Comments

ACCESS TO PUBLIC UTILITY COMMUNICATIONS: LIMITS UNDER THE FIFTH AND FIRST AMENDMENTS

Proposals to allow consumer groups access to public utility billing envelopes are currently before state legislatures and administrative agencies. Access to utility mailings will allow representative groups to communicate with utility ratepayers and to provide organized and informed representation before regulatory commissions. However, laws giving speakers access to space inside the utility's billing envelopes reduce the utility's ability to use the space. This Comment focuses on utility property rights and speech rights and analyzes the validity of access to utility mailings.

INTRODUCTION

Recently commentators and legislators have sought public access to public utility communications.[1] Commentators favor access because of the potential dangers of utility political advocacy.[2] Legislators have proposed public access to provide consumers with better information about energy issues and more effective representation

1. The terms "public access" and "mandated access" indicate any legislatively or judicially imposed rule forcing a utility to allow public groups to use the utility's communication media to present the group's viewpoints. In the broadcasting field, the FCC's fairness doctrine is an example of legislatively-mandated access rights. Under this doctrine, a broadcaster must provide fair coverage to each side of public issues. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377-78 (1969). Another example of legislatively-mandated public access is the Citizens Utility Board, enacted by statute in Wisconsin. *See infra* note 10 and accompanying text.

2. A utility's state created monopoly status gives utility speech an advantage over speech from sources not guaranteed the same state aid. *See* Harrison, *Public Utilities in the Marketplace of Ideas: A "Fairness" Solution for a Competitive Imbalance*, 1982 WIS. L. REV. 43, 45; Comment, *Public Utility Bill Inserts, Political Speech, and the First Amendment: A Constitutionally Mandated Right to Reply*, 70 CALIF. L. REV. 1221, 1226-27 (1982).

before regulatory agencies.[3]

Utility political speech is accorded a special status in the marketplace of ideas.[4] Although a utility is a state-created corporation which enjoys monopoly status, its political comment is protected under the first amendment.[5] Because states may not restrict utility speech, commentators have proposed methods of ensuring that alternative views are heard. One writer has argued that, when utilities insert political messages into their billing envelopes, a public forum is created and a right of reply is constitutionally required.[6] Another writer suggests a fairness doctrine similar to that used in broadcasting be applied to public utilities.[7] Any utility political comment would create an opportunity for public rebuttal.

Public access to utility billing envelopes has been proposed in many state legislatures, but has passed in only one.[8] In 1979, Wisconsin enacted a Citizens Utility Board (CUB) to represent utility ratepayers.[9] The Wisconsin CUB has access to utility billing envelopes four times per year to inform consumers on utility issues and to solicit financial support for CUB endeavors.[10] A concept similar to CUB is being tested on a regional basis by the California Public

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3. *See* WIS. STAT. ANN. § 199.02 (West Supp. 1983).

Access to utility mailings allows consumer groups to communicate easily with ratepayers to organize a strong and informed voice before regulatory agencies. Extra-agency participation in the administrative process fosters a better balance in administrative decisions by offering a greater range of ideas and alternatives. *See* Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 381 (1972). Extra-agency input is especially important to offset a regulatory agency's inherent bias toward the subject of regulation. Regulatory commission leaders are most often businessmen who identify with the values and beliefs of those whom they regulate. *See* Munkirs, Ayers & Grandys, *Rape of the Rate Payer: Monopoly Overcharges in the 'Regulated' Electric-Utility Industry*, 8 ANTITRUST L. & ECON. REV. 57, 64 (1976).

4. *See* Harrison, *supra* note 2, at 45.

5. Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 534 n.1 (1980).

6. *See* Comment, *supra* note 2. The writer contends that public utility mailing practices should be found to constitute state action. State agencies, which regulate utilities, authorize utility mailing procedures. Moreover, a utility's monopoly status is conferred by the state. Because of this close nexus between state and utility, utility political speech is imbued with state action. *Id.* at 1240-47. *But cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (no state action present when public utility terminated electric service for nonpayment). Assuming state action is found, fairness requires that opposing viewpoints be heard when a utility uses a state-created forum for political purposes. Comment, *supra* note 2 at 1248-56. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

7. *See* Harrison, *supra* note 2, at 65-72. Professor Harrison proposes that utilities be required to allow billing envelope access to anyone willing to pay the marginal cost of postage. He suggests the fairness doctrine as applied to broadcasters could similarly be applied to utilities.

The FCC fairness doctrine requires broadcasters to provide fair coverage of controversial public issues and provides that the subject of a critical report be given opportunity to respond. *See* Red Lion Broadcasting v. FCC, 395 U.S. 367, 369-72 (1969).

8. *See* N.Y. Times, June 6, 1982, § IV, at 8, col. 3.

9. WIS. STAT. ANN. §§ 199.01-.18 (West Supp. 1983).

10. WIS. STAT. ANN. § 199.10 (West Supp. 1983).

Utilities Commission. In 1983 the Commission established a consumers board to represent ratepayers and ordered a utility company to grant the board access to the utility's billing envelope.[11] The California measure is distinctive because it was administratively enacted and is limited to an area serviced by only one utility.

This Comment analyzes the validity of state-enforced access to public utility communications. A central issue in reviewing any state-mandated access is whether the state's police power has been exercised within federal constitutional boundaries. State-mandated access to private property is valid if the restriction is not a taking under the fifth amendment and does not violate any other constitutional provision.[12]

As private entities, public utilities are imbued with constitutional rights.[13] Accordingly, Parts III and IV of this Comment analyze the impact of mandated access on a utility's rights under the fifth amendment takings clause and first amendment free speech guarantee. Before discussing the substantive issues, however, Part II addresses the economic characteristics of public utilities.

THE PUBLIC UTILITY

Before the twentieth century, public utilities often competed for business within the same locality.[14] However, competing companies soon found merger necessary to avoid ruinous price wars and costly duplication of generating and transmitting facilities.[15] Competition was impractical because of the large initial and continuing capital

11. Center for Pub. Interest Law v. San Diego Gas & Elec. Co., Cal. P.U.C. Dec. No. 83-04-020 (1983). The Center for Public Interest Law petitioned the California Public Utilities Commission (PUC) for permission to use extra space inside San Diego Gas and Electric's (SDG&E) billing envelopes. The Center proposed to create a corporation, Utilities Consumer Action Network (UCAN), staffed by a board elected by ratepayers to represent SDG&E ratepayers before the PUC. The Commission allowed UCAN access to the utility's billing envelope four times per year to solicit SDG&E ratepayers to join UCAN.

12. PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). In *PruneYard*, the Supreme Court upheld the California Supreme Court's interpretation of the state's constitution which guaranteed handbillers access to a privately owned shopping center. The Supreme Court tested the state's access decision by analyzing its impact on the shopping center owner's rights under the first amendment free speech guarantee and the fifth amendment takings clause. *Id.* at 80-88. This Comment is patterned after the approach taken in *PruneYard*.

13. *See* Santa Clara County v. Southern Pacific R.R. Co., 118 U.S. 394, 396 (1886) (public utilities are "persons" within the intent of the fourteenth amendment).

14. *See* 2 A. KAHN, THE ECONOMICS OF REGULATION 117 (1971).

15. P. GARFIELD & W. LOVEJOY, PUBLIC UTILITY ECONOMICS 16 (1964).

investment needed to provide customers with constant service.[16] By combining, companies took advantage of the economies of scale and spread costs over a larger market.[17]

By the turn of the century utilities were recognized as natural monopolies.[18] Natural monopolies can supply their services most efficiently when only one firm operates in a given market.[19] Because utilities are not subject to forces of a competitive market, states feared potential monopoly abuse.[20] To avoid oppressive pricing, yet achieve the economy of a natural monopoly, states established regulatory commissions as substitutes for competition.[21]

Utility commissions are empowered to prescribe reasonable utility rates and standards.[22] Although utilities are guaranteed a profit,[23] regulatory commissions can exercise discretion over which utility expenditures are operating expenditures chargeable to ratepayers.[24] Improper utility expenditures are not considered for rate making purposes and are borne by the utility's shareholders.[25] Advertising expense, which the commission does not regard as a direct benefit to ratepayers, generally may not be included as an operating cost.[26] Additionally a utility may not include in its operating expense any expenditures which directly or indirectly are used for political

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16. *See* 2 A. KAHN, *supra* note 14, at 119-20.

17. *Id.* at 117. In economies of scale the cost of each unit becomes cheaper as the firm produces more units. *See* 1 A. KAHN, *supra* note 14, at 21.

18. *See* M. FARRIS & R. SAMPSON, PUBLIC UTILITIES: REGULATION, MANAGEMENT AND OWNERSHIP 13 (1973).

19. A natural monopoly exists when the entire demand of a market can be satisfied at the lowest cost by one firm. If such a market contains more than one firm, the firms will either merge or will consume more resources than necessary. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969).

20. *See* 1 A. KAHN, *supra* note 14, at 27-28.

21. *See* M. FARRIS & R. SAMPSON, *supra* note 18, at 13. Most commissions were established between 1900-1915. *Id.*

In a capitalist system, regulation conflicts with the predisposition toward free enterprise. The grave attitude with which scholars viewed the decision to regulate is exhibited by a 1911 statement made by Harvard economist F.W. Taussig: "It is not too much to say that the future of democracy will depend on its success in dealing with the problems of public ownership and regulation." *Quoted in* C. CLAY, THE REGULATION OF PUBLIC UTILITIES vii (1932).

22. *See* M. FARRIS & R. SAMPSON, *supra* note 18, at 89-90.

23. Smyth v. Ames, 169 U.S. 466, 547 (1898). A utility is permitted a "fair return upon the value of that which it employs for the public convenience." *Id.*

24. P. GARFIELD & W. LOVEJOY, PUBLIC UTILITY ECONOMICS 47 (1964).

25. M. FARRIS & R. SAMPSON, *supra* note 18, at 94-97. Only operating expenses, defined by the commission, can be recovered by the utility as part of its revenue.

The traditional ratemaking formula used to regulate utility expenditures is: (rate base x rate of return) + operating expenses = revenue. Pontz & Sheller, *The Consumer Interest—Is It Being Protected by the Public Utility Commission?*, 45 TEMP. L.Q. 315, 316 (1972).

26. Pacific Gas & Electric Co., 78 Cal. P.U.C. 638, 687 (1975). *See generally* Note, *Electric and Gas Utility Advertising: The First Amendment Legacy of* Central Hudson, 60 WASH. U.L.Q. 459, 470-76 (1982).

purposes.[27]

ANALYSIS UNDER THE TAKINGS CLAUSE[28]

Although government regulation of property can result in an obligation to provide just compensation, it is unclear when this requirement arises. The Supreme Court has repeatedly said that "[t]here is no set formula to determine where regulation ends and taking begins."[29] Added to this confused state of the law is the problem of defining public utility property. Before the body of takings law can be approached, the nature of utility property must be addressed.[30]

Defining Utility Property Rights for Fifth Amendment Purposes

Under the fifth amendment "property" is defined as any expectancy or interest a person may possess as a result of his relationship to a thing.[31] Important rights which result from this relationship include the rights to use,[32] to sell,[33] and to exclude others from the

27. New England Tel. & Tel. Co. v. Pub. Util. Comm'n, 390 A.2d 8, 56-57 (Me. 1978) (lobbying expenses may not be included in operating costs); Boushey v. Pacific Gas & Elec. Co., 10 Pub. Util. Rep. 4th 23, 29 (1975) (incremental expense of inserting political advertisements into billing envelope must be excluded from operating expense).

28. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment is applied to the states through the fourteenth amendment. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236, 241 (1897).

29. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); *see also* Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); United States v. Caltex, Inc., 344 U.S. 149, 156 (1952).

The disarray of takings law has moved commentators to make colorful analogies. Professor Stoebuck said that the combined Supreme Court decisions leave the takings area "as disheveled as a ragpicker's coat." Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059 n.11 (1980). Professor Dunham describes the pattern of Supreme Court takings decisions as a "crazy quilt." Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 73.

30. "The constitutional concepts of 'taking' and 'property' are intertwined. To discuss one sometimes requires the making of assumptions about the nature of the other." Stoebuck, *supra* note 29, at 1083. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61 (1964).

31. *See* United States v. General Motors Corp., 323 U.S. 373, 377-79 (1945) *See also* Sax, *supra* note 30, at 61: "Instead of some static and definable quantity, property really is a multitude of existing interests which are constantly interrelating with each other . . . ." (footnote omitted).

32. *See, e.g.*, United States v. Causby, 328 U.S. 256, 261-62 (1946) (low flying aircraft destroyed use of property as a residence).

33. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922) (regulation prevented company from realizing profit in contractual right to coal).

property.[34] Property ownership has been described as the bundle of rights and interests which one possesses.[35] A state's right to regulate private property pivots largely on the extent to which those rights are impinged.[36]

Because public utility property is affected with a public interest it can be state-regulated.[37] The purpose of utility regulation is to provide consumers adequate service at the lowest reasonable cost.[38] Regulation, however, does not change property ownership.[39] Investor-owned public utilities are private property.[40]

Recently the California Public Utilities Commission avoided a property rights analysis when it ruled that extra space inside a utility's billing envelope is the ratepayers' property and not the utility's.[41] Rather than investigating utility property rights, the Commission relied on what it termed "equitable considerations" to reach its decision.[42] After the utility inserts its bill and required notices, extra space usually exists in the billing envelope which may be used without incurring added postage cost.[43] The Commission reasoned that since the utilities charge envelope and postage cost to ratepayers, ratepayers are the equitable owners of the extra space.[44] This ruling allowed the Commission to order a utility to grant a consumer group access to the utility's billing envelope to communicate with

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34. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (public access to privately owned marina violated right to exclude others).

35. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 (1980).

36. *See id.* at 82-83, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-28 (1978).

37. Munn v. Illinois, 94 U.S. 113, 126 (1876). Governmental regulation has been routinely upheld in businesses other than public utilities. *See, e.g.*, Martin v. Walton, 368 U.S. 25 (1961) (restrictions on attorneys with out-of-state licenses); Sage Stores Co. v. Kansas *ex rel.* Mitchell, 323 U.S. 32 (1944) (prohibiting sale of filled milk); Townsend v. Yeomans, 301 U.S. 441 (1937) (setting maximum tobacco prices).

38. Morel v. R.R. Comm'n, 11 Cal. 2d 488, 492, 81 P.2d 144, 146 (1938); 1 A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 3 (1969).

39. *See infra* note 49.

40. United Rys. & Elec. Co. of Baltimore v. West, 280 U.S. 234, 249 (1930); Chicago, Milwaukee & St. Paul R.R. Co. v. Wisconsin, 238 U.S. 491, 499 (1915).

41. Pacific Gas & Elec., Cal. P.U.C. Dec. No. 82-03-047 (1982).

42. *See* Center for Pub. Interest Law v. San Diego Gas & Elec. Co., Cal. P.U.C. Dec. No. 83-04-020 (1983).

43. Postage rates increase for every ounce mailed. For example, a bill weighing less than one ounce currently costs 20¢ to mail. A bill weighing a fraction more than one ounce is charged at the next higher rate. If a utility mails a bill weighing less than one ounce, "extra space" exists that may be used for added materials without incurring extra costs. The Commission defined "extra space" as the space remaining after the utility bill and required notices were included. The Commission apparently did not view the utility's inserted messages as a required notice. *Id.*

44. The Commission added that equity requires that extra envelope space be used in the manner most beneficial to ratepayers. The most beneficial use of the extra space is one which provides the ratepayers with information. The Commission believed the utility's use of the space was beneficial to ratepayers, but said that granting other groups access would provide ratepayers greater benefit. *Id.*

ratepayers.

The Commission's decision achieves desirable results,[45] but uses questionable reasoning. The fact that ratepayers pay for envelope and postage costs is an insufficient reason to give them rights to extra envelope space. Consumers may not take property rights to a company's service and billing mechanism merely because they pay for the mechanism.[46] Property rights are acquired through the creation, purchase or possession of a thing.[47]Under the common meaning of the words, ratepayers are neither creators nor possessors of the utility's billing envelopes. The Commission's decision is more simply understood as based on the premise that the utility has no rights to extra envelope space.[48]

The premise is in error. States may regulate public utilities, but they may not act as owners of public utility property.[49] A public utility is a private property owner able to use and sell its property, subject to state regulation.[50] Items purchased by the utility to pro-

45. *See supra* note 3.

46. The principle that ratepayer property rights are created because the utility includes operational costs in rates is difficult to limit. With little effort many analogies to unused envelope space can be made: open offices and conference rooms, unused passenger and hauling space in utility vehicles, available storage area in utility buildings and on land upon which the utility expects to build, and any unused capacity in a utility computer might be used by ratepayers. Equipment and tools which the utility needs only sporadically might also be available for ratepayer use.

A large part of the privately owned utility's managerial discretion might vanish if such a principle is enforced. An agency's full use of its power to regulate management decisions might be counter-productive. Confusion and shifting responsibilities which can result from dual management create a less efficient enterprise. Comment, *"Management Invaded"—A Real or False Defense?*, 5 STAN. L. REV. 110, 124-28 (1952).

47. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 10-16 (1962). Possession is an integral element in a property right. Possession is traditionally viewed as the union between intent to control a thing and an ability to exercise power over the thing. R. BROWN, THE LAW OF PERSONAL PROPERTY 20-22 (3d ed. 1975).

48. The Commission's decision contradicts its premise. If the envelope space belongs to ratepayers, the true issue is whether the *utility* can have access to the envelope space. Yet, the Commission allowed UCAN envelope access only four times per year. *See supra* note 11.

49. "It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership." Southwestern Bell Tel., Co. v. Pub. Serv. Comm'n, 262 U.S. 276, 289 (1923). *See also* Pacific Tel. and Tel. Co. v. Pub. Utilities Comm'n, 34 Cal.2d 822, 828-29, 215 P.2d 441, 445 (1950)(corporation devoting its property to public use does not relinquish ownership right to the public).

50. It is fundamental that utilities are private property and "neither the corpus of the property nor the use thereof" can constitutionally be taken without just compensation. United Rw. and Elec. Co. v. West, 280 U.S. 234, 249 (1930). Despite the private nature of utility property, states grant utility commissions regulatory power which can

vide service to the public are utility property. For example, if a utility has a franchise to install a power pole, then loses the franchise it nonetheless owns the pole and may not be denied its property without just compensation.[51] Like a corporation's loss of charter, a utility's franchise loss has no effect on property rights.[52] Utility property rights are those of the investors and exist apart from regulation. Without regulation, envelopes used by the utility would be utility property. Because regulation does not transfer property rights,[53] a regulated utility's billing envelopes still belong to the utility.

Language in a recent Supreme Court decision assumes that billing envelopes are utility property. The Court continually refers to utility billing envelopes as belonging to the utility instead of belonging to the ratepayers.[54] Clearly, billing envelopes are utility property and a

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limit utility property rights. California delegates to its P.U.C. the broad power to "do all things" necessary and convenient to regulate utilities. CAL. PUB. UTIL. CODE § 701 (West 1975). The powers granted to New York's Public Service Commission include: the power to prescribe reasonable rates, examine utility accounts, enter and inspect utility property and alter the informational format of utility bills. N.Y. PUB. SERV. LAW § 66 (McKinney Supp. 1982). For a chart listing each state commission's grant of power, *see Characteristics of the Public Utility Regulatory Agencies in the United States*, 28 BAYLOR L. REV. 1157 (1976).

Acting within the power granted by its state, a commission may be able to influence utility management's decision on the use of utility property. The extent to which utility management may be regulated differs among the states. Comment, *Rates Follow Service: The Power of the Public Utility Commission to Regulate Quality of Service*, 28 BAYLOR L. REV. 1137, 1149-50 (1976). Commission influence over utility management may be limited by applying one of the following tests: In states such as California, where commissions have plenary grants of power, the only limit might be the utility's constitutional rights. *See* Comment, *supra* note 48 at 118. Courts could also choose to require commission influence over management to be consistent with the purpose for utility regulation, which is to insure the public adequate service at reasonable rates. *See id.* at 118. Finally, commission action might be limited by requiring only that it be in the public interest. *See* Comment, *supra* at 1150.

Regulation also colors a utility's ability to sell its property. One view holds the sale of utility property valid only if the commission finds the sale in the public good. *See* City of York v. Pennsylvania Pub. Utilities Comm'n, 449 Pa. 136, 295 A.2d 825, 828 (1972). Another view holds that commissions may restrain sale of utility property only if the sale is detrimental to the public interest. *Re* Laclede Gas Co., 92 P.U.R.3d 426, 430-31; *Re* The Pacific Teleph. and Teleg. Co., 39 P.U.R.3d 132, 139 (1961).

In analyzing utility property rights, two observations must be made. State regulation cannot erase the fact that utilities do have property rights. The fact of regulation, by itself, implies that utilities maintain substantial property rights. Secondly, state law cannot be the sole touchstone for defining property rights. If only state law were consulted, states could gradually regulate away private property. *See infra* notes 54-57 and accompanying text.

51. *See* Cleveland Elec. Ry. Co. v. Cleveland, 204 U.S. 116, 142 (1907); 2 O. POND, A TREATISE ON THE LAW OF PUBLIC UTILITIES 807-11 (4th ed. 1932).

52. *See* O. POND, *supra* note 50 at 811.

53. Regulatory power falls into three categories: (1) right to regulate rates and charges, (2) right to prevent utility discrimination, and (3) right to regulate utility conduct to assure the public desirable safeguards and conveniences. "Beyond these matters regulation . . . does not and from the very meaning of the word cannot go." Pacific Teleph. and Teleg. Co. v. Eshleman, 166 Cal. 640, 663, 137 P. 1119, 1127 (1913).

54. *See* Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 532, 540

transfer of property rights is required to make them ratepayer property.

The federal Constitution is the best guide in determining the validity of a state's redefinition of property.[55] The takings clause is invoked when government transfers private property rights to another person against the owner's will.[56] A state's ability to regulate is great,[57] but must be limited by sources outside state law.[58] A state is not the solitary regulator of its own police power. The requirement that just compensation be paid when government appropriates private property is intended to curb the arbitrary exercise of a state's power.[59] Although state law is relevant in the transfer of property rights, the limit of state power is ultimately defined by the federal Constitution.[60] Conflict between the state's power and the takings clause should not be resolved by attempting any path shorter than the constitutional course.[61]

(1980) (the utility "seeks merely to utilize its own billing envelopes to promulgate its views"). In his dissent Justice Blackmun suggests that 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." *Id.* at 556 (Blackmun, J., dissenting). If the state must use its power to redefine billing envelopes as ratepayer property, the billing envelopes are utility property in the first instance.

55. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (a state is subject to the fifth amendment takings clause); Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 556 (Blackmun, J., dissenting) (the fifth amendment takings clause and the first amendment determine the validity of a state ruling that ratepayers own utility billing envelopes).

Exercise of state police power in public utility regulation is subject to certain fundamental principles. The state possesses regulatory powers, but cannot deprive the utility of its property without just compensation. No public convenience can justify such a taking of property. Takings include both permanent and temporary deprivations of the property. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 662-64, 137 P. 1119, 1127 (1913). *See also* Comment, *supra* note 48, at 113-16.

56. *See* Stoebuck, *A General Theory of Eminent Domain,* 47 WASH. L. REV. 553, 556-57 (1972).

57. *See, e.g.,* Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (upheld zoning regulation that diminished plaintiff's property value by 87.5%).

58. Without reference to sources outside state law, private property is subject to the argument that because states give property rights, they can freely take them as well. Using a property owner's expectations as a guide for analysis under the takings clause is subject to the same circular reasoning. The property owner's expectations are subject to state manipulation and may be steadily whittled away. Factors independent of state law, such as, equality, regularity, and autonomy must also be considered if the taking clause is to have legal content. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 465 (1978).

59. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1218-24 (1967).

60. *See supra* note 55. This Comment approaches the issue from a constitutional vantage point to construct a framework within which state law will be valid.

61. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

Two lines of analysis can be identified under the takings clause.[62] The Court has distinguished between government regulations which are external restrictions and those which are physical invasions of one's property.[63] External restrictions, which limit an owner's use of his property, are most often upheld.[64] Zoning laws are examples of external restrictions.[65] Conversely, the Court has been quick to rule a taking exists when government physically invades private property.[66] A physical invasion occurs when government occupies or allows others to occupy privately owned property.[67]

A government-mandated access is a physical invasion of the utility's property. The regulation not only restricts a utility's use of its property, but allows others to occupy space that previously belonged to the utility. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[68] the Supreme Court recently introduced a new approach for examining physical invasions under the takings clause.

At issue in *Loretto* was a state law which required landlords to permit cable TV installations on their buildings. On the roof of plaintiff's building Teleprompter installed two boxes that contained directional taps connecting a half-inch diameter cable to the building. The installation was bolted to the building and occupied only ⅛ of a cubic foot of the building's roof. Plaintiff asserted that her property was taken without just compensation and brought a class action on behalf of all New York real property owners.

The Supreme Court found that the cable installation was a taking and invalidated the New York law.[69] The Court based its decision solely on the character of the governmental action. When the government enacts a permanent physical invasion, the action is automatically considered a taking and it is unnecessary to analyze factors usually examined in takings cases.[70] The size of the area occupied is not considered when the Court decides whether or not a taking exists. The controlling principle is solely that "permanent

62. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

63. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-27 (1982).

64. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978).

65. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980) (upholding ordinance restricting development to one residence per acre); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding anti-commune zoning).

66. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).

67. *See* Michelman, *supra*, note 56, at 1184.

68. 458 U.S. 419 (1982).

69. *Id.* at 3178-79.

70. "[W]hen the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner" (citation omitted). *Id.* at 434-35.

physical occupation of property is a taking."[71]

The task remaining after *Loretto* is to define a permanent physical occupation.[72] It might be better understood by examining the extent to which the occupation infringes on an owner's property rights.[73] Justice Marshall, writing for the majority, observed that,when the government permanently occupies physical property, it destroys all of an owner's rights to that space.[74] Permanent physical occupation prevents an owner from ever exercising the right to control, use and exploit the property.[75]

Arguably, the *Loretto per se* taking rule applies to a mandated access doctrine.[76] When a utility must allow others to use its billing envelopes it loses all rights concerning the use, control and exploitation of that portion of property which is invaded. Because size of the area invaded is of no concern, even the slightest access must be considered permanent if it were a continuous requirement.[77] Mandated access effectively nullifies every strand of the bundle of rights which constitutes ownership of the invaded property.[78]

Mandated access cases should not be considered permanent physical occupations.[79] For practical reasons the *per se* rule should be limited to permanent structures fixed on real property. A permanent occupation of real property is easy to conceptualize and presents few problems of proof.[80] A box bolted to a building is easier to visualize as a permanent physical occupation than is an easement to a bay[81] or a right of access to an envelope. Not surprisingly, the cases cited by the Court in support of the *per se* taking rule involved permanent

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71. *Id.* at 3179.

72. The *Loretto* dissenters argued that takings must be evaluated on a case-by-case basis; therefore, the permanent physical occupation rule was not helpful. *See id.* at 442-51 (Blackmun, J., dissenting).

73. *See supra* notes 31-35 and accompanying text.

74. 458 U.S. at 435.

75. *See id.*

76. "The one incontestable case for compensation . . . seems to occur when the government deliberately brings it about that its agents, or the public at large, regularly use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." Michelman, *supra* note 59, at 1184 (footnote omitted).

77. *See* 458 U.S. at 433-35.

78. Property ownership has been described as a "bundle of rights." Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

79. 458 U.S. at 435 n.12.

80. The *Loretto* Court implicitly limited the *per se* rule to real estate. "[W]hether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." 458 U.S. at 437.

81. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

physicial occupations of real property.[82]

Rights of access are better classified as temporary limitations. In a footnote, the Court used two cases involving rights of access to private property to illustrate a temporary limitation.[83] The Court called temporary limitations physical occupations of private property that are on the borderline of the *per se* rule and warrant a complex balancing analysis.[84]

Temporary Limitations

Takings analysis examines various factors, including the character of the governmental action, its economic impact and its interference with investment-backed expectations.[85] The Court has analyzed these and related factors on a case-by-case basis.[86] As previously discussed, state mandated access to utility mailings amounts to a temporary limitation. This section addresses factors important in the Court's scrutiny of temporary limitations.

The right to exclude others from property is a central right of property ownership.[87] A requirement that an owner allow another access to private property is a direct challenge to this right. Violation of the right to exclude others resulted in the Court's decision that a taking occurred in *Kaiser Aetna v. United States*.[88] In this case, Kaiser received permission from the United States Army to dredge a waterway connecting a private pond to a public bay. Kaiser invested substantial amounts of money in developing a private marina and surrounding community. The federal government claimed that navigational laws required public access to the marina. The Court ruled if the government enforced public access to the marina, it must accord Kaiser just compensation.[89]

Kaiser wished to exclude the public from the marina to enhance property values in the marina development. In violating Kaiser's right to exclude others, the government substantially reduced marina property values.[90] The impact of public access was even more dam-

82. *See, e.g.*, St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) (telegraph poles permanently implanted in plaintiff's property); Pumpelly v. Green Bay Co., 80 U.S. 116 (1871) (construction of dam permanently flooded plaintiff's property).

83. 458 U.S. at 435 n.12. The illustrative cases, Kaiser Aetna v. United States, 444 U.S. 164 (1979) and PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), are discussed in the next section.

84. 458 U.S. at 435 n.12.

85. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

86. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

87. *See* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (the right to exclude others is a fundamental element of property ownership and cannot be violated by the government without compensation).

88. *Id.*

89. *Id.* at 180.

90. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 83-84 (1980).

aging to Kaiser because of the expectations it developed based on the government's approval.[91] The case of *United States v. Causby*[92] also focused on the harm caused by an owner's inability to exclude others. Causby owned a residence and chicken farm near the flight path of an airport. When the federal government leased the airport, military airplanes flew so close to Causby's property that its use as a residence and chicken farm was destroyed. The Court held that the low-flying aircraft were equivalent to a physical invasion of land and found a taking.[93]

Temporary physical limitations on private property need not be compensated if they do not unreasonably impair the value or use of the property.[94] In *PruneYard Shopping Center v. Robins*,[95] the Court upheld a state court ruling that the owners of a privately owned shopping center must allow handbillers access to their property. Because the owners invited customers to enter the shopping center, they had little expectancy interest in excluding the public. The Court said that, if the handbillers were orderly, their conduct did not impair the value or use of the shopping center.

The *Kaiser Aetna* and *PruneYard* decisions stand on their own and are easily distinguished by their facts. As precedent for mandated access to utility billing envelopes, however, these cases are inconclusive. A court's decision could legitimately go either way.

Like Kaiser's marina, a utility's billing envelope is private property and is not intended for public access. Governmentally imposed access nullifies a utility's right to exclude others. Because access results in a physical occupation of utility property, appropriate compensation should be paid to the utility.[96]

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91. 444 U.S. at 179.

> While the consent of individual officials representing the United States cannot "estop" the United States [from asserting public access to private property], it can lead to the fruition of a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the land-owner's property.

Id. (citations omitted).

92. 328 U.S. 256 (1946).

93. *Id.* at 264-65.

94. PruneYard Shopping Center v. Robins, 447 U.S. 74, 83-84 (1980).

95. *Id.*

96. This argument might be made based on the Supreme Court's accord of stricter scrutiny to physical invasions. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-38 (1982). In *Kaiser*, the Court implies that the effect of a physical invasion is such a blatant interference with private property that it must be a taking without regard to the devaluation of the property. 444 U.S. at 180.

> The use of the invaded portion of private property need not be permanently lost to

However, the financial impact of mandated access on a utility is likely to be similar to the impact on the shopping center. Inability to exclude others from its billing envelopes would not depress the value of the utility. Any adverse impact would fall short of the losses sustained by property owners in *Causby* and *Kaiser*. Additionally, this situation would be similar to *PruneYard* because access would be the result of a state ruling, whereas in *Causby* and *Kaiser*, access was imposed by federal law. Because the state has the primary authority to define property, its decision to alter property rights would be given wider deference by courts.[97]

Takings analysis ultimately balances the public need for regulation with the burden imposed on private property.[98] To reach this balance, the Court must consider a broad range of factors and finally hinge its decision on fairness and justice.[99] An argument for access to utility billing envelopes is that it will increase democratic participation in the administrative and legislative process.[100] Access will also accommodate first amendment-based concerns that diverse viewpoints be presented to the public.[101]

Moreover, access will not unfairly reduce a utility's expected use of its property. Nor would an access rule cause the utility financial hardship. Because utilities have accepted regulation in exchange for monopoly status, their ability to use and exploit their property is diluted.[102] Accordingly, standards of fairness are adjusted when examining restrictions on utility property.[103] States grant utilities corpo-

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require compensation. A plurality of the Court has recognized that appropriate compensation can be accorded when property is temporarily or periodically taken by government. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 657-59 (1981) (Brennan, J., dissenting).

97. *See* PruneYard Shopping Center v. Robins, 447 U.S. at 84. *See also,* Note, *The Supreme Court, 1979 Term,* 94 HARV. L. REV. 75, 211 n.44 (1980). ("The takings clause is unusual in that it predicates a federal right on state law. The fifth amendment speaks of 'private property' and therefore incorporates state law to the extent that property law is state created") (citing *PruneYard*). *But see supra* notes 55-60 and accompanying text.

98. *See,* Oakes, Property Rights In Constitutional Analysis Today, 56 WASH. L. REV. 583, 613 (1981) (the court weighs the relative worth of the legislation to the value of the property rights at stake).

99. "The Takings Clause . . . preserves governmental power to regulate, subject only to the dictates of 'justice and fairness'." Andrus v. Allard, 444 U.S. 51, 65 (1979).

100. *See supra* note 3.

101. *See infra* notes 144-46 and accompanying text.

102. *See supra* note 50. Because the public interest is uniquely affected by direct utility - consumer contact, this area is highly susceptible to regulation. *See* Comment, *supra* note 48, at 118-19.

103. Fairness dictates that invasions of a private individual's property receive harsher scrutiny than invasions of corporate or utility property. This might be illustrated by comparing the effect of the governmental action on Mr. Causby, a private homeowner, and a public utility. When Mr. Causby's land is invaded he can only seek relief from government. Conversely, when utility property is invaded, the impact can be softened by distributing any burden among ratepayers or shareholders.

rate and monopoly status with the understanding that they will act in the public interest.[104] Practical considerations in addition to logic influence a court's decisions.[105] These considerations support public access to utility billing envelopes without requiring compensation.

MANDATED ACCESS TO UTILITY COMMUNICATION UNDER THE FIRST AMENDMENT[106]

Public Utility Political Speech

In *First National Bank of Boston v. Bellotti*,[107] the Court held the first amendment protects a corporation's right to engage in political debate. Earlier decisions distinguished corporate speech from other speech because of the corporation's profit motive.[108] The *Bellotti* Court, however, found that the corporate identity of a speaker was unimportant and focused instead on whether the speech itself is entitled to protection.[109] Considering only the speech itself, protection of corporate political speech is consistent with first amendment policies. In a democracy, government must not limit the information sources available to the public[110] and must allow the people to decide the merits of conflicting arguments.[111] Corporations with access to a broad base of knowledge are an important source of information for

104. *See* Munn v. Illinois, 94 U.S. 113, 126 (1876). Utility regulation is a two-way street. Regulation protects the public from monopoly abuse. Regulation also insulates utilities from competition and increases the probability of profit. *See* M. FARRIS & R. SAMPSON, *supra* note 18, at 13-14.

105. *See* Andrus v. Allard, 444 U.S. 51, 65 (1979) (exercise of judgment is as important as application of logic in takings cases).

106. "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. The first amendment is applied to the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

107. 435 U.S. 765 (1978) (struck down state law prohibiting corporate expenditures to influence voters on issues not affecting the corporation's business).

108. *See* Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372, 376-79 (1979). The development of corporate political speech coincides with the historical treatment of commercial speech. *See* Prentice, Consolidated Edison and Bellotti: *First Amendment Protection of Corporate Political Speech*, 16 TULSA L.J. 599, 600-01 (1981).

Initially, the Court denied first amendment protection to commercial speech. *See* Breard v. City of Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942). The Court first gave commercial speech first amendment protection in 1976. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

109. 435 U.S. at 776.

110. *Id.* at 783.

111. *Id.* at 791-92. "[T]he 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).

the public.[112] The corporate status of a speaker does not diminish the informational value of the speech to the public.

In *Consolidated Edison Co. v. Public Service Commission*,[113] the Court affirmed the *Bellotti* reasoning and extended first amendment protection to public utility political speech.[114] The *Consolidated Edison* case arose when the utility placed an insert in its billing envelope expressing the utility's opinion on the benefits of nuclear power.[115] An anti-nuclear group requested that Consolidated Edison include an opposing view in its next mailing. When Consolidated Edison refused, the group petitioned the Public Service Commission for access to Consolidated Edison's mailings.

The Commission denied the access request, but issued an order prohibiting the utility companies from using bill inserts to discuss controversial issues of public policy.[116] The Commission reasoned that utility consumers receiving political inserts inside their bills are a captive audience and should not be subjected to the utility's opinions. The New York Court of Appeals affirmed the Commission's ruling as a valid time, place, and manner restriction.[117]

On appeal to the United States Supreme Court, the Commission contended that substantial state interests necessitated the political speech ban, and that consumers would benefit more from information which was useful than from the utility's political messages. The Commission also argued that the prohibition was needed to avoid forced subsidy[118] and captive audience problems.[119] The Court dis-

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112. *See* Prentice, *supra* note 108, at 621. Professor Prentice also notes dangers in discriminating against corporate speech:

> Trends in the American political system flow likes tides in response to the various voices and pressures applied. The pendulum swings back and forth, now more conservative, now more liberal. Only if important voices are censored is the pendulum likely to swing too far in one direction, throwing the system out of kilter. If the corporate voice is silenced, there is an increased possibility that governmental regulation and interference might go too far.

Id. at 631-32.

113. 447 U.S. 530 (1980).

114. *Id.* at 533.

115. The insert stated nuclear energy was safe, economical, and clean and its benefits outweighed any risks. *Id.* at 532. Other groups objecting to political inserts in utility billing envelopes have unsuccessfully sought to include rebuttals in utility mailings. *See* Vermont Pub. Interest Research Group, Inc. v. Central Vt. Pub. Serv. Corp., 39 Pub. Util. Rep. 4th (PUR) 59, 61-63 (1980) (rebuttal sought to utility's pro-nuclear bill inserts); Boushey v. Pacific Gas & Elec. Co., 10 Pub. Util. Rep. 4th (PUR) 23, 24 (1975) (rebuttal sought to insert promoting state ballot proposition).

116. 447 U.S. at 532.

117. 47 N.Y.2d 94, 106-07, 390 N.E.2d 749, 755 (1979), *rev'd*, 447 U.S. 530 (1980).

118. The Commission contended that ratepayers could not be forced to pay the mailing costs of envelopes which carry viewpoints they disagreed with under the rule of *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). The Court said the argument was irrelevant because the Commission could better allocate costs between ratepayers and shareholders. 447 U.S. at 543 n.13.

119. An unwilling receiver of a message is a captive audience if he or she is unable

missed these contentions, however, and invalidated the prohibition as content discriminatory.[120] The reasons underlying corporate speech protection apply equally well to public utility political speech. The regulated status of a public utility does not affect the value of the information it provides to the public.[121]

Mandated Access: The Need to Balance

Mandated access to utility political speech, unlike protection of the speech itself, is an unresolved issue. The Supreme Court has come to opposite conclusions in two cases which address laws mandating access to media. In *Red Lion Broadcasting v. FCC*[122] the Court considered the constitutionality of the FCC's fairness doctrine which requires broadcasters to grant equal time for opposing opinions on public issues.[123] The case arose when Red Lion refused to comply with an FCC order that it provide reply time to a political writer criticized in a Red Lion broadcast. The FCC regulation was upheld based on the unique nature of the broadcast media.[124] Because broadcast frequencies are limited in number, those selected as broadcast licensees are fiduciaries to the public and are required to present unbiased views to the public.[125]

In contrast to *Red Lion* is *Miami Herald Publishing Co. v. Tornillo*.[126] In this case, a political candidate demanded the *Miami Herald* print his reply to an editorial critical of his candidacy. Florida law required newspapers to give free reply space to political candidates whom they criticized in print. When the newspaper refused to print his reply, Mr. Tornillo sued to enforce the state's statute. The Court invalidated the statute as violating the first amend-

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to avoid receipt of the message. For example, a person inside his or her home is captive to a message emitted from a truck equipped with loudspeakers traversing residential streets. *See* Kovacs v. Cooper, 336 U.S. 77 (1949). The Court rejected the captive audience argument and said billing inserts were less offensive than the sound truck in *Kovacs* because Con Ed's customers could avoid exposure simply by averting their eyes. 447 U.S. at 541-42.

120. 447 U.S. at 536. "[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Id.*

121. *Id.* at 534 n.1.

122. 395 U.S. 367 (1969).

123. The fairness doctrine requires that broadcasters give adequate coverage to public issues and fairly present both sides. *Id.* at 377-78.

124. *Id.* at 400.

125. *Id.* at 389.

126. 418 U.S. 241 (1974).

ment.[127] The Court was concerned that freedom of the press would be endangered if the government could overrule a newspaper's editorial discretion.[128]

These conflicting cases are more helpful as policy guides than as precedent for or against access to utility communication.[129] Attempts to analogize either of these cases to a public utility is likely to be futile.[130] Newspapers and broadcasters are news media requiring special first amendment consideration because they control access to the channels of communication.[131] In contrast, a public utility is only a purchaser and user of media.[132]

Because no detectable difference exists between newspapers and broadcasters for first amendment purposes, attempts to reconcile *Red Lion* and *Tornillo* are also likely to be difficult.[133] The two cases are best explained as resulting from a balance of competing interests.[134] Access regulation offers public benefits while, at the same time posing potential dangers.[135] The following sections examine the benefits and dangers of access and limitations on the states' ability to enforce an access law.

Benefits of Access

A law providing access to public utility communication furthers the first amendment's egalitarian values.[136] Access increases the di-

127. *Id.* at 258.

128. *Id.* at 257 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). "Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer 'the power of reason as applied through public discussion'. . . . " 418 U.S. 241, 259 (White, J., concurring) (footnote omitted).

129. *Cf.* L. TRIBE, *supra* note 55 at 770 (suggestion that the juxtaposition of *Red Lion* and *Tornillo* might offer a paradigm for analayzing new types of communication).

130. Public utility communication could be seen as analogous to broadcaster communication. Both utilities and broadcasters function under a regulatory scheme designed to serve the public interest. *See* Comment, *supra* note 2, at 1258. However, the broadcast industry is unique because of the need to allocate broadcast frequencies in order to create a viable media. *See* Note, *Reconciling* Red Lion *and* Tornillo: *A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563, 569-70 (1976). Public utilities are neither members of the media, nor are its methods of communication unique.

131. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 n.30 (1978).

132. *See* Harrison, *supra* note 2, at 53-55.

133. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 71 MICH. L. REV. 1, 2 (1976).

134. By providing access in one medium and full editorial control in the other medium, the Court has sought to achieve the advantages of both public access and minimal governmental intervention. *Id.* at 36.

135. Professor Bollinger points out general benefits and dangers posed by access regulation. The benefits include equalizing opportunities to speak and furthering democratic ideals. The dangers include discouraging discussion of controversial issues, increasing censorship potential and risking burdensome regulation. *Id.* at 27-32.

136. "The principle of equal liberty of expression underlies important purposes of the first amendment." Three purposes of the first amendment are: (1) to permit citizens in a democracy to make informed choices; (2) to aid in the search for truth; and (3) to promote the sense of individual self worth. Karst, *Equality as a Central Principle in the*

versity of viewpoints available to the public, encourages democratic participation in government, and tempers the influence of utility advocacy.

By increasing the diversity of views available to the public, access better informs ratepayers. The better informed the public, the more capable it is of making sound decisions.[137] The Court has stressed the importance of ensuring the public's receipt of information. In *Red Lion*, the Court focused on the interests of the listeners and viewers in receiving diverse views.[138] The protection of corporate speech is based on its value as a source of information to the public.[139]

Access increases democratic participation by providing ratepayers an opportunity to organize for effective advocacy before regulatory commissions. Representative government operates best when it is informed of all relevant opinions.[140] Because utility practices affect virtually every citizen, commissions need capable consumer input to balance the informed and interested utility representative.[141]

Public access also fosters a better balance between corporate and consumer power in the marketplace of ideas. Although corporations have a great capacity to inform the public, some commentators fear that corporate speech overshadows individual speech.[142] Corporations possess greater wealth than most individuals, and can thwart the efforts of an individual's advocacy.[143] Because a corporation exists only as a state created fiction, corporate speech is a state-created amplification system.[144]

Not only are public utilities state-created amplification systems,

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First Amendment, 43 U. CHI. L. REV. 20, 23 (1975).

137. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 881 (1953).

138. "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount." Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1968).

139. *See* Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 534 n.1 (1980); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976).

140. *See* Emerson, *supra* note 137, at 882.

141. *See supra* note 3.

142. *See* Patton & Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494, 501; Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L. J. 1833, 1834 (1981).

143. "[N]ext to the political power of the corporate speaker who can afford media advertising, the power of an individual voter to influence the political process is virtually symbolic." Note, *supra* note 142, at 1854.

144. Patton & Bartlett, *supra* note 142, at 501.

they are state-protected amplification systems.[145] Arguably, the close association between the utility and the state requires that alternative views be included in the utility's billing envelope. By authorizing a process which allows the utility to distribute its political comment with its bills, the state creates an exclusive forum for utility use.[146] It is unfair that the state allows the utility this freedom while it excludes others from the opportunity to disseminate their views through the same forum.[147] When a state opens a forum for some speakers, it must allow other speakers equal opportunity to be heard.[148] An access law reduces the state-created inequity by ensuring that alternative views are presented in the envelope.

Dangers of Access

An access law cannot be implemented without government involvement. When government involves itself in the marketplace of ideas, a danger exists that government and not the public will judge the value of expression.[149]

When it implements an access law, the state is forced to judge different speakers. Merely approving an access requirement signifies the state's choice to lessen the utility's position and elevate the access speaker's position.[150] The state must choose between speakers again when it decides who will be granted access.

Such extensive state involvement is inconsistent with the theory of an uninhibited marketplace of ideas.[151] The marketplace theory holds that truth can emerge from robust debate when that debate is free from government interference.[152] In a democracy, the people must be responsible for judging the merits of conflicting arguments.[153] To enjoy the liberties granted by the first amendment, the

145. Utilities are natural monopolies protected from competition by the state. *See supra* notes 18-21 and accompanying text.

146. See Comment, *supra* note 2, at 1246-47.

147. *Id.*

148. *See* Police Dept. of Chicago v. Mosely, 408 U.S. 92, 96 (1972).

149. Implementing an "enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about confrontation with the express provisions of the First Amendment . . . ." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254 (1974).

150. Utilities, even without access rules, are discouraged from making political comment. Unlike other corporations, a utility cannot pass on the costs of political speech to consumers. *See supra* notes 25-26 and accompanying text. Because the utilities' shareholders bear the cost, the utilities' political speech will likely be directed only to limited issues calculated to create revenue. An access doctrine would further limit a utility's voice by requiring it to share limited space with opposing speakers.

151. "[T]he ultimate good desired is better reached by a free trade in ideas . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

152. Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 965 (1978).

153. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 (1978).

people must risk the danger that some may not be able to properly evaluate opposing arguments.[154]

Limiting Access

Government, however, must intervene to ensure that diverse views are adequately aired.[155] The marketplace theory fails because dominant groups control access to the marketplace and restrict less powerful groups from establishing their views.[156] By creating corporations and protecting monopolies that engage in public discussion, government is already involved in the marketplace. Because government has created an imbalanced marketplace, it is responsible for correcting that imbalance. When the benefits are weighed against the dangers, an access law is clearly desirable.[157] The question remaining is how extensively a state may enforce an access law before it violates the utility's first amendment rights.

The most direct limit to state regulation of utility speech is the *Con Ed* case.[158] The Court in *Con Ed* held that a state may not regulate utility speech on the basis of its content.[159] A content-based regulation exists when the state restricts particular viewpoints or prohibits public discussion of an entire topic.[160] A valid access law must clearly avoid distinguishing speech on the basis of its message.

Beyond this dictate, *Con Ed* is unhelpful as a limiting source. Utilities may argue that the state is regulating content when it enacts an access law that reduces the utility's message in order to allow other messages to be heard. Access laws, however, do not regulate content, but rather specify the forum in which a speaker may present his message. The state's decision to offer the public alternative viewpoints through an access law should not be confused with a content-based regulation.

The Court has recognized that a speaker may be required to allow

154. *Id.*

155. *See* L. TRIBE, *supra* note 58, at 693; T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 630 (1970).

156. *See* L. TRIBE, *supra* note 58 at 577; Baker, *supra* note 152, at 978.

157. "The attempt to use governmental power to achieve some limited objective while at the same time keeping the power under control, is always a risky enterprise. Nowhere is this truer than in the area of freedom of expression. Nevertheless there is no alternative. The weaknesses of the existing system are so profound that failure to act is the more dangerous course." EMERSON, *supra* note 155 at 630.

158. 447 U.S. 530 (1980).

159. *Id.* at 537. New York's Public Service Commission intentionally sought to ban only messages discussing controversial issues. *Id.*

160. *Id.*

other messages to accompany his message.[161] States may create rights of access as long as the Federal Constitution is not violated.[162] A content-neutral access law prescribes only the time, place, or manner of utility speech. A law merely restricting the utility's available forum will be upheld if it serves significant state interests and leaves the speaker alternative channels of communication.[163]

Another limitation might be derived from the first amendment right not to speak developed in *Wooley v. Maynard*.[164] This case involved a New Hampshire statute that required drivers to display the state motto "Live Free or Die" on their license plates. The Court invalidated the statute and held that a state may not force a person to carry messages he finds unacceptable on his private property.[165] Violation of the right not to speak was particularly offensive in *Wooley* because the motorist could not avoid being identified with the message he was carrying.

The force of *Wooley*, however, appears limited by *PruneYard Shopping Center v. Robins*.[166] Billing envelope access is more like *PruneYard* than *Wooley* and a court might likely follow *PruneYard* in its analysis of billing envelope access. Access laws do not prescribe the exact messages one must carry, but require the property owner to provide space for another speaker. Unlike Wooley's personal car, shopping centers and billing envelopes are already used for communicating and transacting business with the public. Like the shopping center, a billing envelope offers the utility the opportunity to dissociate itself from messages inserted into utility billing envelopes. At most, *Wooley* appears to require the state to allow the utility to disassociate itself from the inserted message. A note or warning stating that the insert is not associated with the utility fulfills this requirement.[167]

A third possible limit is the Court's admonition in *Police Department of Chicago v. Mosley* that all points of view must be afforded equal opportunity to be heard.[168] At issue in *Mosley* was a city ordinance prohibiting picketing near school grounds but allowing picketing of any school involved in a labor dispute. The Court invalidated

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161. *See id.* at 543 (utility might be lawfully ordered to carry other inserts in its billing envelope). *See also* Bates v. State Bar of Arizona, 433 U.S. 350, 386 (1977) (suggestion that attorney advertising may be required to include supplemental messages).

162. PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

163. *See* Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. at 535-36.

164. 430 U.S. 705, 715 (1977).

165. *Id.*

166. *See* 447 U.S. at 85-87 (*Wooley* does not apply when a state requires a shopping center owner to permit handbillers to use shopping center property to distribute their messages).

167. The *PruneYard* Court noted that the shopping center owners could post signs disavowing any connection with the handbiller's message. *Id.* at 87.

168. 408 U.S. 92, 96 (1972).

the ordinance as content discriminatory.[169] The Court stated that both the first amendment and the equal protection clause prohibited government from selecting the issues which are worth discussing or debating in public facilities. "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard."[170]

An access law that allows both public groups and the utility access to the envelope is consistent with *Mosley's* emphasis on equality. An access law excluding utility messages, however, appears contrary to the Court's language. *Mosley* directs that all viewpoints are of equal status and that government may not assess otherwise. An access law which excludes utility messages from the envelope indicates that the state's purpose was not to provide equal representation in the marketplace, but rather to discriminate against the utility.

Differential treatment between speakers requires an inquiry into the state interests served by the treatment.[171] The equal protection clause requires that statutes affecting first amendment interests be narrowly tailored to the state's objective.[172] Particularly careful scrutiny is required when government excludes a speaker from a forum.[173] An access law serves state interests by making diverse views available to the public and encouraging greater participation in regulatory decisions. These state concerns are best served when the utility has access to the envelope in conjunction with ratepayers. An access law goes too far when it excludes utility messages. Such an access law fails to serve narrowly tailored state interests and may violate the first amendment.

CONCLUSION

Proposals to provide consumer groups access to public utility mailing are currently before state legislatures and utility commissions. This Comment has examined two obstacles to access laws — the fifth and first amendments.

Analysis under the fifth amendment takings clause is somewhat inconclusive. Precedent exists to support a ruling that access to util-

169. *Id.* at 99
170. *Id.* at 96 (citation omitted).
171. *Id.* at 95.
172. *Id.* at 101.
173. *Id.* at 98-99. After *Mosley*, any "restriction that selectively excludes speakers from a public forum must survive careful judicial scrutiny to ensure that the exclusion is the minimum necessary to further a significant governmental interest." Karst, *supra* note 136 at 28.

ity billing envelopes is a taking. The Court has vowed a case-by-case analysis, however, and equally strong arguments exist to support access without requiring compensation. This latter option becomes the clear choice when a broad balance is adopted.

When the burden on private property is so onerous it outweighs the public benefit of regulation, a taking must be found. If, at some point, an extensive access requirement interferes with the use of utility property and/or causes substantial loss to utility shareholders, *Causby* and *Kaiser Aetna* would control and a taking should be found.

Access laws further first amendment policy by making diverse viewpoints available to the public. At the same time, access laws encourage organized and informed consumer representation before regulatory commissions. Limits on the state's ability to enforce access laws are sparse, but present. Under *Con Ed*, a content based regulation of speech will be invalidated. *Con Ed*, however, does not impose any substantial limitation because access laws are not content based regulations. A more pointed limitation is found in the *Mosley* decision. *Mosley* emphasizes that all viewpoints are of equal status and should have equal opportunities to be aired. An access law that excludes the utility's messages is inconsistent with the *Mosley* language and is unnecessary to achieve the state's objectives.

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