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## *FCC v. League of Women Voters: Freedom of Public Broadcasters to Editorialize*

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# ***FCC v. League of Women Voters: Freedom of Public Broadcasters to Editorialize***

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## I. INTRODUCTION

In 1967, Congress passed the Public Broadcasting Act to facilitate the growth of public television. The Act provided for the creation of a nonprofit company, the Corporation for Public Broadcasting, to disburse federal funds to individual public noncommercial stations.<sup>1</sup> Section 399 of the Act provided that no public television station may engage in editorializing, or support or oppose any candidate for political office.<sup>2</sup> The League of Women Voters of California, Pacifica Foundation, and Congressman Henry Waxman challenged the provision on the grounds that it violated the first amendment right to freedom of speech, and that it denied equal protection under the due process clause of the fifth amendment.<sup>3</sup>

The plaintiffs moved for summary judgment several months after filing the complaint, and the United States Department of Justice chose not to defend the constitutionality of section 399.<sup>4</sup> Instead, the Department of Justice presented the matter to Con-

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1. Grabow, *The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. MICH. J.L. REF. 541, 545-46 (1980).

2. 47 U.S.C. § 399 (1982).

3. *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3113 (1984). The California League of Women Voters challenged § 399 because it wished to enlist the "editorial support" of educational stations. Pacifica Foundation is a nonprofit corporation operating five educational radio stations that wished to state their views in editorial form and to label them as opinions of the management. Henry Waxman, a regular listener and viewer of educational stations, wished to hear their editorial opinions. *Id.* at 3112 n.6.

4. *Id.* at 3113. Justice Brennan noted that then Attorney General Benjamin Civiletti said the Department of Justice had already concluded that § 399 violated the first amendment, and that no reasonable argument could be made in its defense. *See id.* at 3113 n.8.

gress, which considered various forms of action.<sup>5</sup> The Senate Legal Counsel moved for leave to appear as *amicus curiae*, and the Senate noticed a motion to dismiss on the alternative ground that the matter was not ripe for adjudication. The plaintiffs moved to disallow the motion to dismiss.<sup>6</sup> The district court granted the Senate's motion for leave to appear as *amicus curiae*, denied the plaintiffs' motion to disallow filing of the motion to dismiss, and granted the Senate's motion to dismiss.<sup>7</sup>

The Department of Justice then further complicated matters by choosing to defend the constitutionality of section 399 on the plaintiffs' appeal of dismissal.<sup>8</sup> On remand, the United States District Court for the Central District of California vacated the order of dismissal.<sup>9</sup> Before the court heard the original summary judgment motion, however, Congress amended section 399.<sup>10</sup> Instead of applying to all public broadcasters, the amended Act barred only those public broadcasters receiving funds from the Corporation for Public Broadcasting. Congress, however, continued to bar all public stations from supporting or opposing political candidates.

The plaintiffs amended their complaint to concentrate on the editorial ban by dropping the challenge to the portion of section 399 prohibiting involvement with political campaigns. The California district court then granted the plaintiffs' motion for summary judgment, declaring section 399 to be unconstitutional.<sup>11</sup> On direct appeal, the Supreme Court of the United States affirmed, holding that section 399's ban on editorializing violates the first amendment.<sup>12</sup>

## II. HISTORICAL CONTEXT LEADING TO *FCC v. League of Women Voters*

### A. Legislative Developments

The federal government's involvement with educational

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5. *League of Women Voters v. FCC*, 547 F. Supp. 379, 381 (C.D. Cal. 1982), *aff'd*, 104 S. Ct. 3106 (1984).

6. *Id.*

7. *League of Women Voters v. FCC*, 489 F. Supp. 517 (C.D. Cal. 1980).

8. *League of Women Voters*, 547 F. Supp. at 381.

9. *Id.* at 382.

10. *Id.*

11. *Id.* at 387. The court held that § 399 violated the first amendment insofar as it prohibited funded, noncommercial broadcasters from editorializing. The evidence before the court was insufficient to grant summary judgment under the equal protection guarantee of the fifth amendment. *Id.* at 388.

12. *FCC v. League of Women Voters*, 104 S. Ct. 3106 (1984).

broadcasting dates back to 1939, when the Federal Communications Commission (FCC) first reserved certain radio frequencies for educational use.<sup>13</sup> The first financial assistance came from the Educational Television Facilities Act of 1962.<sup>14</sup> This Act gave the Department of Health, Education and Welfare the power to distribute \$32 million in matching grants over a five-year period for the construction of educational television facilities.<sup>15</sup>

In 1967, the Carnegie Commission printed the first major report concerning the status of public television.<sup>16</sup> The report emphasized a chronic lack of funds and recommended the creation of a nonprofit corporation to disburse funds to qualifying noncommercial educational broadcasting stations.<sup>17</sup>

The report met with tremendous government approval. Subsequently, Congress drafted and passed the Public Broadcasting Act of 1967 pursuant to the Carnegie Commission's recommendations.<sup>18</sup> The Act created the Corporation for Public Broadcasting to receive periodic congressional appropriations from the government and to disburse them to qualifying public stations.<sup>19</sup> The Carnegie Commission's report suggested this procedure to avoid conflicts of interest between the government and public broadcasters.<sup>20</sup> Congress went one step further by adding section 399 to the Act, which prohibits any broadcaster receiving federal funds from editorializing or contributing to political campaigns.<sup>21</sup> Section 399

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13. Grabow, *supra* note 1, at 543.

14. Pub. L. No. 87-447, 76 Stat. 64 (1967).

15. Grabow, *supra* note 1, at 544.

16. CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION (1967).

17. Grabow, *supra* note 1, at 545.

18. Public Broadcasting Act of 1967, 47 U.S.C. §§ 390-399 (1982).

19. The President appoints a fifteen-member Board of Directors, subject to Senate approval, to run the corporation. Only eight of the members may belong to the same political party. In addition, the Act expressly prohibits the corporation from owning or operating any stations or networks of its own, and it may not contribute to any political campaigns. Grabow, *supra* note 1, at 546.

Some critics of the Act claim that Congress's policy of making sporadic appropriations lacks efficiency, and that Congress therefore should revise its policy. Others consider the periodic disbursement program to operate as a check on the government's ability to frighten public stations into saying only what Congress finds favorable. Compare Grabow, *supra* note 1, at 545 with FCC v. League of Women Voters, 104 S. Ct. 3106, 3123 (1984). Although Justice Brennan implies in *League of Women Voters* that sporadic funding acts as a check against congressional strong-arm tactics, commentator Grabow considers such a system a "plague" on the various public broadcasting agencies.

20. Grabow, *supra* note 1, at 545, 546; see also Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123, 1152 (1974).

21. 47 U.S.C. § 399 (1982) codified § 399 of Pub. L. No. 97-35, 95 Stat. 730 as follows:

is the only major ban that Congress has placed on owners and operators of public broadcasting facilities.<sup>22</sup>

The House of Representatives added section 399 to the Public Broadcasting Act admittedly out of an "abundance of caution."<sup>23</sup> Many congressmen felt that, without strict precautions, the stations receiving federal funding would become virtual propaganda agencies for political parties or would present only one point of view.<sup>24</sup> A review of the House hearings, however, suggests that section 399 was a compromise to swing the votes of congressmen who feared that broadcasters might aim derogatory editorials at them in their home districts.<sup>25</sup>

Regardless of the exact intent of the House members, the final draft included section 399. The FCC since has interpreted it to preclude only editorials conveying the opinions of the broadcast licensees, their management, or individuals speaking on their behalf.<sup>26</sup> Thus, any individual not connected with the station and any station employee who states an opinion as his own may editorialize on any subject.<sup>27</sup>

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"No noncommercial educational broadcasting station which receives a grant from the Corporation under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office."

22. A second restriction was added to the Act in 1973 requiring noncommercial licensees to retain audio recordings of all controversial programs for 90 days and to make them available to anyone wishing to view them. Act of Aug. 6, 1973, Pub. L. No. 93-84, § 2, 87 Stat. 219 (1973). The United States Court of Appeals for the District of Columbia Circuit declared this second restriction unconstitutional in *Community-Service Broadcasting v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978). Chief Justice Skelly Wright found that "[n]one of the purposes put forward to support the recording requirement adequately justifies the distinction drawn between commercial and noncommercial broadcasters." *Id.* at 1103-04. As a result, the court held that the statute and regulations were unconstitutional. *Id.* at 1123. See generally Grabow, *supra* note 1, at 547 (discussing *Community-Service Broadcasting v. FCC*).

23. The Public Broadcasting Act began as a Johnson Administration proposal, then went through a Senate revision before reaching the House of Representatives, where § 399 was added. H.R. REP. No. 572, 90th Cong., 1st Sess. 20 (1967), reprinted in *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3121 (1984).

24. The fear of creating propaganda machines was the strongest argument in support of § 399 from its inception until the Supreme Court struck it down. See Grabow, *supra* note 1, at 548.

25. "The House floor debate reveals that the reason for the prohibition may have been less a congressional concern over government propagandizing and more a fear of the power of television on the personal political survival of many congressmen." Grabow, *supra* note 1, at 548. Congressman Joelson, referring to the decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), stated that public officials such as himself were "sitting ducks." Grabow, *supra* note 1, at 548 n.59 and accompanying text.

26. *League of Women Voters v. FCC*, 547 F. Supp. 379, 383 (C.D. Cal. 1982), *aff'd*, 104 S. Ct. 3106 (1984).

27. *Id.* at 383.

### B. Case History of Speech Restrictions in Broadcasting

For almost two decades, both commercial and noncommercial broadcasters have dealt with the issues that arise when they publicly state their own opinions.<sup>28</sup> The Court's decision in *Red Lion Broadcasting v. FCC*<sup>29</sup> highlights some of these issues. Red Lion Broadcasting Company was licensed to operate Pennsylvania radio station WGCB. In November 1964, the station aired a fifteen-minute broadcast, during which Reverend Billy James Hargis made several charges concerning author Fred J. Cook and his book, *Goldwater—Extremist on the Right*.<sup>30</sup> According to Hargis, the newspaper for which Cook worked fired Cook because he made false charges against a city official. Hargis also charged that Cook worked for a "Communist-affiliated publication," that he had attacked J. Edgar Hoover and the CIA, and that he had written his book "to smear and destroy Barry Goldwater."<sup>31</sup> Cook heard the broadcast and demanded free reply time, alleging that Hargis had personally attacked him.<sup>32</sup> The station refused to grant him reply time. After Cook and Red Lion informed the FCC, it determined that Hargis had made a personal attack on Cook's character, and that Red Lion had not complied with the requirements of the fairness doctrine as expressed in *Times-Mirror Broadcasting Co.*<sup>33</sup> Under the fairness doctrine, the station is obligated to send a tape, transcript, or summary of the broadcast to the person being attacked and offer him reply time, whether or not the person could pay the station for the air time.<sup>34</sup> The Court of Appeals of the District of Columbia Circuit upheld the doctrine on review, finding it to be constitutional and otherwise proper.<sup>35</sup> Courts as well as broadcasters consider the fairness doctrine an equitable way to deal with editorial opinions that station managements espouse.<sup>36</sup>

A related problem arises when organizations compete for limited broadcast time to air editorial advertisements on controversial issues. In *CBS v. Democratic National Committee*,<sup>37</sup> the Business

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28. See generally Canby, *supra* note 20, at 1123-65 (an overview of freedom of speech violations in various forms of the media).

29. 395 U.S. 367 (1969).

30. *Id.* at 371.

31. *Id.*

32. *Id.* at 371-72.

33. 1 RAD. REG. (P&F) ¶ 10:315(G) (1962).

34. *Id.*

35. *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908, 930 (D.C. Cir. 1967).

36. See, e.g., Canby, *supra* note 20, at 1160-61.

37. 412 U.S. 94 (1973).

Executives for Vietnam Peace (BEM) asked to buy time on radio station WTOP in Washington, D.C., to air a series of one-minute spot announcements expressing their views on the Vietnam conflict. The station refused to sell them any air time, saying that it followed the policy of many fellow broadcasters.<sup>38</sup> Those adhering to this policy argued that because they presented "full and fair" coverage of controversial issues, they could refuse to sell air time for editorial use by private groups or individuals.<sup>39</sup> When BEM filed a formal complaint with the FCC, WTOP presented evidence that it already had allowed critics of the Vietnam policy to air their views, and thus it was not required to sell time to BEM.<sup>40</sup>

Four months later, the Democratic National Committee filed a request with the FCC for a declaratory ruling claiming that it intended to purchase time on various radio and television stations to present the committee's views and to solicit funds.<sup>41</sup> The committee stated that although it did not object to the policies of any particular broadcaster, it feared the committee would encounter "considerable difficulty," if not complete frustration, if the FCC did not make the requested ruling.<sup>42</sup>

The FCC rejected the demands of both groups, stating that "responsible" individuals and organizations did not have a right to purchase air time under the fairness doctrine.<sup>43</sup> The court of appeals reversed the FCC's decision on the ground that such a ban on paid public announcements is in violation of the first amendment.<sup>44</sup> The Supreme Court of the United States ultimately held in favor of the stations, ruling that they retained the right to accept only those paid editorial advertisements they chose.<sup>45</sup>

The United States Court of Appeals for the District of Colum-

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38. *Id.* at 98.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 99.

43. *Id.*

44. *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 643 (D.C. Cir. 1971).

45. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 123 (1973).

The Commission was justified in concluding that the public interest in providing access to the marketplace of "ideas and experiences" would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth. . . . [T]he views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently.

*Id.*

bia Circuit analyzed the regulation of noncommercial broadcasters in *Accuracy in Media, Inc. v. FCC*.<sup>46</sup> Accuracy in Media, Inc. (AIM), an organization concerned with the content of public broadcast material, filed complaints against the Public Broadcasting Service (PBS) concerning two programs that PBS distributed to its affiliate stations. The organization alleged that the programs, which dealt with sex education and the American criminal justice system, did not adequately present all sides of the issues.<sup>47</sup> AIM asserted the fairness doctrine and section 396(g)(1)(A) of the Public Broadcasting Act as the legal bases of its complaint.<sup>48</sup> Section 396(g)(1)(A) qualifies the Corporation for Public Broadcasting's authority to fund programming activities of local, noncommercial broadcasting licensees by directing that programs be "made available . . . with strict adherence to objectivity and balance."<sup>49</sup>

PBS is a nonprofit corporation that distributes national programming to educational broadcast licensees by common carrier. The Corporation for Public Broadcasting funds both PBS itself and a significant number of the programs that PBS distributes.<sup>50</sup> AIM argued that because the corporation funded the PBS programs in question, the programs must adhere to the "objectivity and balance" requirement of section 396(g)(1)(A).<sup>51</sup> The court held that the FCC has authority to enforce the fairness doctrine against noncommercial licensees, which it chose not to do in this case, but that the FCC did not have authority to enforce the mandate of section 396(g)(1)(A) against the Corporation for Public Broadcasting.<sup>52</sup>

In 1979, the Carter-Mondale Presidential Committee filed a complaint with the FCC when all three major networks refused to sell them a thirty-minute block of prime time during the first week of December 1979.<sup>53</sup> The complaint charged that the networks violated the "reasonable access" provision of section 312(a)(7).<sup>54</sup> The FCC ruled that the networks violated section 312(a)(7), concluding that the networks had not satisfied the FCC's standards of reason-

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46. 521 F.2d 288 (D.C. Cir. 1975).

47. *Id.* at 290.

48. *Id.*

49. *Id.*; see 47 U.S.C. § 396(g)(1)(A) (1982).

50. *Accuracy in Media, Inc.*, 521 F.2d at 292.

51. *Id.* at 290.

52. *Id.* at 292-96.

53. *CBS v. FCC*, 453 U.S. 367, 371 (1981).

54. *Id.* at 373-74.

ableness in refusing to sell the time.<sup>55</sup> The court of appeals affirmed the FCC's order on the ground that the statute "created a new, affirmative right of access to the broadcast media for individual candidates for federal elective office."<sup>56</sup>

CBS and NBC argued that section 312(a)(7) merely codified policies that the FCC developed under the public interest standard, and that it did not impose new obligations on broadcasters.<sup>57</sup> The public interest requirement called for broadcasters to devote some air time to political issues. This requirement, however, neither bestowed upon an individual candidate a right of access, nor distinguished between federal, state, and local elections.<sup>58</sup> The networks also asserted that section 312(a)(7), as the FCC implemented it, violated the first amendment rights of broadcasters because it "unduly circumscrib[ed] their editorial discretion."<sup>59</sup> The Supreme Court of the United States affirmed the decision of the court of appeals, holding that section 312(a)(7) does grant individual candidates a special right of access.<sup>60</sup> The Court found that the FCC's standards are not arbitrary and capricious, and that the FCC's action represents "a reasoned attempt to effectuate the statute's access requirement, giving broadcasters room to exercise their discretion but demanding that they act in good faith."<sup>61</sup> They further held that section 312(a)(7) does not violate the "First Amendment rights of broadcasters by unduly circumscribing their [individual] discretion" but rather balances the first amendment rights of the candidates, the broadcasters, and the public.<sup>62</sup>

### C. FCC v. League of Women Voters: *Combining the Issues*

The Supreme Court made several observations while resolving the section 399 constitutionality question in *League of Women Voters*. First, because Congress directly controls the purse strings of the Corporation for Public Broadcasting, it is possible that stations could become the puppets of politicians. Second, the fairness doctrine, which commercial broadcasters who editorialize use so ef-

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55. *Id.* at 374.

56. *Id.* at 375.

57. *Id.* at 376-77.

58. *Id.* at 378-79.

59. *Id.* at 394.

60. *Id.* at 379.

61. *Id.* at 390.

62. *Id.* at 394. "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Id.* at 395 (quoting *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969)).

fectively, could provide sufficient protection from such governmental bullying. Finally, the public's right to hear all sides of controversial issues plays an important role as well.

Justice Brennan, writing for the majority, first tackled the issues before him by separating the two sentences of section 399, and stating that the Court would not determine the constitutionality of the second sentence. Instead, the Court would sever the Act into two distinct parts: one dealing with editorializing and one with supporting or opposing political candidates.<sup>63</sup>

In addressing the main issue, the Court found that section 399 did not provide a viable solution to the government control problems.<sup>64</sup> The Court reasoned that editorializing by local non-commercial stations would vary greatly in content.<sup>65</sup> If one such station in the Midwest voiced a concept that Congress did not like, it seems highly unlikely that Congress would decide to cut off all funds to public broadcasters.<sup>66</sup> Use of the fairness doctrine could produce the same results in noncommercial television as it has for years in the commercial sector, requiring stations to provide equal time for opposing viewpoints.<sup>67</sup> These reasons caused the Court to hold that section 399 served no substantial interest of Congress, and that it placed too great a restriction on first amendment rights.<sup>68</sup>

### III. ANALYSIS OF THE *League of Women Voters* DECISION

#### A. *Legislative Intent*

When Congress enacted the Public Broadcasting Act of 1967, it sought to use its power under the commerce clause to regulate a scarce national resource, available public broadcasting time.<sup>69</sup> In fact, the "scarcity doctrine" had existed for some time in the realm of broadcasting.<sup>70</sup> In *League of Women Voters*, however, the Court

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63. *League of Women Voters*, 104 S. Ct. at 3113 n.9.

64. *Id.* at 3121-25.

65. *Id.* at 3123.

66. *Cf. Grabow, supra* note 1, at 558-61 (Because federal funding for public broadcasting is minimal, it does not pose a danger of government control.).

67. *Cf. Canby, supra* note 28, at 1150 (private broadcasters must devote part of their broadcast time to public issues).

68. *League of Women Voters*, 104 S. Ct. at 3118. The Supreme Court abandoned the district court's "compelling governmental interest" standard and adopted this "substantial interest" standard. *See infra* text accompanying notes 73-75.

69. *League of Women Voters*, 104 S. Ct. at 3115.

70. The Supreme Court first used the "scarcity doctrine" in 1943 in *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-14 (1943). The doctrine "is based on the

suggested that this doctrine has probably become obsolete with the advent of dozens of cable television stations.<sup>71</sup> Although this doctrine may no longer apply, Congress has retained the power to balance the presentation of information on controversial issues of public interest and importance,<sup>72</sup> within the confines of the first amendment. For commercial broadcasters, the fairness doctrine provided a workable method of balancing the public interest in objectivity and the broadcaster's discretion when presenting editorials. Public broadcasting, however, proved a more complex problem. In the commercial sector, economic factors provide a set of checks and balances that broadcasters must adhere to if they wish to remain in business. They rely exclusively on the income received from advertisers, who hold a wide variety of views. Public broadcasters, at least those affected by section 399, receive funding from at least two sources—private sector organizations or individuals and the federal government via the Corporation for Public Broadcasting. Thus, the theoretical economic balance cannot be struck because the federal government should not, under the first amendment, influence broadcasters' material.

The district court, taking these arguments into consideration, found that it should look for a "compelling" governmental interest when reviewing the contents of section 399.<sup>73</sup> Justice Brennan stated that although this appears correct at first blush, the broadcasting industry presents unusual and specific problems. The government argued that the problem of "spectrum scarcity" provides the necessity for regulating all broadcasters' power to editorialize.<sup>74</sup> In addition, noncommercial broadcasting provides the additional factor of being the only medium that has the "programming excellence and diversity that the commercial sector could not or would not produce."<sup>75</sup> The Court gave little credence to the spectrum scarcity doctrine, concentrating instead on its past decisions in all areas of media regulation.

Citing *Mills v. Alabama*<sup>76</sup> and *Miami Herald Publishing Co. v.*

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premise that the electromagnetic broadcast spectrum is a valuable public resource in scarce supply." Grabow, *supra* note 1, at 552. The government's failure to regulate would supposedly cause signal interference. *Id.* at 553.

71. *League of Women Voters*, 104 S. Ct. at 3115.

72. *Id.* at 3116.

73. *Id.* at 3115.

74. *Id.*

75. *Id.*

76. 384 U.S. 214 (1966).

*Tornillo*,<sup>77</sup> the Court stated that if a ban on editorializing were applied to print media, it would clearly violate the first amendment, and that the Court would immediately declare such a provision unconstitutional.<sup>78</sup> The broadcast medium does not always present the same issues as the print media, however, and the Court has on previous occasions recognized that “‘differences in the characteristics of new media justify differences in the first amendment standards applied to them.’”<sup>79</sup> Thus, Congress, through the commerce clause, has the power to “seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations.”<sup>80</sup>

On the other hand, the journalistic freedom given to broadcasters should stay as broad as possible. Decisions such as *CBS v. FCC*<sup>81</sup> are indicative of the Court’s attempts to maintain the broad scope of broadcasters’ first amendment rights. In that case, the Court held that broadcasters are entitled to exercise “the widest journalistic freedom consistent with their public [duties].”<sup>82</sup>

Justice Brennan concluded from these prior decisions that Congress has a substantial but not compelling interest in the regulation of public broadcasters.<sup>83</sup> Even using the substantial interest test, the Court found that the editorial ban surpassed the limits of Congress’s power, and declared it unconstitutional.<sup>84</sup>

### B. *The Majority’s Compromise*

The Court, in its discussion, compromised both conclusions and, in some instances, precedent, to unite the requisite five judges needed for a majority. First, Justice Brennan stated that the suppression of speech was content-based, that the ban on editorializ-

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77. 418 U.S. 241 (1974).

78. *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3115-16 (1984).

79. *Id.* at 3116 (quoting *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 386 (1969)).

80. *Id.*

81. 453 U.S. 367 (1981).

82. *Id.* at 395; see also *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 124-27 (1973).

83. *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3117-18 (1984); see *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 377 (1968).

84. *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3129 (1984). “In sum, § 399’s broad ban on all editorializing by every station that receives CPB funds far exceeds what is necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of government.” *Id.* at 3126.

ing was based on the subject matter of the suppressed speech, and that such a ban denied first amendment rights.<sup>85</sup> Justice Brennan cited *Consolidated Edison v. Public Service Commission*<sup>86</sup> for the proposition that such a ban demonstrates the clearest form of unconstitutional censorship.<sup>87</sup> In *Consolidated*, a public utility enclosed in its monthly electric bills a pamphlet entitled "Independence is Still a Goal, and Nuclear Power is Needed to Win the Battle."<sup>88</sup> Two months later, the Natural Resources Defense Council (NRDC) requested that Consolidated include a rebuttal in its next bill mailing. When Consolidated refused, NRDC asked the Public Service Commission of New York to intervene. The Commission denied NRDC's request, but subsequently forbade the utilities in New York from discussing political matters in bill inserts.<sup>89</sup> The Supreme Court declared the Commission's move unconstitutional. As Justice Stevens pointed out in his *League of Women Voters* dissent, however, the statement that Justice Brennan quoted was from Stevens's concurrence in *Consolidated*, and it referred to suppression of statements of a *particular point of view*, whereas section 399's ban on editorials is completely neutral, disallowing statements of opinion regardless of what that opinion may be.<sup>90</sup>

The Court's second major argument appears more logical. When the Carnegie Commission first filed its report on public television, and Congress patterned the Public Broadcasting Act after its recommendations, the Act was full of safeguards to prevent direct government interference with public television management. First, Congress designed the Corporation for Public Broadcasting to facilitate freedom from government intervention.<sup>91</sup> Second, the

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85. *Id.* at 3119-20.

86. 447 U.S. 530 (1980).

87. "A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'" *Id.* at 546.

88. *Id.* at 532.

89. *Id.*

90. As Justice Stevens points out in his *League of Women Voters* dissent, *Consolidated* addressed the problem of regulations designed to stop particular groups from espousing a *particular point of view*—such as the public utilities in *Consolidated* espousing the pros of nuclear power. *League of Women Voters*, 104 S. Ct. at 3137-38. Section 399, on the other hand, suppresses a certain *type* of speech—editorials—regardless of their content. *Id.*

91. The corporation's directors are not government employees, and no more than half may belong to the same political party. In addition, the corporation may not own or operate any stations of its own; thus, no station falls under direct federal control. See *supra* note 19 and accompanying text.

fairness doctrine applies to both public and private stations that present controversial programming.<sup>92</sup> In addition, case law determined when a station could refuse air time to political candidates. The most dramatic example of the Supreme Court upholding such a denial of free speech is *CBS v. Democratic National Committee*.<sup>93</sup> There, the Supreme Court upheld the FCC's refusal to require broadcasters to accept all paid political advertisements. The *Red Lion* Court held that as long as both sides are represented in some manner, the first amendment requirement is met.<sup>94</sup> Finally, the district court in *Accuracy in Media, Inc. v. FCC*<sup>95</sup> held that the Corporation for Public Broadcasting is not required to make sure that its stations provide programming that is unbiased and objective.<sup>96</sup>

Another safeguard in the Act allows Congress to give long-term appropriations of funds rather than yearly allotments.<sup>97</sup> This budgeting technique helps ensure that public stations do not suffer a loss of funding if they choose to espouse a point of view with which Congress does not agree.<sup>98</sup> In the Court's view, the risk of such an occurrence is "speculative" at best because Congress would not refuse funding to hundreds of stations because a handful held views that were unpopular with legislators.<sup>99</sup>

The Court suggested that a major threat to Congress comes in the form of nationally produced and distributed programs, which could potentially reach a much larger audience than local station editorials.<sup>100</sup> Yet, section 399 does not contemplate this issue at all because only local station opinions are forbidden, not station programs specifically addressing controversial issues.<sup>101</sup>

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92. See *supra* text accompanying notes 29 and 31.

93. 412 U.S. 94 (1973).

94. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 378 (1969).

95. 521 F.2d 288 (D.C. Cir. 1975).

96. *Id.* at 297.

97. See *supra* note 37.

98. See *id.*

99. *League of Women Voters*, 104 S. Ct. at 3123.

100. *Id.* at 3124.

101. The majority ignores the suggestion that perhaps Congress was not concerned with programs of national scope when it drafted § 399 but was only interested in keeping public broadcasters from using federal funds to produce and broadcast opinions that legislators or taxpayers might not favor. Justice Rehnquist, dissenting, stated:

[I]t is entirely rational for Congress to have wished to avoid the appearance of government sponsorship of a particular view or a particular political candidate. . . . Nor has it prevented public stations from airing programs, documentaries, interviews, etc. dealing with controversial subjects, so long as management itself does not expressly endorse a particular viewpoint.

The majority quickly dismissed another government contention in support of section 399. Because stations retain the freedom to express opinions through program and interview selection, and because they choose the format under which news is presented, the government suggested that section 399 does not deny public stations freedom of speech. Justice Brennan answered that if that is true, section 399 does not advance any substantial governmental interest.<sup>102</sup>

The majority's conclusion, however, logically does not follow the premise. If Congress denied stations the freedom to editorialize to avoid the possibility of trapping them into situations in which government dictates their opinions but specifically allowed them the freedom to state their opinions in ways that could not become vehicles for government propaganda, then it would seem that section 399 provides a solution to a problem of potential magnitude. Public broadcasters, under section 399, need not worry about tailoring their opinions to those of local, state, or federal government officials; they simply may not present those opinions in editorial form.

The government's final argument was that Congress's spending power provides the authority for section 399. In *Regan v. Taxation With Representation*<sup>103</sup> (*TWR*), the Supreme Court interpreted sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code to allow organizations seeking to engage in lobbying to establish separate affiliates for nonlobbying and lobbying activities and still claim a tax exemption for both under the respective provisions.<sup>104</sup> Taxation With Representation is an organization that promotes its view of the "public interest" on matters involving federal taxation. It attempted to take tax exempt status under section 501(c)(3) because the corporation was formed by combining a section 501(c)(3) tax-exempt organization with a section 501(c)(4) tax-exempt company. Internal Revenue Service denied the exemption because it appeared that a substantial part of the corporation's activities would involve influencing legislation, a factor that rendered

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*Id.* at 3129, 3132 (Rehnquist, J., dissenting).

102. *Id.* at 3126.

103. 461 U.S. 540 (1983).

104. *Id.* at 544. In *TWR*, however, the corporation was able to split its functions in two parts, forming lobbying affiliates and nonlobbying affiliates. In *League of Women Voters*, all Justices are in agreement that the facts are substantially different—a station receiving even 1% of its funding from the Corporation for Public Broadcasting is completely barred from editorializing. *League of Women Voters*, 104 S. Ct. at 3128.

it ineligible for tax-exempt status under section 501(c)(3).<sup>105</sup>

Using *TWR* as a model, Justice Brennan suggested that a revised form of section 399, permitting noncommercial stations to establish "affiliate" organizations responsible for all editorial functions, would meet the Court's approval.<sup>106</sup> Because the Court has no authority to revise section 399, however, the majority declared that *TWR* was not binding.<sup>107</sup>

Justice Rehnquist took a different view in dissent. He stated that although the right to lobby is constitutional, the Court rejected the "contention that Congress' decision not to subsidize lobbying violates the First Amendment."<sup>108</sup> The Justice equated the situation in *TWR* with the *League of Women Voters* dilemma: because Congress subsidized these public broadcasters, they also would subsidize their editorial activities.

#### IV. THE SIGNIFICANCE OF *League of Women Voters*

*FCC v. League of Women Voters* gives public broadcasters the power to editorialize on any issue. But what have broadcasters really gained? Prior to this decision, any noncommercial public broadcaster could express its opinions through selection of programs, presentation of news items, and presentation of editorials by individuals. As a result of *League of Women Voters*, a broadcaster may state that its editorials represent the opinion of the management, and it must provide equal reply time to any group or individual who disagrees. This lends validity to the majority's statement that section 399 appears to merely limit free speech without providing any benefit. Yet, Justice Stevens's opening remark in his dissenting opinion, which suggested that psychological propagandizing exists everywhere, is equally plausible.<sup>109</sup>

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105. *TWR*, 461 U.S. at 541-42.

106. *League of Women Voters*, 104 S. Ct. at 3128.

107. *Id.*

108. *Id.* at 3129, 3131 (Rehnquist, J., dissenting). Rehnquist also pointed out that the *TWR* majority held that strict judicial scrutiny is not necessary when Congress chooses to "subsidize some speech but not other speech," because this is a valid use of Congress's spending power. *Id.* at 3131.

109. The court jester who mocks the King must choose his words with great care.

. . . The child who wants a new toy does not preface his request with a comment on how fat his mother is. . . . Elected officials may remember how their elections were financed. By enacting the statutory provision that the Court invalidates today, a sophisticated group of legislators expressed a concern about the potential impact of government funds on pervasive and powerful organs of mass communication.

*Id.* at 3133 (Stevens, J., dissenting).

Although public broadcasters may have achieved a limited victory, one of the plaintiffs in *League of Women Voters*, and the class he represented, did gain something of substance. Henry Waxman personified the group that uses public broadcasting, and this group of individuals has gained the right to *hear* the opinions of public broadcasters, uninfluenced by commercial advertisers. Perhaps Justice Brennan saw this as the ultimate achievement—one worth the creative reasoning he used to ensure a majority agreed with him.

The Court succeeded in writing a mildly liberal opinion in favor of first amendment rights, but in doing so, it has attempted to limit Congress's spending power. In addition, Justice Brennan seemed obsessed with suggesting ways in which Congress could resurrect section 399, rather than destroy it.

Unfortunately, the most obvious point of dissension among the majority, and between Justices Rehnquist and Stevens, was a question that will always yield valid arguments both ways. Freedom of speech has been a vital part of American philosophy since the Revolution, but the fear of the government disseminating propaganda through the media is the stuff of political nightmares. Just how much restraint section 399 placed on educational broadcasters remains to be seen. Given the Court's liberal use of suggestions on how to take the sting out of the editorial ban while still allowing Congress to retain some control over its purse strings, it seems likely that future legislation is forthcoming and that the viewing public has not seen the last of section 399.<sup>110</sup>

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110. Congress's most likely course of action will be to utilize one of the suggestions made in the majority opinion. A disclaimer requirement could accomplish the same goal as § 399. Brennan suggested that if all public station managements would broadcast a disclaimer stating that editorial views do not reflect those of the government, then they could voice any opinion without congressional retaliation. *League of Women Voters*, 104 S. Ct. at 3125. This could merely circumvent the problem, however, if public broadcasters fear that disapproving congressmen would cut funding regardless of whose opinions were aired. Congress, if it is to rewrite § 399, must choose its words carefully.