

# Washington University Law Review

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Volume 69  
Issue 3 *Symposium on Banking Reform*

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January 1991

## Power to the People: The First Amendment and Utility Operating Expenses

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### Recommended Citation

Richard P. Johnson, *Power to the People: The First Amendment and Utility Operating Expenses*, 69 WASH. U. L. Q. 945 (1991).

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## POWER TO THE PEOPLE: THE FIRST AMENDMENT AND UTILITY OPERATING EXPENSES

In *Cahill v. Public Service Commission*,<sup>1</sup> the New York Court of Appeals created another theory on which ratepayers may prevent a public utility from factoring its charitable contributions into its monthly charges. Although courts have considered other constitutional issues involving public utilities,<sup>2</sup> *Cahill* marks the first case to hold that a utility's funding of charitable causes from monthly billings violates an objecting ratepayer's first amendment rights. While the decision opens a new judicial avenue for ratepayers to reign in utility rates, it also may close utilities' coffers to increasingly desperate private charitable organizations.<sup>3</sup>

States extensively regulate public utilities because of their natural monopoly status.<sup>4</sup> States employ utility commissions to set rates and place

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1. 76 N.Y.2d 102, 556 N.E.2d 133, 556 N.Y.S.2d 840 (1990).

2. See, e.g., *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (regulatory agency constitutionally may not prevent utility from including political editorials in utility billing envelopes); *Pacific Gas & Elec. v. Public Utilities Comm'n*, 475 U.S. 1 (1986) (plurality opinion) (regulatory agency constitutionally may not require utility to include political statements opposed to the utility's positions in billing envelopes). The Supreme Court considered a ratepayer's fifth and fourteenth amendment claims against a public utility in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 256-57 (1974). However, the Court did not reach the merits, holding that the plaintiff failed to establish that the alleged unconstitutional behavior involved state action. See *infra*, note 34 and accompanying text for an explanation of how the plaintiff in *Cahill* successfully established state action.

3. See *infra* note 56 and accompanying text.

4. A natural monopoly exists when one firm can produce a good or service more cheaply than multiple firms. *Northern Natural Gas Co. v. Federal Power Comm'n*, 399 F.2d 953, 965 n.19 (D.C. Cir. 1968). States substantially regulate natural monopoly firms because of their inherent economic power. Fanfara, Suelflow, & Draba, *Energy and Competition: The Saga of Electric Power*, 25 ANTI-TRUST BULL. 125, 126-27 (1980). However, courts generally permit natural monopoly firms to compete fairly in such one-firm markets. *Ovitron Corp. v. General Motors Corp.*, 295 F. Supp. 373, 378 (S.D.N.Y. 1969). See also *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 & n.4 (1st Cir. 1960) ("A market may, for example, be so limited that it is impossible to produce at all and to meet the cost of production except by a plant large enough to supply the whole demand.") (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945)).

Natural monopolies arise when start-up costs are large compared to operating costs. A firm in such a market must do a huge volume of business to recover its initial investment and earn a profit. For an excellent introduction to natural monopoly theory, see H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 31-36; R. SCHMALENSEE, *THE CONTROL OF NATURAL MONOPOLIES* 3 (1979). Three general categories of businesses have been identified as "public utilities:" (1) transportation and related services, including railroads, bus lines, and pipelines; (2) communications services, including telephone and telegraph services; and (3) home, commercial, and industrial service utilities, including power and light service, water supply, and sewage facilities. WELCH, *CASES AND TEXT ON PUBLIC UTILITY REGULATION* 2 (1968).

other restrictions on the utilities' business conduct. Normally, a commission sets the utility rate approximately equal to the cost of delivering service plus a reasonable rate of return on investment for the utilities' shareholders.<sup>5</sup> Commissions usually impose two types of restrictions on utilities' political and charitable expenditures: bans and allocations of expenditures to shareholders. While Courts have rejected complete bans,<sup>6</sup> they generally have accepted the commissions' "allocation" methods<sup>7</sup> of restricting public utility expenditures. For example, in *El Paso Electric Co. v. New Mexico Public Service Commission*,<sup>8</sup> the New Mexico Supreme Court upheld the commission's prohibition on utilities' charg-

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5. Harrison, *Public Utilities and the First Amendment: The Economics and Ideology of Pacific Gas & Electric*, 28 U. FLA. L. REV. 319, 324 (1986).

6. In *Consolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980), the Supreme Court held unconstitutional a Commission order prohibiting public utilities from including political editorials in their billing envelopes. *Id.* at 533-544. The Court held that such an outright prohibition violated the first and fourteenth amendments. *Id.* at 544. The Court reasoned that the framers of the Bill of Rights intended the first amendment to protect all political discourse regardless of whether it emanated from a corporation. *Id.* at 533. Moreover, the Court found that the Commission's order did not further a compelling state interest. *Id.* at 541-42.

The Court also found the ban too broad to achieve the legitimate state interest of preventing forced subsidy of the utility's political views. *Id.* at 543. The Court observed in dicta that the Commission could have ordered the utility to allocate the cost of billing inserts to the shareholders rather than ratepayers.

The *Consolidated Edison* court also indicated in dicta that the Public Service Commission might have the authority to order utilities to include billing inserts from organizations opposed to the utilities' views. *Id.* at 543. However, a fragmented Supreme Court later struck down such an order in *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986). *Pacific Gas* involved a California Public Utility Commission order permitting a utility watchdog group to place fund raising and other announcements in the utility's billing envelopes four times a year. 475 U.S. at 1. The Supreme Court vacated the order, holding that it violated the utility's free speech rights. *Id.* at 1-2. The plurality reasoned that, because it granted access only to organizations generally opposed to the utility's political views, the order had two unconstitutional effects. *Id.* at 2. First, the order burdened the utility by requiring it to disseminate information adverse to its own views. *Id.* at 2, 12-15. Second, the plurality found that the order effectively forced the utility to respond to the watchdog group's inserts, thus unconstitutionally compelling speech. *Id.* at 2, 15-18.

Commentators have heavily criticized *Pacific Gas* for its questionable exposition of first amendment theory. See Tilner, *Government Compulsion of Corporate Speech: Legitimate Regulation or First Amendment Violation? A Critique of PG & E*, 27 SANTA CLARA L. REV. 485 (1987); Harrison, *supra* note 4, at 332-40; Note, *Pacific Gas & Electric Co. v. California Public Utilities Commission: Property in an Envelope*, 49 U. PITT. L. REV. 229 (1987); Comment, *Pacific Gas & Electric v. Public Utilities Commission of California: Negative First Amendment Rights for Corporations*, 15 N.Y.U. REV. L. & SOC. CHANGE 371 (1988).

7. A utility commission allocates an expense to shareholders by denying the utility permission to bill ratepayers for the expense. If the utility still decides to incur the expense, it must charge the expense to its shareholders in the form of reduced dividend payments. Harrison, *supra* note 8, at 325.

8. 103 N.M. 300, 706 P.2d 511 (1985).

ing certain advertising and lobbying expenses to ratepayers.<sup>9</sup> The court held that utilities may include in their rates only those reasonable expenses that directly benefit ratepayers.<sup>10</sup> The order withstood constitutional scrutiny because it did not ban speech. Instead, it merely restricted the utilities' ability to charge ratepayers for the cost of disseminating the utilities' views.<sup>11</sup>

Two principal theories have emerged for allocating utility expenses.<sup>12</sup>

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9. 103 N.M. at 302, 706 P.2d at 513.

10. *Id.* See, e.g., *Detroit Edison Co. v. Public Service Comm'n*, 127 Mich. App. 499, 342 N.W.2d 273 (1983); *Providence Gas Co. v. Burman*, 376 A.2d 687 (R.I. 1977).

11. *El Paso*, 103 N.M. at 304, 706 P.2d at 515. See *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990). In *Austin*, the Supreme Court upheld a campaign spending limitation statute against first amendment attack. *Id.* at 1396. Although the statute burdened political expression, the Court reasoned that the state's compelling interest in preventing corruption justified the burden. *Id.* at 1396-98. The statute did not ban corporate political expenditures outright; rather, it allowed a corporation to make such expenditures only through a fund segregated from the general corporate treasury. *Id.* at 1395. The Court concluded that the statute was sufficiently narrowly tailored to achieve the state's compelling purpose. *Id.* at 1395, 1398-1400.

The *El Paso* court also found that the Commission's order was reasonably tailored to fulfill the Commission's statutory obligation to set reasonable rates. *El Paso*, 103 N.M. at 303-04, 706 P.2d at 514-15 (affirming the district court). The order divided advertising into permissible and impermissible expenses. Permissible expenses included any expense that:

- (a) Advises the ratepayers of matters of public safety, health or emergency situations;
- (b) Advocates to ratepayer [sic] through factual data and advice their conservation of energy resources and reduction of peak demand;
- (c) Explains utility billing practices, services, and rates to ratepayers;
- (d) Must be filed with governmental agencies or financial institutions (including annual reports, and stock prospectuses), other than advertisements filed pursuant to (f) below;
- (e) Advises customers of employment opportunities with the utility company;
- (f) Provides information required to be made available to customers or stockholders under State or Federal law and regulation; or
- (g) Otherwise results in a measurable reduction of operating costs and more efficient utility service to ratepayers except as excluded by . . . (that part of the order setting forth impermissible expenditures).

Public Service Commission General Order 31 § IV.A.2. Impermissible expenditures included those that:

- (a) Promote increases in the usage of energy or utility services;
- (b) Except as required by State or Federal law or regulations, promote the sale of any goods or services from any specific company, including, but not limited to, the utility company or any subsidiary or affiliated company;
- (c) Seek to establish a favorable public image of the company, other than by identifying it as the source of an allowable advertising expenditure . . .
- (d) Advocate a position rather than providing factual information in any (allowable) advertisement . . . ; or
- (e) Justify a request for higher rates, or the need for plant expansion, or for any particular addition to plant or service costs.

Public Service Commission General Order 31, § IV.A.3.

12. See *supra* notes 2, 6 and accompanying text for an approach to limiting utility expenditures that the Supreme Court expressly rejected.

First, the taxation theory holds that utility expenditures charged to ratepayers, which are unrelated to service, are in effect a form of taxation without representation.<sup>13</sup> This theory rests on the monopolistic nature of the utility business;<sup>14</sup> individual ratepayers can neither do without a utility's service nor obtain it elsewhere.<sup>15</sup> Accordingly, ratepayers have no recourse when a utility decides to be "generous with ratepayers' money."<sup>16</sup>

The California Supreme Court adopted the taxation theory in its influential opinion *Pacific Telephone & Telegraph Co. v. Public Utilities Commission*.<sup>17</sup> The court assumed *arguendo* that utilities' charitable donations performed a valuable public service. Additionally, restricting those donations might cause an increase in taxes so as to address those needs previously met by the utilities' largesse.<sup>18</sup> Nevertheless, the court concluded that this potential result did not authorize any utility "to extract from its customers payments in lieu of taxes."<sup>19</sup> Such action amounted to an "involuntary levy on ratepayers."<sup>20</sup>

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13. *El Paso Elec. Co. v. New Mexico Pub. Serv. Comm'n*, 103 N.M. 300, 706 P.2d 511 (1985); *State v. Oklahoma Gas & Elec. Co.*, 536 P.2d 887 (Okla. 1975); *State ex rel. Allain v. Mississippi Pub. Serv. Comm'n*, 435 So. 2d 608, 617 (Miss. 1983); *Pacific Tel. & Tel. Co. v. Public Util. Comm'n*, 62 Cal. 2d 634, 44 Cal. Rptr. 1, 401 P.2d 353 (1965); *Southern New England Tel. Co. v. Public Utils. Comm'n*, 29 Conn. Supp. 253, 282 A.2d 915 (1970). See also *Cahill v. Public Serv. Comm'n*, 76 N.Y.2d 102, 114, 556 N.E.2d 133, 556 N.Y.S.2d 840, 845 (1990) (Titone, J., concurring).

14. See *supra* note 4 for a brief discussion of natural monopolies and public utilities.

15. A 1973 Supreme Court decision slightly reduced the monopoly power of electric utilities. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), involved a utility's refusal to sell power to municipal power companies and to transfer (or "wheel") power to them through the utility's lines from other sources. *Id.* The government brought suit under § 2 of the Sherman Act, 15 U.S.C. § 2. *Id.* The district court found that the utility had acted to foreclose competition from the municipal power companies. *Id.* at 368. *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 60 (D. Minn. 1971). The Supreme Court affirmed the district court's holding that the utility had violated § 2. 410 U.S. at 380-82.

Despite the Court's holding, the *Otter Tail* case has affected the monopoly position of electric utilities only minimally. The Federal Energy Regulatory Commission may only authorize wheeling after an exhaustive fact finding procedure. See Note, *Deregulating the Transmission of Electricity: Wheeling under P.U.R.P.A. Sections 203, 204, and 205*, 56 WASH. U.L.Q. 435, 449-50 (1989). Thus, a municipal utility may compel wheeling only by winning an antitrust suit, a costly and risky process. *Id.* at 452-54. See also Norton & Early, *Limitations on the Obligation to Provide Access to Electric Transmission and Distribution Lines*, 5 ENERGY L.J. 47, 63 (1984).

16. *Pacific Tel. & Tel. Co. v. Public Utils. Comm'n*, 62 Cal. 2d 634, 668, 401 P.2d 353, 374, 44 Cal. Rptr. 1, 22 (1965).

17. 62 Cal. 2d 524, 401 P.2d 353, 44 Cal. Rptr. 1 (1965).

18. *Id.*

19. *Id.*

20. *Id.* Courts often have used "involuntary levy" language to reject summarily utility chal-

The second theory of utility expenditure allocation focuses on the utility as a corporation.<sup>21</sup> This theory holds that corporations have a social obligation to engage in philanthropic pursuits.<sup>22</sup> The Supreme Judicial Court of Massachusetts, in *New England Telephone & Telegraph v. Department of Public Utilities*,<sup>23</sup> imposed a corporate duty of generosity to the communities in which they reside.<sup>24</sup> Corporations fulfill this duty by donating to their community's charitable organizations.<sup>25</sup> Accordingly, the court reasoned that such donations are reasonable operating expenses which utilities may legitimately charge to their ratepayers.<sup>26</sup>

Other courts have adopted a qualified version of the corporate obligation rationale by allowing utilities to charge to the ratepayers only those donations that directly benefit the utility or the ratepayers.<sup>27</sup> Under this rationale, utilities justify charging ratepayers for donations that benefit them in only a broad fashion.<sup>28</sup>

In *Cahill v. Public Service Commission of New York*,<sup>29</sup> the New York Court of Appeals adopted a different theory for allocating utility spend-

enges to regulatory authority. See *Cleveland Elec. Illuminating Co. v. Public Utils. Comm'n*, 69 Ohio St. 2d 258, 23 Ohio Op. 3d 254, 431 N.E.2d 683 (1982); *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 600 S.W.2d 222, 229 (Mo. Ct. App. 1980); *New England Tel. & Tel. Co. v. Public Utils. Comm'n*, 390 A.2d 8 (Me. 1978); *Alabama Power Co. v. Alabama Pub. Serv. Comm'n*, 359 So. 2d 776 (Ala. Civ. App.), *aff'd*, 390 So. 2d 1017 (Ala. 1978); *Jewell v. Washington Utils. & Transp. Comm'n*, 585 P.2d 1167 (Wash. 1978); *State v. Oklahoma Gas & Elec. Co.*, 536 P.2d 887 (Okla. 1975).

21. For a discussion of natural monopoly theory, see *supra* note 5.

22. See, e.g., *Detroit Edison Co. v. Public Serv. Comm'n*, 342 N.W.2d 273 (Mich. Ct. App. 1983); *American Hoechst Corp. v. Department of Pub. Utils.*, 379 Mass. 408, 399 N.E.2d 493 (1971); *United States Transit Co. v. Nunes*, 99 R.I. 501, 209 A.2d (1965). See also 1 PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 83-87 (1969).

23. 360 Mass. 443, 275 N.E.2d 493 (1971).

24. *New England Telephone*, 275 N.E.2d at 518-21. The court quoted from the following regulatory decisions: *In re New York Tel. Co.*, 84 P.U.R.3d 321, 349-50; *United Gas Pipe Line Co.*, 31 F.P.C. 1180, 1189; *Vrtjak v. Illinois Commerce Comm'n*, 32 P.U.R.3d 385, 387-88. *New England Telephone*, 275 N.E.2d at 520. The court also cited a number of judicial decisions supporting its contention. See, e.g., *In re Diamond State Tel. Co.*, 51 Del. 525, 149 A.2d 324 (1959); *Miami v. Florida Pub. Serv. Comm'n*, 208 So. 2d 249 (Fla. 1968); *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 192 Kan. 39, 386 P.2d 515 (1963); *Northern States Power Co. v. Board of Railroad Comm'rs*, 71 N.D. 1, 298 N.W. 423 (1941). *New England Tel.*, 275 N.E.2d at 521.

25. *New England Tel.*, 275 N.E.2d at 521.

26. *Id.* Alternatively, the court indicated it would have upheld the expenditures under the theory that they were reasonable business expenses analogous to advertising. *Id.*

27. See Note, *Charitable Contributions No Longer Chargeable as Operating Expenses in Mississippi* 4 MISS. C.L. REV. 353, 360-62 for a discussion of these "direct benefit" cases.

28. See *Detroit Edison Co. v. Public Serv. Comm'n*, 127 Mich. App. 498, 523-24, 342 N.W.2d 273, 284-85 (1983).

29. 76 N.Y.2d 102, 556 N.E.2d 133, 556 N.Y.S.2d 840 (1990).

ing. Unlike prior opinions concerning allocation of utilities' expenditures, the *Cahill* court avoided any discussion of a utility's implied power of taxation or implied obligation to its community. Rather, the *Cahill* court concentrated solely on ratepayers' first amendment rights.

In *Cahill*, a ratepayer attempted to force the Public Service Commission to rescind its order permitting utilities to charge charitable donations to their ratepayers.<sup>30</sup> The ratepayer alleged that the Commission's order authorized utilities to compel ratepayers to contribute to organizations with which the ratepayers might disagree,<sup>31</sup> and therefore violated their first amendment rights.<sup>32</sup>

The court of appeals held the Commission's order unconstitutional on the theory that governmentally compelled expression violates the first

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30. *Cahill*, 556 N.E.2d at 134-35. Plaintiff brought the action under CPLR Article 78, a proceeding similar in purpose and function to a mandamus proceeding. *Id.* See N.Y. CIV. PRAC. L. & R. 78 (McKinney 1990).

31. *Cahill*, 556 N.E.2d at 135. A slightly fuller statement of the facts appears in a prior decision in the same litigation; see *Cahill v. Public Serv. Comm'n*, 69 N.Y.2d 265, 268-69, 506 N.E.2d 187, 188, 513 N.Y.S.2d 656, 656-57 (1986) (plaintiff's first amendment claim did not fail for want of state action). See *infra* note 37. The court explained that the plaintiff, a Catholic, primarily objected to those utility donations made to organizations supporting abortion rights. *Cahill*, 506 N.E.2d at 188.

Some have argued that the government's coerced extraction of taxes violates a taxpayer's first amendment rights when the taxpayer objects to a cause on which the government spends tax dollars. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982). *Lee* involved an Amish employer who refused to withhold social security taxes from his employees. The employer, a farmer and carpenter, asserted that the social security tax system infringed his freedom of religion. Because the Amish have a religious obligation to provide for their elders, they view the national social security system as limiting their ability to meet this obligation. *Id.* at 255. The Court held that the social security system did not infringe unconstitutionally *Lee's* freedom of religion. *Id.* at 261. The Court conceded that the social security system interfered with *Lee's* ability freely to exercise his religion. *Id.* at 256-57. However, the Court also observed that the government had a strong interest in maintaining a comprehensive national insurance plan like social security. *Id.* at 258. The Court reasoned that recognizing *Lee's* alleged religious immunity to social security taxes would create a crazy-quilt of constitutional exemptions, potentially eviscerating the social security system. The Court also saw no principled way of distinguishing between social security taxes and other taxes. *Id.* at 260. The Court explained that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs." *Id.* The Court concluded that the "broad public interest in maintaining a sound tax system" precluded a holding that the infringement on *Lee's* religion constituted a violation of the first amendment. *Id.* See also *Lull v. Commissioner*, 602 F.2d 1166 (4th Cir. 1979) (taxpayers not allowed to deduct proportion of their taxes used for military spending because such expenditures do not unconstitutionally infringe on taxpayer's religious beliefs), *cert. denied*, 444 U.S. 1040 (1980).

32. *Cahill*, 556 N.E.2d at 135. The trial court held that the Commission's order was unconstitutional and the appellate division affirmed. *Id.* at 137. *Cahill v. Public Serv. Comm'n*, 147 A.D.2d 49, 542 N.Y.S.2d 394 (1989).

amendment no less than governmentally prohibited expression.<sup>33</sup> The court held that the Commission's order compelled speech by authorizing public utilities to extract from ratepayers a subsidy for the utilities' political expression.<sup>34</sup> Accordingly, the court concluded that the Commission's order violated ratepayers' first amendment rights.<sup>35</sup>

The court first noted a long line of Supreme Court precedent holding that the first amendment protects the right not to speak.<sup>36</sup> Specifically, the court observed that the first amendment protects an individual from "participation in the dissemination of his State's ideological message."<sup>37</sup>

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33. *Cahill*, 556 N.E.2d at 135. Commentators generally have referred to the right not to speak as a negative first amendment right. See, e.g., Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995, 1014-17 (1982). The *Cahill* court cited several Supreme Court cases upholding this right. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1986) (first amendment prohibits government employees' union from using dues coerced from dissident employees under agency shop agreement for promoting ideological causes that the dissidents opposed); *Elrod v. Burns*, 427 U.S. 347 (1976) (patronage dismissals violate first amendment because employee cannot be forced to support a particular candidate); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state may not compel individual to display motto on license plate with which he does not agree); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (students required to attend public school may not be forced to say pledge of allegiance). See also *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990), discussed *supra* at note 11; *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984) (union expenditures beyond those necessary to union's function as a collective bargaining agent violate dissenting employees first amendment rights where employees work in agency shop). *But cf.* *PruneYard Shopping Center v. Robins*, 442 U.S. 74 (1980) (state provisions construed to permit petitioning and handbilling on shopping center premises do not violate shopping center owners' negative first amendment rights because owner has invited public to use his premises).

34. *Cahill*, 556 N.E.2d at 136.

35. *Id.* at 134.

36. *Id.* at 135. See *supra* note 33 for Supreme Court cases on which the New York Court of Appeals relied.

37. *Cahill*, 556 N.E.2d at 135 (discussing *Wooley v. Maynard*, 430 U.S. 605). Note that in *Cahill*, the ratepayer objected to the utility's ideological message, not the state's. Purely private conduct does not infringe an individual's constitutional rights. *Civil Rights Cases*, 109 U.S. 3, 11 (1883). In order for a plaintiff to demonstrate that a constitutional violation has occurred, the plaintiff must demonstrate some form of state involvement in the action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356-57. A state's heavy regulation of a private actor does not automatically transform private conduct into state action. *Jackson*, 419 U.S. at 350. See also *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm'n*, 483 U.S. 522 (1987) (United State Olympic Committee, to which Congress granted corporate charter and extensive funds, is not state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1981) (private non-profit school heavily funded by state and with which state has extensive contractual relations is not state actor); *Blum v. Yaretsky*, 451 U.S. 991 (1981) (nursing home subject to state regulation is not state actor); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (trustee who sells goods for purposes of executing lien is not state actor); *cf.* *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982) (private party acting pursuant to a constitutionally defective statute is state actor).

The ratepayer in *Cahill* cleared the state action hurdle by challenging the Public Service Commis-



The court analogized Cahill's situation to that of the plaintiffs in *Abood v. Detroit Board of Education*.<sup>38</sup> In *Abood*, the Supreme Court ruled that a government employees' union constitutionally could not spend general union dues on political causes to which some employees objected when payment of union dues was a condition of employment.<sup>39</sup> The Court concluded that the union could use its general dues solely to perform functions germane to its collective bargaining duties.<sup>40</sup> The Court in *Abood* explained that the state had a compelling interest in furthering industrial peace, and thus unions permissibly could spend funds only to further that objective.<sup>41</sup>

The *Cahill* court viewed the utility charges as compelled payments that, like the union dues in *Abood*, financed causes repugnant to the ratepayer. While the objecting employees in *Abood* faced termination if they refused to pay their dues, the *Cahill* court observed that the conse-

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sion's order rather than the utility's charitable donations made pursuant to the order. *Cahill*, 506 N.E.2d 187 at 189-90. The court stressed that the issue was "not the conduct of the utility officials, but the policy and directives of the PSC in establishing utility rates which include charitable contributions as operating expenses." *Cahill*, 506 N.E.2d at 190 (emphasis in original).

38. 431 U.S. 209 (1977).

39. *Abood*, 431 U.S. at 235-36. The *Abood* labor contract in which payment of union dues is a condition of employment created an "agency shop." In *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956), a precursor to *Abood*, the Court confronted a "union shop" agreement, in which union membership is a condition of continued employment. See *infra* note 41.

Union and agency shop agreements are two types of "union security" arrangements. Such arrangements prevent an employer from breaking a union by hiring nonunion workers or by coercing employees into refusing to pay union dues. See R. GORMAN, *LABOR LAW* 639 (1976). The Supreme Court upheld the constitutionality of union security arrangements in *Hanson*, 351 U.S. at 238; see *infra*, note 41. *Abood*, by contrast, involved a successful challenge to union expenditure of funds extracted under a valid union security agreement.

40. *Abood*, 431 U.S. at 235-36.

41. The Court in *Abood* relied heavily on *Railway Employees Dept v. Hanson*, 351 U.S. 225 (1956). *Hanson* involved a union shop agreement made pursuant to § 2, Eleventh, of the Railway Labor Act. 351 U.S. at 228 & n.2. Nonunion employees challenged the agreement, *inter alia*, as violative of their first amendment rights. *Id.* at 236-37. The Court held the agreement constitutional. *Id.* at 238. The Court began its analysis by observing that the commerce clause granted Congress wide latitude to regulate labor relations. *Id.* at 233. The Court reasoned that the power to make policy decisions concerning how best to effect industrial peace is included in this congressional power. *Id.* The Court observed that Congress made just such a decision when it authorized union shop agreements under § 2, Eleventh. *Id.* at 233-34. Specifically, Congress made it "explicit that no conditions to membership may be imposed except as respects periodic dues, initiation fees, and assessments." *Id.* at 238 (quoting § 2, Eleventh, of the Railway Labor Act). The Court reserved judgment on the situation where "exaction of dues, initiation fees, or assessments (are) used as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Id.* The *Abood* Court squarely faced this question.

quences of the ratepayers' failure to pay might be even more severe.<sup>42</sup> At the least, the employees theoretically had the option of seeking alternative employment; ratepayers cannot seek an alternative utility.<sup>43</sup>

The *Cahill* court rapidly dispensed with the utilities' argument that the Commission's order did not violate the ratepayer's first amendment rights because no one could ever personally identify the ratepayer with any of the utilities' charitable contributions.<sup>44</sup> The court found that this argument erroneously assumed that an unconstitutional compulsion of speech occurs only when a reasonable third party would associate the individual with the repugnant message.<sup>45</sup> The court concluded that the proper issue was whether the *ratepayer* reasonably regarded the donations as a coerced affirmation of an ideology that he opposed.<sup>46</sup> Thus, the association of the ratepayer with the donation by the donee or any third

42. *Cahill* 556 N.E.2d at 133, 136.

43. *Id.* Since the Supreme Court's decision in *Otter Tail Power Co.*, see *supra* note 15, ratepayers are not completely without recourse if they wish to terminate service from their local utility. Similarly, dissident employees may also seek another union. However, unless the dissident employees get a majority of the bargaining unit to agree with them, and unless ratepayers can convince their town to switch power companies, these alternatives do not alleviate first amendment concerns.

44. *Cahill*, 556 N.E.2d at 133, 136. At least one commentator has argued that the right not to speak (the negative first amendment right, see *supra* note 33) is not infringed unless some nexus exists between the individual and the compelled message. Gaebler, *supra* note 33, at 1016. Professor Gaebler contends that the negative first amendment right protects individuals from two distinct harms: (1) the harm to an individual forced to project to the world ideas that are anathema to him; and (2) the harm to the individual's own conscience from his forced association with a repugnant message. *Id.* at 1004, 1016. Gaebler argues that "(e)ventually a point is reached where the level of personal involvement is so minimal and the resulting nexus between the individual and the message is so remote that no legally cognizable infringement of negative first amendment rights occurs." *Id.* at 1014.

The *Cahill* court rejected the nexus argument, at least as it applies to the second type of injury that Professor Gaebler described. See *infra* text accompanying notes 43-45.

45. *Cahill*, 556 N.E.2d at 133, 136.

46. *Id.* Compare Professor Cantor's view that, in forced payment cases, "[t]he critical constitutional issue at stake is government establishment of particular political causes." Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 7 (1983). Professor Cantor contends that "moral affront or upset to conscience from being used as a financial instrument is not, by itself, a serious constitutional injury." *Id.* at 25 (footnote omitted). Professor Cantor apparently asserts that the nexus between the speaker and the compelled offensive message is, without more, irrelevant to the constitutional inquiry. Compare Gaebler, *supra* note 33.

Thus, three distinct views concerning the negative freedom-of-conscience right emerge. At one end of the spectrum lies the *Cahill* opinion, which holds that forced payments to support causes anathema to the payor are per se unconstitutional absent a compelling state interest. At the other end lies Professor Cantor's view that such payments are per se constitutional if the plaintiff alleges that the payments wound his conscience. Professor Gaebler's view lies somewhere in between. Unlike Cantor, Gaebler believes that harm to one's own conscience by itself is enough to find a constitu-

party is irrelevant.<sup>47</sup>

The court also rejected the utilities' alternative argument that their charitable donations were "germane" to their business conduct.<sup>48</sup> The New York Court of Appeals observed that only a compelling interest could justify an infringement upon an individual's first amendment rights.<sup>49</sup> The court explained that, under *Abood*, "germane" expenses were those the state had a compelling interest in retrieving from the individual.<sup>50</sup> For purposes of analyzing utility expenses, the court expanded *Abood*, holding that "germane" utility expenses are those relating to both "the reasonable cost of doing business and to the provision of utility services."<sup>51</sup> The utilities, however, failed to demonstrate this compelling interest because they did not show that the charitable donations at issue were reasonable and necessary.<sup>52</sup>

The court also rejected the utilities' assertion that their charitable donations violated ratepayer's first amendment rights no more than the government's spending of tax dollars on programs offensive to taxpayers.<sup>53</sup> The majority observed that to accept the utilities' argument would be tantamount to accepting the assumption that the state had delegated to public utilities the power to tax.<sup>54</sup> The court held that such a delega-

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tional violation. However, unlike the *Cahill* opinion, Gaebler would require the payor to establish nexus between the payor and the repugnant message.

47. *Cahill*, 556 N.E.2d at 133, 136. The court believed the framers sought to prevent compelled speech, not merely observed compelled speech. *Id.*

48. *Id.* *Cahill v. Public Serv. Comm'n*, 147 A.D.2d, 542 N.Y.S.2d 384 (1989).

49. *Cahill*, 556 N.E.2d at 137.

50. *Id.*

51. *Id.*

52. *Id.* The court observed that "the effects of this gossamer civic goodwill on the elementary provision of utility services are at best speculative, and at worst clearly not a sufficient basis upon which to compromise first amendment freedoms held by so many affected persons."

53. *Cahill* 556 N.E.2d at 133, 137-38. This apparent *reductio ad absurdum* argument also failed to impress the concurring judge, but for different reasons than the majority. *See infra* note 9.

54. *Cahill* 556 N.E.2d at 133, 137-38. The court observed that to allow the government to delegate to preferred agents the power of taxation to support the beliefs of those agents would undermine "the doctrinal integrity of first amendment jurisprudence." *Id.* at 138.

The concurring judge disagreed with the majority's resolution of the delegation problem. *Id.* at 138-40 (Titone, J., concurring). The concurrence argued that the Commission's order effectively delegated taxation power to the utilities. Accordingly, the concurrence would have struck the order on that ground. Furthermore, the concurrence observed that voters may remedy objectionable tax policies with their ballots, while ratepayers have no similar recourse. *Id.* at 140. Thus, when a utility has the power to tax, a "taxation without representation" problem arises. *Id.* Note that this reasoning is similar to that used in several other state courts to invalidate utilities' charges of political expenditures to ratepayers. *See supra* notes 13-16 and accompanying text. However, these courts never explicitly relied on a constitutional rationale. Rather, they found the idea of an invol-

tion would be unconstitutional.

The *Cahill* decision provides courts and ratepayers another potent weapon with which to prevent allocations of a utility's charitable, political, and lobbying expenditures to ratepayers.<sup>55</sup> The decision establishes an opening through which a ratepayer may bring a constitutional challenge to public utility expenditures, increasing the likelihood that state and local utilities will be fighting battles over operating expenses in federal court. Finally, and perhaps most significantly, the decision signals an implicit recognition that courts will not let public utilities abuse their unique position.

On the other hand, the decision may represent a major blow to private charities.<sup>56</sup> In contrast to the corporate obligation theory of expenditure allocation, which recognizes a utility's duty of generosity to its community,<sup>57</sup> the *Cahill* approach discourages utilities from making charitable donations. Many public utilities have attempted to shoulder the burden left by shrivelling government aid programs; this task now will be even more difficult to achieve. Consequently, while the *Cahill* decision may represent more power to the people, it may also have pulled the plug on some of the thousand points of light.

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untary levy so offensive that they refused to allow it. These decisions had more of an equitable than a constitutional flavor.

55. See *supra* notes 8-28 and accompanying text.

56. Several charitable organizations filed amicus curiae briefs urging reversal of the lower court's holding, including the New York Mission Society, the United Way of New York, the New York Public Library, and the New York Blood Center.

57. See *supra* notes 21-28 and accompanying text.