest would be better served if the available space were used to promote energy conservation, safety or to remind consumers of their rights. Red Lion Broadcasting v. Federal Communications Commission, 395 U.S. 366 (1969) is cited in support of this argument. In that case, the Court recognized the necessity of government regulation of the limited frequencies available to radio and television broadcasters. We find little analogy between the expansive availability of the United States postage system and the severe limitations of frequencies available for the electronic media.

lfp/ss 4/28/80 Rider A; p. 17 (Con Ed)

It hardly can be asserted seriously that the billing inserts at issue intrude significantly on privacy. The mails, thanks to favorable postage rates, do indeed carry an overabundance of solicitations, advertisements, appeals for contributions, and various types of propagandizing. To be sure a utility bill comes first class and one fails to open it at his peril. Yet, if an enclosure is unwelcome it is no great deprivation to deposit it in the nearest wastebasket.

(Jon: I view this particular argument as facially frivolous, and would give it the back of our hand. Perhaps the citation to Martin v. Struthers could be dropped to a footnote. Or you could add one sentence to the above, citizing Martin.

The question in this case is whether the First Amendment is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts that discuss controversial issues of public policy.

The bill insert stated Consolidated Edison's views on "the benefits of nuclear power", stating that they "far outweigh any potential risk" and that nuclear power plants are safe, economical and clean. It was contended that increased use of nuclear energy would further this country's independence from foreign energy sources.

But there is no comparison between the limited number of broadcast frequencies and the unlimited availability of the United States mail for dissemination of information. We need not consider whether the Commission has authority to order Consolidated Edison to employ bill inserts or other means to promote conservation, safety or some other purpose deemed by the Commission to be worthy. Cf. Central Hudson Gas & Electric Corp. v. Public Service Commission, supra, decided today. Suffice it to say that in the narrowest sense a single billing envelope is a "limited resource", but on the record before us there is no showing that even the standard billing envelope could not enclose additional information if Consolidated Edison were lawfully ordered to do so. More fundamentally, unlike broadcast frequencies, numerous communication means are available to Condolidated Edison, to

the Commission itself, to Natural Resources Defense Council, and to anyone else interested in these subjects.*

*In addition to the mails, all elements of the media are available for advertisements.

*

File

Uncorrected

lfp/ss 5/6/80 Rider A; p. 1 (Central Hudson)

This case presents the question whether a regulation of the Public Service Commission of the state of New York is violative of the First Amendment because it completely bans "promotional" advertising by an electical utility.

We come finally to the critical inquiry in this case: whether the ~~Emjn~~ Commission's complete suppression of speech normally protected by the First Amendment is a valid means of furthering the interest of the state in energy conservation.

lfp/ss 5/6/80 Rider A; p. 20 (Central Hudson)

We are not unmindful of the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities, such as the New York Commission, have the authority -- and indeed the duty -- to take appropriate action to further this goal. When, however, suchaction involves the suppression of speech, the First Amendment requires that the ban be no more extensive than is necessary to serve the state interest. In this case, as we have shown above, the record before us fails to show that the total ban on promotional advertising meets this requirement.

5-6-80

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-134

Consolidated Edison Company of New York, Inc., Appellant, *v.* Public Service Commission of New York.	On Appeal from the Court of Appeals of New York.

[May —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the First Amendment is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts that discuss controversial issues of public policy.

I

The Consolidated Edison Company of New York (Consolidated Edison), appellant in this case, placed written material entitled "Independence Is Still a Goal, and Nuclear Power Is Needed To Win The Battle" in its January 1976 billing envelope. The bill insert stated Consolidated Edison's views on "the benefits of nuclear power," stating that they "far outweigh any potential risk" and that nuclear power plants are safe, economical and clean. App., at 35. It was contended that increased use of nuclear energy would further this country's independence from foreign energy sources.

In March 1976, the Natural Resources Defense Council, Inc. (NRDC) requested Consolidated Edison to enclose a rebuttal prepared by NRDC in its next billing envelope. *Id.*, at 45-46. When Consolidated Edison refused, NRDC asked the Public Service Commission of the State of New York

(Commission) to open Consolidated Edison's billing envelopes to contrasting views on controversial issues of public importance. *Id.*, at 32–33.

On February 17, 1977, the Commission, appellee here, denied NRDC's request, but prohibited "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power." *Id.*, at 50. The Commission explained its decision in a Statement of Policy on Advertising and Promotion Practices of Public Utilities issued on February 25, 1977. The Commission concluded that with respect to bill inserts Consolidated Edison customers are a captive audience of diverse views who should not be subjected to the utility's beliefs. Accordingly, the Commission barred utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." *Id.*, at 43a. The Commission did not, however, bar Consolidated Edison from sending bill inserts discussing topics that are not "controversial issues of public policy." The Commission denied petitions for rehearing filed by Consolidated Edison and other utilities. *Id.*, at 59a.

Consolidated Edison sought review of the Commission's order in the New York state courts. The State Supreme Court, Special Term held that the order violated the First Amendment. 93 Misc. 2d 313, 402 N. Y. S. 2d 551 (1978). But the State Supreme Court, Appellate Division reversed, 63 A. D. 2d 364, 407 N. Y. S. 2d 735 (1978), and the New York Court of Appeals affirmed that judgment. 47 N. Y. 2d 94, 390 N. E. 2d 749 (1979). The Court of Appeals held that the order did not violate the First Amendment because it was a valid time, place, and manner regulation designed to protect the privacy of Consolidated Edison's customers. *Id.*, at 106–107, 390 N. E. 2d, at 755. We noted probable jurisdiction, — U. S. — (1979). We reverse.

II

The prohibition on bill inserts cannot be upheld on the

ground that Consolidated Edison is not entitled to the protections of the First Amendment. In *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765 (1978), we rejected the contention that a State could confine corporate speech to specified issues. That decision recognized that "[t]he 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." *Id.,* at 777. Because the state action limited protected speech, we concluded that the regulation could not stand absent a showing of a compelling state interest. *Id.,* at 786.[1]

The First and Fourteenth Amendments guarantee that no State shall "abridg[e] the freedom of speech." See *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 500–501 (1952). Freedom of speech is "indispensible to the discovery and spread of political truth," *Whitney* v. *California,* 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams* v. *United States,* 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).[2] The First Amendment removes "governmental restraints from the arena

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[1] Nor does Consolidated Edison's status as a privately owned but government-regulated monopoly preclude its assertion of First Amendment rights. *Central Hudson Gas & Electric Co.* v. *Public Service Commission,* No. 79–565 slip op., at — (1980). We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. See, *e. g., Friedman* v. *Rogers,* 440 U. S. 1 (1979); *Virginia State Board of Pharmacy* v. *Virginia Consumers Council,* 425 U. S. 748, 763–765 (1976). Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. See generally *Public Media Center* v. *FCC,* — U. S. App. D. C. —, 587 F. 2d 1322, 1325, 1326 (1978); *Pacific Gas & Electric Co.* v. *City of Berkley,* 60 Cal. App. 3d 123, 127–129 (1976).

[2] Freedom of speech also protects the individual's interest in self-expression. *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765, 777, n. 12 (1978); see T. Emerson, The System of Freedom of Expression 6 (1970).

of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . ." *Cohen* v. *California,* 403 U. S. 15, 24 (1971).[3]

This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102 (1940); see *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966). The Commission's prohibition of discussion of controversial issues of public policy thus strikes at the heart of the freedom to speak. In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this issue, and other controversial issues of national interest and importance.

III

The Commission's ban on bill inserts is not, of course, invalid merely because protected speech is infringed. See *First National Bank of Boston* v. *Bellotti, supra,* at 786. We must consider whether the State can demonstrate that its regulation is a permissible limitation on speech. The Commission's arguments requires us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

A

This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant govern-

[3] See also A. Meiklejohn, Political Freedom 35–36 (1965).

mental interest and leave ample alternative channels for communication. See *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 771 (1976); see also *Kovacs* v. *Cooper, supra,* at 104 (Black, J., dissenting). In *Cox* v. *New Hampshire,* 312 U. S. 563 (1941), this Court upheld a licensing requirement for parades through city streets. The Court recognized that the regulation, which was based on time, place, or manner criteria, served the municipality's legitimate interests in regulating traffic, securing public order, and insuring that simultaneous parades did not prevent all speakers from being heard. *Id.,* at 576. Similarly, in *Grayned* v. *Rockford,* 408 U. S. 104 (1972), we upheld an antinoise regulation that prohibited demonstrations that would disturb the good order of an educational facility. The narrowly drawn restriction constitutionally advanced the city's interest "in having an undisrupted school session conducive to students' learning. . . ." *Id.,* at 119. Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. A roving soundtruck that blares at 2:00 a. m. disturbs neighborhood tranquility no matter what its message.

A time, place, or manner restriction may not be based upon the content of speech. See *Linmark, supra,* at 93–94; see also *Papish* v. *University of Missouri Curators,* 410 U. S. 667, 670 (1973) (*per curiam*). A restriction that regulates only the time, place, or manner of speech may be imposed constitutionally so long as it is reasonable. But when regulation is based upon the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko* v. *Maryland,* 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in the result). See *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205,

209 (1975); *Police Department of Chicago* v. *Mosley,* 408 U. S. 92, 99 (1972).[4]

The Commission does not pretend that its action is unrelated to the content of bill inserts. Indeed, it has undertaken to prohibit certain bill inserts precisely because they address a controversial issue of public policy. The Commission allows inserts that present certain kinds of information to consumers, such as energy conservation measures, but it forbids the use of inserts that discuss public controversies. The Commission, with commendable candor, justifies its ban on the ground that consumers will benefit from receiving "useful" information but may be harmed by receipt of the prohibited information. See App. to Jurisdictional Statement, at 66a–67a. The Commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation.

B

The Commission next argues that its order is acceptable because all mention of controversial public issues in bill inserts, and not just Consolidated Edison's opinions, has been suppressed. The prohibition, the Commission contends, is related to subject-matter rather than to the views of a particular speaker. That is, the Commission's prohibition bars all discussion of nuclear power, whether pro or con, in bill inserts. Because the regulation does not favor one side of a political controversy over another, the Commission asserts that it is constitutionally permissible.

But the First Amendment's hostility to content-based regulation extends not only to restrictions on opinion, but also to suppression of public discussion of an entire topic. "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department* v. *Mosley, supra,*

[4] See also Kalven, The Concept of the Public Forum: *Cox* v. *Louisiana,* 1965 Sup. Ct. Rev. 29.

at 95. See *Cox* v. *Louisiana, supra,* at 580–581 (Black, J., dissenting). In *Mosley,* we held that a municipality could not exempt labor picketing from a general prohibition on picketing at a school even though the ban would have reached both pro- and antiunion demonstrations. If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating. . . ." 408 U. S., at 96. See also *Erznoznik* v. *City of Jacksonville, supra,* at 214–215 (1975); *Tinker* v. *Des Moines School District,* 393 U. S. 503, 510–511 (1969). To allow a government to select permissible subjects of public debate would be to allow that government to control the search for political truth.

In limited circumstances, however, governmental regulation may be based upon the subject-matter of speech.[5] The court below relied upon two cases in which this Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated. 47 N. Y. 2d, at 107, 390 N. E. 2d, at 755. In *Greer* v. *Spock,* 424 U. S. 828 (1976), we held that the Federal Government could prohibit partisan political speech on a military base even though civilian speakers had been allowed to lecture on other

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[5] For example, when courts are asked to determine whether a species of speech is covered by the First Amendment, they must look to the content of the expression. See *Central Hudson* v. *Public Service Commission,* No. 79–565, slip op., at — (1980) (commercial speech); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 340 (1974) (libel); *Miller* v. *California,* 413 U. S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572–573 (1942) (fighting words). Compare *Federal Communications Commission* v. *Pacifica Foundation,* 438 U. S. 726, 746–747 (1978) (opinion of STEVENS, J.) and *Young* v. *American Mini Theatres,* 427 U. S. 50, 70–71 (1976) (opinion of STEVENS, J.) with *Federal Communications Commission* v. *Pacifica Foundation, supra,* at 761 (opinion of POWELL, J.); *id.,* at 762–763 (BRENNAN J., dissenting); and *Young* v. *American Mini Theatres, supra,* at 87 (STEWART, J., dissenting) (indecent speech).

subjects. See *id.*, at 838, n. 10.[6] In *Lehmann* v. *Shaker Heights*, 418 U. S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court similarly concluded that a city transit system that rented space in its vehicles for commercial advertising did not have to accept partisan political advertising. The municipality's refusal to accept political advertising was based upon fears that partisan advertisements might jeopardize long term commercial revenue, that commuters would be subjected to political propaganda, and that acceptance of particular political advertisements might lead to charges of favoritism. *Id.*, at 302, 304.[7]

Greer and *Lehmann* are viewed properly as narrow exceptions to the general prohibition against subject-matter distinctions. In both cases the Court was asked to decide whether a public facility was open to all speakers.[8] The plurality in *Lehmann*, like the Court in *Greer*, concluded that the functioning of governmental facililities would be disrupted

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[6] The necessity of excluding partisan speech was based upon the traditional policy "of keeping official military activities . . . wholly free of entanglement with partisan political campaigns of any kind." *Id.*, at 839. Thus, the Court's decision construed the public right of access in light of "the unique character of the Government property upon which the expression is to take place." *Id.*, at 842 (POWELL, J., concurring).

[7] Mr. Justice Douglas, who concurred in the result in *Lehmann*, did not view "the content of the message as relevant either to the petitioner's right to express it or to the commuters' right to be free from it." 418 U. S., at 308. Rather, Justice Douglas upheld the municipality's actions because commuters were a captive audience. *Id.*, at 306–308. The Consolidated Edison customers who receive bill inserts are not a similarly captive audience. See *infra*, at 12–13. Four Members of the *Lehmann* Court dissented on the ground that the municipality could not discriminate among users. 418 U. S., at 308, 309 (BRENNAN, J., dissenting).

[8] *Lehmann* and *Greer* represent only one category of this Court's cases dealing with rights of access to governmental property. Compare *Tinker* v. *Des Moines School District*, 393 U. S., at 512–513, and *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515–516 (opinion of Roberts, J.), with *Adderley* v. *Florida*, 385 U. S. 39 (1966).

unduly if they were used for partisan political speech but not for other forms of speech.

But the analysis of *Greer* and *Lehmann* is not applicable to this case. In both cases, a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its views on controversial issues of public policy. To be sure, the State has a ligitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments have always been able to use their police powers in the public interest to regulate private behavior. See *New Orleans* v. *Duke,* 427 U. S. 297, 303 (1976) (*per curiam*). But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

C

Where, as here, government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. See *First National Bank of Boston* v. *Bellotti,* 435 U. S., at 786; *Buckley* v. *Valeo,* 424 U. S. 1, 25 (1976) (*per curiam*); see also *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960).[9] The Commission argues

[9] The Commission contends that its order should be judged under the standard of *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968), because it "is only secondarily concerned with the subject matter of Consolidated Edison communications. . . ." Brief for Appellee, at 9, n. 3. The *O'Brien* Court stated the test for the constitutionality of regulations that incidentally infringe speech where "the governmental interest is unrelated to the suppression of free expression. . . ." 391 U. S., at 377. The bill insert prohibition does not further a governmental interest unrelated to the suppression of speech. Indeed, the court below justified the ban expressly on the basis that speech might be harmful to consumers. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755.

that the prohibition is necessary (i) to avoid forcing Consolidated Edison's views on a captive audience, (ii) to allocate limited resources in the public interest, and (iii) to ensure that ratepayers do not subsidize the cost of the bill inserts.

The State Court of Appeals based its approval of the prohibition largely upon its conclusion that the bill inserts intruded upon individual privacy.[10] The court stated that because consumers have no choice whether they receive the insert and the views expressed in the insert may inflame their sensibilities, the Commission could act to protect the privacy of the utility's customers. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755. But the Court of Appeals erred in its assessment of the seriousness of the intrusion.

Even if a short exposure to Consolidated Edison's views may offend the sensibilities of some consumers, the ability of government "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California,* 403 U. S., at 21. A less stringent analysis would permit a government to slight the First Amendment's role "in affording the public access to discussion, debate and the dissemination of information and ideas." *First National Bank of Boston* v. *Bellotti,* 435 U. S., at 783; see *Red Lion Broadcasting* v. *Federal Communications Commission,* 395 U. S. 367, 390 (1969); *Lamont* v. *Postmaster General,* 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring).

[10] The State Court of Appeals also referred to the alternative means by which Consolidated Edison might promulgate its views on controversial issues of public policy. Although a time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers, see *Linmark Associates* v. *Willingboro, supra,* at 93, we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Council, Inc.,* 425 U. S. 748, 757, n. 15 (1976); *Southeastern Promotions Ltd.* v. *Conrad,* 420 U. S. 546, 556 (1975); *Spence* v. *Washington,* 418 U. S. 405, 411, n. 4 (1974) (*per curiam*).

Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.

Passengers on public transportation, see *Lehmann* v. *Shaker Heights,* 418 U. S., at 307–308 (Douglas, J., concurring in the judgment), or residents of a neighborhood disturbed by the raucous emissions of a passing soundtruck, see *Kovacs* v. *Cooper, supra,* may well be unable to escape an unwanted message. But customers who encounter an objectionable billing insert may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California, supra,* at 21. See *Spence* v. *Washington,* 418 U. S. 405, 412 (1974) (*per curiam*). So may the customer of Consolidate Edison avoid exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.[11]

The Commission also contends that because a billing envelope can accommodate only a limited amount of information, the public interest would be better served if the available space were used to promote energy conservation or safety, or to remind consumers of their legal rights. This Court has recognized that allocation of limited resources, such as radio and television broadcast frequencies, may allow the government to exercise unusual authority over speech. See *Red*

[11] Although this Court has recognized the special privacy interests that attach to persons who seek seclusion within their own homes, see *Rowan* v. *Post Office Department,* 397 U. S. 728, 737 (1970), the arrival of a billing envelope is hardly as intrusive as the visit of a door-to-door solicitor. Yet this Court has rejected the contention that a municipality may ban door-to-door solicitors because they may invade the privacy of households. *Martin* v. *Struthers,* 319 U. S. 141, 146–147 (1943). Even if there were a compelling state interest in protecting consumers against overly intrusive bill inserts, it is possible that the State could achieve its goal simply by requiring Consolidated Edison to refrain from delivering bill inserts to the homes of objecting customers. See *Rowan* v. *Post Office Department, supra.*

Lion Broadcasting v. *Federal Communications Commission*, 395 U. S. 367 (1969). The Commission has not demonstrated, however, that billing envelopes are a limited resource comparable to the radio spectrum. And the Commission has failed to show that the presence of bill inserts devoted to discussion of public issues precludes the inclusion of other bill inserts in a single billing envelope. Unlike radio stations broadcasting on a single frequency, multiple bill inserts will not result in a cacophony of unintelligible voices. Consumers can select those inserts or portions of an insert that they wish to read. And the space within a envelope for bill inserts may be expanded simply by purchase of more postage or larger envelopes.

Finally, the Commission urges that its prohibition would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts. But the Commission's order was not based on its inability to allocate costs between the shareholders of Consolidated Edison and the ratepayers. Rather, the Commission stated "that using bill inserts to proclaim a utility's viewpoint on controversial issues (*even when the stockholder pays for it in full*) is tantamount to taking advantage of a captive audience. . . ." App. to Juris. St., at 43a (emphasis added). Accordingly, there is no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base.[12] Mere speculation of harm does not constitute a compelling state interest. See *Mine Workers* v. *Illinois Bar Association*, 389 U. S. 217, 222–223 (1967).[13]

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[12] In its denial of petitions for rehearing, the Commission re-emphasized that it would impose the ban without regard to allocation of costs between shareholders and ratepayers. App., at 67a, n. 1. The Commission stated that even if costs were allocated, utilities would be able to monopolize the billing process in order to present their positions on public issues.

[13] The Commission also contends that ratepayers can not be forced to support the costs of Consolidated Edison's bill inserts. Because the Commission has failed to demonstrate that such costs could not be allocated

IV

The Commission's prohibition on bill inserts that discuss controversial issues of public policy directly infringes speech that is protected by the First Amendment. The state action is neither a valid time, place, or manner restriction, a permissible subject-matter regulation, nor a prohibition justified by a compelling state interest. Accordingly, the regulation must be invalidated. *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 795.

The decision of the New York Court of Appeals is

Reversed.

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between shareholders and ratepayers, we have no occasion to decide whether the rule of *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), would prevent Consolidated Edison from passing onto ratepayers the costs of bill inserts that discuss controversial issues of public policy.

lfp/ss 5/8/80 Rider A, p. 9 (Con Ed)

The analysis of Greer and Lehmann is not applicable to the Commission's regulation of bill inserts. In both of those cases a private party asserted a right of access to public facilities. The Commission makes no claim in this case that the billing envelope is public property. It does assert that the envelope, as a necessary adjunct to the operations of a privately owned but extensively regulated utility, may be controlled by the state. To be sure, the state has a legitimate regulatory interest in controlling Condolidated Edison's activities, just as local governments always have been able to assert their police powers in the public interest to regulate private behavior. See New Orleans v. Duke, 427 U.S. 297, 303 (1975)(Per Curiam). But the power to regulate utility service in the public interest. No public interest is served by the suppression of speech on

an important "issue" of public policy.

Jon: I have thought a good deal about your insert one for page 9 that raises and refutes the "state action" point. I prefer not to address it in the opinion we circulate. It seems wholly remote from the Spock and Lehmann argument. If raised by the dissent, we can meet it then. I would not object to a footnote that cites Jackson v. Metropolitan Edison Co. simply as an example of the fact that a public utility subject to extensive regulation is not an arm of the state or its actions equivalent to state action.

Reliance is placed upon the Court's decision in Red Lion Broadcasting v. Federal Communications Commission, 395 U.S. 367 (1966), in which the Court recognized that allocation of extremely limited resources, such as radio and television broadcast frequencies, may allow the government to exercise unusual authority over speech. This reliance is misplaced. There is no comparison between the limited number of broadcast frequencies and the unlimited availability of the United States mail for the dissemination of information, a means available to the Commission itself, to Natural Resources Defense Council, and indeed to anyone else interested in espousing a cause. It can be said that a bill insert is a particularly convenient or effect means of reaching utility customers. It is not, however, a limited public resource such as broadcast frequencies. Rather, it is

a mailing by a private though regulated party in a way that does not preclude reasonable comparable means of communication. Moreover, on the record before us there is no showing that even the standard billing envelope could not enclose additional information if Consolidated Edison were lawfully ordered include it.

4,5,9,11

12
5-9-80

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: MAY 12 1980

Recirculated: _____

~~2nd CHAMBERS~~ First DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-134

Consolidated Edison Company of New York, Inc., Appellant, *v.* Public Service Commission of New York.	On Appeal from the Court of Appeals of New York.

[May —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the First Amendment is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts discussing controversial issues of public policy.

I

The Consolidated Edison Company of New York, appellant in this case, placed written material entitled "Independence Is Still a Goal, and Nuclear Power Is Needed To Win The Battle" in its January 1976 billing envelope. The bill insert stated Consolidated Edison's views on "the benefits of nuclear power," saying that they "far outweigh any potential risk" and that nuclear power plants are safe, economical, and clean. App., at 35. The utility also contended that increased use of nuclear energy would further this country's independence from foreign energy sources.

In March 1976, the Natural Resources Defense Council, Inc. (NRDC) requested Consolidated Edison to enclose a rebuttal prepared by NRDC in its next billing envelope. *Id.*, at 45–46. When Consolidated Edison refused, NRDC asked the Public Service Commission of the State of New York

to open Consolidated Edison's billing envelopes to contrasting views on controversial issues of public importance. *Id.*, at 32–33.

On February 17, 1977, the Commission, appellee here, denied NRDC's request, but prohibited "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power." *Id.*, at 50. The Commission explained its decision in a Statement of Policy on Advertising and Promotion Practices of Public Utilities issued on February 25, 1977. The Commission concluded that Consolidated Edison customers who receive bills containing inserts are a captive audience of diverse views who should not be subjected to the utility's beliefs. Accordingly, the Commission barred utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." *Id.*, at 43a. The Commission did not, however, bar utilities from sending bill inserts discussing topics that are not "controversial issues of public policy." The Commission later denied petitions for rehearing filed by Consolidated Edison and other utilities. *Id.*, at 59a.

Consolidated Edison sought review of the Commission's order in the New York state courts. The State Supreme Court, Special Term, held that the order violated the First Amendment. 93 Misc. 2d 313, 402 N. Y. S. 2d 551 (1978). But the State Supreme Court, Appellate Division, reversed, 63 A. D. 2d 364, 407 N. Y. S. 2d 735 (1978), and the New York Court of Appeals affirmed that judgment. 47 N. Y. 2d 94, 390 N. E. 2d 749 (1979). The Court of Appeals held that the order did not violate the First Amendment because it was a valid time, place, and manner regulation designed to protect the privacy of Consolidated Edison's customers. *Id.*, at 106–107, 390 N. E. 2d, at 755. We noted probable jurisdiction, — U. S. — (1979). We reverse.

II

The restriction on bill inserts cannot be upheld on the

ground that Consolidated Edison is not entitled to the protections of the First Amendment. In *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), we rejected the contention that a State could confine corporate speech to specified issues. That decision recognized that "[t]he 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." *Id.*, at 777. Because the state action limited protected speech, we concluded that the regulation could not stand absent a showing of a compelling state interest. *Id.*, at 786.[1]

The First and Fourteenth Amendments guarantee that no State shall "abridg[e] the freedom of speech." See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 500–501 (1952). Freedom of speech is "indispensable to the discovery and spread of political truth," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).[2] The First Amendment removes "governmental restraints from the arena

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[1] Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. See *Central Hudson Gas & Electric Co.* v. *Public Service Commission*, No. 79–565 slip op., at 8–9 (1980). We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. See, *e. g.*, *Friedman* v. *Rogers*, 440 U. S. 1 (1979); *Virginia State Board of Pharmacy* v. *Virginia Consumers Council*, 425 U. S. 748, 763–765 (1976). Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. See generally *Public Media Center* v. *FCC*, — U. S. App. D. C. —, 587 F. 2d 1322, 1325, 1326 (1978); *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 127–129 (1976).

[2] Freedom of speech also protects the individual's interest in self-expression. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12 (1978); see T. Emerson, The System of Freedom of Expression 6 (1970).

of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . ." *Cohen* v. *California,* 403 U. S. 15, 24 (1971).[3]

This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102 (1940); see *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966). In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

III

The Commission's ban on bill inserts is not, of course, invalid merely because it infringes protected speech. See *First National Bank of Boston* v. *Bellotti, supra,* at 786. We must consider whether the State can demonstrate that its regulation is a permissible limitation on speech. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

A

This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant govern-

[3] See also A. Meiklejohn, Political Freedom 35–36 (1965).

mental interest and leave ample alternative channels for communication. See *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 771 (1976). See also *Kovacs* v. *Cooper, supra,* at 104 (Black, J., dissenting). In *Cox* v. *New Hampshire,* 312 U. S. 563 (1941), this Court upheld a licensing requirement for parades through city streets. The Court recognized that the regulation, which was based on time, place, or manner criteria, served the municipality's legitimate interests in regulating traffic, securing public order, and insuring that simultaneous parades did not prevent all speakers from being heard. *Id.,* at 576. Similarly, in *Grayned* v. *Rockford,* 408 U. S. 104 (1972), we upheld an antinoise regulation that prohibiting demonstrations that would disturb the good order of an educational facility. The narrowly drawn restriction constitutionally advanced the city's interest "in having an undisrupted school session conducive to students' learning. . . ." *Id.,* at 119. Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving soundtrack that blares at 2 a. m. disturbs neighborhood tranquility.

A restriction that regulates only the time, place, or manner of speech may be imposed constitutionally so long as it is reasonable. But when regulation is based upon the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views" *Niemotko* v. *Maryland,* 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in the result). See *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 209 (1975); *Police Department of Chicago* v. *Mosley,* 408 U. S. 92, 99 (1972).[4]

[4] See also Kalven, The Concept of the Public Forum: *Cox* v. *Louisiana,* 1965 Sup. Ct. Rev. 29.

Therefore, a time, place, or manner restriction may not be based upon the content of speech. See *Linmark Associates, Inc.* v. *Willingboro, supra,* at 93–94; see also *Papish* v. *University of Missouri Curators,* 410 U. S. 667, 670 (1973) (*per curiam*).

The Commission does not pretend that its action is unrelated to the content of bill inserts. Indeed, it has undertaken to suppress certain bill inserts precisely because they address controversial issues of public policy. The Commission allows inserts that present information to consumers on certain subjects, such as energy conservation measures, but it forbids the use of inserts that discuss public controversies. The Commission, with commendable candor, justifies its ban on the ground that consumers will benefit from receiving "useful" information, but not from the prohibited information. See App. to Juris. St., at 66a–67a. The Commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation.

B

The Commission next argues that its order is acceptable because it suppresses all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the Commission contends, is related to subject-matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the Commission asserts that it is constitutionally permissible.

Nevertheless, the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to supression of public discussion of an entire topic. In *Police Department* v. *Mosley, supra,* at 95, we said that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." See *Cox* v. *Louisiana, supra,* at 580–581 (Black, J., dissenting). We held that a municipality could not exempt labor picketing from a general

prohibition on picketing at a school even though the ban would have reached both pro- and anti-union demonstrations. If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating. . . ." 408 U. S., at 96. See also *Erznoznik* v. *City of Jacksonville, supra,* at 214–215 (1975); *Tinker* v. *Des Moines School District,* 393 U. S. 503, 510–511 (1969). To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

In limited circumstances, however, governmental regulation may be based upon the subject-matter of speech.[5] The court below relied upon two cases in which this Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated. 47 N. Y. 2d, at 107, 390 N. E. 2d, at 755. In *Greer* v. *Spock,* 424 U. S. 828 (1976), we held that the Federal Government could prohibit partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects. See *id.,* at 838, n. 10.[6] In *Lehmann* v. *Shaker*

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[5] For example, when courts are asked to determine whether a species of speech is covered by the First Amendment, they must look to the content of the expression. See *Central Hudson* v. *Public Service Commission,* No. 79–565, slip op., at 4 (1980) (commercial speech); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 340 (1974) (libel); *Miller* v. *California,* 413 U. S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572–573 (1942) (fighting words). Compare *Federal Communications Commission* v. *Pacifica Foundation,* 438 U. S. 726, 746–747 (1978) (opinion of STEVENS, J.), and *Young* v. *American Mini Theatres,* 427 U. S. 50, 70–71 (1976) (opinion of STEVENS, J.), with *Federal Communications Commission* v. *Pacifica Foundation, supra,* at 761 (opinion of POWELL, J.), *id.,* at 762–763 (BRENNAN, J., dissenting), and *Young* v. *American Mini Theatres, supra,* at 87 (STEWART, J., dissenting) (indecent speech).

[6] The necessity for excluding partisan speech was based upon the traditional policy "of keeping official military activities . . . wholly free of

Heights, 418 U. S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court similarly concluded that a city transit system that rented space in its vehicles for commercial advertising did not have to accept partisan political advertising. The municipality's refusal to accept political advertising was based upon fears that partisan advertisements might jeopardize long term commercial revenue, that commuters would be subjected to political propaganda, and that acceptance of particular political advertisements might lead to charges of favoritism. *Id.*, at 302, 304.[7]

Greer and *Lehmann* properly are viewed as narrow exceptions to the general prohibition against subject-matter distinctions. In both cases, the Court was asked to decide whether a public facility was open to all speakers.[8] The plurality in *Lehmann* and the Court in *Greer* concluded that partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.

The analysis of *Greer* and *Lehmann* is not applicable to the

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entanglement with partisan political campaigns of any kind." *Id.*, at 839. Thus, the Court's decision construed the public right of access in light of "the unique character of the Government property upon which the expression is to take place." *Id.*, at 842 (POWELL, J., concurring).

[7] Mr. Justice Douglas, who concurred in the judgment in *Lehmann*, did not view "the content of the message as relevant either to the petitioner's right to express it or to the commuters' right to be free from it." 418 U. S., at 308. Rather, Justice Douglas upheld the municipality's actions because commuters were a captive audience. *Id.*, at 306–308. The Consolidated Edison customers who receive bill inserts are not a capative audience. See *infra*, at 10–11. Four Justices dissented in *Lehmann* on the ground that the municipality could not discriminate among advertisers. 418 U. S., at 308, 309 (BRENNAN, J., dissenting).

[8] *Lehmann* and *Greer* represent only one category of this Court's cases dealing with rights of access to governmental property. Compare *Tinker* v. *Des Moines School District*, 393 U. S., at 512–513, and *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515–516 (opinion of Roberts, J.), with *Adderley* v. *Florida*, 385 U. S. 39 (1966).

Commission's regulation of bill inserts. In both cases, a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy. The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. See *New Orleans* v. *Duke,* 427 U. S. 297, 303 (1976) (*per curiam*). But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

C

Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. See *First National Bank of Boston* v. *Bellotti,* 435 U. S., at 786; *Buckley* v. *Valeo,* 424 U. S. 1, 25 (1976) (*per curiam*). See also *Bates* v. *Little*

[9] The Commission contends that its order should be judged under the standard of *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968), because the order "is only secondarily concerned with the subject matter of Consolidated Edison communications. . . ." Brief for Appellee, at 9, n. 3. The *O'Brien* test applies to regulations that incidentally infringe speech were "the governmental interest is unrelated to the suppression of free expression. . . ." 391 U. S., at 377. The bill insert prohibition does not further a governmental interest unrelated to the suppression of speech. Indeed, the court below justified the ban expressly on the basis that the speech might be harmful to consumers. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755.

Rock, 361 U. S. 516, 524 (1960). The Commission argues finally that its prohibition is necessary (i) to avoid forcing Consolidated Edison's views on a captive audience, (ii) to allocate limited resources in the public interest, and (iii) to ensure that ratepayers do not subsidize the cost of the bill inserts.

The State Court of Appeals largely based its approval of the prohibition upon its conclusion that the bill inserts intruded upon individual privacy.[10] The court stated that the Commission could act to protect the privacy of the utility's customers because they have no choice whether to receive the insert and the views expressed in the insert may inflame their sensibilities. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755. But the Court of Appeals erred in its assessment of the seriousness of the intrusion.

Even if a short exposure to Consolidated Edison's views may offend the sensibilities of some consumers, the ability of government "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California*, 403 U. S., at 21. A less stringent analysis would permit a government to slight the First Amendment's role "in affording the public access to discussion, debate and the dissemination of information and ideas." *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 783; see *Red Lion Broadcasting* v. *Federal Communications*

[10] The State Court of Appeals also referred to the alternative means by which Consolidated Edison might promulgate its views on controversial issues of public policy. Although a time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers, see *Linmark Associates* v. *Willingboro*, *supra*, at 93, we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Council, Inc*, 425 U. S. 748, 757, n. 15 (1976); *Southeastern Promotions Ltd.* v. *Conrad*, 420 U. S. 546, 556 (1975); *Spence* v. *Washington*, 418 U. S. 405, 411, n. 4 (1974) (*per curiam*).

Commission, 395 U. S. 367, 390 (1969); *Lamont* v. *Postmaster General*, 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring). Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.

Passengers on public transportation, see *Lehmann* v. *Shaker Heights*, 418 U. S., at 307–308 (Douglas, J., concurring in the judgment), or residents of a neighborhood disturbed by the raucous broadcasts from a passing soundtruck, cf. *Kovacs* v. *Cooper*, *supra*, may well be unable to escape an unwanted message. But customers who encounter an objectionable billing insert may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California*, *supra*, at 21. See *Spence* v. *Washington*, 418 U. S. 405, 412 (1974) (*per curiam*). The customer of Consolidated Edison may ~~avoid~~ escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.[11]

The Commission contends that because a billing envelope can accommodate only a limited amount of information, political messages should not be allowed to take the place of inserts that promote energy conservation or safety, or that remind consumers of their legal rights. The Commission relies upon *Red Lion Broadcasting* v. *Federal Communications Commission*, 395 U. S. 367 (1969), in which the Court held

[11] Although this Court has recognized the special privacy interests that attach to persons who seek seclusion within their own homes, see *Rowan* v. *Post Office Department*, 397 U. S. 728, 737 (1970), the arrival of a billing envelope is hardly as intrusive as the visit of a door-to-door solicitor. Yet the Court has rejected the contention that a municipality may ban door-to-door solicitors because they may invade the privacy of households. *Martin* v. *Struthers*, 319 U. S. 141, 146–147 (1943). Even if there were a compelling state interest in protecting consumers against overly intrusive bill inserts, it is possible that the State could achieve its goal simply by requiring Consolidated Edison to stop sending bill inserts to the homes of objecting customers. See *Rowan* v. *Post Office Department*, *supra*.

that the regulation of radio and television broadcast frequencies permit the Federal Government to exercise unusual authority over speech. But billing envelopes differ from broadcast frequencies in two ways. First, a broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails. Thus, it cannot be said that billing envelopes are a limited resource comparable to the broadcast spectrum. Second, the Commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope. Unlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a "cacophony of competing voices." *Id.*, at 376.

Finally, the Commission urges that its prohibition would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts. But the Commission did not base its order on an inability to allocate costs between the shareholders of Consolidated Edison and the ratepayers. Rather, the Commission stated "that using bill inserts to proclaim a utility's viewpoint on controversial issues (*even when the stockholder pays for it in full*) is tantamount to taking advantage of a captive audience. . . ." App. to Juris. St., at 43a (emphasis added). Accordingly, there is no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base.[12] Mere speculation of harm does not constitute a compelling state interest. See *Mine Workers* v. *Illinois Bar Association,* 389 U. S. 217, 222–223 (1967).[13]

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[12] In its denial of petitions for rehearing, the Commission re-emphasized that it would impose the ban without regard to allocation of costs between shareholders and ratepayers. App., at 67a, n. 1.

[13] The Commission also contends that ratepayers cannot be forced to support the costs of Consolidated Edison's bill inserts. Because the Com-

IV

The Commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes speech protected by the First Amendment. The state action is neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest. Accordingly, the regulation is invalid. *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 795.

The decision of the New York Court of Appeals is

Reversed.

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mission has failed to demonstrate that such costs could not be allocated between shareholders and ratepayers, we have no occasion to decide whether the rule of *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), would prevent Consolidated Edison from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

5-12-80

From: Mr. Justice Powell

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SUPREME COURT OF THE UNITED STATES

No. 79-134

Consolidated Edison Company of New York, Inc., Appellant, *v.* Public Service Commission of New York.	On Appeal from the Court of Appeals of New York.

[May —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the First Amendment is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts discussing controversial issues of public policy.

I

The Consolidated Edison Company of New York, appellant in this case, placed written material entitled "Independence Is Still a Goal, and Nuclear Power Is Needed To Win The Battle" in its January 1976 billing envelope. The bill insert stated Consolidated Edison's views on "the benefits of nuclear power," saying that they "far outweigh any potential risk" and that nuclear power plants are safe, economical, and clean. App., at 35. The utility also contended that increased use of nuclear energy would further this country's independence from foreign energy sources.

In March 1976, the Natural Resources Defense Council, Inc. (NRDC) requested Consolidated Edison to enclose a rebuttal prepared by NRDC in its next billing envelope. *Id.*, at 45–46. When Consolidated Edison refused, NRDC asked the Public Service Commission of the State of New York

to open Consolidated Edison's billing envelopes to contrasting views on controversial issues of public importance. *Id.*, at 32–33.

On February 17, 1977, the Commission, appellee here, denied NRDC's request, but prohibited "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power." *Id.*, at 50. The Commission explained its decision in a Statement of Policy on Advertising and Promotion Practices of Public Utilities issued on February 25, 1977. The Commission concluded that Consolidated Edison customers who receive bills containing inserts are a captive audience of diverse views who should not be subjected to the utility's beliefs. Accordingly, the Commission barred utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." *Id.*, at 43a. The Commission did not, however, bar utilities from sending bill inserts discussing topics that are not "controversial issues of public policy." The Commission later denied petitions for rehearing filed by Consolidated Edison and other utilities. *Id.*, at 59a.

Consolidated Edison sought review of the Commission's order in the New York state courts. The State Supreme Court, Special Term, held that the order violated the First Amendment. 93 Misc. 2d 313, 402 N. Y. S. 2d 551 (1978). But the State Supreme Court, Appellate Division, reversed, 63 A. D. 2d 364, 407 N. Y. S. 2d 735 (1978), and the New York Court of Appeals affirmed that judgment. 47 N. Y. 2d 94, 390 N. E. 2d 749 (1979). The Court of Appeals held that the order did not violate the First Amendment because it was a valid time, place, and manner regulation designed to protect the privacy of Consolidated Edison's customers. *Id.*, at 106–107, 390 N. E. 2d, at 755. We noted probable jurisdiction, — U. S. — (1979). We reverse.

II

The restriction on bill inserts cannot be upheld on the

ground that Consolidated Edison is not entitled to the protections of the First Amendment. In *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), we rejected the contention that a State could confine corporate speech to specified issues. That decision recognized that "[t]he 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." *Id.*, at 777. Because the state action limited protected speech, we concluded that the regulation could not stand absent a showing of a compelling state interest. *Id.*, at 786.[1]

The First and Fourteenth Amendments guarantee that no State shall "abridg[e] the freedom of speech." See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 500–501 (1952). Freedom of speech is "indispensable to the discovery and spread of political truth," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).[2] The First Amendment removes "governmental restraints from the arena

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[1] Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. See *Central Hudson Gas & Electric Co.* v. *Public Service Commission*, No. 79–565 slip op., at 8–9 (1980). We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. See, *e. g.*, *Friedman* v. *Rogers*, 440 U. S. 1 (1979); *Virginia State Board of Pharmacy* v. *Virginia Consumers Council*, 425 U. S. 748, 763–765 (1976). Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. See generally *Public Media Center* v. *FCC*, — U. S. App. D. C. —, 587 F. 2d 1322, 1325, 1326 (1978); *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 127–129 (1976).

[2] Freedom of speech also protects the individual's interest in self-expression. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12 (1978); see T. Emerson, The System of Freedom of Expression 6 (1970).

of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . ." *Cohen* v. *California*, 403 U. S. 15, 24 (1971).[3]

This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102 (1940); see *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

III

The Commission's ban on bill inserts is not, of course, invalid merely because it infringes protected speech. See *First National Bank of Boston* v. *Bellotti*, *supra*, at 786. We must consider whether the State can demonstrate that its regulation is a permissible limitation on speech. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

A

This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant govern-

[3] See also A. Meiklejohn, Political Freedom 35–36 (1965).

mental interest and leave ample alternative channels for communication. See *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 771 (1976). See also *Kovacs* v. *Cooper, supra,* at 104 (Black, J., dissenting). In *Cox* v. *New Hampshire,* 312 U. S. 563 (1941), this Court upheld a licensing requirement for parades through city streets. The Court recognized that the regulation, which was based on time, place, or manner criteria, served the municipality's legitimate interests in regulating traffic, securing public order, and insuring that simultaneous parades did not prevent all speakers from being heard. *Id.,* at 576. Similarly, in *Grayned* v. *Rockford,* 408 U. S. 104 (1972), we upheld an antinoise regulation prohibiting demonstrations that would disturb the good order of an educational facility. The narrowly drawn restriction constitutionally advanced the city's interest "in having an undisrupted school session conducive to students' learning. . . ." *Id.,* at 119. Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving soundtrack that blares at 2 a. m. disturbs neighborhood tranquility.

A restriction that regulates only the time, place, or manner of speech may be imposed constitutionally so long as it is reasonable. But when regulation is based upon the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko* v. *Maryland,* 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in the result). See *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 209 (1975); *Police Department of Chicago* v. *Mosley,* 408 U. S. 92, 99 (1972).[4]

[4] See also Kalven, The Concept of the Public Forum: *Cox* v. *Louisiana,* 1965 Sup. Ct. Rev. 29.

Therefore, a time, place, or manner restriction may not be based upon the content of speech. See *Linmark Associates, Inc.* v. *Willingboro, supra,* at 93–94; see also *Papish* v. *University of Missouri Curators,* 410 U. S. 667, 670 (1973) (*per curiam*).

The Commission does not pretend that its action is unrelated to the content of bill inserts. Indeed, it has undertaken to suppress certain bill inserts precisely because they address controversial issues of public policy. The Commission allows inserts that present information to consumers on certain subjects, such as energy conservation measures, but it forbids the use of inserts that discuss public controversies. The Commission, with commendable candor, justifies its ban on the ground that consumers will benefit from receiving "useful" information, but not from the prohibited information. See App. to Juris. St., at 66a–67a. The Commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation.

B

The Commission next argues that its order is acceptable because it suppresses all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the Commission contends, is related to subject-matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the Commission asserts that it is constitutionally permissible.

Nevertheless, the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to supression of public discussion of an entire topic. In *Police Department* v. *Mosley, supra,* at 95, we said that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." See *Cox* v. *Louisiana, supra,* at 580–581 (Black, J., dissenting). We held that a municipality could not exempt labor picketing from a general

prohibition on picketing at a school even though the ban would have reached both pro- and anti-union demonstrations. If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating. . . ." 408 U. S., at 96. See also *Erznoznik* v. *City of Jacksonville, supra,* at 214–215 (1975); *Tinker* v. *Des Moines School District,* 393 U. S. 503, 510–511 (1969). To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

In limited circumstances, however, governmental regulation may be based upon the subject-matter of speech.[5] The court below relied upon two cases in which this Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated. 47 N. Y. 2d, at 107, 390 N. E. 2d, at 755. In *Greer* v. *Spock,* 424 U. S. 828 (1976), we held that the Federal Government could prohibit partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects. See *id.,* at 838, n. 10.[6] In *Lehmann* v. *Shaker*

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[5] For example, when courts are asked to determine whether a species of speech is covered by the First Amendment, they must look to the content of the expression. See *Central Hudson* v. *Public Service Commission,* No. 79–565, slip op., at 4 (1980) (commercial speech); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 340 (1974) (libel); *Miller* v. *California,* 413 U. S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572–573 (1942) (fighting words). Compare *Federal Communications Commission* v. *Pacifica Foundation,* 438 U. S. 726, 746–747 (1978) (opinion of STEVENS, J.), and *Young* v. *American Mini Theatres,* 427 U. S. 50, 70–71 (1976) (opinion of STEVENS, J.), with *Federal Communications Commission* v. *Pacifica Foundation, supra,* at 761 (opinion of POWELL, J.), *id.,* at 762–763 (BRENNAN, J., dissenting), and *Young* v. *American Mini Theatres, supra,* at 87 (STEWART, J., dissenting) (indecent speech).

[6] The necessity for excluding partisan speech was based upon the traditional policy "of keeping official military activities . . . wholly free of

Heights, 418 U. S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court similarly concluded that a city transit system that rented space in its vehicles for commercial advertising did not have to accept partisan political advertising. The municipality's refusal to accept political advertising was based upon fears that partisan advertisements might jeopardize long term commercial revenue, that commuters would be subjected to political propaganda, and that acceptance of particular political advertisements might lead to charges of favoritism. *Id.*, at 302, 304.[7]

Greer and *Lehmann* properly are viewed as narrow exceptions to the general prohibition against subject-matter distinctions. In both cases, the Court was asked to decide whether a public facility was open to all speakers.[8] The plurality in *Lehmann* and the Court in *Greer* concluded that partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.

The analysis of *Greer* and *Lehmann* is not applicable to the

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entanglement with partisan political campaigns of any kind." *Id.*, at 839. Thus, the Court's decision construed the public right of access in light of "the unique character of the Government property upon which the expression is to take place." *Id.*, at 842 (POWELL, J., concurring).

[7] Mr. Justice Douglas, who concurred in the judgment in *Lehmann*, did not view "the content of the message as relevant either to the petitioner's right to express it or to the commuters' right to be free from it." 418 U. S., at 308. Rather, Justice Douglas upheld the municipality's actions because commuters were a captive audience. *Id.*, at 306–308. The Consolidated Edison customers who receive bill inserts are not a capative audience. See *infra*, at 10–11. Four Justices dissented in *Lehmann* on the ground that the municipality could not discriminate among advertisers. 418 U. S., at 308, 309 (BRENNAN, J., dissenting).

[8] *Lehmann* and *Greer* represent only one category of this Court's cases dealing with rights of access to governmental property. Compare *Tinker* v. *Des Moines School District*, 393 U. S., at 512–513, and *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515–516 (opinion of Roberts, J.), with *Adderley* v. *Florida*, 385 U. S. 39 (1966).

Commission's regulation of bill inserts. In both cases, a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy. The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. See *New Orleans* v. *Duke*, 427 U. S. 297, 303 (1976) (*per curiam*). But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

C

Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. See *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 786; *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*). See also *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960).[9] The Commission argues

[9] The Commission contends that its order should be judged under the standard of *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968), because the order "is only secondarily concerned with the subject matter of Consolidated Edison communications. . . ." Brief for Appellee, at 9, n. 3. The *O'Brien* test applies to regulations that incidentally infringe speech where "the governmental interest is unrelated to the suppression of free expression. . . ." 391 U. S., at 377. The bill insert prohibition does not further a governmental interest unrelated to the suppression of speech. Indeed, the court below justified the ban expressly on the basis that the speech might be harmful to consumers. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755.

finally that its prohibition is necessary (i) to avoid forcing Consolidated Edison's views on a captive audience, (ii) to allocate limited resources in the public interest, and (iii) to ensure that ratepayers do not subsidize the cost of the bill inserts.

The State Court of Appeals largely based its approval of the prohibition upon its conclusion that the bill inserts intruded upon individual privacy.[10] The court stated that the Commission could act to protect the privacy of the utility's customers because they have no choice whether to receive the insert and the views expressed in the insert may inflame their sensibilities. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755. But the Court of Appeals erred in its assessment of the seriousness of the intrusion.

Even if a short exposure to Consolidated Edison's views may offend the sensibilities of some consumers, the ability of government "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California*, 403 U. S., at 21. A less stringent analysis would permit a government to slight the First Amendment's role "in affording the public access to discussion, debate and the dissemination of information and ideas." *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 783; see *Red Lion Broadcasting* v. *Federal Communications*

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[10] The State Court of Appeals also referred to the alternative means by which Consolidated Edison might promulgate its views on controversial issues of public policy. Although a time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers, see *Linmark Associates* v. *Willingboro*, *supra*, at 93, we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Council, Inc.*, 425 U. S. 748, 757, n. 15 (1976); *Southeastern Promotions Ltd.* v. *Conrad*, 420 U. S. 546, 556 (1975); *Spence* v. *Washington*, 418 U. S. 405, 411, n. 4 (1974) (*per curiam*).

Commission, 395 U. S. 367, 390 (1969); *Lamont* v. *Postmaster General*, 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring). Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.

Passengers on public transportation, see *Lehmann* v. *Shaker Heights*, 418 U. S., at 307–308 (Douglas, J., concurring in the judgment), or residents of a neighborhood disturbed by the raucous broadcasts from a passing soundtruck, cf. *Kovacs* v. *Cooper*, *supra*, may well be unable to escape an unwanted message. But customers who encounter an objectionable billing insert may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California*, *supra*, at 21. See *Spence* v. *Washington*, 418 U. S. 405, 412 (1974) (*per curiam*). The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.[11]

The Commission contends that because a billing envelope can accommodate only a limited amount of information, political messages should not be allowed to take the place of inserts that promote energy conservation or safety, or that remind consumers of their legal rights. The Commission relies upon *Red Lion Broadcasting* v. *Federal Communications Commission*, 395 U. S. 367 (1969), in which the Court held

[11] Although this Court has recognized the special privacy interests that attach to persons who seek seclusion within their own homes, see *Rowan* v. *Post Office Department*, 397 U. S. 728, 737 (1970), the arrival of a billing envelope is hardly as intrusive as the visit of a door-to-door solicitor. Yet the Court has rejected the contention that a municipality may ban door-to-door solicitors because they may invade the privacy of households. *Martin* v. *Struthers*, 319 U. S. 141, 146–147 (1943). Even if there were a compelling state interest in protecting consumers against overly intrusive bill inserts, it is possible that the State could achieve its goal simply by requiring Consolidated Edison to stop sending bill inserts to the homes of objecting customers. See *Rowan* v. *Post Office Department*, *supra*.

that the regulation of radio and television broadcast frequencies permit the Federal Government to exercise unusual authority over speech. But billing envelopes differ from broadcast frequencies in two ways. First, a broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails. Thus, it cannot be said that billing envelopes are a limited resource comparable to the broadcast spectrum. Second, the Commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope. Unlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a "cacophony of competing voices." *Id.*, at 376.

Finally, the Commission urges that its prohibition would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts. But the Commission did not base its order on an inability to allocate costs between the shareholders of Consolidated Edison and the ratepayers. Rather, the Commission stated "that using bill inserts to proclaim a utility's viewpoint on controversial issues (*even when the stockholder pays for it in full*) is tantamount to taking advantage of a captive audience. . . ." App. to Juris. St., at 43a (emphasis added). Accordingly, there is no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base.[12] Mere speculation of harm does not constitute a compelling state interest. See *Mine Workers* v. *Illinois Bar Association*, 389 U. S. 217, 222–223 (1967).[13]

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[12] In its denial of petitions for rehearing, the Commission re-emphasized that it would impose the ban without regard to allocation of costs between shareholders and ratepayers. App., at 67a, n. 1.

[13] The Commission also contends that ratepayers cannot be forced to support the costs of Consolidated Edison's bill inserts. Because the Com-

IV

The Commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes speech protected by the First Amendment. The state action is neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest. Accordingly, the regulation is invalid. *First National Bank of Boston* v. *Bellotti,* 435 U. S., at 795.

The decision of the New York Court of Appeals is

Reversed.

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mission has failed to demonstrate that such costs could not be allocated between shareholders and ratepayers, we have no occasion to decide whether the rule of *Abood* v. *Detroit Board of Education,* 431 U. S. 209 (1977), would prevent Consolidated Edison from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 12, 1980

Re: No. 79-134 - Consolidated Edison of New York, Inc. v. Public Service Commission of New York

Dear Lewis:

I shall try my hand at a dissent in this case in due course.

Sincerely,

HAB.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 13, 1980

Re: 79-134 - Consolidated Edison Company of New York, Inc., v. PSC of New York

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 14, 1980

Re: No. 79-134 - Consolidated Edison Company of New York v. Public Service Commission of New York

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 15, 1980

Re: 79-134 - Consolidated Edison v. Public Serv. Comm'n

Dear Lewis:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 16, 1980

Re: 79-134 - Consolidated Edison v. Public Service Commission

Dear Lewis:

If you can make two changes in your draft opinion, I would be happy to join it.

First, it seems to me that as now written there is some tension between the second and third sentences of the paragraph that begins at the bottom of page 5 and runs over to the top of page 6. The problem would be solved if you could revise the sentence at the top of page 6 to read substantially as follows:

narrowly limited ~~where~~

"Therefore, although there are situations in which a time, place, or manner restriction may be based on the subject matter of certain types of communication, see Lehmann v. Shaker Heights, 418 U.S. 298; Greer v. Spock, 424 U.S. 828; Young v. American Mini Theatres, 427 U.S. 50, no such restriction may be based on the particular point of view expressed by the speaker. See Linmark Associates etc."

Second, because the sentence you quote from Mosley toward the bottom of page 6 ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content") is inconsistent with the holdings in Lehmann, Greer, Young, and Pacifica, it seems to me that that sentence should not be quoted with unqualified approval in this opinion. I would propose that you simply eliminate that sentence and cite Cox right after the preceeding sentence and then merely say that "In Mosley we held that a municipality . . . ."

See next change p 6

Respectfully,

JPS

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 16, 1980

RE: No. 79-134 Consolidated Edison Co. of N.Y.
v. Public Service Commission of New York

Dear Lewis:

I agree.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Personal

May 21, 1980

Re: 79-134 - Consolidated Edison v. Public Service Commission

Dear Lewis:

Thank you for your thoughtful response to my letter. I am afraid that the conceptual difference that separated us in Mini Theatres and Pacifica continues to be a problem.

I frankly do not understand how the Court can continue to state, as you do in your draft as well as in your letter, that "a time, place or manner restriction may not be based upon the content of speech" and yet not disavow the holdings in a whole series of cases in which the Court has done precisely that.

I appreciate your attempt to satisfy my concerns, but I am afraid it will be necessary for me to write separately.

Respectfully,

JPS

Mr. Justice Powell

JS 5/21/80

MEMORANDUM

To: Mr. Justice Powell

Re: No. 79-134, Consolidated Edison v. Public Service Commission

Attached is a proposed letter to Justice Stevens. As you requested, it contains a possible addition that may explain your opinion more clearly.

To be frank, however, I do not believe that Justice Strevens' views derives from his inability to understand our opinion. I think that the language on pp 5-6 quite clearly states why a time, place, and manner restriction must be content-neutral. Indeed, the proposed addition is somewhat repetitive. For that reason, I would not suggest adding the insert unless that action will convince Justice Stevens to join

the opinion. We have a Court and the addition says little that is not already clear from the opinion. I've asked David whether he believes that the insert adds anything significant to the opinion, and he says he doesn't think it is needed.

Justice Stevens cites three cases in support of his statement that time, place, and manner restrictions may be based upon the subject matter of certain types of communication. In two of the cases, Lehman and Young v. American Mini-Theatres, there was no Court opinion. But I do not believe that even the plurality opinions support Justice Stevens' assertion. In Lehman, the plurality explicitly based its analysis on the right of the government to decide what advertising to accept in its buses. The plurality held that the car cards were not a public forum. Discussion of time, place, and manner analysis is intertwined with public forum analysis. Similarly in Young, the plurality emphasizes that the indecent nature of the speech allows content-based distinctions. Although there is some mention that the restriction merely regulates "place," that is only the faintest invocation of time, place, and manner analysis. Greer is the only Court opinion cited by Justice Stevens. Again "place" is important, but only because the site of speech was to be a military base. The Court explicitly discussed "public forum" analysis, but not the time, place, and manner standard. Public forum analysis will always bear a superficial resemblance to time, place, and manner analysis.

Thus, I believe we have correctly analyzed these three cases. In Young the Court looked to content to decide whether the First Amendment protects indecent speech. The question in Lehman and Greer was whether a piece of public property was a public forum.

I do not believe it is worth challenging Justice Stevens' reliance upon these cases in the letter to him. It seems more positive to explain why our cases do support what you say. Nevertheless, I believe that a careful examination of the cases would lead Justice Stevens to agree with us.

May 21, 1980

79-134 Consolidated Edison v. Public Service Commission

PERSONAL

Dear John:

Thank you for the opportunity to answer your concerns about my draft opinion.

I do not think there is tension between the second and third sentences of the paragraph running from page five to page six. The Niemotko quotation refers to a speaker's view. The quotation is followed by a citation to Erznozik v. City of Jacksonville, which states that "[a] State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content." 422 U.S., at 209. Then my opinion cites Mosley, which states that:

> "In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of time, place, and circumstance into a concern about content." [quoting Kalven, 1965 Sup. Ct. Rev. 29] This is never permitted.

I view these cases as establishing that "a time, place or manner restriction may not be based upon the content of speech." Ante, at 6. If the opinion is not sufficiently clear, however, I would be happy to add one or both of the above quotations either in the text or a footnote.

You do not suggest that the last paragraph of IIIA be altered. That paragraph states that the bill insert regulation is not content neutral, and the Commission's action cannot, therefore, be upheld as a time, place, or manner regulation. It seems to me that the language you suggest could be viewed as creating a conflict between the last two paragraphs of IIIA. After establishing that a time, place, and manner regulation could be based on subject matter, we would state that the subject matter restriction in this case cannot be sustained as a time, place, or manner regulation. Would not this be internally inconsistent?

Perhaps I can make another modification that might accomodate your concerns. In foonote nine, the opinion explains why the restriction in this case cannot be judged under United States v. O'Brien. I could move this footnote to the last sentence of IIIA on page six. I am considering adding an additional paragraph to that footnote to state substantially as follows:

> "Of course, the restriction is not invalid merely because it fails to qualify either as a time, place, and manner regulation or because it does not pass the standard of United States v. O'Brien. Where the state goal is unrelated to the content or subject-matter of speech, we can be more certain that the state is not attempting to censor political views. Thus, both the time, place, and manner and the United States v. O'Brien tests, which have evolved as methods to identify situations in which non-speech related goals are advanced through means that infringe tangentially upon speech, are applicable only to content-neutral regulation. State action like the regulation at issue in this case that is based explicitly on either subject-matter or a speaker's point of view must be judged under the more searching analysis discussed in Parts IIIB and IIIC infra."

As to your second point, I understand that the Mosley quotation on page six may be confusing at first glance. I believe, however, that the structure of the discussion on pages six through nine clearly explains that Mosley states a general principle to which there are two narrow exceptions. Still, I would be willing to modify the second paragraph of IIIB to eliminate any possible confusion. Perhaps we could state that: "The general principle, subject only to limited exceptions, is well stated in Police Department v. Mosley, supra, at 95. We said that 'the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'"

Sincerely,

Mr. Justice Stevens

lfp/ss

JS 5/30/80

MEMORANDUM

To: Mr. Justice Powell

Re: No. 79-134, Consolidated Edison v. PSC

You may be interested in knowing that Justice Stevens has taken a position in Carey v. Brown, No. 79-703 that is at odds with his private stance in the Con Ed case.

After Carey was circulated yesterday, Justice Stevens told Justice Brennan that he would join the opinion if Justice Brennan would delete a sentence from Mosely on page 7 of the draft. That sentence was the same sentence Justice Stevens objected to in Con Ed: "the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content..." Justice Brennan agreed to the change, and Justice Stevens promptly joined Carey. The remainder of the draft emphasizes, in harmony with Con Ed that a restriction (even a subject-matter

restriction) must be justified as a necessary means to the achievement of a compelling state interest.

Suprisingly, Justice Stevens did not object to language on page 14 where Justice Brennan quotes the admonition from Erznoznik that a "state or municipality may protect indiviual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content." By joining Carey Justice Stevens has contradicted his own view that time, place, and manner restrictions may be based upon the content of speech.

Perhaps this means that Justice Stevens will not object to the same analysis in Con Ed. It would seem odd for a Justice to adopt inconsistent views in two opinions issued almost simultaneously.

"political" issue - 5, 6, 9, 11 2

total ban on inserts only way - 11

2 7 11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 03 1980

Recirculated: _____

No. 79-134 - Consolidated Edison Company of New York
v. Public Service Commission of New York

Received

MR. JUSTICE BLACKMUN, dissenting.

I don't think any reply is indicated

My dissent in this case in no way indicates any disapprobation on my part of the precious rights of free speech (so carefully catalogued by the Court in its opinion) that are protected by the First and Fourteenth Amendments against repression by the State. My prior writings for the Court in the speech area prove conclusively my sensitivity about these rights and my concern for them. See, e.g., Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

But I cannot agree with the Court that the New York Public Service Commission's ban on the utility bill insert somehow deprives the utility of its First and Fourteenth Amendment rights. Because of Consolidated Edison's monopoly status and its rate structure, the use of the insert amounts to an exaction from the utility's customers by way of forced aid for the utility's speech. And, contrary to the Court's suggestion, an allocation of the insert's cost between the utility's shareholders and the ratepayers would not eliminate this coerced subsidy.

I

A public utility is a state-created monopoly. See, e.g., N.Y. Pub. Serv. Law § 68 (McKinney 1955); Jones, Origins of the Certificate of Public Convenience and Necessity; Developments in the States 1870-1920, 79 Colum. L. Rev. 426, 458-461 (1979); Comment, Utility Rates, Consumers, and the New York State Public Service Commission, 39 Albany L. Rev. 707,

709-714 (1975). Although monopolies generally are against the public policies of the United States and of the State of New York, see, e.g., N.Y. Gen. Bus. Law § 340 (McKinney 1968), Consolidated Edison and other utilities are permitted to operate as monopolies because of a determination by the State that the public interest is better served by protecting them from competition. See 2 A. Kahn, The Economics of Regulation 113-171 (1971).

This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching. For this reason, the State regulates the rates that utilities may charge. See N.Y. Pub. Serv. Law § 66.12 (McKinney 1979-1980 Supp.). In addition, New York law gives its Public Service Commission plenary supervisory powers over all property, real and personal, "used or to be used for or in connection with or

to facilitate the . . . sale or furnishing of electricity for light, heat or power." N.Y. Pub. Serv. Law §§ 2.12 and 66.1 (McKinney 1955). State law explicitly gives the Commission control over the format of the utility bill and any material included in the envelope with the bill. § 66.12-a (McKinney 1979-1980 Supp.).

The rates authorized by the Public Service Commission may reflect only the costs of providing necessary services to customers plus a reasonable rate of return to the utility's shareholders. See, e.g., Comment, 39 Albany L. Rev., at 719-723. The entire bill payment system -- meters, meter-reading, bill mailings, and bill inserts -- are paid for by the customers under Commission rules permitting recovery of necessary operating expenses. Uniform System of Accounts -- Expense Accounts -- Customer Account Expenses, 16 N.Y. Code Rules & Regs. Vol. A §§ 901-906. Under the laws of New York and other States, however, a public utility cannot include in

the rate base the costs of political advertising and lobbying. See, e. g., Uniform System of Accounts, Account 426.4, Expenditures for Certain Civic, Political and Related Activities, 16 N.Y. Code Rules & Regs. ch. II, subch. F; Southern Bell Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n, 239 La. 175, 207-209, 118 So.2d 372, 384 (1960); Southwestern Bell Tel. Co., 19 P.U.R. 4th 1, 28-29 (Kan. Corp. Comm'n 1977); Boushey v. Pacific Gas & Elec. Co, 10 P.U.R. 4th 23 (Cal. Pub. Util. Comm'n 1975)(banning controversial bill inserts); Cascade Natural Gas Corp., 8 P.U.R. 4th 19, 27 (Ore. Pub. Util. Comm'n 1974); Pacific Power & Light Co., 34 P.U.R. 3d 36, 46-47 (Ore. Pub. Util. Comm'n 1960); Southwestern Bell Tel. Co., 77 P.U.R. (n.s.) 33, 42 (Mo. Pub. Serv. Comm'n 1949); In re Investigation into the Advertising and Promotional Practicies of Regulated Iowa Pub. Utils, No. U-463 (Iowa State Commerce Comm'n Jan. 29, 1975). These costs cannot be passed on to consumers because ratepayers derive no

irrelevant

service-related benefits from political advertisements. The purpose of such advertising and lobbying is to benefit the utility's shareholders, and its cost must be deducted from profits otherwise available for the shareholders. The Federal Energy Regulatory Commission, formerly the Federal Power Commission, has adopted this rule as well. Alabama Power Co., 24 F.P.C. 278, 286-287 (1960), aff'd sub. nom. Southwestern Electric Power Co. v. Federal Power Com'n, 304 F.2d 29 (CA5) cert. denied, 371 U.S., 924 (1962); Federal Energy Regulatory Commission, Uniform System of Accounts, Account 426.4, 18 CFR Part 101, p. 383 (1979).

II

The Commission concluded, properly in my view, that use of the billing envelope to distribute management's pamphlets amounts to a forced subsidy of the utility's speech by the ratepayers. Consolidated Edison would counter this argument by pointing out that it is willing to allocate to shareholders the

additional costs attributable to the inserts. It maintains: "The fact that the utilities may incidentally save money by the use of bill inserts, at no expense to the ratepayers, is not detrimental to the ratepayers or the public." Brief for Appellant 21.

I do not accept appellant's argument that preventing a "free ride" for the utility's message, is not a substantial, legitimate state concern. Even though the free ride may cost the ratepayers nothing additional by way of specific dollars, it still qualifies as forced support of the utility's speech. See, e.g., Boushey v. Pacific Gas & Elec. Co., 10 P.U.R. 4th, at 27; Note, Utility Companies and the First Amendment: Regulating the Use of Political Inserts in Utility Bills, 64 Va. L. Rev. 921, 926 (1978). If the State compelled an individual to help defray the utility's speech expenses, that compulsion surely would violate that person's First and Fourteenth Amendment rights. Abood v. Detroit Board of

Education, 431 U.S. 209, 233-235 (1977); id., at 256 (POWELL, J., concurring). The fact that providing such aid costs the individual nothing extra does not make the compulsion any less offensive. See Wooley v. Maynard, 430 U.S. 705, 714-715 (1977); Buckley v. Valeo, 424 U.S. 1, 22-23, 36 (recognizing that permitting a candidate to use real or personal property provides material financial assistance to the candidate), 91 n. 124 (1976).1/ For example, a state law requiring a person to permit the utility to include its insert in the envelope with that person's private letters clearly would infringe upon the letter-writer's First and Fourteenth Amendment rights.

Of course, a private business does not deprive an individual of his constitutional rights unless state action is involved. Although the State has given utilities their monopoly power and thus contributed to a situation in which coerced support of the utility's speech is possible, the state action requirement of the Fourteenth Amendment may not be met

in this situation. See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

I do not find it necessary, however, to decide whether state action in the Fourteenth Amendment sense has occurred here. It is not necessary to decide whether the ratepayers' First and Fourteenth Amendment rights have been infringed in order to determine whether the State has the power to prevent the utility from exacting aid from the ratepayers in dissemination of a message with which they do not all agree. Even if the State is not so entwined in the activities of Consolidated Edison to meet the state action requirement, the State has made a monopoly possible by preventing others from competing with the utility. Thus the State is legitimately concerned with preventing the utility from taking advantage of this monopoly power to force consumers to subsidize dissemination of its viewpoint on political issues.2/

In suggesting that the State's interest in eliminating forced subsidization of the utility's speech can be achieved by allocating the expenses of the inserts to the utility's shareholders, the Court has glossed over the difficult allocation issue underlying this controversy. It is not clear to me from the Court's opinion whether it believes that charging the shareholders with the marginal costs associated with the inserts, that is, the costs of printing and putting them into the envelope, will satisfy the State's interest, or whether the Court is suggesting some division of the fixed costs of the mailing, that is, the postage, the envelope, the creation and maintenance of the mailing list, and any other overhead expense. See ante, at _____ (slip op., at 12).

The Commission maintains that no allocation short of charging all the fixed costs of mailing the bills to the utility's shareholders will eliminate the problem of forced subsidization of the utility's speech. The Commission is

obviously correct that the utility will obtain a partial free ride for its message even if the shareholders are charged with part of the mailing costs in addition to the costs directly attributable to the inserts. Consumers would still be forced to aid in the dissemination of the utility's message by making the utility's distribution costs less than they otherwise would be.

Charging all the mailing costs to the shareholders is equivalent, as a practical matter, to the Commission's ban on political inserts. The utility wants to use the inserts only because they are less expensive than a separate mailing. 3/ Thus, there is no way for the State to achieve its important goal -- protecting the ratepayers from forced support of ideas with which they disagree -- that is less restrictive than a total ban.

Because ratepayers bear the cost of this medium of communication, the utility's claim to use the bill envelope for

its own purposes is not analogous to that of a private letter-writer, or of a non-monopolistic business, whose customers can turn elsewhere if they object to inserts in their bills that their sales dollars help to finance. Cf. First National Bank of Boston v. Bellotti, 435 U.S. 765, 794 n.34 (1978). This, therefore, is not a typical prohibition of a speaker's attempt "merely to utilize its own [property] to promulgate its views." Ante, at ____ (slip op., at 9). Rather, this is an attempt by the utility to appropriate and make convenient use of property, for which the public is compelled to pay, for the utility's sole benefit. The Commission's ban on bill inserts does not restrict the utility from using the shareholders' resources to finance communication of its viewpoints on any topic. Consolidated Edison is completely free to use the mails and any other medium of communication on the same basis as any other speaker. The order merely prevents the utility from relying on a forced subsidy from the ratepayers. This lead me

to conclude that the State's attempt here to protect the ratepayers from unwillingly 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.

III

I might observe, additionally, that I am hopeful that the Court's decision in this case has not completely tied a State's hands in preventing this type of "abuse of monopoly power." The Court's opinion appears to turn on the particular facts of this case, and slight differences in approach might permit a State to achieve its proper goals.

First, it appears that New York and other States might use their power to define property rights so that the billing envelope is the property of the ratepayers and not of the utility's shareholders. Cf. Pruneyard Shopping Center v. Robins, _____U.S._____, (1980). Since it is the ratepayers who

pay for the billing packet, I doubt that the Court would find a law establishing their ownership of the packet violative of either the Takings Clause or the First and Fourteenth Amendments. If, under state law, the envelope belongs to the customers, I do not see how restricting the utility from using it could possibly be held to deprive the utility of its rights.

Second, the opinion leaves open the issue of cost allocation. The Commission could charge the utility's shareholders all the costs of the envelopes and postage and of creating and maintaining the mailing list, and charge the consumers only the cost of printing and inserting the bill and the consumer service insert. See Long Island Lighting Co. v. New York State Public Service Comm'n, reproduced in App. to Brief for Long Island Lighting Company as Amicus Curiae 22a. There is no reason that the shareholders should be given a free ride for their pamphlets, rather than the customers be given a free ride for their bills. Such an allocation would eliminate

the most offensive aspects of the forced subsidization of the utility's speech. But see n. 3, supra.

Because I agree with the Appellate Division of the New York Supreme Court, that "[i]n the battle of ideas, the utilities are not entitled to require the consumers to help defray their expenses," 63 App. Div. 2d 364, 368, 407 N.Y.S. 2d 735, 737 (1978), I respectfully dissent.

1/ Pruneyard Shopping Center v. Robins, _____U.S._____, (1980), does not impinge upon this general principle. The decision there was based on the fact that the shopping center voluntarily chose to open its grounds to the public and therefore the State could require that the center permit the exercise of speech rights on the property.

2/ An example makes this point clear. States authorize the creation of trusts, and the costs of administering a trust are charged to the trust estate. If the trustee, for example a bank, finds it necessary to communicate with the beneficiaries of the trust by letter concerning investments, income distribution and the like, the expenses of that mailing ordinarily are proper administrative costs to be borne by the trust. In the trust situation, it would seem to be entirely permissible for the State to prohibit the trustee from including in such a mailing its own political insert on a matter unrelated to the trust. Even though adding the bank's insert may cost the beneficiaries nothing, assuming that the bank pays for the printing and stuffing of the insert, the State has an interest in assuring that the trustee does not derive personal benefit from its role as trustee. The trustee has no constitutional right to a free ride for its message.

(footnote 2 cont'd)

Here, the state interest in preventing a utility from obtaining a free ride is even stronger, since utility customers have no choice but to purchase electricity from Consolidated Edison, while trusts are voluntarily created and the trustee is chosen by the trustor.

3/ Due to the greater likelihood that a recipient would read an insert with the bill, the utility well might desire to place its insert with the bill even if the total cost of the mailing were charged to the shareholders. See Long Island Lighting Co. v. New York State Public Service Comm'n, No. 77 C 972, (EDNY, March 30, 1977), reproduced in App. to Brief for Long Island Lighting Company as Amicus Curiae 1a. This, however, is just another type of forced aid for the utility's message that cannot be eliminated except by a total ban on bill inserts.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1980

79-134

Consolidated Edison Company of New York
v.
Public Service Commission of New York

Dear Harry:

Please join me in parts I and II of your dissenting opinion in this case.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 4, 1980

RE: 79-134 - Consolidated Edison Co. of N.Y.
v. Public Service Commission of New York

Dear Lewis:

I join.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

3, 5-6, 7-8, 11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1-4, 9, 13

6-13-80

~~5-15-80~~

From: Mr. Justice Powell

Circulated: _____

3rd

~~2nd~~ DRAFT

Recirculated: MAY 15 1980

SUPREME COURT OF THE UNITED STATES

No. 79-134

Consolidated Edison Company of New York, Inc., Appellant, *v.* Public Service Commission of New York.	On Appeal from the Court of Appeals of New York.

[May —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the First Amendment, as incorporated by the Fourteenth Amendment, is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts discussing controversial issues of public policy.

I

The Consolidated Edison Company of New York, appellant in this case, placed written material entitled "Independence Is Still a Goal, and Nuclear Power Is Needed To Win The Battle" in its January 1976 billing envelope. The bill insert stated Consolidated Edison's views on "the benefits of nuclear power," saying that they "far outweigh any potential risk" and that nuclear power plants are safe, economical, and clean. App., at 35. The utility also contended that increased use of nuclear energy would further this country's independence from foreign energy sources.

In March 1976, the Natural Resources Defense Council, Inc. (NRDC) requested Consolidated Edison to enclose a rebuttal prepared by NRDC in its next billing envelope. *Id.*, at 45–46. When Consolidated Edison refused, NRDC asked the Public Service Commission of the State of New York

to open Consolidated Edison's billing envelopes to contrasting views on controversial issues of public importance. *Id.*, at 32–33.

On February 17, 1977, the Commission, appellee here, denied NRDC's request, but prohibited "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power." *Id.*, at 50. The Commission explained its decision in a Statement of Policy on Advertising and Promotion Practices of Public Utilities issued on February 25, 1977. The Commission concluded that Consolidated Edison customers who receive bills containing inserts are a captive audience of diverse views who should not be subjected to the utility's beliefs. Accordingly, the Commission barred utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." *Id.*, at 43a. The Commission did not, however, bar utilities from sending bill inserts discussing topics that are not "controversial issues of public policy." The Commission later denied petitions for rehearing filed by Consolidated Edison and other utilities. *Id.*, at 59a.

Consolidated Edison sought review of the Commission's order in the New York state courts. The State Supreme Court, Special Term, held the order unconstitutional. 93 Misc. 2d 313, 402 N. Y. S. 2d 551 (1978). But the State Supreme Court, Appellate Division, reversed, 63 A. D. 2d 364, 407 N. Y. S. 2d 735 (1978), and the New York Court of Appeals affirmed that judgment. 47 N. Y. 2d 94, 390 N. E. 2d 749 (1979). The Court of Appeals held that the order did not violate the Constitution because it was a valid time, place, and manner regulation designed to protect the privacy of Consolidated Edison's customers. *Id.*, at 106–107, 390 N. E. 2d, at 755. We noted probable jurisdiction, — U. S. — (1979). We reverse.

II

The restriction on bill inserts cannot be upheld on the

ground that Consolidated Edison is not entitled to freedom of speech. In *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), we rejected the contention that a State ~~could~~ may confine corporate speech to specified issues. That decision recognized that "[t]he 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." *Id.*, at 777. Because the state action limited protected speech, we concluded that the regulation could not stand absent a showing of a compelling state interest. *Id.*, at 786.[1]

The First and Fourteenth Amendments guarantee that no State shall "abridg[e] the freedom of speech." See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 500–501 (1952). Freedom of speech is "indispensable to the discovery and spread of political truth," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).[2] The First and Fourteenth Amendments remove "governmental restraints

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[1] Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. See *Central Hudson Gas & Electric Co.* v. *Public Service Commission*, No. 79–565 slip op., at 8–9 (1980). We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. See, *e. g.*, *Friedman* v. *Rogers*, 440 U. S. 1 (1979); *Virginia State Board of Pharmacy* v. *Virginia Consumers Council*, 425 U. S. 748, 763–765 (1976). Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. See generally *Public Media Center* v. *FCC*, — U. S. App. D. C. —, 587 F. 2d 1322, 1325, 1326 (1978); *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 127–129 (1976).

[2] Freedom of speech also protects the individual's interest in self-expression. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12 (1978); see T. Emerson, The System of Freedom of Expression 6 (1970).

from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . ." *Cohen* v. *California*, 403 U. S. 15, 24 (1971).[3]

This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102 (1940); see *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

III

The Commission's ban on bill inserts is not, of course, invalid merely because it imposes a limitation upon speech. See *First National Bank of Boston* v. *Bellotti*, *supra*, at 786. We must consider whether the State can demonstrate that its regulation is constitutionally permissible. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

A

This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant govern-

[3] See also A. Meiklejohn, Political Freedom 35–36 (1965).

mental interest and leave ample alternative channels for communication. See *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 771 (1976). See also *Kovacs* v. *Cooper, supra,* at 104 (Black, J., dissenting). In *Cox* v. *New Hampshire,* 312 U. S. 563 (1941), this Court upheld a licensing requirement for parades through city streets. The Court recognized that the regulation, which was based on time, place, or manner criteria, served the municipality's legitimate interests in regulating traffic, securing public order, and insuring that simultaneous parades did not prevent all speakers from being heard. *Id.,* at 576. Similarly, in *Grayned* v. *Rockford,* 408 U. S. 104 (1972), we upheld an antinoise regulation prohibiting demonstrations that would disturb the good order of an educational facility. The narrowly drawn restriction constitutionally advanced the city's interest "in having an undisrupted school session conducive to students' learning. . . ." *Id.,* at 119. Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving soundtrack that blares at 2 a. m. disturbs neighborhood tranquility.

~~A restriction that regulates only the time, place, or manner of speech may be imposed constitutionally so long as it is reasonable. But when regulation is based upon the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko* v. *Maryland,* 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in the result). See *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 209 (1975); *Police Department of Chicago* v. *Mosley,* 408 U. S. 92, 99 (1972).[4]~~

Insert One

~~[4] See also Kalven, The Concept of the Public Forum: *Cox* v. *Louisiana,* 1965 Sup. Ct. Rev. 29.~~

Insert One No. 79-134 Pages 5-6

A restriction that regulates only the time, place, or manner of speech may imposed so long as its reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." Niemotko v. Maryland, 340 U.S. 268, 282 (1951)(Frankfurter J., concurring in the result). As a consequence, we have emphasized that time, place, and manner regulations must be "applicable to all speech regardless of content." Erznozick v. City of Jacksonville, 422 U.S. 205, 209 (1975); see Carey v. Brown, ___ U.S. ___ (1980)(slip op., at 14-15). Governmental action that regulates speech on the basis of its subject matter "'slip[s] from the neutrality of time, place, and circumstance into a concern about content.'" Police Department v. Mosley, 408 U.S. 92, 99 (1972) quoting Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 29. Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.[4]

~~Therefore, a time, place, or manner restriction may not be based upon the content of speech. See *Linmark Associates, Inc.* v. *Willingboro*, *supra*, at 93–94; see also *Papish* v. *University of Missouri Curators*, 410 U. S. 667, 670 (1973) (*per curiam*).~~ [4]

The Commission does not pretend that its action is unrelated to the content or subject matter of bill inserts. Indeed, it has undertaken to suppress certain bill inserts precisely because they address controversial issues of public policy. The Commission allows inserts that present information to consumers on certain subjects, such as energy conservation measures, but it forbids the use of inserts that discuss public controversies. The Commission, with commendable candor, justifies its ban on the ground that consumers will benefit from receiving "useful" information, but not from the prohibited information. See App. to Juris. St., at 66a–67a. The Commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation.

B

~~The Commission next argues that its order is acceptable because it suppresses all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the Commission contends, is related to subject matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the Commission asserts that it is constitutionally permissible.~~

~~Nevertheless, the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to supression of public discussion of an entire topic. In *Police Department* v. *Mosley*, *supra*, at 95, we said that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." See *Cox* v. *Louisiana*, *supra*, at 580–581 (Black, J., dissenting). We held that a~~ municipality could not exempt labor picketing from a general

4. Insert One Two

Insert Two No. 79-134 New note 4

4. See also Linmark Associates, Inc. v. Willingboro, supra, at 93-94; Papish v. University of Missouri Curators, 410 U.S. 667, 670 (1970)(per curiam).

The Commission next argues that its order is acceptable because it applies to all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the Commission contends, is related to subject matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the Commission asserts that it does not unconstitutionally suppress freedom of speech.

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content." Police Department v. Mosley, supra, at 95 (1972); see Cox v. Lousisiana, supra, at 580-581 (Black, J., dissenting). In Mosley, we held that a

prohibition on picketing at a school even though the ban would have reached both pro- and anti-union demonstrations. If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating. . . ." 408 U. S., at 96. See also *Erznoznik* v. *City of Jacksonville, supra,* at 214–215 (1975); *Tinker* v. *Des Moines School District,* 393 U. S. 503, 510–511 (1969). To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

~~In limited circumstances, however, governmental regulation may be based upon the subject matter of speech.~~[5] The court below relied upon two cases in which this Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated. 47 N. Y. 2d, at 107, 390 N. E. 2d, at 755. In *Greer* v. *Spock,* 424 U. S. 828 (1976), we held that the Federal Government could prohibit partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects. See *id.,* at 838, n. 10.[6] In *Lehman* v. *Shaker*

[5] For example, when courts are asked to determine whether a species of speech is covered by the First Amendment, they must look to the content of the expression. See *Central Hudson* v. *Public Service Commission,* No. 79–565, slip op., at 4 (1980) (commercial speech); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 340 (1974) (libel); *Miller* v. *California,* 413 U. S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572–573 (1942) (fighting words). Compare *Federal Communications Commission* v. *Pacifica Foundation,* 438 U. S. 726, 746–747 (1978) (opinion of STEVENS, J.), and *Young* v. *American Mini Theatres,* 427 U. S. 50, 70–71 (1976) (opinion of STEVENS, J.), with *Federal Communications Commission* v. *Pacifica Foundation, supra,* at 761 (opinion of POWELL, J.), *id.,* at 762–763 (BRENNAN, J., dissenting), and *Young* v. *American Mini Theatres, supra,* at 87 (STEWART, J., dissenting) (indecent speech).

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Nevertheless, governmental regulation based on subject matter has been approved in narrow circumstances.[5]

Heights, 418 U. S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court similarly concluded that a city transit system that rented space in its vehicles for commercial advertising did not have to accept partisan political advertising. The municipality's refusal to accept political advertising was based upon fears that partisan advertisements might jeopardize long term commercial revenue, that commuters would be subjected to political propaganda, and that acceptance of particular political advertisements might lead to charges of favoritism. *Id.*, at 302, 304.[7]

Greer and *Lehmann* properly are viewed as narrow exceptions to the general prohibition against subject-matter distinctions. In both cases, the Court was asked to decide whether a public facility was open to all speakers.[8] The plurality in *Lehmann* and the Court in *Greer* concluded that partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.

The analysis of *Greer* and *Lehmann* is not applicable to the

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entanglement with partisan political campaigns of any kind." *Id.*, at 839. Thus, the Court's decision construed the public right of access in light of "the unique character of the Government property upon which the expression is to take place." *Id.*, at 842 (POWELL, J., concurring).

[7] Mr. Justice Douglas, who concurred in the judgment in *Lehmann*, did not view "the content of the message as relevant either to the petitioner's right to express it or to the commuters' right to be free from it." 418 U. S., at 308. Rather, Justice Douglas upheld the municipality's actions because commuters were a captive audience. *Id.*, at 306–308. The Consolidated Edison customers who receive bill inserts are not a capative audience. See *infra*, at 10–11. Four Justices dissented in *Lehmann* on the ground that the municipality could not discriminate among advertisers. 418 U. S., at 308, 309 (BRENNAN, J., dissenting).

[8] *Lehmann* and *Greer* represent only one category of this Court's cases dealing with rights of access to governmental property. Compare *Tinker* v. *Des Moines School District*, 393 U. S., at 512–513, and *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515–516 (opinion of Roberts, J.), with *Adderley* v. *Florida*, 385 U. S. 39 (1966).

Commission's regulation of bill inserts. In both cases, a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy. The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. See *New Orleans* v. *Duke*, 427 U. S. 297, 303 (1976) (*per curiam*). But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

C

Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. See *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 786; *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*). See also *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960).[9] The Commission argues

[9] The Commission contends that its order should be judged under the standard of *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968), because the order "is only secondarily concerned with the subject matter of Consolidated Edison communications. . . ." Brief for Appellee, at 9, n. 3. The *O'Brien* test applies to regulations that incidentally limit speech where "the governmental interest is unrelated to the suppression of free expression. . . ." 391 U. S., at 377. The bill insert prohibition does not further a governmental interest unrelated to the suppression of speech. Indeed, the court below justified the ban expressly on the basis that the speech might be harmful to consumers. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755.

finally that its prohibition is necessary (i) to avoid forcing Consolidated Edison's views on a captive audience, (ii) to allocate limited resources in the public interest, and (iii) to ensure that ratepayers do not subsidize the cost of the bill inserts.

The State Court of Appeals largely based its approval of the prohibition upon its conclusion that the bill inserts intruded upon individual privacy.[10] The court stated that the Commission could act to protect the privacy of the utility's customers because they have no choice whether to receive the insert and the views expressed in the insert may inflame their sensibilities. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755. But the Court of Appeals erred in its assessment of the seriousness of the intrusion.

Even if a short exposure to Consolidated Edison's views may offend the sensibilities of some consumers, the ability of government "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California,* 403 U. S., at 21. A less stringent analysis would permit a government to slight the First Amendment's role "in affording the public access to discussion, debate and the dissemination of information and ideas." *First National Bank of Boston* v. *Bellotti,* 435 U. S., at 783; see *Red Lion Broadcasting* v. *Federal Communications*

[10] The State Court of Appeals also referred to the alternative means by which Consolidated Edison might promulgate its views on controversial issues of public policy. Although a time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers, see *Linmark Associates* v. *Willingboro, supra,* at 93, we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Council, Inc.,* 425 U. S. 748, 757, n. 15 (1976); *Southeastern Promotions Ltd.* v. *Conrad,* 420 U. S. 546, 556 (1975); *Spence* v. *Washington,* 418 U. S. 405, 411, n. 4 (1974) (*per curiam*).

Commission, 395 U. S. 367, 390 (1969); *Lamont* v. *Postmaster General,* 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring). Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.

Passengers on public transportation, see *Lehman* v. *Shaker Heights,* 418 U. S., at 307–308 (Douglas, J., concurring in the judgment), or residents of a neighborhood disturbed by the raucous broadcasts from a passing soundtruck, cf. *Kovacs* v. *Cooper, supra,* may well be unable to escape an unwanted message. But customers who encounter an objectionable billing insert may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California, supra,* at 21. See *Spence* v. *Washington,* 418 U. S. 405, 412 (1974) (*per curiam*). The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.[11]

The Commission contends that because a billing envelope can accommodate only a limited amount of information, political messages should not be allowed to take the place of inserts that promote energy conservation or safety, or that remind consumers of their legal rights. The Commission relies upon *Red Lion Broadcasting* v. *Federal Communications Commission,* 395 U. S. 367 (1969), in which the Court held

[11] Although this Court has recognized the special privacy interests that attach to persons who seek seclusion within their own homes, see *Rowan* v. *Post Office Department,* 397 U. S. 728, 737 (1970), the arrival of a billing envelope is hardly as intrusive as the visit of a door-to-door solicitor. Yet the Court has rejected the contention that a municipality may ban door-to-door solicitors because they may invade the privacy of households. *Martin* v. *Struthers,* 319 U. S. 141, 146–147 (1943). Even if there were a compelling state interest in protecting consumers against overly intrusive bill inserts, it is possible that the State could achieve its goal simply by requiring Consolidated Edison to stop sending bill inserts to the homes of objecting customers. See *Rowan* v. *Post Office Department, supra.*

that the regulation of radio and television broadcast frequencies permit the Federal Government to exercise unusual authority over speech. But billing envelopes differ from broadcast frequencies in two ways. First, a broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails. Thus, it cannot be said that billing envelopes are a limited resource comparable to the broadcast spectrum. Second, the Commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope. Unlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a "cacophony of competing voices." *Id.*, at 376.

Finally, the Commission urges that its prohibition would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts. But the Commission did not base its order on an inability to allocate costs between the shareholders of Consolidated Edison and the ratepayers. Rather, the Commission stated "that using bill inserts to proclaim a utility's viewpoint on controversial issues (*even when the stockholder pays for it in full*) is tantamount to taking advantage of a captive audience. . . ." App. to Juris. St., at 43a (emphasis added). Accordingly, there is no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base.[12] Mere speculation of harm does not constitute a compelling state interest. See *Mine Workers* v. *Illinois Bar Association,* 389 U. S. 217, 222–223 (1967).[13]

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[12] In its denial of petitions for rehearing, the Commission re-emphasized that it would impose the ban without regard to allocation of costs between shareholders and ratepayers. App., at 67a, n. 1.

[13] The Commission also contends that ratepayers cannot be forced to support the costs of Consolidated Edison's bill inserts. Because the Com-

IV

The Commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments. The state action is neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest. Accordingly, the regulation is invalid. *First National Bank of Boston* v. *Bellotti,* 435 U. S., at 795.

The decision of the New York Court of Appeals is

Reversed.

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mission has failed to demonstrate that such costs could not be allocated between shareholders and ratepayers, we have no occasion to decide whether the rule of *Abood* v. *Detroit Board of Education,* 431 U. S. 209 (1977), would prevent Consolidated Edison from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

6-13-80

Circulated: _____

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-134

Consolidated Edison Company of New York, Inc., Appellant, *v.* Public Service Commission of New York. | On Appeal from the Court of Appeals of New York.

[May —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the First Amendment, as incorporated by the Fourteenth Amendment, is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts discussing controversial issues of public policy.

I

The Consolidated Edison Company of New York, appellant in this case, placed written material entitled "Independence Is Still a Goal, and Nuclear Power Is Needed To Win The Battle" in its January 1976 billing envelope. The bill insert stated Consolidated Edison's views on "the benefits of nuclear power," saying that they "far outweigh any potential risk" and that nuclear power plants are safe, economical, and clean. App., at 35. The utility also contended that increased use of nuclear energy would further this country's independence from foreign energy sources.

In March 1976, the Natural Resources Defense Council, Inc. (NRDC) requested Consolidated Edison to enclose a rebuttal prepared by NRDC in its next billing envelope. *Id.*, at 45–46. When Consolidated Edison refused, NRDC asked the Public Service Commission of the State of New York

to open Consolidated Edison's billing envelopes to contrasting views on controversial issues of public importance. *Id.*, at 32–33.

On February 17, 1977, the Commission, appellee here, denied NRDC's request, but prohibited "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power." *Id.*, at 50. The Commission explained its decision in a Statement of Policy on Advertising and Promotion Practices of Public Utilities issued on February 25, 1977. The Commission concluded that Consolidated Edison customers who receive bills containing inserts are a captive audience of diverse views who should not be subjected to the utility's beliefs. Accordingly, the Commission barred utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." *Id.*, at 43a. The Commission did not, however, bar utilities from sending bill inserts discussing topics that are not "controversial issues of public policy." The Commission later denied petitions for rehearing filed by Consolidated Edison and other utilities. *Id.*, at 59a.

Consolidated Edison sought review of the Commission's order in the New York state courts. The State Supreme Court, Special Term, held the order unconstitutional. 93 Misc. 2d 313, 402 N. Y. S. 2d 551 (1978). But the State Supreme Court, Appellate Division, reversed, 63 A. D. 2d 364, 407 N. Y. S. 2d 735 (1978), and the New York Court of Appeals affirmed that judgment. 47 N. Y. 2d 94, 390 N. E. 2d 749 (1979). The Court of Appeals held that the order did not violate the Constitution because it was a valid time, place, and manner regulation designed to protect the privacy of Consolidated Edison's customers. *Id.*, at 106–107, 390 N. E. 2d, at 755. We noted probable jurisdiction, — U. S. — (1979). We reverse.

II

The restriction on bill inserts cannot be upheld on the

ground that Consolidated Edison is not entitled to freedom of speech. In *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), we rejected the contention that a State may confine corporate speech to specified issues. That decision recognized that "[t]he 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." *Id.*, at 777. Because the state action limited protected speech, we concluded that the regulation could not stand absent a showing of a compelling state interest. *Id.*, at 786.[1]

The First and Fourteenth Amendments guarantee that no State shall "abridg[e] the freedom of speech." See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 500–501 (1952). Freedom of speech is "indispensable to the discovery and spread of political truth," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).[2] The First and Fourteenth Amendments remove "governmental restraints

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[1] Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. See *Central Hudson Gas & Electric Co.* v. *Public Service Commission*, No. 79–565 slip op., at 8–9 (1980). We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. See, *e. g.*, *Friedman* v. *Rogers*, 440 U. S. 1 (1979); *Virginia State Board of Pharmacy* v. *Virginia Consumers Council*, 425 U. S. 748, 763–765 (1976). Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. See generally *Public Media Center* v. *FCC*, — U. S. App. D. C. —, 587 F. 2d 1322, 1325, 1326 (1978); *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 127–129 (1976).

[2] Freedom of speech also protects the individual's interest in self-expression. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12 (1978); see T. Emerson, The System of Freedom of Expression 6 (1970).

from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . ." *Cohen* v. *California,* 403 U. S. 15, 24 (1971).[3]

This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102 (1940); see *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966). In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

III

The Commission's ban on bill inserts is not, of course, invalid merely because it imposes a limitation upon speech. See *First National Bank of Boston* v. *Bellotti, supra,* at 786. We must consider whether the State can demonstrate that its regulation is constitutionally permissible. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

A

This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for com-

[3] See also A. Meiklejohn, Political Freedom 35–36 (1965).

munication. See *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 771 (1976). See also *Kovacs* v. *Cooper, supra,* at 104 (Black, J., dissenting). In *Cox* v. *New Hampshire,* 312 U. S. 563 (1941), this Court upheld a licensing requirement for parades through city streets. The Court recognized that the regulation, which was based on time, place, or manner criteria, served the municipality's legitimate interests in regulating traffic, securing public order, and insuring that simultaneous parades did not prevent all speakers from being heard. *Id.,* at 576. Similarly, in *Grayned* v. *Rockford,* 408 U. S. 104 (1972), we upheld an antinoise regulation prohibiting demonstrations that would disturb the good order of an educational facility. The narrowly drawn restriction constitutionally advanced the city's interest "in having an undisrupted school session conducive to students' learning. . . ." *Id.,* at 119. Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving soundtrack that blares at 2 a. m. disturbs neighborhood tranquility.

A restriction that regulates only the time, place or manner of speech may imposed so long as its reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko* v. *Maryland,* 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in the result). As a consequence, we have emphasized that time, place, and manner regulations must be "applicable to all speech regardless of content." *Erznoznick* v. *City of Jacksonville,* 422 U. S. 205, 209 (1975); see *Carey* v. *Brown,* — U. S. — (1980) (slip op., at 14–15). Governmental action that regulates speech on the basis of its subject

matter "'slip[s] from the neutrality of time, place, and circumstances into a concern about content.'" *Police Department* v. *Mosley*, 408 U. S. 92, 99 (1972), quoting Kalven, The Concept of the Public Forum: *Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 29. Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.[4]

The Commission does not pretend that its action is unrelated to the content or subject matter of bill inserts. Indeed, it has undertaken to supress certain bill inserts precisely because they address controversial issues of public policy. The Commission allows inserts that present information to consumers on certain subjects, such as energy conservation measures, but it forbids the use of inserts that discuss public controversies. The Commission, with commendable candor, justifies its ban on the ground that consumers will benefit from receiving "useful" information, but not from the prohibited information. See App. to Jur. St., at 66a–67a. The Commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation.

B

The Commission next argues that its order is acceptable because it applies to all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the Commission contends, is related to subject matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the Commission asserts that it does not unconstitutionally suppress freedom of speech.

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints,

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but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department* v. *Mosley, supra,* at 95 (1972); see *Cox* v. *Louisiana, supra,* at 580–581 (Black, J., dissenting). In *Mosley,* we held that a municipality could not exempt labor picketing from a general prohibition on picketing at a school even though the ban would have reached both pro- and anti-union demonstrations. If the market place of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating. . . ." 408 U. S., at 96. See also *Erznoznik* v. *City of Jacksonville, supra,* at 214–215 (1975); *Tinker* v. *Des Moines School District,* 393 U. S. 503, 510–511 (1969). To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

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plurality in *Lehman* and the Court in *Greer* concluded that partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.

The analysis of *Greer* and *Lehman* is not applicable to the Commission's regulation of bill inserts. In both cases, a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy. The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. See *New Orleans* v. *Duke*, 427 U. S. 297, 303 (1976) (*per curiam*). But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

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Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. See *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 786; *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*). See also *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960).[9] The Commission argues

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The State Court of Appeals largely based its approval of the prohibition upon its conclusion that the bill inserts intruded upon individual privacy.[10] The court stated that the Commission could act to protect the privacy of the utility's customers because they have no choice whether to receive the insert and the views expressed in the insert may inflame their sensibilities. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755. But the Court of Appeals erred in its assessment of the seriousness of the intrusion.

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Passengers on public transportation, see *Lehman* v. *Shaker Heights,* 418 U. S., at 307–308 (Douglas, J., concurring in the judgment), or residents of a neighborhood disturbed by the raucous broadcasts from a passing soundtruck, cf. *Kovacs* v. *Cooper, supra,* may well be unable to escape an unwanted message. But customers who encounter an objectionable billing insert may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California, supra,* at 21. See *Spence* v. *Washington,* 418 U. S. 405, 412 (1974) (*per curiam*). The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.[11]

The Commission contends that because a billing envelope

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can accommodate only a limited amount of information, political messages should not be allowed to take the place of inserts that promote energy conservation or safety, or that remind consumers of their legal rights. The Commission relies upon *Red Lion Broadcasting* v. *Federal Communications Commission*, 395 U. S. 367 (1969), in which the Court held that the regulation of radio and television broadcast frequencies permit the Federal Government to exercise unusual authority over speech. But billing envelopes differ from broadcast frequencies in two ways. First, a broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails. Thus, it cannot be said that billing envelopes are a limited resource comparable to the broadcast spectrum. Second, the Commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope. Unlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a "cacophony of competing voices." *Id.*, at 376.

Finally, the Commission urges that its prohibition would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts. But the Commission did not base its order on an inability to allocate costs between the shareholders of Consolidated Edison and the ratepayers. Rather, the Commission stated "that using bill inserts to proclaim a utility's viewpoint on controversial issues (*even when the stockholder pays for it in full*) is tantamount to taking advantage of a captive audience. . . ." App. to Juris. St., at 43a (emphasis added). Accordingly, there is no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base.[12] Mere

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speculation of harm does not constitute a compelling state interest. See *Mine Workers* v. *Illinois Bar Association,* 389 U. S. 217, 222–223 (1967).[13]

IV

The Commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments. The state action is neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest. Accordingly, the regulation is invalid. *First National Bank of Boston* v. *Bellotti,* 435 U. S., at 795.

The decision of the New York Court of Appeals is

Reversed.

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that it would impose the ban without regard to allocation of costs between shareholders and ratepayers. App., at 67a, n. 1.

[13] The Commission also contends that ratepayers cannot be forced to support the costs of Consolidated Edison's bill inserts. Because the Commission has failed to demonstrate that such costs could not be allocated between shareholders and ratepayers, we have no occasion to decide whether the rule of *Abood* v. *Detroit Board of Education,* 431 U. S. 209 (1977), would prevent Consolidated Edison from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy.

3,5-7,9

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

6-13-80

From: Mr. Justice Powell

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SUPREME COURT OF THE UNITED STATES

No. 79-134

Consolidated Edison Company of New York, Inc., Appellant, *v.* Public Service Commission of New York.

On Appeal from the Court of Appeals of New York.

[May —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the First Amendment, as incorporated by the Fourteenth Amendment, is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts discussing controversial issues of public policy.

I

The Consolidated Edison Company of New York, appellant in this case, placed written material entitled "Independence Is Still a Goal, and Nuclear Power Is Needed To Win The Battle" in its January 1976 billing envelope. The bill insert stated Consolidated Edison's views on "the benefits of nuclear power," saying that they "far outweigh any potential risk" and that nuclear power plants are safe, economical, and clean. App., at 35. The utility also contended that increased use of nuclear energy would further this country's independence from foreign energy sources.

In March 1976, the Natural Resources Defense Council, Inc. (NRDC) requested Consolidated Edison to enclose a rebuttal prepared by NRDC in its next billing envelope. *Id.*, at 45–46. When Consolidated Edison refused, NRDC asked the Public Service Commission of the State of New York

to open Consolidated Edison's billing envelopes to contrasting views on controversial issues of public importance. *Id.*, at 32–33.

On February 17, 1977, the Commission, appellee here, denied NRDC's request, but prohibited "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power." *Id.*, at 50. The Commission explained its decision in a Statement of Policy on Advertising and Promotion Practices of Public Utilities issued on February 25, 1977. The Commission concluded that Consolidated Edison customers who receive bills containing inserts are a captive audience of diverse views who should not be subjected to the utility's beliefs. Accordingly, the Commission barred utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." *Id.*, at 43a. The Commission did not, however, bar utilities from sending bill inserts discussing topics that are not "controversial issues of public policy." The Commission later denied petitions for rehearing filed by Consolidated Edison and other utilities. *Id.*, at 59a.

Consolidated Edison sought review of the Commission's order in the New York state courts. The State Supreme Court, Special Term, held the order unconstitutional. 93 Misc. 2d 313, 402 N. Y. S. 2d 551 (1978). But the State Supreme Court, Appellate Division, reversed, 63 A. D. 2d 364, 407 N. Y. S. 2d 735 (1978), and the New York Court of Appeals affirmed that judgment. 47 N. Y. 2d 94, 390 N. E. 2d 749 (1979). The Court of Appeals held that the order did not violate the Constitution because it was a valid time, place, and manner regulation designed to protect the privacy of Consolidated Edison's customers. *Id.*, at 106–107, 390 N. E. 2d, at 755. We noted probable jurisdiction, — U. S. — (1979). We reverse.

II

The restriction on bill inserts cannot be upheld on the

ground that Consolidated Edison is not entitled to freedom of speech. In *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), we rejected the contention that a State may confine corporate speech to specified issues. That decision recognized that "[t]he 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." *Id.*, at 777. Because the state action limited protected speech, we concluded that the regulation could not stand absent a showing of a compelling state interest. *Id.*, at 786.[1]

The First and Fourteenth Amendments guarantee that no State shall "abridg[e] the freedom of speech." See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 500–501 (1952). Freedom of speech is "indispensable to the discovery and spread of political truth," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).[2] The First and Fourteenth Amendments remove "governmental restraints

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[1] Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. See *Central Hudson Gas & Electric Co.* v. *Public Service Commission*, No. 79–565 slip op., at 8–9 (1980). We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. See, *e. g.*, *Friedman* v. *Rogers*, 440 U. S. 1 (1979); *Virginia State Board of Pharmacy* v. *Virginia Consumers Council*, 425 U. S. 748, 763–765 (1976). Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. See generally *Public Media Center* v. *FCC*, — U. S. App. D. C. —, 587 F. 2d 1322, 1325, 1326 (1978); *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 127–129 (1976).

[2] Freedom of speech also protects the individual's interest in self-expression. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12 (1978); see T. Emerson, The System of Freedom of Expression 6 (1970).

from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . ." *Cohen* v. *California,* 403 U. S. 15, 24 (1971).[3]

This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102 (1940); see *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966). In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

III

The Commission's ban on bill inserts is not, of course, invalid merely because it imposes a limitation upon speech. See *First National Bank of Boston* v. *Bellotti, supra,* at 786. We must consider whether the State can demonstrate that its regulation is constitutionally permissible. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

A

This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for com-

[3] See also A. Meiklejohn, Political Freedom 35–36 (1965).

munication. See *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 771 (1976). See also *Kovacs* v. *Cooper, supra,* at 104 (Black, J., dissenting). In *Cox* v. *New Hampshire,* 312 U. S. 563 (1941), this Court upheld a licensing requirement for parades through city streets. The Court recognized that the regulation, which was based on time, place, or manner criteria, served the municipality's legitimate interests in regulating traffic, securing public order, and insuring that simultaneous parades did not prevent all speakers from being heard. *Id.,* at 576. Similarly, in *Grayned* v. *Rockford,* 408 U. S. 104 (1972), we upheld an antinoise regulation prohibiting demonstrations that would disturb the good order of an educational facility. The narrowly drawn restriction constitutionally advanced the city's interest "in having an undisrupted school session conducive to students' learning. . . ." *Id.,* at 119. Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving soundtrack that blares at 2 a. m. disturbs neighborhood tranquility.

A restriction that regulates only the time, place or manner of speech may imposed so long as its reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko* v. *Maryland,* 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in the result). As a consequence, we have emphasized that time, place, and manner regulations must be "applicable to all speech regardless of content." *Erznoznick* v. *City of Jacksonville,* 422 U. S. 205, 209 (1975); see *Carey* v. *Brown,* —— U. S. —— (1980) (slip op., at 14–15). Governmental action that regulates speech on the basis of its subject

matter " 'slip[s] from the neutrality of time, place, and circumstances into a concern about content.' " *Police Department* v. *Mosley,* 408 U. S. 92, 99 (1972), quoting Kalven, The Concept of the Public Forum: *Cox* v. *Louisiana,* 1965 Sup. Ct. Rev. 29. Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.[4]

The Commission does not pretend that its action is unrelated to the content or subject matter of bill inserts. Indeed, it has undertaken to supress certain bill inserts precisely because they address controversial issues of public policy. The Commission allows inserts that present information to consumers on certain subjects, such as energy conservation measures, but it forbids the use of inserts that discuss public controversies. The Commission, with commendable candor, justifies its ban on the ground that consumers will benefit from receiving "useful" information, but not from the prohibited information. See App. to Jur. St., at 66a–67a. The Commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation.

B

The Commission next argues that its order is acceptable because it applies to all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the Commission contends, is related to subject matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the Commission asserts that it does not unconstitutionally suppress freedom of speech.

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints,

[4] See also *Linmark Associates, Inc.* v. *Willingboro, supra,* at 93–94; *Papish* v. *University of Missouri Curators,* 410 U. S. 667, 670 (1970) (*per curiam*).

but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department* v. *Mosley, supra,* at 95 (1972); see *Cox* v. *Louisiana, supra,* at 580–581 (Black, J., dissenting). In *Mosley,* we held that a municipality could not exempt labor picketing from a general prohibition on picketing at a school even though the ban would have reached both pro- and anti-union demonstrations. If the market place of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating. . . ." 408 U. S., at 96. See also *Erznoznik* v. *City of Jacksonville, supra,* at 214–215 (1975); *Tinker* v. *Des Moines School District,* 393 U. S. 503, 510–511 (1969). To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Nevertheless, governmental regulation based on subject matter has been approved in narrow circumstances.[5] The court below relied upon two cases in which this Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental

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[5] For example, when courts are asked to determine whether a species of speech is covered by the First Amendment, they must look to the content of the expression. See *Central Hudson* v. *Public Service Commission,* No. 79–565, slip op., at 4 (1980) (commercial speech); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 340 (1974) (libel); *Miller* v. *California,* 413 U. S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572–573 (1942) (fighting words). Compare *Federal Communications Commission* v. *Pacifica Foundation,* 438 U. S. 726, 746–747 (1978) (opinion of STEVENS, J.), and *Young* v. *American Mini Theatres,* 427 U. S. 50, 70–71 (1976) (opinion of STEVENS, J.), with *Federal Communications Commission* v. *Pacifica Foundation, supra,* at 761 (opinion of POWELL, J.), *id.,* at 762–763 (BRENNAN, J., dissenting), and *Young* v. *American Mini Theatres, supra,* at 87 (STEWART, J., dissenting) (indecent speech).

purpose for which the property has been dedicated. 47 N. Y. 2d, at 107, 390 N. E. 2d, at 755. In *Greer* v. *Spock*, 424 U. S. 828 (1976), we held that the Federal Government could prohibit partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects. See *id.*, at 838, n. 10.[6] In *Lehman* v. *Shaker Heights*, 418 U. S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court similarly concluded that a city transit system that rented space in its vehicles for commercial advertising did not have to accept partisan political advertising. The municipality's refusal to accept political advertising was based upon fears that partisan advertisements might jeopardize long term commercial revenue, that commuters would be subjected to political propaganda, and that acceptance of particular political advertisements might lead to charges of favoritism. *Id.*, at 302, 304.[7]

Greer and *Lehaman* properly are viewed as narrow exceptions to the general prohibition against subject-matter distinctions. In both cases, the Court was asked to decide whether a public facility was open to all speakers.[8] The

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[6] The necessity for excluding partisan speech was based upon the traditional policy "of keeping official military activities . . . wholly free of entanglement with partisan political campaigns of any kind." *Id.*, at 839. Thus, the Court's decision construed the public right of access in light of "the unique character of the Government property upon which the expression is to take place." *Id.*, at 842 (POWELL, J., concurring).

[7] Mr. Justice Douglas, who concurred in the judgment in *Lehman*, did not view "the content of the message as relevant either to the petitioner's right to express it or to the commuters' right to be free from it." 418 U. S., at 308. Rather, Justice Douglas upheld the municipality's actions because commuters were a captive audience. *Id.*, at 306–308. The Consolidated Edison customers who receive bill inserts are not a capative audience. See *infra*, at 10–11. Four Justices dissented in *Lehman* on the ground that the municipality could not discriminate among advertisers. 418 U. S., at 308, 309 (BRENNAN, J., dissenting).

[8] *Lehman* and *Greer* represent only one category of this Court's cases dealing with rights of access to governmental property. Compare *Tinker* v. *Des Moines School District*, 393 U. S., at 512–513, and *Hague* v. *Com-*

plurality in *Lehman*, and the Court in *Greer* concluded that partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.

The analysis of *Greer* and *Lehman* is not applicable to the Commission's regulation of bill inserts. In both cases, a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy. The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. See *New Orleans* v. *Duke*, 427 U. S. 297, 303 (1976) (*per curiam*). But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

C

Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. See *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 786; *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*). See also *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960).[9] The Commission argues

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mittee for Industrial Organization, 307 U. S. 496, 515–516 (opinion of Roberts, J.), with *Adderley* v. *Florida*, 385 U. S. 39 (1966).

[9] The Commission contends that its order should be judged under the standard of *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968), because the order "is only secondarily concerned with the subject matter of

finally that its prohibition is necessary (i) to avoid forcing Consolidated Edison's views on a captive audience, (ii) to allocate limited resources in the public interest, and (iii) to ensure that ratepayers do not subsidize the cost of the bill inserts.

The State Court of Appeals largely based its approval of the prohibition upon its conclusion that the bill inserts intruded upon individual privacy.[10] The court stated that the Commission could act to protect the privacy of the utility's customers because they have no choice whether to receive the insert and the views expressed in the insert may inflame their sensibilities. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755. But the Court of Appeals erred in its assessment of the seriousness of the intrusion.

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Passengers on public transportation, see *Lehman* v. *Shaker Heights*, 418 U. S., at 307–308 (Douglas, J., concurring in the judgment), or residents of a neighborhood disturbed by the raucous broadcasts from a passing soundtruck, cf. *Kovacs* v. *Cooper*, *supra*, may well be unable to escape an unwanted message. But customers who encounter an objectionable billing insert may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California*, *supra*, at 21. See *Spence* v. *Washington*, 418 U. S. 405, 412 (1974) (*per curiam*). The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.[11]

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Finally, the Commission urges that its prohibition would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts. But the Commission did not base its order on an inability to allocate costs between the shareholders of Consolidated Edison and the ratepayers. Rather, the Commission stated "that using bill inserts to proclaim a utility's viewpoint on controversial issues (*even when the stockholder pays for it in full*) is tantamount to taking advantage of a captive audience. . . ." App. to Juris. St., at 43a (emphasis added). Accordingly, there is no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base.[12] Mere

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speculation of harm does not constitute a compelling state interest. See *Mine Workers* v. *Illinois Bar Association*, 389 U. S. 217, 222–223 (1967).[18]

IV

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The decision of the New York Court of Appeals is

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[18] The Commission also contends that ratepayers cannot be forced to support the costs of Consolidated Edison's bill inserts. Because the Commission has failed to demonstrate that such costs could not be allocated between shareholders and ratepayers, we have no occasion to decide whether the rule of *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), would prevent Consolidated Edison from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy.

JS 6/13/80

Noted
Agree

MEMORANDUM

To: Mr. Justice Powell

Re: No. 79-134, Consolidated Edison v. PSC

Justice Blackmun has circulated an additional footnote to his dissent taking issue with Justice Marshall's statement in his concurrence that the "forced subsidy" issue was relied upon by the Commission. And he has quoted a footnote to the Commission's decision on rehearing which, he claims, demonstrates that the forced subsidy issue was considered.

We cite the same footnote for the opposite proposition. In note twelve, the Court's opinion states: "In its denial of petitions for rehearing, the Commission re-emphasized that it would impose the ban without regard to allocation of costs

betwen shareholders and ratepayers." Curiously, Justice Blackmun has never attacked that footnote.

I believe that our reading is correct. The footnote states that the utility gets an advantage "even if an allocation of the expenses could be made." The footnote then refers, a bit ambiguously, to a non-economic unfair advantage gained by the utility. The only such advantage explicitly identified by the Commission is the utility's ability to take advantage of a captive audience. And even if this footnote is ambiguous in its entirety, it does not explicitly reject the statement from the first Commission decision, quoted on page 12, that the decision would stand even if the stockholder paid for the insert in full.

Janet Cooper, Justice Marshall's clerk on this case, came by today to seek advice on whether Justice Marshall should respond to Justice Blackmun's added footnote. We thought that no response was necessary by Justice Marshall since the footnote on its face does not appear to support Justice Blackmun's interpretation. Nor do I believe any response need be added to the Court's opinion.

I agree

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-134 - Consolidated Edison of New York, Inc. v. Public Service Commission of New York

In my dissenting opinion, I shall add the following as a new footnote appended to the first sentence of Part II on page 4:

> 1/ MR. JUSTICE MARSHALL in his concurring opinion, states: "The Commission did not rely on the argument that the use of bill inserts required ratepayers to subsidize the dissemination of management's view in issuing its order, and we therefore are precluded from sustaining the order on that ground." Ante, at 1.
>
> I cannot agree that the Commission did not rely on the "forced subsidy" justification. In its opinion denying petitions for rehearing, the Commission stated:
>
> > "We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See Abood v. Detroit Board of Education, [431 U.S. 209] (1977)." App. to Juris. Statement 67, n. 1.

HAB

lfp/ss 6/19/80 79-134 Consolidated Edison v. Public Service Commission

This is an appeal from the Court of Appeals of New York. The appellant, an electric utility, placed a printed insert in its billing envelopes sent to its customers, ~~that~~ The insert emphasized the benefits of nuclear power. Appellee, the Public Service Commission thereafter issued an order prohibiting ~~public service~~ utility companies from including - with bills - inserts ~~in billng envelopes~~ that discuss - and here I quote - "controversial issues of public importance".

Appellant challenged the validity of this ~~ordinance~~ order, arguing that it violates the First and Fourteenth Amendments. The New York Court of Appeals, advancing several different grounds, sustained its validity.

We take a different view. A ban - even one ~~directed to~~ imposed on public utility companies - on the discussion of controversial issues of public importance directly infringes freedom of speech protected by the Constitution.

The Commission's order

The Commission's order is neither a valid time, place or manner restriction; nor is it a permissible subject matter regulation; nor a narrowly drawn prohibition justified by a compelling state interest.

Accordingly, the decision of the New York Court of Appeals is reversed.

Mr. Justice Marshall has filed a concurring opinion. Mr. Justice Stevens has filed an opinion concurring in the judgment.

Mr. Justice Blackmun has filed a dissenting opinion, in Parts I and II of which Mr. Justice Rehnquist has joined.

2 copies 6 Mr Lewis 5/15/80

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A B.	L. F. P.	W. H. R.	J. P. S.
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join L F P 6/4/80	join LFP 5/16/80	join L F P 5/15/80	join L F P 5/13/80	join L F P 5/14/80	will dissent 5-12-80	1st draft 5/12/80 2nd draft	Join Part I & II HAB 6/3/80	Con in the judgment 6/10/80
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				2nd draft 6/17/80	1st prelim draft 6/4/80			2nd draft 6/16/80
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79-134 Consolidated Edison v. Public Service

NYT 6/24/80

Electric Bills and the Bill of Rights

The right of an electric company to extol nuclear power in its billing envelope is not a treasured American liberty. Nor will extra rockets be fired on July 4 for a utility's right to promote electricity consumption. Yet the Supreme Court is surely right to rule that the political and commercial messages are protected by the First Amendment from Government prohibition.

The prohibitions in question both came from New York's Public Service Commission. It ordered Consolidated Edison not to clutter its billing envelopes with any political or social messages. And it told Central Hudson Gas & Electric not to entice customers into using more electric power. Both orders, though well-intentioned, were too sweeping. The Court correctly observed that the order against Con Ed put government in the position of choosing which issues are worth discussing or debating. Customers are not a captive audience; they can throw the unwanted message into the waste basket. The particular insert the Court was considering cost the customer nothing.

The Court recognized a stronger government interest — energy conservation — in the Central Hudson case. That utility's argument was weaker than Con Ed's because commercial advertising has not won as much protection as political speech. Still, a total ban on promotional messages went too far. Some justices also perceived some political content, worthy of full constitutional protection, even in the utility's "commercial" message.

Utilities, however, may well wonder if they have really won this battle when they learn that the Court has suggested the prior screening of advertising as one way of lawfully regulating what the companies say.

Those regulators have great power over utilities — to set rates, allocate costs and influence patterns of energy production and consumption. To give them power also over how utilities can express themselves may make their job easier. But the cost would be too great in lost freedom. Besides, recent Supreme Court decisions promoting corporate and commercial speech have helped many ordinary consumers as much as they have helped giant corporations — by letting lawyers and pharmacists advertise low rates, for example. Freedom of speech in commerce does have its annoyances and risks. But it is better than government control of the market in ideas.