

# The Burger Court Opinion Writing Database

## *Pacific Gas & Electric Co. v. Public Utilities Commission of California*

475 U.S. 1 (1986)

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



To Bill in note -

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

Talk to C P S  
Clerk.

CHAMBERS OF  
THE CHIEF JUSTICE

December 18, 1985

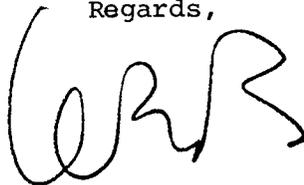
PERSONAL

Re: 84-1044 - Pacific Gas & Electric v. Public Utilities of California

Dear Lewis:

I am having problems with this case. I will try to get further word to you this week.

Regards,



Justice Powell

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

file

CHAMBERS OF  
THE CHIEF JUSTICE

PERSONAL

December 20, 1985

Re: 84-1044 - Pacific Gas and Electric Co. v. Public Utilities Commission

Dear Lewis:

I have reviewed the most recent version of your draft opinion in the above case. While I agree with most of what you have to say, I have some questions about reliance on a characterization of the PUC access order as a "penalty" for Pacific's prior publication of its newsletter Progress in reaching your holding that the access order violates the First Amendment. I would put it this way:

CHIEF JUSTICE BURGER, concurring.

While I agree with most of the Court's opinion, I do not accept the characterization of the Public Utilities Commission access order as a "penalty" for Pacific Gas & Electric's prior publication of its newsletter Progress in reaching its holding that the access order violates the First Amendment.

The penalty analysis troubles me for two reasons: first, it is not apparent that Pacific's publication of Progress caused the PUC order granting access to appellee Towards Utility Rate Normalization ("TURN"). Unlike the situation in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), TURN is to be granted access regardless of what Pacific chooses to say in Progress in the future--even if Pacific chooses to stop publishing Progress entirely. The PUC order is the result of Pacific's distribution of Progress only in the most general way: by distributing Progress Pacific called attention to the availability of the billing envelope as a forum and thus prompted PUC to grant access to other viewpoints. Unlike the situation in Tornillo, TURN's right of access is not "triggered" by any particular expression by Pacific, and the portion of the Tornillo holding that relied on the right of reply statute's effect of penalizing prior speech is thus inapplicable.

The second defect in the "penalty" rationale is that it tends to detract from the central question presented by this case, which is the injury to Pacific's right to be free from forced association with views with which it disagrees. Much of the Court's reasoning quite properly focuses on the deleterious effects of such forced association, including the effect of forcing Pacific to modify its own speech in order to meet the agenda set by TURN. These effects offend the First Amendment because of the access order's direct effect on Pacific's "negative speech" right to be free from forced association, and not due to the more uncertain and consequential effect on Pacific's unquestioned right to publish Progress. In the circumstances of this case Pacific's "negative speech" rights are clearly implicated; like the automobile owner in Wooley v. Maynard, 430 U.S. 705 (1977), who was forced to carry a message he did not believe on his personal automobile, Pacific is here required to carry a message it finds repugnant in its own corporate envelopes--surely as much a medium of individualized expression as the automobile in Wooley.

I would not, therefore, base this Court's holding that the PUC order is offensive to the First Amendment on a characterization of that order as a penalty. Instead, I would rely on that portion of the Tornillo holding that a forced right of reply violates a newspaper's right to be free from forced dissemination of views it would not voluntarily disseminate, just as we held that Maynard must be free from being forced to disseminate views with which he disagrees. To compel Pacific to mail messages for others cannot be distinguished from compelling it to carry the messages of others on its trucks, its buildings, or other property used in the conduct of its business. Those properties cannot be distinguished from other properties acquired by Pacific from its income and resources.

Regards,



Justice Powell

*U.S. Maybe you can "absorb" this!*

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



CHAMBERS OF  
THE CHIEF JUSTICE

PERSONAL

January 8, 1986

Re: No. 84-1044 - Pacific Gas & Electric v. Public  
Utilities of California

Dear Lewis:

When we talked my mind had "blanked out" on your fourth draft, which meets most of my problems.

I don't want to jeopardize a Court for your opinion so I had decided to join, but still point out that it is sufficient to decide the case on the basis of compelled association, relying entirely on Wooley v. Maynard. However, with four of my opinions being circulated this week, this small concurrence got lost.

Here it is.

Regards,

Justice Powell

To: Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **The Chief Justice**

Circulated: JAN 10 1986

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
*v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January —, 1986]

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but think we need not go beyond the authority of *Wooley v. Maynard*, 430 U. S. 705 (1977) to decide this case. I would not go beyond the central question presented by this case, which is the infringement of Pacific's right to be free from forced association with views with which it disagrees. I would also rely on that part of *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974) holding that a forced right of reply violates a newspaper's right to be free from forced dissemination of views it would not voluntarily disseminate, just as we held that *Maynard* must be free from being forced by the State to disseminate views with which he disagreed. To compel Pacific to mail messages for others cannot be distinguished from compelling it to carry the messages of others on its trucks, its buildings, or other property used in the conduct of its business. For purposes of this case, those properties cannot be distinguished from property like the mailing envelopes acquired by Pacific from its income and resources.

82 JAN 10 1986

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

.....3 OF  
JUSTICE Wm. J. BRENNAN, JR.

December 17, 1985

No. 84-1044

Pacific Gas and Electric Company  
v. Public Utilities Commission

Dear Lewis,

As we discussed last Friday, I am still solidly with you in this case. I have now read and reread both your opinion and Bill's dissent and am convinced, above all else, that the issues raised are as difficult as they are important. What is at stake, of course, is not only how the states will be permitted to assist the groups that intervene on behalf of the public in ratemaking procedures, but also basic First Amendment principles involving the rights not to speak and not to be compelled either to associate with or carry the messages of others. The rather lengthy comments and thoughts that follow reflect, I suppose, my own struggle with the issues as well as an appreciation of their complexity.

As I read your opinion, you would hold the PUC's access order invalid because of the effect that TURN's speech would have on PG&E's constitutionally protected speech and because it works a penalty on that speech. While I agree that the order requiring PG&E to permit Turn access to its billing envelope violates the First Amendment, in my view the cardinal defect from which the

order suffers is that it compels PG&E both to associate with, and carry the messages of, a speaker with which it may violently disagree. To be sure, the evils that attend forced association of this sort include, as you suggest, the potential penalization of particular points of view and the alteration of protected speech to conform to an agenda not set by the speaker; however, my reading of the facts and the record lead me to conclude that penalization is not really a part of this case. My sense is thus that the case is most readily analyzed under Wooley v. Maynard, 430 U.S. 705 (1977), and your concurrence in PruneYard Shopping Center v. Robins, 447 U.S. 74, 96 (1980), rather than Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

I have some difficulty understanding what you mean when you suggest that the Commission's order penalized PG&E in any way for in the past having published Progress. At the outset, PG&E concedes that it was inappropriate for its customers to be "paying" for dissemination of that publication, and it does seem to me evident that the ratepayers were subsidizing Progress so long as there was "extra space" in the envelope which had economic value. Nobody argues that this prior arrangement which PG&E enjoyed for so many years could or should be permitted to persist, and in this sense, anything that the PUC ordered as a corrective might be said to "penalize" PG&E, but only in that it terminated a benefit that PG&E had somewhat unfairly appropriated to itself. My point is that PUC had to act, and it had to take something away from PG&E. This was no more a penalty than had an individual been required to return something that did not

rightfully belong to him. The fact that the use that had been made of that value involved speech does not, it seems, to me, transform the order into a penalty on speech. To extend the analogy perhaps further than it need go, if I were to find some money and use it to start a newspaper, a police directive that I return that money to its true owner would not impermissibly penalize my free speech rights.

Moreover, as far as I can make out, there is nothing in the record to suggest that the PUC had a "hidden agenda" to "get" PG&E as a result of anything that it had been saying in Progress. In all likelihood, PUC would have ordered PG&E to provide TURN access regardless of whether Progress had ever been published or included in the billing envelope. As we learned from the amici, public utility regulators in many states have awarded similar access to the billing envelopes to public interest groups, and I feel confident that in most of those cases the utility neither published nor disseminated in its envelopes a political newsletter. It seems to me that the real concern of the regulators, and the impetus for the orders providing access to groups such as TURN, is the clout the utilities exercise in ratemaking procedures, and not what they choose to say in their newsletters. It is in this sense that I believe Tornillo to be somewhat inapposite. Since I do not believe speech is being penalized, there is little if any danger that this utility-- or any other-- will respond to the order by avoiding controversial speech.

In the last full paragraph on the bottom of page 11 of your opinion you make a second argument, and note that the PUC's order may force PG&E to alter its speech to conform to the agenda set by TURN. I am in complete agreement with this point, and I think it an important one. As you say in your opinion, no one has a right to be free from vigorous debate, but as you also explain, what is involved in this case is a government order which in effect compels PG&E to engage in debate, and to speak when it may well prefer to remain silent. As I have thought about this issue, it seems to me that this danger is one of the consequences of forced association, and of being compelled to carry the messages of another, rather than an independent doctrine of First Amendment jurisprudence. I think you proved this point powerfully in your PruneYard concurrence. As you wrote, "[i]n many situations, a right of access is no less intrusive than speech compelled by the State itself." This is true for many reasons. First, in a case such as Tornillo, forced access burdens the right to decide what to print or omit. Second, a property owner confronted with forced access to his property for the speech of others may be faced with a choice of either permitting people to receive a mistaken impression that the messages are his own (or, presumably, that he does not disagree with the views expressed by others) or disavowing the messages. If he takes the latter course, "he has been forced to speak when he would prefer to remain silent...he has lost control over his freedom to speak or not to speak on certain issues. The mere fact that he is free to dissociate himself from the views

expressed on his property...cannot restore his 'right to refrain from speaking at all.' Wooley v. Maynard....'" PruneYard, supra, at 99. In this connection, you noted that "[t]he pressure to respond is particularly apparent when the owner has taken a position opposed to the view being expressed on his property," and you argued convincingly that "an owner who strongly objects to some of the causes to which the state-imposed right of access would extend may oppose activities 'of any sort' that are not related to the purposes for which he has invited the public onto his property." Id., at 100. You concurred in PruneYard because on the record before us in that case the appellants had not alleged, and there was no evidence to suggest, that they disagreed with the views to be expressed or the interest groups to be admitted as a result of the forced access.

I think the PUC order before us presents the case you hypothesized in PruneYard. TURN is, without doubt, hostile to PG&E; indeed, as you observe in your opinion, the whole idea behind providing TURN access is that it does oppose PG&E. There can be no doubt that PG&E does disagree (quite strongly, I imagine) with TURN and the views it is likely to express. Moreover, there can be little doubt that PG&E will feel compelled to respond to assertions, arguments and allegations made by TURN in its messages to PG&E's customers. In this connection, what is particularly troubling to me is that the PUC order is completely open-ended. TURN may say whatever it chooses about any subject matter it addresses -- politics, for example, as well as ratemaking. I believe that it is the breadth of the order that

transforms it from an arguably permissible, though perhaps onerous regulation into an invalid infringement of protected First Amendment rights. Again, I agree with your discussion of this issue on pages 11-12, and particularly with footnote 11 which distinguishes this case from cases in which the states permissibly impose information disclosure requirements on individuals and corporations.

Summing up, I think this case calls for application of the principles you articulated in PruneYard and which had previously been expressed -- though with respect to individuals, not corporations -- in Wooley. Obviously, Tornillo is relevant: even the narrowest reading of that case instructs that so-called negative First Amendment rights are not automatically surrendered simply because a speaker assumes a corporate form. While it is certainly not necessary in order to decide this case to delineate the precise scope of a corporation's right not to speak, in my view the fact that the PUC's order not only provides access to what we may fairly describe as an avowed enemy of PG&E, but also allows TURN an unreviewable right to speak on any subject, no matter how repugnant to PG&E, puts this case well beyond the line of permissible regulation.

I do apologize for the length of this letter, and for the fact that it contains very little in the way of specific suggestions. It just seemed the better course to see how close

our views are with respect to the broader issues before getting down to crossing t's and dotting i's.

Sincerely,

*Bill*

Justice Powell

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

December 23, 1985

Pacific Gas & Electric v. Public  
Utilities Commission  
No. 84-1044

Dear Lewis:

I certainly appreciate your comments and proposed changes with respect to the above, which appear to address fully the thoughts I had expressed. I look forward to seeing your circulation incorporating the new material, and no doubt will join that opinion for the Court.

Sincerely,

A handwritten signature in cursive script, appearing to read "B. Powell", is written in dark ink.

Justice Powell

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

December 26, 1985

No. 84-1044

Pacific Gas & Electric  
v. Public Utilities Commission  
of California

Dear Lewis:

I have now had a chance to read your revised opinion in the above, which I am delighted to join. Many thanks again for considering my suggestions.

Merry Christmas,



Justice Powell

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

December 26, 1985

No. 84-1044

Pacific Gas & Electric  
v. Public Utilities Commission  
of California

Dear Lewis:

Please join me in your circulation  
of December 23.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 9, 1985

84-1044 - Pacific Gas and Electric Company  
v. PUC of California

Dear Bill,

Please join me.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

15:01 → 10:51

RECEIVED  
2008

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Marshall**

Circulated: **JAN 15 1986**

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
*v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January —, 1986]

JUSTICE MARSHALL, concurring in the judgment.

In *Pruneyard Shopping Center v. Robbins*, 447 U. S. 74 (1979), we held that a State could, consistently with the Federal Constitution, prohibit the private owner of a shopping center from using State trespass law to exclude peaceful expressive activity in the open areas of the shopping center. Concurring in *Pruneyard*, I viewed the State's abrogation of the property owner's traditional right to exclude as raising the question of how the Federal Constitution limits a state's ability to redefine its common-law property rights. See *id.*, at 92-93 (MARSHALL, J., concurring). Today we face a similar question. In the present case, California has taken from petitioner the right to deny access to its property—its billing envelope—to a group that wishes to use that envelope for expressive purposes. Two significant differences between the State's grant of access in this case and the grant of access in *Pruneyard* lead me to find a constitutional barrier here that I did not find in the earlier case.

The first difference is the degree of intrusiveness of the permitted access. We noted in *Pruneyard*: "the shopping center by choice of its owner is not limited to the personal use of [its owner]. It is instead a business establishment that is open to the public to come and go as they please." 447 U. S., at 87. The challenged rule did not permit a markedly greater intrusion onto the property than that which the

Stylistic Changes  
Throughout

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: JAN 21 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January —, 1986]

JUSTICE MARSHALL, concurring in the judgment.

In *Pruneyard Shopping Center v. Robins*, 447 U. S. 74 (1980), we held that a State could, consistently with the Federal Constitution, prohibit the private owner of a shopping center from using state trespass law to exclude peaceful expressive activity in the open areas of the shopping center. Concurring in *Pruneyard*, I viewed the State's abrogation of the property owner's traditional right to exclude as raising the question of how the Federal Constitution limits a State's ability to redefine its common-law property rights. See *id.*, 447 U. S. 93 (MARSHALL, J., concurring). Today we face a similar question. In the present case, California has taken from the appellant the right to deny access to its property—its billing envelope—to a group that wishes to use that envelope for expressive purposes. Two significant differences between the State's grant of access in this case and the grant of access in *Pruneyard* lead me to find a constitutional barrier here that I do not find in the earlier case.

The first difference is the degree of intrusiveness of the permitted access. We noted in *Pruneyard*: "the shopping center by choice of its owner is not limited to the personal use of the owner]. It is instead a business establishment that is open to the public to come and go as they please." *Id.*, at 87. The challenged rule did not permit a markedly greater intrusion onto the property than that which the owner had volun-

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 22, 1986

84-1044 Pacific Gas & Electric Co.

Dear Lewis:

I appreciate your effort to clarify your views concerning this case. While I agree that your opinion does not reject any of the points contained in my concurring opinion, your opinion as it stands contains considerable language with which I disagree concerning the application of PruneYard and Tornillo to this case. In particular, I do not agree that this case can be analyzed in terms of the "punishment" rationale of Tornillo, nor do I believe that the concerns applicable to regulation of the press are so easily expanded to cover a non-media corporation. These differences make it impossible for me to join your opinion, sorry.

Sincerely,



Justice Powell

tm/pm

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

pp. 3, 4

\* STYLISTIC CHANGES THROUGHOUT

From: Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: JAN 31 1986

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
*v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January —, 1986]

JUSTICE MARSHALL, concurring in the judgment.

In *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), we held that a State could, consistently with the Federal Constitution, prohibit the private owner of a shopping center from using state trespass law to exclude peaceful expressive activity in the open areas of the shopping center. Concurring in *PruneYard*, I viewed the State's abrogation of the property owner's traditional right to exclude as raising the question of how the Federal Constitution limits a State's ability to redefine its common-law property rights. See *id.*, at 92-93 (MARSHALL, J., concurring). Today we face a similar question. In the present case, California has taken from appellant the right to deny access to its property—its billing envelope—to a group that wishes to use that envelope for expressive purposes. Two significant differences between the State's grant of access in this case and the grant of access in *PruneYard* lead me to find a constitutional barrier here that I did not find in the earlier case.

The first difference is the degree of intrusiveness of the permitted access. We noted in *PruneYard*: "the shopping center by choice of its owner is not limited to the personal use of [its owner]. It is instead a business establishment that is open to the public to come and go as they please." *Id.*, at 87. The challenged rule did not permit a markedly greater intrusion onto the property than that which the owner had volun-

Justice Brennan  
 Justice White  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Marshall**

Circulated: \_\_\_\_\_

Recirculated: **FEB 7 1986**

P. 4

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
*v.* PUBLIC UTILITIES COMMISSION OF  
 CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January —, 1986]

JUSTICE MARSHALL, concurring in the judgment.

In *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), we held that a State could, consistently with the Federal Constitution, prohibit the private owner of a shopping center from using state trespass law to exclude peaceful expressive activity in the open areas of the shopping center. Concurring in *PruneYard*, I viewed the State's abrogation of the property owner's traditional right to exclude as raising the question of how the Federal Constitution limits a State's ability to redefine its common-law property rights. See *id.*, at 92-93 (MARSHALL, J., concurring). Today we face a similar question. In the present case, California has taken from appellant the right to deny access to its property—its billing envelope—to a group that wishes to use that envelope for expressive purposes. Two significant differences between the State's grant of access in this case and the grant of access in *PruneYard* lead me to find a constitutional barrier here that I did not find in the earlier case.

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 14, 1985

Re: No. 84-1044, Pacific Gas & Electric Co. v.  
Public Utilities Commission of California

Dear Lewis:

At the end of the next draft of your opinion for this case, would you please add the following:

"JUSTICE BLACKMUN took no part in the consideration or decision of this case."

Sincerely,



Justice Powell

cc: The Conference

11/13

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Powell**

Circulated: NOV 14 1985

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
 v. PUBLIC UTILITIES COMMISSION OF  
 CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[November —, 1985]

JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party where the utility company uses the billing envelope to distribute a newsletter to its customers.

## I

For the past 62 years, appellant Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter, called *Progress*, reaches over three million customers. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills. App. to Juris. Statement A-66, A-183 to A-190.<sup>1</sup>

<sup>1</sup>For example, the December 1984 issue of *Progress* included a story on appellant's "automatic payment" and "balanced payment" plans, an article instructing ratepayers on how to weatherstrip their homes, recipes for holiday dishes, and a feature on appellant's efforts to help bald eagles in the Pit River area of California. App. to Juris. Statement A-183 to A-190. When the Commission first addressed the question whether appellant could continue to have exclusive access to its billing envelopes, it noted that *Progress* has previously discussed the merits of recently-passed and pending legislation in Congress. App. to Juris. Statement A-66.

November 18, 1985

84-1044 Pacific Gas & Electric

Dear Sandra:

Thank you for your memorandum of November 15 on Pacific Gas & Electric. As you note, the case is complicated, and I welcome suggestions. I hope that what follows is responsive to your questions.

1. I am glad to include the fact that the Commission's order requires TURN to disclaim any connection with PG&E in TURN's inserts. As I stated in my concurrence in PruneYard, the absence of such a disclaimer would raise independent First Amendment difficulties, because it would, in effect, place TURN's words in PG&E's mouth. PruneYard Shopping Center v. Robins, 447 U.S. 74, 99 (1980) (POWELL, J., concurring in part and in the judgment). I do not believe, however, that the presence of such a disclaimer remedies the other impermissible aspects of the Commission's order. I note, for example, that Tornillo contained no discussion of the danger that the audience would confuse the candidate's speech with that of the Miami Herald.

2. Requiring PG&E to place various kinds of legal notices in the billing envelopes does not, in my view, raise the same First Amendment difficulties as the order that grants TURN access. Such requirements are analogous to the requirement that attorneys include in their advertisements a statement that clients might be liable for litigation costs if their contingent-fee case was unsuccessful. See Zauderer v. Office of Disciplinary Counsel, 105 S.Ct. 2265, 2281-2283 (1985). As Zauderer suggests, the state has substantial leeway in framing appropriate information disclosure requirements for businesses. Id., at 2282. The problem in this case is quite different. Under the Commission's order, TURN is permitted to use the billing envelopes to spread its own political messages. Zauderer and our other commercial speech cases are therefore inapplicable.

I believe this point is made in the draft, see p. 10, but perhaps it could be made more clearly. Accordingly, I will try adding either a sentence or two of text or a footnote addressing this question.

3. You also ask whether the draft as presently constituted would bar states from requiring corporations to include the views of minority shareholders in proxy solicitation statements. I think clearly not. Proxy statements, in effect, are speech by the corporation to itself. All shareholders have ownership interests in all corporate assets, and not merely the "space" in the envelope that contains the proxy statement. The primary purpose of an annual meeting, as of course you know, is to elect the Board of Directors and also to afford guidance to the board and officers on issues presented by shareholders. Nothing in Bellotti, Consolidated Edison, or this case affects the state's power to impose some kinds of limitations on intra-corporate speech in the interest of promoting effective shareholder control of corporations. The First Amendment interests are quite different, it seems to me, when the state acts in such a way as to deter speech by the corporation to the public at large.

I am inclined not to address this last point unless the dissent raises it. I would prefer not to suggest or imply what states may or may not require with respect to the exercise of corporate voting rights. If the dissent raises this issue (as I expect it will), we might add a brief statement to the effect that the Commission's order affects PG&E's ability to communicate to the public at large, and not a corporation's ability simply to communicate with its shareholders. Our reply will depend on what the dissent says.

I will show you the sentence or two that I intend to add in response to your second point before I recirculate. I appreciate your comments sent privately to me, and will be happy to discuss these or any further thoughts you may have. I need your vote!

Sincerely,

Justice O'Connor

lfp/ss

November 21, 1985

84-1044 Pacific Gas & Electric v. Public Utility

Dear Sandra,

Following are my proposed changes in response to your suggestions.

1. Change the third complete sentence on page 3 of my draft to read: "The Commission placed no limitations on what TURN or appellant could say in the envelope, except that TURN is required to state that its messages are not those of appellant." In addition, I would add the following footnote at page 10, at the conclusion of part III, A:

The presence of a disclaimer on TURN's messages, see ante, at 3, does not suffice to eliminate the impermissible pressure on appellant to respond to TURN's speech. The disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant. PruneYard, supra, at 99 (opinion of POWELL, J.). It does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message. Ibid.

2. Add the following footnote at page 10, after the sentence that reads, "The order leaves TURN free to use the billing envelopes to discuss any issues it chooses":

The Commission's order is thus readily distinguishable from orders requiring appellant to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated. The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See Zauderer v. Office of Disciplinary Counsel, 105 S.Ct. 2265, 2282 (1985). Nothing in Zauderer suggests, however, that the State is equally free to require corporations to carry the messages of third parties,

where the messages themselves are biased against or are expressly contrary to the corporation's views.

If these changes are satisfactory, I will make them in my second draft. I would, of course, welcome any suggestions.

Sincerely,

Justice O'Connor  
LFP/vde

11/22

pp. 3, 10, 11, 15

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: NOV 23 85 \_\_\_\_\_

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
*v.* PUBLIC UTILITIES COMMISSION OF  
CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[November —, 1985]

JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party where the utility company uses the billing envelope to distribute a newsletter to its customers.

## I

For the past 62 years, appellant Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter, called *Progress*, reaches over three million customers. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills. App. to Juris. Statement A-66, A-183 to A-190.<sup>1</sup>

<sup>1</sup> For example, the December 1984 issue of *Progress* included a story on appellant's "automatic payment" and "balanced payment" plans, an article instructing ratepayers on how to weatherstrip their homes, recipes for holiday dishes, and a feature on appellant's efforts to help bald eagles in the Pit River area of California. App. to Juris. Statement A-183 to A-190. When the Commission first addressed the question whether appellant could continue to have exclusive access to its billing envelopes, it noted that *Progress* has previously discussed the merits of recently-passed and pending legislation in Congress. App. to Juris. Statement A-66.

Justice Brennan  
 Justice White  
 Justice Marshall ✓  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: DEC 10 1985

PP. 6, 7, 9, 10, 11, 12

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
 v. PUBLIC UTILITIES COMMISSION OF  
 CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[December —, 1985]

JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party where the utility company uses the billing envelope to distribute a newsletter to its customers.

I

For the past 62 years, appellant Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter, called *Progress*, reaches over three million customers. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills. App. to Juris. Statement A-66, A-183 to A-190.<sup>1</sup>

<sup>1</sup>For example, the December 1984 issue of *Progress* included a story on appellant's "automatic payment" and "balanced payment" plans, an article instructing ratepayers on how to weatherstrip their homes, recipes for holiday dishes, and a feature on appellant's efforts to help bald eagles in the Pit River area of California. App. to Juris. Statement A-183 to A-190. When the Commission first addressed the question whether appellant could continue to have exclusive access to its billing envelopes, it noted that *Progress* has previously discussed the merits of recently-passed and pending legislation in Congress. App. to Juris. Statement A-66.

*W-13*

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 20, 1985

84-1044 Pacific Gas & Electric v. Public Utilities  
Commission

Dear Bill:

As I indicated when we spoke yesterday on the telephone, I was out of the city when your letter of December 17 arrived. I have now had an opportunity to take a close look at it, and I am happy to make the changes indicated in the attached memorandum.

As I read your letter, we are fully in accord as to the importance of this First Amendment case and also as to the fundamental principles that control it. Our differences, if any, are primarily a matter of semantics (though I recognize these may also be important). I offer these brief comments.

1. As you suggest, use of the term "penalty" can be confusing. In revising my draft to accord with your views, I have excised the term wherever it has been applied to PG&E.

In addition, I have sought to clarify the manner in which I believe the Commission's order burdens appellant's affirmative speech rights. It was not my intention to state that the Commission's order punished PG&E for having used the billing envelopes to disseminate Progress. The point I wish to make is a different and broader one: all content-based access rules burden affirmative speech rights in a manner analogous to the right-of-reply statute in Tornillo. See change number 5 in the attached memorandum. I believe this revision clarifies the point.

2. The only portion of the opinion that relies at all on appellant's publication of Progress is part II (pp. 4-5). The primary purpose of that section is to reinforce the proposition, established in Bellotti and Consolidated Edison, that corporate speech is fully protected for its informative value. I thought it desirable to emphasize that proposition early in the opinion because the opinion later derives appellant's "negative" First Amendment rights from its affirmative right to speak. In addition, the analogy between the publication of Progress and the publication of the newspaper at issue in Tornillo may be helpful--though certainly not essential to the outcome or to the opinion's basic analysis.

3. You correctly note that Wooley v. Maynard lends support to our position. In the attached draft, I have omitted the footnote that formerly disclaimed reliance on Wooley, and I have added a cite and footnote concerning Wooley to the opinion's discussion of PG&E's right not to speak.

I have thought it unwise, however, to rely on Wooley as a primary authority, and thereby invite a strong dissent. The section of Wooley that discusses the Maynards' right not to speak ties that right to "freedom of thought" and "freedom of mind," and does not rely in its holding on the Maynards' affirmative right to speak. 430 U.S., at 714-715; see also id., at 713 and n. 10. In this case, we tie appellant's right to be free from forced association with TURN to appellant's affirmative right to speak. Tornillo is plainly the single most relevant authority to such an analysis.

4. As my opinion in PruneYard did not attract a Court (although I joined a part of the Court opinion and concurred in the judgment), I have refrained from emphasizing it unduly. In addition, Bill Rehnquist's dissent relies heavily on the Court's opinion in PruneYard. Although I think PruneYard is plainly distinguishable, it seems best not to rely in a primary sense on my separate opinion in that case.

\* \* \*

Your suggestions have enabled me to make changes that both clarify and strengthen my draft. If you should have further thoughts, I will of course be glad to have them.

Sincerely,

*Lewis*

Justice Brennan

LFP/vde

December 20, 1985

PROPOSED CHANGES in 84-1044 Pacific Gas & Electric

Following are a number of changes prompted by your letter of December 17.

1. Change the first sentence on page 1 to read: "The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees."

2. Delete note 4, pages 5-6. (This is the footnote that expressly declines to apply Wooley v. Maynard and Board of Education v. Barnette to this case.)

3. Delete the first full sentence on page 7, along with the accompanying cite. (That sentence reads: "This constituted a 'penalty on the basis of the content of a newspaper.' ibid.")

12/19

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

1, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16

From: Justice Powell

Circulated:

Recirculated: 12/23/85

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1044

**PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.**

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[December —, 1985]

JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees.

I

For the past 62 years, appellant Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter, called *Progress*, reaches over three million customers. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills. App. to Juris. Statement A-66, A-183 to A-190.<sup>1</sup>

In 1980, appellee Toward Utility Rate Normalization ("TURN"), an intervenor in a ratemaking proceeding before

<sup>1</sup> For example, the December 1984 issue of *Progress* included a story on appellant's "automatic payment" and "balanced payment" plans, an article instructing ratepayers on how to weatherstrip their homes, recipes for holiday dishes, and a feature on appellant's efforts to help bald eagles in the Pit River area of California. App. to Juris. Statement A-183 to A-190. When the Commission first addressed the question whether appellant could continue to have exclusive access to its billing envelopes, it noted that *Progress* has previously discussed the merits of recently-passed and pending legislation in Congress. App. to Juris. Statement A-66.

December 30, 1985

84-1044 PG&E

Dear Chief:

Thank you for your letter of December 20, and particularly for sending it to me on a "personal" basis.

As it so happens, I was in process of making considerable changes in this case. Your letter was timely, and I believe my recirculation of December 23 will enable you to join my opinion in its entirety. If you wish to drive home your well expressed thoughts, of course, this could still be done in a concurring opinion.

Sincerely,

The Chief Justice

lfp/ss

December 30, 1985

84-1044 PG&E

Dear Sandra,

I would be happy to collapse the last two complete sentences on page 9 to read: "Such one-sidedness impermissibly burdens appellant's own expression." Footnote 8 (presently on page 9) will be moved to page 3, to correspond to the sentence, "The Commission reserved the right to grant other groups access in the future."

These changes will appear in my next recirculation.

Sincerely,

Justice O'Connor

lfp/ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 21, 1986

84-1044 Pacific Gas and Electric

Dear Thurgood:

Thank you for joining the judgment in the above case, as this gives us a Court for the result.

It occurs to me that you could join the opinion as well, and still file your concurring opinion. What you have said about Pruneyard is entirely consistent with my views, and with the shorter discussion of that case in my opinion. See p. 8, and n. 6. Your view that the First Amendments rights of corporations are not identical to those of individuals is also consistent with my opinion. I purposely placed reliance on cases involving corporate and not individual speech: Bellotti, Consolidated Edison, and of course Tornillo.

In sum, I see no tension whatever between our two opinions. I do think what you have written is quite useful, and should be retained as a concurring opinion.

Sincerely,

*Lewis*

Justice Marshall

lfp/ss

22 JAN 31 1986

202 20880  
20880

Stylistic Changes Throughout

PP. 1, 2, 7, 9, 10, 11

Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: JAN 24 1986

5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
*v.* PUBLIC UTILITIES COMMISSION OF  
CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January —, 1986]

JUSTICE POWELL announced the judgment of the Court and delivered an opinion in which the CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE O'CONNOR joined.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees.

## I

For the past 62 years, appellant Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter, called *Progress*, reaches over three million customers. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills. App. to Juris. Statement A-66, A-183 to A-190.<sup>1</sup>

<sup>1</sup> For example, the December 1984 issue of *Progress* included a story on appellant's "automatic payment" and "balanced payment" plans, an article instructing ratepayers on how to weatherstrip their homes, recipes for holiday dishes, and a feature on appellant's efforts to help bald eagles in the Pit River area of California. App. to Juris. Statement A-183 to A-190. When the Commission first addressed the question whether appellant could continue to have exclusive access to its billing envelopes, it noted that *Progress* has previously discussed the merits of recently-passed and pending legislation in Congress. *Id.*, at A-66.

02/22

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

Stylistic Changes Throughout.

and p. 17

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

FEB 22 1986

6th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
 v. PUBLIC UTILITIES COMMISSION OF  
 CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February 25, 1986]

JUSTICE POWELL announced the judgment of the Court and delivered an opinion in which the CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE O'CONNOR joined.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees.

I

For the past 62 years, appellant Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter, called *Progress*, reaches over three million customers. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills. App. to Juris. Statement A-66, A-183 to A-190.<sup>1</sup>

<sup>1</sup> For example, the December 1984 issue of *Progress* included a story on appellant's "automatic payment" and "balanced payment" plans, an article instructing ratepayers on how to weatherstrip their homes, recipes for holiday dishes, and a feature on appellant's efforts to help bald eagles in the Pit River area of California. App. to Juris. Statement A-183 to A-190. When the Commission first addressed the question whether appellant could continue to have exclusive access to its billing envelopes, it noted that *Progress* has previously discussed the merits of recently-passed and pending legislation in Congress. *Id.*, at A-66.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 19, 1986

84-1044 Pacific Gas & Electric Co. v. Public  
Utilities Commission of California

MEMORANDUM TO THE CONFERENCE:

The Reporter of Decisions recently received a letter from counsel for two of the appellees in this case, pointing out a technical error in the last sentence of footnote 2 of my opinion. That sentence now states that of the five appellees, "Only the Commission and TURN have filed separate briefs in this Court." The letter from counsel notes, correctly, that TURN's brief is joined by four of the other appellees.

Absent objection, I propose to delete the last sentence of footnote 2.

*L. F. P.*  
L.F.P., Jr.

SS

cc: Mr. Henry C. Lind

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 19, 1985

Re: No. 84-1044 Pacific Gas & Electric Co. v. Public  
Utilities Commission of California

Dear Lewis,

I will prepare and eventually circulate a dissent in  
this case.

Sincerely,



Justice Powell

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

Circulated: DEC 6 1985

Recirculated: \_\_\_\_\_

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[December —, 1985]

JUSTICE REHNQUIST, dissenting.

The Court holds that a state-created, limited right of access to the extra space in a utility's billing envelopes unconstitutionally burdens the utility's right to speak if the utility has used the space itself to express political views to its customers. This is so even though the extra envelope space belongs to the customers as a matter of state property law. The Court justifies its decision on the ground that the right of access is a content-based penalty that will chill the utility's speech or interfere with its right to remain silent like the fair reply statute struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974). Because I believe the effect of the right of access here is far different from the effect of the fair reply statute struck down in *Tornillo*, and instead much more like that of the right of access upheld in *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), I dissent.<sup>1</sup>

<sup>1</sup> It may be useful to point out what this case does not involve. It does not involve the direct suppression of a corporation's positive right to speak. See *First National Bank of Boston v. Bellotti*, 435 U. S. 765, 776 (1978); *Consolidated Edison Co. v. Pacific Service Comm'n*, 447 U. S. 530, 544 (1980). Nor does it address the question whether the First Amendment grants a right of access to a private forum. See *Hudgens v. NLRB*, 424 U. S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U. S. 551 (1972); *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U. S. 308 (1968);

Handwritten notes: A large question mark, a diagonal line, and the text "NO 12/10".

STYLISTIC CHANGES THROUGHOUT

Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

Circulated: \_\_\_\_\_

DEC 12 1985

Recirculated: \_\_\_\_\_

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[December —, 1985]

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join, dissenting.

The Court holds that a state-created, limited right of access to the extra space in a utility's billing envelopes unconstitutionally burdens the utility's right to speak if the utility has used the space itself to express political views to its customers. This is so even though the extra envelope space belongs to the customers as a matter of state property law. The Court justifies its decision on the ground that the right of access is a content-based penalty that will chill the utility's speech or interfere with its right to remain silent like the fair reply statute struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974). Because I believe the effect of the right of access here is far different from the effect of the fair reply statute struck down in *Tornillo*, and instead much more like that of the right of access upheld in *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), I dissent.<sup>1</sup>

<sup>1</sup> It may be useful to point out what this case does not involve. It does not involve the direct suppression of a corporation's positive right to speak. See *First National Bank of Boston v. Bellotti*, 435 U. S. 765, 776 (1978); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U. S. 530, 544 (1980). Nor does it address the question whether the First Amendment grants a right of access to a private forum. See *Hudgens v. NLRB*, 424 U. S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U. S. 551 (1972); *Food Em-*

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 9, 1986

Re: No. 84-1044 Pacific Gas & Electric v.  
PUC of California

Dear Lewis,

Because of your revisions in the proposed Court opinion, I am in the process of revising my dissent, but it will take a few more days.

Sincerely,



Justice Powell

cc: The Conference

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Stevens  
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: \_\_\_\_\_

Recirculated: **JAN 28 1986**

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
*v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January —, 1986]

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join, dissenting.

The plurality concludes that a state-created, limited right of access to the extra space in a utility's billing envelopes unconstitutionally burdens the utility's right to speak if the utility has used the space itself to express political views to its customers. This is so even though the extra envelope space belongs to the customers as a matter of state property law. The plurality justifies its conclusion on grounds that the right of access may (1) deter the utility from saying things that might trigger an adverse response, or (2) induce it to respond to subjects about which it might prefer to remain silent, in violation of the principles established in *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974), and *Wooley v. Maynard*, 430 U. S. 705 (1977). I do not believe that the right of access here will have any noticeable deterrent effect. Nor do I believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally. I believe that the right of access here is constitutionally indistinguishable from the right of access approved in *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), and therefore I dissent.<sup>1</sup>

<sup>1</sup>This case does not involve the question whether the First Amendment provides a right of access to a private forum. See *Hudgens v. NLRB*, 424

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Stevens  
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: \_\_\_\_\_

Recirculated: JAN 31 1986

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January —, 1986]

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join, dissenting.

The plurality concludes that a state-created, limited right of access to the extra space in a utility's billing envelopes unconstitutionally burdens the utility's right to speak if the utility has used the space itself to express political views to its customers. This is so even though the extra envelope space belongs to the customers as a matter of state property law. The plurality justifies its conclusion on grounds that the right of access may (1) deter the utility from saying things that might trigger an adverse response, or (2) induce it to respond to subjects about which it might prefer to remain silent, in violation of the principles established in *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974), and *Wooley v. Maynard*, 430 U. S. 705 (1977). I do not believe that the right of access here will have any noticeable deterrent effect. Nor do I believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally. I believe that the right of access here is constitutionally indistinguishable from the right of access approved in *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), and therefore I dissent.<sup>1</sup>

<sup>1</sup>This case does not involve the question whether the First Amendment provides a right of access to a private forum. See *Hudgens v. NLRB*, 424

Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Stevens  
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: \_\_\_\_\_

Recirculated: **FEB 19 1986**

5th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
*v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February —, 1986]

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join as to Part I, dissenting.

The plurality concludes that a state-created, limited right of access to the extra space in a utility's billing envelopes unconstitutionally burdens the utility's right to speak if the utility has used the space itself to express political views to its customers. This is so even though the extra envelope space belongs to the customers as a matter of state property law. The plurality justifies its conclusion on grounds that the right of access may (1) deter the utility from saying things that might trigger an adverse response, or (2) induce it to respond to subjects about which it might prefer to remain silent, in violation of the principles established in *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974), and *Wooley v. Maynard*, 430 U. S. 705 (1977). I do not believe that the right of access here will have any noticeable deterrent effect. Nor do I believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally. I believe that the right of access here is constitutionally indistinguishable from the right of access approved in *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980), and therefore I dissent.<sup>1</sup>

<sup>1</sup>This case does not involve the question whether the First Amendment provides a right of access to a private forum. See *Hudgens v. NLRB*, 424

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

December 10, 1985

Re: 84-1044 - Pacific Gas and Electric Co.  
v. Public Utilities  
Commission of California

Dear Bill:

Please join me in your dissenting opinion.

Respectfully,



Justice Rehnquist

Copies to the Conference

DEC 10 10:01

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Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice O'Connor

From: **Justice Stevens**

Circulated: 1-13-86

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
*v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January —, 1986]

JUSTICE STEVENS, dissenting.

Because the Court's opinion is largely concerned with questions that need not be answered in order to decide this case,<sup>1</sup> I believe it is important to identify the actual issue with some care. The narrow question we must address is whether a state public utility commission may require the fund-raising solicitation of a consumer advocacy group to be carried in a utility billing envelope. Since the utility concedes that *it* has no right to use the extra space in the billing envelope for its own newsletter, the question is limited to whether the Commission's requirement that it be the courier for the message of a third party violates the First Amendment. In my view, this requirement differs little from regulations applied daily to a variety of commercial communications that have rarely

<sup>1</sup> For the Court, the question in this case is whether a public utility commission "may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees." *Ante*, at 1. The Court seems concerned that the California Public Utility Commission's decision may be the harbinger of future decisions requiring publicly regulated institutions to bear banners antithetical to their own self-interest. Henceforth, a company's buildings and vehicles might display signs and stickers proclaiming the benefits of conservation, lower rates, and perhaps even government ownership. See *ante*, at 3 and n. 3, 11 and n. 10.

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.  
 SEE PAGES: 5-6

From: Justice Stevens

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT  
 v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January —, 1986]

JUSTICE STEVENS, dissenting.

Because the plurality opinion is largely concerned with questions that need not be answered in order to decide this case,<sup>1</sup> I believe it is important to identify the actual issue with some care. The narrow question we must address is whether a state public utility commission may require the fund-raising solicitation of a consumer advocacy group to be carried in a utility billing envelope. Since the utility concedes that *it* has no right to use the extra space in the billing envelope for its own newsletter, the question is limited to whether the Commission's requirement that it be the courier for the message of a third party violates the First Amendment. In my view, this requirement differs little from regulations applied daily to a variety of commercial communica-

<sup>1</sup>For the plurality, the question in this case is whether a public utility commission "may require a privately owned utility company to include in its billing envelopes speech of a third party" with which the utility disagrees. *Ante*, at 1. The plurality seems concerned that the California Public Utility Commission's decision may be the harbinger of future decisions requiring publicly regulated institutions to bear banners antithetical to their own self-interest. Henceforth, a company's buildings and vehicles might display signs and stickers proclaiming the benefits of conservation, lower rates, and perhaps even government ownership. See *ante*, at 3, and n. 3, 11, and n. 10.

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 15, 1985

No. 84-1044 Pacific Gas & Electric Co. v. PUC of CA

Dear Lewis,

I expect to join your excellent opinion in this case. It is a complicated case, however, and I have a couple of questions I would like to pose.

*yes*  
The current draft nowhere mentions that TURN must disclaim PG&E's approval in all TURN's communications in the billing envelope. While this disclaimer obviously does not eliminate the concern that the utility will feel obliged to speak in response to TURN's message, I think that the disclaimer is of sufficient import to warrant some mention. I would not be surprised to see the dissent talk about it in light of your discussion in Pruneyard Shopping Center v. Robins, 447 U.S. 74, 101 (1980) to the effect that shoppers could not possibly have confused the schoolchildren's message with that of the shopping center's owner. Do you think it should be addressed?

I also have two questions relating to speech unmentioned in the current draft.

First, as you know, PUC has on numerous occasions required PG&E to place various notices inside the billing envelope relating to hearings or conservation or the like. In light of the fact that you discount the heavy regulation of utilities as a factor in the analysis, and of your conclusion that the ownership of the extra space in the envelope is irrelevant, do you think that your current draft would allow the utility to claim that PUC's attempt to require PG&E to include various materials within its billing envelope violates PG&E's First Amendment rights?

Second, I am concerned about the effect of this opinion on the common practice of requiring proxy solicitations to include the view of minority shareholders. Statutes or regulations requiring such access involve a corporation that

must give access to the views of those with whom it disagrees. Do you think that your current draft would allow the corporation to claim that requiring such access violates its First Amendment rights?

Perhaps these concerns need not be addressed in this opinion if you are satisfied they are not implicated, but I would welcome your thoughts.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra".

Justice Powell

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 18, 1985

No. 84-1044 Pacific Gas & Electric v. PUC of CA

Dear Lewis,

Thank you for responding so quickly to my inquiry. My inclination is certainly to join you.

I think it would be desirable to refer in the majority opinion to the disclaimer and explain why it does not alter the result. Also, if you are willing, it would be helpful to clarify that the opinion does not affect the validity of requirements that PG & E include notices concerning rate hearings.

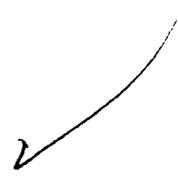
I agree with you that the opinion need not mention the proxy statement question and I am pleased you believe the opinion would not affect current practices in that regard.

Sincerely,



Justice Powell

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



CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 22, 1985

No. 84-1044 Pacific Gas & Electric v. PUC of CA

Dear Lewis,

The proposed changes are entirely acceptable as far as I am concerned. Thank you for incorporating them.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra", is located below the word "Sincerely,".

Justice Powell



CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

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

November 22, 1985

No. 84-1044 Pacific Gas & Electric v. PUC of CA

Dear Lewis,

Please join me.

Sincerely,

Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

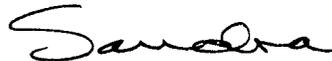
December 30, 1985

No. 84-1044 Pacific Gas & Electric Co. v. Public  
Utilities Commission of California

Dear Lewis,

I have reviewed the changes you have made in your opinion in this case and, generally, I think they are fine. I am troubled, however, by the first sentence of the second paragraph on p. 9, which declares that PUC infringed the rights of those denied access to the billing envelope. It seems to me we need not decide whether rights of other parties were infringed. Would you object to omitting the sentence or qualifying it a bit?

Sincerely,



Justice Powell

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 2, 1986

No. 84-1044 Pacific Gas & Electric v. PUC of CA

Dear Lewis,

Thank you for your willingness to adjust the language on p. 9. Your suggestion is entirely acceptable as far as I am concerned.

Sincerely,

Justice Powell