The Burger Court Opinion Writing Database

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

447 U.S. 530 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

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 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.
1.

Mr. Justice Powell

Copies to 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

11 JUN 1980

79-134 Consolidated Edison v. Public Service Commission

MR. JUSTICE MARSHALL, concurring.

I join the Court's opinion. I write separately to emphasize that our decision today in no way addresses the question whether the Commission may exclude the costs of bill inserts from the rate base, nor does it intimate any view on the appropriateness of any allocation of such costs the Commission might choose to make. Ante, at 12. 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. Cf. SEC v. Chenery Corp., 318 U.S. 80, 95 ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); FPC v. Texaco, Inc., 417 U.S. 380, 397 (1974); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 249 (1972).

12 JUN 1980

Printed

1st 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.

[June —, 1980]

MR. JUSTICE MARSHALL, concurring.

I join the Court's opinion. I write separately to emphasize that our decision today in no way addresses the question whether the Commission may exclude the costs of bill inserts from the rate base, nor does it intimate any view on the appropriateness of any allocation of such costs the Commission might choose to make. *Ante,* at 12. 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. Cf. *SEC* v. *Chenery Corp.,* 318 U. S. 80, 95 ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); *FPC* v. *Texaco, Inc.,* 417 U. S. 380, 397 (1974); *FTC* v. *Sperry & Hutchinson Co.,* 405 U. S. 233, 249 (1972).

17 JUN 1980

2nd 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.

[June —, 1980]

MR. JUSTICE MARSHALL, concurring.

I join the Court's opinion. I write separately to emphasize that our decision today in no way addresses the question whether the Commission may exclude the costs of bill inserts from the rate base, nor does it intimate any view on the appropriateness of any allocation of such costs the Commission might choose to make. *Ante*, at 12. 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. Cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); *FPC* v. *Texaco, Inc.*, 417 U. S. 380, 397 (1974); *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249 (1972).

HAB

March 19, 1980

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

Dear Bill:

Pursuant to our telephone conversation of this afternoon, I shall try my hand at a dissent in this case in due course.

Sincerely,

HAB

Mr. Justice Rehnquist

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

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

MR. JUSTICE BLACKMUN, dissenting.

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).

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: _____

Recirculated: JUN 04 1980

Printed

1st 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.

[June —, 1980]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST as to Parts I and II joins, dissenting.

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.

p. 1

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: _____

2nd DRAFT

Recirculated: JUN 11 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.

[June —, 1980]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST as to Parts I and II joins, dissenting.

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); *Central Hudson Gas & Elec. Co.* v. *Public Service Comm'n, post*, at —— (concurring opinion).

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.

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

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice [illegible]

From: Mr. Justice Bl[illegible]

Circulated: _____

Recirculated: _____

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.

[June —, 1980]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST as to Parts I and II joins, dissenting.

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). See also *Central Hudson Gas & Elec. Co.* v. *Public Service Comm'n*, *post*, at — (concurring opinion).

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.

5-12-80

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

MAY 12 1980

Circulated: _____

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1st 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: 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

5-15-80

From: Mr. Justice Powell

Circulated: _____

Recirculated: MAY 15 1980

2nd 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.

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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

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

3,5-7,9

6-13-80

From: Mr. Justice Powell

Circulated: _____

Recirculated: JUN 13 1980

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.

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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

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
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:

> "Therefore, although there are, narrowly limited 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 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

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

From: Mr. Justice Stevens

Circulated: JUN 10 '80

1st DRAFT

Recirculated: _____

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.

[June —, 1980]

MR. JUSTICE STEVENS, concurring in the judgment.

Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that "a time, place, or manner restriction may not be based upon the content of speech." *Ante*, at 6. And every lawyer who has read our Rules,[1] or our cases upholding various restrictions on speech with specific reference to subject matter[2] must

[1] This Court's Rules 15, 16, 21, 22, 33, 34, 36.

[2] See, *e. g.*, *National Labor Relations Board* v. *Store Employees Union, Local 1001*, — U. S. — (labor picketing at site of neutral third parties in labor dispute); *Ohralik* v. *Ohio State Bar Association*, 436 U. S. 447 (in-person solicitation of legal business, distinguished from other forms of legal advertising); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (indecent language in early afternoon radio broadcast); *Young* v. *American Mini Theatres*, 427 U. S. 50 (zoning of "adult" movie threatres); *Greer* v. *Spock*, 424 U. S. 828 (partisan political speeches on military base); *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (political advertising on municipal transit system); *Schenck* v. *United States*, 249 U. S. 47, 52 (Holmes, J.): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a threatre and causing a panic." See also cases cited in *American Mini Theatres*, *supra*, at 67-71.

See generally Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Georgetown L. J. 727 (1980); Note, *Pacifica Foundation* v. *FCC*: "Filthy Words," the First Amendment and the Broadcast Media, 78 Colum. L. Rev. 164 (1978).

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

7p. 1-2

From: Mr. Justice Stevens

Circulated: _____

2nd DRAFT

Recirculated: JUN 16 '80

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.

[June —, 1980]

MR. JUSTICE STEVENS, concurring in the judgment.

Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a "time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Ante*, at 6. And every lawyer who has read our Rules,[1] or our cases upholding various restrictions on speech with specific reference to subject matter[2] must recognize the hyperbole in the dic-

[1] This Court's Rules 15, 16, 21, 22, 33, 34, 36.

[2] See, *e. g.*, *National Labor Relations Board* v. *Store Employees Union, Local 1001*, — U. S. — (labor picketing at site of neutral third parties in labor dispute); *Ohralik* v. *Ohio State Bar Association*, 436 U. S. 447 (in-person solicitation of legal business, distinguished from other forms of legal advertising); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (indecent language in early afternoon radio broadcast); *Young* v. *American Mini Theatres*, 427 U. S. 50 (zoning of "adult" movie threatres); *Greer* v. *Spock*, 424 U. S. 828 (partisan political speeches on military base); *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (political advertising on municipal transit system); *Schenck* v. *United States*, 249 U. S. 47, 52 (Holmes, J.): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a threatre and causing a panic." See also cases cited in *American Mini Theatres*, *supra*, at 67–71.

See generally Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Georgetown L. J. 727 (1980); Note, *Pacifica Foun-*