

FREEDOM BY DESIGN: OBJECTIVE ANALYSIS AND THE CONSTITUTIONAL STATUS OF PUBLIC BROADCASTING

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INTRODUCTION

Since the 1980s, the institution of public broadcasting has been subject to continuing criticism, particularly by those who are concerned that it is ideologically biased.¹ In 2005, public broadcasting was in the limelight yet again when it was discovered that the Chairman of the Corporation for Public Broadcasting (CPB), Kenneth Tomlinson, secretly hired a consultant to monitor PBS programming for partisan biases.² In the name of “balance,”³ Tomlinson’s project examined the programs of Bill Moyers, Tavis Smiley, and Diane Reihm, and rated their guests according to whether they were liberal or conservative.⁴ Related (and perhaps more obviously alarming)

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¹ See Editorial, *Squelching Public Broadcasting*, N.Y. TIMES, June 15, 2005, at A22 (noting Newt Gingrich’s efforts ten years before to eliminate funding for public broadcasting because of its “liberal bias,” and reporting on continuing attacks on the organization).

² See Lisa de Moraes, *Scrutiny of Broadcast Agency Chief Intensifies*, WASH. POST, July 13, 2005, at C1 (describing growing concern among members of Congress about the project’s examination of the “political leanings” of guests on certain public broadcasting programs).

³ The Corporation for Public Broadcasting has statutory authority to facilitate the development of programming “with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature.” 47 U.S.C. § 396(g)(1)(A) (2000). Tomlinson relied on this “balance” justification to explain his activities, which included pushing PBS to create a conservative talk show featuring editorialists from the *Wall Street Journal*. See Editorial, *Politicizing Public Broadcasting*, N.Y. TIMES, May 4, 2005, at A22 (noting that as a result of his efforts, many stations took on both *Now with Bill Moyers* and the *Wall Street Journal* show).

⁴ CORP. FOR PUB. BROAD. OFFICE OF INSPECTOR GENERAL, REVIEW OF ALLEGED ACTIONS VIOLATING THE PUBLIC BROADCASTING ACT OF 1967, AS AMENDED, REP. NO. EPB503-602, at 8 (Nov. 15, 2005).

categories asked whether program guests were pro- or anti-administration, as well as “pro-Bush versus anti-Bush.”⁵

After a report on the impropriety of Tomlinson’s activities by the CPB’s Inspector General, Tomlinson resigned from his post.⁶ Public concerns have not abated with his departure, though. While some see more political pressure on the horizon because of the Republican-dominated CPB board,⁷ others may simply note these are difficulties inherent in the institution of public broadcasting, regardless of its partisan makeup.⁸ Regardless of the argument, however, it is clear that the interplay between governance and programming content choices raises salient First Amendment issues of editorial autonomy and independence from government influence.⁹

While the incident leading to Tomlinson’s departure may not itself present a justiciable issue, it points to a significant dilemma related to the structure of public broadcasting. That is, the system is supposed to be independent, yet nearly half of the state public broadcasters are run by the government, and the President appoints the leadership of the CPB. As a result, the possibility appears to remain that ruling political interests could exercise significant influence on the system by regulating speech directly, or indirectly through funding conditions. In developing noncommercial broadcasting institutions, however, Congress clearly intended to insulate programming

⁵ *Id.*

⁶ See Paul Farhi, *Kenneth Tomlinson Quits Public Broadcasting Board*, WASH. POST, Nov. 4, 2005, at C1 (providing an overview of the reasons for which Tomlinson was asked to leave, after the release of the Inspector General’s report).

⁷ See Editorial, *Public Broadcasting’s Enemy Within*, N.Y. TIMES, Nov. 28, 2005, at A18 (describing Tomlinson’s political ties to the Republican party and noting that Republicans still control the CPB).

⁸ See, e.g., Editorial, *Liberate PBS*, CHI. TRIB., May 9, 2005, at A14 (positing that, because of the declining quality of programming in a landscape with many more channels than thirty years ago, federal funding of public broadcasting is more trouble than it’s worth).

⁹ Though this Comment will focus on the American system of public broadcasting, it is worthwhile to note that the problem of corporate governance with respect to public broadcasting affects other countries’ systems as well. See David Liddiment, *Television: Providing a Popular Public Service*, THE GUARDIAN (London), Mar. 14, 2005, at 8 (“[P]ress comment has focused on structural matters, in particular whether re-engineering the BBC governors into a Trust will fix the conflict of interest at the heart of BBC governance.”). This may suggest that the problems raised here regarding the separation of editorial decision making from political pressures (or lack thereof) are inherent in the very concept of public broadcasting. However, this phenomenon is outside the scope of this Comment.

decisions from such pressures, so that individual broadcasters could freely pursue the variety of social roles for public broadcasting.

This Comment argues that the Supreme Court's traditional First Amendment analysis cannot provide a solution to this potential contradiction. By embracing an analysis of speech restrictions that focuses on the objective characteristics of the institution in which the speech occurs, however, the Court can preserve the autonomy of public broadcasters and make protection of speech more robust under its precedents. Furthermore, when applied at the state and federal levels of public broadcasting, such an approach may lead to the conclusion that programming decisions made to advance partisan interests are presumptively invalid under the First Amendment.

Part I of this Comment provides a brief overview of the social roles and functions of the public broadcasting system in the United States and considers how that system came into existence. Part II explains why the Supreme Court's traditional First Amendment jurisprudence is poorly equipped to address issues that might exist in reality or in theory. Taking off from the Court's opinions in *FCC v. League of Women Voters of California* and *Arkansas Education Television Commission v. Forbes*, Part III then proposes a First Amendment approach that considers the objective characteristics of how an institution is organized to determine how the Court's precedents should apply to it. Part IV then applies this approach to the U.S. public broadcasting system at both the federal and state levels, examining the Corporation for Public Broadcasting and New Jersey public television as case studies. Finally, Part V offers a brief summary and conclusion.

I. PUBLIC BROADCASTING IN THE UNITED STATES: HISTORY AND OVERVIEW

A. *The Structure of the Public Broadcasting Institution*

The American system of public broadcasting operates at three interconnected levels.¹⁰ First, individual noncommercial stations make up the local "bottom" level. These stations receive their broadcast licenses from the Federal Communications Commission (FCC) and are subject to the same regulations as commercial broadcasters, though

¹⁰ Because these three levels are so firmly linked together, in this Comment I will refer to the entire chain described here as the "public broadcasting system" or the "public broadcasting institution." I do not intend to confuse it with the second link in that chain—the Public Broadcasting System—which is described *infra* Part IV.

they receive some special treatment in the form of mandated carriage on cable and satellite distribution systems.¹¹ These stations are often licensed to universities and community organizations but are also held by executive agencies within the state governments.¹²

Second, at the national level, most of these local noncommercial licensees are members of the Public Broadcasting System (PBS), an ostensibly private, nonprofit corporation.¹³ PBS's primary mission is acquiring programming for distribution to its member broadcasters and providing fundraising, promotional, and logistical support.¹⁴ PBS makes its own decisions about what programming will be made available;¹⁵ the decision of whether to broadcast that content, however, is ultimately made by each individual station, based on its own needs.¹⁶ In addition to the programming they receive from PBS, local stations can create their own programming as well.¹⁷

Finally, the Corporation for Public Broadcasting (CPB) is, first and foremost, the funding arm of the public broadcasting institution.¹⁸ Its primary mission is to provide support for local noncommercial stations by financing the development of quality program-

¹¹ LAURA R. LINDER, PUBLIC ACCESS TELEVISION: AMERICA'S ELECTRONIC SOAPBOX 7-13 (1999) (discussing the FCC's role in regulating public broadcast television amidst strong growth of local stations).

¹² Thirteen states have public broadcasting systems overseen by state government agencies or commissions. See *infra* note 120 and accompanying text.

¹³ For the sake of clarity, I am focusing on public broadcast television. Noncommercial radio in the United States is structured very similarly; its programming is distributed by National Public Radio (NPR) and, like PBS, is funded in part by the Corporation for Public Broadcasting.

¹⁴ The package of programming sent to local stations is called the National Programming Service. PBS does not create any programming itself, and its programs are compiled from individual member stations and outside content producers. See Public Broadcasting Service, About PBS: Corporate Facts, http://www.pbs.org/aboutpbs/aboutpbs_corp.html (last visited Feb. 15, 2007) (providing an overview of PBS's member stations, audience, and programming activities).

¹⁵ *Id.*

¹⁶ See Public Broadcasting Service, About PBS: FAQs, http://www.pbs.org/aboutpbs/aboutpbs_faqsanswers.html (last visited Feb. 15, 2007) (noting that each PBS member station "schedules [its] programming independently").

¹⁷ See, e.g., About WHY, <http://www.whyy.org/about/> (last visited Feb. 15, 2007) (noting that WHY, the Philadelphia public broadcaster, creates both local and national programming).

¹⁸ See 47 U.S.C. § 396(g)(2) (2000) (authorizing the distribution of federal funds to noncommercial television stations and content providers).

ming and providing logistical and technological support.¹⁹ To that end, the CPB funds station initiatives aimed at determining how non-commercial stations can better serve their local communities and ensures that the programming it finances also serves community needs.²⁰ In supporting the development of content, the CPB seeks to further three particular interests: (1) providing children's programming with a high educational value, (2) serving "underserved audiences," and (3) contributing to a better-informed citizenry at the national and local levels.²¹ In addition to financial support, the CPB engages in research endeavors to help guide ongoing federal investment in public broadcasting.

B. *The Public Broadcasting Act of 1967: Constructing a National Institution*

With the creation of a regime for federal support of noncommercial broadcasting, Congress intended to maximize the editorial autonomy of individual stations and eliminate the possibility that government—particularly ruling majority parties—could influence content decisions, directly or indirectly. At the time of the enactment of the Public Broadcasting Act of 1967, the role that this noncommercial regime was to play in society was not clearly defined, though the possibilities abounded. As such, legislators offered numerous purposes for noncommercial broadcasting without clearly adopting one or linking them together in some way. Rather, the Act focused primarily on the structural creation of an autonomous entity in the CPB, perhaps suggesting that it is for the broadcasters themselves to best determine their social function by how they choose to operate.

1. Defining the Role of the Public Broadcaster

Myriad justifications for public service broadcasting orbit the universe of media theory, but they all largely revolve around the idea of market failure. Put simply, market pressures drive private, commercial broadcasters to underproduce certain types of content that are thought to be valuable for society.²² With a system of noncommercial

¹⁹ Corporation for Public Broadcasting, CPB: Goals and Objectives, http://www.cpb.org/aboutcpb/goals/goalsandobjectives/goalsandobjectives_full.html (last visited Feb. 15, 2007).

²⁰ *Id.*

²¹ *Id.*

²² See generally ROGER G. NOLL ET AL., ECONOMIC ASPECTS OF TELEVISION REGULATION 7-19 (1973) (noting the economic challenges of public broadcasting); C. Edwin

broadcasting, the government can address this problem by removing the pressures of an advertising-driven market and by generally prescribing the type of content to be provided.

Beyond that, however, how the specific social role or function of the public broadcaster should be defined appears open for debate. Communications scholar Monroe Price, for instance, has offered four possible definitions for public television: (1) as a “Lifeline,” which posits that noncommercial television assumes the “residue” of unserved public interest obligations from commercial broadcasting;²³ (2) “National Identity,” under which the broadcast system participates in the creation of a nation-wide cultural identity; (3) “Minority Satisfaction,” under which the broadcaster provides a voice for underserved minorities so that they may feel included in society; and (4) “Public Sphere,” which sees the function of noncommercial broadcasting as an “instrument of civil society” to facilitate deliberative political debate.²⁴ Noncommercial television may also simply be an effective way to ensure that the public has access to programming that takes creative risks and seeks to achieve a higher level of quality and inspiration.²⁵

2. Building an Autonomous Institution: Passage of the 1967 Act

With the passage of the Public Broadcasting Act of 1967 (1967 Act),²⁶ which created the Corporation for Public Broadcasting, Congress sought to correct the “market failure” of commercial broadcasting and, in so doing, provided at least some definition to the role that noncommercial broadcasters should play.²⁷ Though local noncom-

Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2113-14 (1992) (discussing the dominance and importance of advertising in eighteenth-century newspapers); Howard A. White, *Fine Tuning the Federal Government's Role in Public Broadcasting*, 46 FED. COMM. L.J. 491, 496-97 (1994) (describing the Ford Foundation's efforts to promote educational broadcasting).

²³ Monroe E. Price, *Public Broadcasting and the Crisis of Corporate Governance*, 17 CARDOZO ARTS & ENT. L.J. 417, 427 (1999). Defining public broadcasters based on this “Lifeline” idea would create the opportunity for commercial broadcasters to shed their existing public interest obligations altogether. *Id.*

²⁴ *Id.* at 427-28.

²⁵ See Meredith C. Hightower, *Beyond Lights and Wires in a Box: Ensuring the Existence of Public Television*, 3 J.L. & POL'Y 133, 137 (1994) (addressing the major aims of promoting public television).

²⁶ Pub. L. No. 90-129, 81 Stat. 365 (codified as amended at 47 U.S.C. §§ 390-399 (2000)).

²⁷ See William D. Rowland Jr., *Public Service Broadcasting in the United States: Its Mandate, Institutions, and Conflicts*, in PUBLIC SERVICE BROADCASTING IN A MULTICHANNEL

mercial stations had existed—and received support from the federal government²⁸—for years, by the late 1960s it appeared that these stations’ programming efforts were impaired by a lack of funding.²⁹ In response to this problem, the Carnegie Corporation sponsored a Congress-supported commission to investigate the status of noncommercial broadcasting nationwide.³⁰ In light of its findings that financially healthy local stations would be essential to expanded noncommercial broadcasting, the Carnegie Commission called for federal funding to supplement existing state and private financing mechanisms.³¹ The Carnegie report also coined the term “public television,” not to distinguish it as the converse to private commercial broadcasters, but to embody a wide range of political, cultural, and educational programming.³²

Responding favorably to the Carnegie Commission’s recommendations, Congress passed the 1967 Act, which created a platform for the nationwide public broadcasting institution we know today. In so doing, Congress hoped to promote the growth of noncommercial broadcasting to serve, *inter alia*, “instructional, educational, and cultural purposes.”³³ The 1967 Act by its terms asserts several apparent roles for public broadcasting in the United States. In its policy declaration, Congress sought to promote the “general welfare” through broadcaster responsiveness to the “interests of people . . . in particular localities” and the provision of “alternative” services nationwide.³⁴ It also asserted the public interest in “encourag[ing] the development of

ENVIRONMENT: THE HISTORY AND SURVIVAL OF AN IDEAL 157, 160-61 (Robert K. Avery ed., 1993) (examining Congress’s role in the future direction and mandate of the purpose of noncommercial television).

²⁸ Congress first posited a national system to support noncommercial educational stations in the Communications Act of 1934. *See id.* The FCC provided further support for these stations in the 1950s when it set aside 242 channels strictly for noncommercial educational purposes. *See In re Amendment of Section 3.606 of the Commission’s Rules and Regulations*, 41 F.C.C. 148, 158 (1952) (sixth report and order) (providing 80 VHF and 162 UHF stations for noncommercial use). Then, in 1962, Congress expanded its support for public broadcasting by offering limited funding for educational television with the Educational Television Facilities Act of 1962. Pub. L. No. 87-447, 76 Stat. 64 (codified as amended at 47 U.S.C. §§ 390-395 (2000)).

²⁹ *See Rowland, supra* note 27, at 172-181 (addressing the state of funding for public broadcasting before the Carnegie Commission).

³⁰ *See generally* CARNEGIE COMM’N ON EDUC. TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION (1967).

³¹ *Id.* at 33-37.

³² *Id.* at 1.

³³ 47 U.S.C. § 396(a)(1) (2000).

³⁴ *Id.* § 396(a)(5).

programming that . . . addresses the needs of unserved and underserved audiences, particularly children and minorities.”³⁵

Underlying all of these interests was also an appeal for programming of particularly high quality, perhaps implicitly acknowledging a market failure in this regard. The Senate noted that programming must “approach the highest possible production standards,”³⁶ and President Lyndon Johnson hoped that the CPB would assist stations “who aim for the best in broadcasting.”³⁷ Furthermore, the Senate asserted that “noncommercial broadcasting is uniquely fitted to offer in-depth coverage and analysis which will lead to a better informed and enlightened public.”³⁸

These varied propositions all resonate in three of the different definitional approaches identified by Professor Price³⁹ and indicate that legislators did not contemplate one all-encompassing definitional framework. The commitment to localism may be a “residual” public interest “Lifeline” obligation that commercial broadcasters fail to serve. Second, providing programming for underserved minorities certainly gets directly at the “Minority Satisfaction” definition. Third, creating a “better informed and enlightened” citizenry serves Price’s “Public Sphere” model.

Aside from the legislature’s broad normative discussion of the aims of public broadcasting, however, the 1967 Act did not focus on precisely defining the role of that institution. Rather, the main feature of the Act was its creation of the Corporation for Public Broadcasting, for the purpose of “facilitat[ing] the development of public telecommunications and to afford maximum protection from extraneous interference and control.”⁴⁰ Indeed, in both the legislative history and statutory text, lawmakers concentrated on providing this independence from government interference with the public broadcasting institution. In signing the 1967 Act, President Johnson asserted that the CPB must be “carefully guarded from government or

³⁵ *Id.* § 396(a)(6).

³⁶ S. REP. NO. 90-222, at 7 (1967).

³⁷ 113 CONG. REC. 23, 31587 (daily ed. Nov. 7, 1967) (President Johnson’s statements at the signing of the 1967 Act).

³⁸ S. REP. NO. 90-222, at 7.

³⁹ See *supra* notes 23-24 and accompanying text.

⁴⁰ 47 U.S.C. § 396(a)(10) (2000).

party control,”⁴¹ and Senator John Pastore, in a Senate Report, explained that “it is our intention that local stations be absolutely free to determine for themselves what they should or should not broadcast.”⁴² The Senate Report particularly emphasized the need for autonomy in programming choices at the local level, stating that “[l]ocal autonomy of stations and diversity of program sources will provide operational safeguards to assure the democratic functioning of the system.”⁴³

To maximize the insulation of programming decisions from political pressures, the 1967 Act created, in the CPB, a “nonprofit corporation . . . which will not be an agency or establishment of the United States Government.”⁴⁴ The statute set out the structure of the Corporation by creating a Board of Directors and detailing how its directors and officers would be selected.⁴⁵ The 1967 Act further ensured that political affiliation could not be a factor in the President’s choice of board members.⁴⁶ Congress then gave fuller effect to the CPB’s independence by establishing a trust for it in the Treasury Department, allowing funds to flow directly to the CPB.⁴⁷

In providing the framework for a national public broadcasting system, Congress clearly intended for the institution—from the CPB at the federal level down to the individual local station—to have the utmost independence from government influence. Indeed, editorial autonomy and insulation from political pressures constituted the one aspect of public broadcasting about which lawmakers appeared so certain that they built it into the structure of the national system. Many ideas about the social role of noncommercial broadcasting were presented, but none were embraced as clearly as the notion that whatever their role, the broadcasters should have the freedom to choose their

⁴¹ 113 CONG. REC. 23, 31587; *see also* S. REP. NO. 90-222, at 11 (“Noncommercial television . . . must be absolutely free from any Federal Government interference over programming.”).

⁴² S. REP. NO. 90-222, at 11.

⁴³ *Id.* at 7-8.

⁴⁴ 47 U.S.C. § 396(b) (2000).

⁴⁵ *See id.* § 396(c) (outlining the appointment and structure of the CPB Board of Directors).

⁴⁶ *See id.* § 396(c)(2) (prohibiting board members from being employees of the United States).

⁴⁷ *See* Patricia M. Chuh, *The Fate of Public Broadcasting in the Face of Federal Funding Cuts*, 3 *COMMLAW CONSPECTUS* 207, 210 (1995) (describing the changes made to public broadcasting during the Carter administration, such as the establishment of a trust fund with the Treasury).

own programming—and perhaps even their social and cultural mission—free from government pressure.

II. INDEPENDENCE DENIED? THE FAILURE OF TRADITIONAL FIRST AMENDMENT ANALYSIS FOR PUBLIC BROADCASTING

Despite legislative emphasis on the fact that public broadcasting should be free from government influence, Supreme Court precedent indicates that the Court would consider the CPB to be a part of the government for First Amendment purposes. The immediate implication is clear: the First Amendment asserts that “Congress shall make no law . . . abridging the freedom of speech,”⁴⁸ and the Court has extended this limitation to all of government. Thus, decisions by a CPB considered to be a government entity could be subject to judicial scrutiny. Furthermore, numerous decisions made at the local level (the “bottom” tier of the system) could also raise First Amendment questions because many stations are administered directly by state governments.⁴⁹ Subjecting public broadcasters to traditional First Amendment scrutiny, however, would lead to results that belie the intended independence of the noncommercial system. Such a result may therefore call for an alternative constitutional approach to analyses of public broadcasting.

A. *The Corporation for Public Broadcasting as Government Entity*

Although it has the title of a nonprofit “corporation” and Congress clearly did *not* intend for it to be considered a government agency, the CPB’s constitutional status remains somewhat questionable. The General Accounting Office, for instance, included the CPB in its *Profiles of Existing Government Corporations*, indicating that it sees the entity as an independent part of the executive branch, similar to the U.S. Postal Service or the Legal Services Corporation.⁵⁰ Furthermore, under Supreme Court analysis of whether an entity is a gov-

⁴⁸ U.S. CONST. amend. I.

⁴⁹ See *infra* Part IV (listing the states whose public broadcasters are run by government agencies).

⁵⁰ See U.S. GEN. ACCOUNTING OFFICE, GOVERNMENT CORPORATIONS: PROFILES OF EXISTING GOVERNMENT CORPORATIONS 160 (1996); see also Chris Johnson, Comment, *Federal Support of Public Broadcasting: Not Quite What LBJ Had in Mind*, 8 COMMLAW CONSPICUOUS 135, 140-41 (2000) (suggesting that based on its inclusion of the CPB in the report, the General Accounting Office considered the CPB to be a government corporation).

ernment agency for First Amendment purposes, there is strong evidence that the Constitution would consider the CPB a state actor.

The Court has implied that for First Amendment analysis, it would consider the CPB to be a part of the government. In *Lebron v. National Passenger Railroad Corp.*, the Court held that it considers a government corporation, in that case Amtrak, part of the federal government if it has been created by special law for the “furtherance of governmental objectives” and if the government has retained power to appoint a majority of its board of directors.⁵¹ The CPB certainly appears to satisfy these requirements, as it was established by the Public Broadcasting Act of 1967⁵² and the President appoints its entire board of directors.⁵³ Indeed, in determining that Amtrak was part of the government in the eyes of the First Amendment, *Lebron* specifically identified the CPB as a point of comparison.⁵⁴ Although Amtrak claimed that its charter’s disclaimer of agency status prevents it from attaining governmental status, the Court rejected that argument and held that the First Amendment could place limits on Amtrak’s speech-restrictive activity.⁵⁵ Under this analysis, the fact that the 1967 Act asserts that it is not a government agency likely would not save the CPB from a judicial determination that it is part of the government for First Amendment purposes.

B. *First Amendment Implications of Government Agency Status*

With this potential government status in mind, under traditional Supreme Court analysis, application of the Court’s First Amendment precedents creates results that frustrate congressional intent and the goals of noncommercial broadcasting. The two potential forms of government action in this space that would raise First Amendment questions are (1) direct regulation of programming choices, either by the federal legislature or executive branch, or by state public television agencies; and (2) placing conditions on funding to public broad-

⁵¹ 513 U.S. 374, 400 (1995).

⁵² See 47 U.S.C. § 396(b) (2000) (authorizing the establishment of the CPB).

⁵³ See *id.* § 396(c) (providing that the President shall appoint the nine-member board of directors, with the “advice and consent” of the Senate).

⁵⁴ *Lebron*, 513 U.S. at 391. The Court also put the Legal Services Corporation in the same group of “government corporations” as the CPB, *id.*, just as the General Accounting Office had done in its report.

⁵⁵ See *id.* at 392. The Court then remanded for a determination of whether Amtrak abridged the plaintiff’s speech by censoring an advertisement on an Amtrak-owned billboard. *Id.* at 400.

casters that limit their content decision making. Unfortunately, because of its extreme deference to government, the Supreme Court's public forum analysis is unhelpful in fulfilling congressional intent. Application of public forum and government speech doctrines would lead to the result that the public broadcaster's autonomy could be constitutionally abridged. Likewise, while the Court's approach to funding conditions under *Legal Services Corp. v. Velazquez*⁵⁶ initially appears to protect the editorial functions of the public broadcaster, it does not do enough to protect institutional independence either.

1. The Limitations of Public Forum Analysis and Government Employment Cases

a. *Speech on Government Property: Public Forum Doctrine*

A direct restriction on the editorial choices of a public broadcaster is the most plausible form of action taken by a state public broadcasting authority administering its stations. Ordinarily, in a situation where the government owns or operates particular property, the Court applies public forum analysis to an abridgement of speech within that space. Under this "public forum doctrine," the Court decides whether the government property on which the speech occurs is (1) a "traditional public forum," (2) a "designated public forum," or (3) a "nonpublic forum."⁵⁷

Public property is a "traditional" public forum if it has "immemorably been held in trust for the use of the public," like a street or public park.⁵⁸ Direct regulations of speech in a traditional public forum must survive strict scrutiny review, and restrictions on the time, place, or manner of the speech must be narrowly tailored to a "significant government interest, and leave open ample alternative channels of communication."⁵⁹ The "designated public forum" consists of property that the government intentionally opens for public use as a place for speech activity.⁶⁰ Content-based speech restrictions in this

⁵⁶ 531 U.S. 533 (2001).

⁵⁷ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

⁵⁸ *Id.* at 45 (internal quotation marks and citation omitted); see also *Boos v. Barry*, 485 U.S. 312, 318 (1988) (noting that traditional public fora have "'time out of mind . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'" (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939))).

⁵⁹ *Perry Educ. Ass'n*, 460 U.S. at 45.

⁶⁰ *Id.* at 45-46.

space, like those in traditional public forums, must be narrowly tailored to serve a compelling government interest.⁶¹ Public property that does not fall into either of these two categories is considered a “nonpublic forum.” Restrictions on speech in nonpublic forums need only be “reasonable” and viewpoint neutral.⁶²

The way the Court has refined the public forum doctrine has created significant weaknesses in this approach, however, and demonstrates that it would be ill-suited for application to public broadcasting. When determining whether a particular space is a “designated public forum,” the Court asks whether the government has *explicitly* and intentionally dedicated it to free expression.⁶³ The practical application of this inquiry, though, raises concerns due to its circularity. That is, because government adoption of a rule against speech would itself be evidence of intention *not* to create a designated public forum, one cannot challenge the constitutionality of that rule because it is the very thing that makes the property a designated public forum (and thus allows it to receive relaxed First Amendment scrutiny).⁶⁴ Thus, government restrictions on editorial autonomy in the public broadcasting realm would be impervious to challenge, because the very interference being challenged would cause the space to become a nonpublic forum (which would be a winning case for the government). A more objective analysis may therefore be necessary to counteract the deleterious effects of traditional forum analysis for speech generally and specifically preserving the independence of the public broadcaster. Indeed, the Court seemed to recognized as much in applying

⁶¹ *Id.*

⁶² *Id.* at 46.

⁶³ See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (“The decision to create a public forum must . . . be made ‘by intentionally opening a nontraditional forum for public discourse.’” (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985))); *Perry Educ. Ass'n*, 460 U.S. at 45-46 (describing a “category consist[ing] of public property which the State has opened for use by the public as a place for expressive activity” in which the state is “bound by the same standards [that] apply in a traditional public forum”).

⁶⁴ See *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting) (making essentially this argument about government “determination” of its property); see also Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1585 (1998) (“[C]ontrary to the thrust of the First Amendment in other contexts, [in public forum doctrine] the most effective means for the government to close a forum is to develop a history of theoretically impermissible content-based regulation of speech in that forum.”); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1784 (1987) (noting the “vicious circularity of the Court’s concentration on government intent” in public forum doctrine).

a forum-like analysis to public broadcasting in *Arkansas Educational Television Commission v. Forbes*.⁶⁵

b. *Speech within a Government Agency*

First Amendment concerns also arise when the speech being abridged occurs within the context of government employment. In this context, a court determination that the CPB or a state public broadcasting authority is truly a government actor for First Amendment purposes has significant consequences for speech. Once the entity is so defined, restrictions on speech are generally more permissible than in the private realm. In *Connick v. Myers*, for instance, the Court held that a government employee could be fired for speech that was disruptive of the operation of the office.⁶⁶ *Connick* indicated that government could legitimately regulate speech within its own agencies if that speech conflicted with its asserted goals.⁶⁷ Professor Baker posits that this approach follows a general trend begun by *Grayned v. City of Rockford*,⁶⁸ which asked if the expression involved was “basically incompatible with the normal activity of a particular place at a particular time.”⁶⁹ Robert Post takes a more restrictive view of the doctrine, suggesting that in the “managerial domains” of government agencies, speech is properly subordinated to the goals of the government entity.⁷⁰

The negative potential for public broadcasting in this context is fairly self-evident. If the public broadcasting system (at least, at the

⁶⁵ 523 U.S. 666 (1998). *Forbes's* treatment of public broadcasters within the ill-fitting public forum doctrine provides the basis of my proposal for an objective institutional analysis. See *infra* Part III.

⁶⁶ 461 U.S. 138, 154 (1983) (“The limited First Amendment interest involved here does not require that [the employer] tolerate action which [it] reasonably believed would disrupt the office, undermine [its] authority, and destroy close working relationships.”).

⁶⁷ *Id.* at 146.

⁶⁸ 408 U.S. 104 (1972). *Grayned* evaluated a city ordinance on noise trucks by asking whether the expression “is basically incompatible with the normal activity of a particular place at a particular time.” *Id.* at 116.

⁶⁹ *Id.* at 116; see also C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 9-10 (1998) (arguing for a “broadened version of the principle developed in *Grayned v. City of Rockford* . . . a condition that restricts a constitutionally protected activity should only be permissible if the activity is fundamentally incompatible with the purpose for which the government makes the resource available”).

⁷⁰ See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 247-52 (1995) (distinguishing between “management” and “governance” as types of authority within government institutions).

CPB and state commission levels) is truly a government entity for First Amendment purposes, actors motivated by undue political pressure could legitimately act to suppress speech within the public broadcasting institution by manipulating its stated goals.⁷¹ Thus, like its public forum analysis, the Court's government employee speech analysis would fail to fully insulate the editorial independence of noncommercial broadcasters.

2. Funding Conditions and the First Amendment: Is *Velazquez* Useful to Public Broadcasting?

Although public forum doctrine seems to leave significant potential for direct government intrusion into public broadcasting, there is still hope for protection against government conditions on funding under Supreme Court precedent. In *Legal Services Corp. v. Velazquez*, the Court held that the federal government could not impose funding conditions that limited the speech of Legal Services Corporation (LSC) attorneys in a way that prevented them from fully performing their jobs.⁷² Distinguishing its decision in *Rust v. Sullivan*,⁷³ the Court asserted that the government could not define the contours of a funding program using restrictions that distort the "usual functioning" of a medium of expression.⁷⁴ Because the restrictions on LSC's funding prohibited attorneys from making certain arguments—such as challenging the constitutionality of welfare rulings—that might be necessary to effective representation of their clients, the government regulation was deemed impermissible under the First Amendment.⁷⁵

⁷¹ The Supreme Court's recent decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), demonstrates that the Court's approach continues to support this conclusion. The majority in *Garcetti*, which included newly appointed Chief Justice Roberts and Justice Alito, held that statements made by public employees in the course of their official duties are not insulated from employer retaliation by the First Amendment. *Id.* at 1960. The Court reasoned that when speaking pursuant to the duties of their employment, such employees are not "citizens" entitled to full First Amendment protection. *Id.* at 1958.

⁷² 531 U.S. 533, 548-49 (2001) ("Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.").

⁷³ 500 U.S. 173 (1991).

⁷⁴ *Velazquez*, 531 U.S. at 543.

⁷⁵ *See id.* at 548 ("The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner.").

If the government were to create a similar funding condition for public broadcasting limiting its content choices, *Velazquez* would appear to say that such a restriction violates the First Amendment.⁷⁶ Indeed, the *Velazquez* majority explicitly referred to the Court's public broadcasting cases as support for its argument, stating that, "[t]he First Amendment forbade the Government from using the [public broadcasting] forum in an unconventional way to suppress speech inherent in the nature of the medium."⁷⁷ With this in mind, whether the Court would consider the CPB a government agency becomes particularly important. If it is a government agency, then the CPB *itself*, in addition to the legislature or executive, could be prohibited from placing conditions on funding for individual broadcasters that distort their usual functioning.

Analyzing such a situation, however, brings to light a shortcoming of the *Velazquez* analysis with respect to the public broadcasting system. While that case inquires into whether the limitation countervails an institution's "usual functioning," it provides little guidance for how, outside the facts before it, one determines what that functioning is. In *Velazquez*, determining the role of the LSC lawyer was fairly straightforward, particularly as "effective assistance" has at least some indisputable basic contours.⁷⁸ Applying the Court's analysis to a public broadcaster, however, would be less clear. As we have seen, Congress itself conceived of numerous roles for public broadcasting in the communications order and in society generally.⁷⁹ Furthermore, if the protected function of the public broadcaster is the exercise of editorial discretion (as the Court seems to imply by referring to *League of*

⁷⁶ See Andrew D. Cotlar, *Say Cheese: The Constitutionality of State-Mandated Free Airtime on Public Broadcasting Stations in Wisconsin*, 56 FED. COMM. L.J. 55, 76-77 (2003) (arguing that under *Velazquez*, Wisconsin public broadcasting statutes are impermissible because they violate editorial independence).

⁷⁷ *Velazquez*, 531 U.S. at 543. The Court cited its consideration of the "dynamics of the broadcast industry" in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). These cases are examined in greater detail in Part III, *infra*, but for this Part's purposes note that those cases did not, in fact, deal with funding conditions and are thus not directly on point for this analysis. Rather, they applied the First Amendment's restrictions to *direct* government regulation of speech and access, respectively.

⁷⁸ *Velazquez*, 531 U.S. at 544 ("[LSC] lawyers funded in the government program may not undertake representation in suits for benefits if they must advise clients respecting the questionable validity of a statute which defines benefit eligibility and the payment structure. The limitation forecloses advice or legal assistance to question the validity of statutes under the Constitution of the United States.").

⁷⁹ See *supra* notes 34-35 and accompanying text (noting the various purposes of public broadcasting asserted in the 1967 Act's text and legislative history).

Women Voters and *Forbes*), we still need an operative principle on which to make that choice.⁸⁰ In the conditional funding context, *Velazquez* is thus of limited use to a First Amendment analysis of any potential government action against public broadcasting.

Unfortunately, traditional First Amendment jurisprudence appears to be of little help to the cause of editorial autonomy that Congress intended to promote for public broadcasting. Public forum doctrine and government speech cases provide a level of deference to the government that would in many cases allow direct government intervention into programming choices. While the government's—and possibly the CPB's—potential power to place speech-restrictive conditions on funding seems limited by *Velazquez*, the case cannot be cited to fully protect editorial autonomy. Thus, for congressional intent to be preserved, an alternative approach to the institution of public broadcasting is required.

III. AN ALTERNATIVE APPROACH: *LEAGUE OF WOMEN VOTERS*, *FORBES*, AND OBJECTIVE ANALYSIS OF PUBLIC BROADCASTING

As we have seen, traditional First Amendment analysis of speech related to government property, employment, and funding conditions leaves open the possibility that the government could constitutionally abridge the speech choices of public broadcasters. This result, which is antithetical to original congressional intention, is bolstered by—if not grounded in—the likelihood that the Court could consider public broadcasters to be part of the government. For the public broadcasting system's First Amendment status to more closely resemble what Congress intended in designing the institution, then, a new approach is needed.

Fortunately, the Court has provided an indication of how it might view public broadcasting for First Amendment purposes in *FCC v. League of Women Voters of California*⁸¹ and *Arkansas Educational Television Commission v. Forbes*.⁸² These cases imply that when determining how the First Amendment will apply to public broadcasting, the Court should look not at the government's own asserted interests but instead at the objective characteristics of how the institution is organized. As we have seen, the potential functions of the public broadcaster are di-

⁸⁰ Part III, *infra*, takes up the task of finding such a principle.

⁸¹ 468 U.S. 364.

⁸² 523 U.S. 666.

verse, and there is not a clear, principled way to favor any particular one. Instead, by focusing on the one attribute that is built into the structure of the system—editorial autonomy—the Court can preserve all these social capabilities of the public broadcaster and maximize protection of speech.

This Part will thus examine how *League of Women Voters* and *Forbes* provide analytical support for such an objective approach to speech institutions under the First Amendment. It will then explain how such an approach not only fills in the gaps of existing First Amendment analysis but also makes the jurisprudence more coherent, creates more desirable results for the public broadcasting system, and preserves Congress's original intent.

A. *The Public Broadcasting Cases and the Objective Approach*

The Court's public broadcasting cases lend support to this objective analysis through their emphasis on the fact that public broadcasters should be accorded the same editorial discretion as commercial broadcasters. Although neither opinion explicitly purports to do so, the Court implicitly recognizes that the objective characteristics of the public broadcaster provide an effective way of defining its status in the eyes of the First Amendment. The Court thus works to preserve the independence of noncommercial broadcasting by noting that the structure of public broadcasting gives its programming choices, under the First Amendment, the same constitutional protection as those of *private* entities.

1. *FCC v. League of Women Voters*

In a five to four decision, *League of Women Voters* overturned as unconstitutional section 399 of the amended Communications Act of 1934, which prohibited noncommercial broadcasters from editorializing.⁸³ The majority introduced its First Amendment scrutiny by stating that “although the Government's interest in ensuring balanced coverage of public issues is plainly both important and substantial, we have . . . made clear that broadcasters are engaged in a vital and *inde-*

⁸³ *League of Women Voters*, 468 U.S. at 402. The provision—introduced by the Public Broadcasting Act of 1967—also prohibited noncommercial broadcast stations from supporting or opposing candidates for political office. This part of the provision, however, was not challenged on appeal. *Id.* at 371 n.9.

pendent form of communicative activity.”⁸⁴ The analysis that followed involved a thorough explication of the extensive ways in which the Corporation for Public Broadcasting and Public Broadcasting System were organized to maximize their insulation from political pressures in government.⁸⁵ Thus, according to the Court, the institution created by the Public Broadcasting Act “would be as insulated from federal interference as the wholly private stations.”⁸⁶ In striking down the relevant provision of section 399, the Court then held that it was an insufficiently justified “abridgment of important journalistic freedoms which the First Amendment jealously protects.”⁸⁷

In its analysis, the *League of Women Voters* Court appears to be telling Congress that because it structured public broadcasting in a way that so closely resembles *commercial* broadcasting, the First Amendment protects journalistic discretion in the same way for both. In other words, the legislature cannot build a public broadcasting system around the principle of autonomy enjoyed by all broadcasters and then seek to violate that same independence by restricting editorial speech, a crucial element of independent journalism. Though the Court does not state it directly, implicit in this conclusion is the idea that the Court will define an institution’s functioning and status (i.e., government entity or not) based on how it was objectively organized, *not* based on the interest asserted by the government at the time of litigation.

2. *Arkansas Educational Television Commission v. Forbes*

Like *League of Women Voters*, the Court in *Forbes* declined to distinguish between commercial and noncommercial broadcasters when it came to applying First Amendment principles. *Forbes* reviewed a First Amendment challenge against the Arkansas Educational Television Commission’s (AETC) decision to exclude an independent candidate from a televised political debate.⁸⁸ Though it was not explicitly part of his analysis, Justice Kennedy began the majority opinion with a brief

⁸⁴ *Id.* at 378 (emphasis added).

⁸⁵ The Court referenced, *inter alia*, the private, bipartisan structure of the Corporation for Public Broadcasting and cited extensive legislative history indicating the intention to grant maximum independence to public broadcasters. *See id.* at 386-95.

⁸⁶ *Id.* at 394.

⁸⁷ *Id.* at 402.

⁸⁸ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 670-71 (1998).

acknowledgement of the way the AETC was organized by statute.⁸⁹ Specifically, he pointed to the fact that members of the AETC are barred from holding any federal or state office and that the Commission employs a staff of professional journalists.⁹⁰ Furthermore, the opinion made particular note of the fact that the AETC employed a “Statement of Principles of Editorial Integrity in Public Broadcasting, which counsel adherence to generally accepted broadcasting industry standards, so that the programming service is free from pressure from political . . . supporters.”⁹¹

The Court went on to determine that public broadcasting was not a public forum under its forum analysis.⁹² If the public broadcaster were a government actor for constitutional purposes, this result would surely not hold under traditional First Amendment jurisprudence, which sees viewpoint discrimination by government actors as anathema.⁹³ The Court explained that if it applied public forum principles like it does for government entities, “[p]rogramming decisions would be particularly vulnerable to claims of [viewpoint discrimination] because even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint based.”⁹⁴ The fact that the AETC was nominally a government actor, then, clearly did not guide the First Amendment analysis in *Forbes*. What *does* explain the Court’s conclusions, though, is the idea that the Court should look at the objective characteristics of an institution to determine its First Amendment status. That the AETC was organized to be insulated from political pressures likely did much of the work in *Forbes*. This would explain why the Court gave public broadcasting the same First Amendment treatment it gives private speakers.

An objective analysis of the institutions at work in the case also explains why the Court viewed the debates themselves as distinct from other programming decisions “rooted” in editorial judgment. The majority held that unlike other programming, the debate was a non-

⁸⁹ *Id.* at 669-70.

⁹⁰ *Id.*

⁹¹ *Id.* at 670 (internal quotation marks omitted).

⁹² *Id.* at 678-80 (noting that the government did not intend to make the opportunity generally available to a class of speakers, and that AETC reserved the power to determine a participant’s eligibility).

⁹³ *See, e.g.,* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (holding that a city ordinance whose “operative distinction” was the subject matter of the speech violated the First Amendment).

⁹⁴ *Forbes*, 523 U.S. at 673.

public forum (and thus subject to the Court's developed forum analysis) because of its "special characteristics."⁹⁵ Justice Kennedy again examined the structural characteristics of this electoral institution, noting that "the debate was *by design* a forum for political speech by the candidates."⁹⁶ Given the sensitivity to imposing obligations of a political nature on a public broadcaster inherent in its design, the institutional separation that results from the Court's analysis here makes sense. Although the debate was a form of programming—and required basic editorial decision making about the setup—just like other types of content, its inherent structural characteristics made it (in the eyes of the Court's First Amendment analysis) a *debate*, not a television show. The distinction demonstrates, then, the Court's willingness to extend an inquiry into the *physical* characteristics of a space to the *organizational structure* of the institutions at work in a given situation and separate them accordingly.⁹⁷

In dissent, Justice Stevens vigorously stressed the importance of the fact that the AETC was state owned, asserting that the majority "understates the constitutional importance of the distinction between state ownership and private ownership of broadcast facilities."⁹⁸ Underlying his objections to the Court's treatment of the public broadcaster as a *de facto* private entity under the First Amendment was Justice Stevens's concern that the AETC—an arm of the state executive branch—would be able to subjectively define the scope of its own discretion. He noted that, "[b]ecause AETC is owned by the State, deference to its interest in making ad hoc decisions about the political content of its programs necessarily increases the risk of government censorship and propaganda in a way that protection of privately owned broadcasters does not."⁹⁹

Justice Stevens's arguments and concerns about the editorial decision making of the AETC are countered, though, by an analytical principle that inquires not into the subjective intent of the state-owned broadcaster, but the objective organization of that entity.

⁹⁵ *Id.* at 676.

⁹⁶ *Id.* at 675 (emphasis added) ("[C]andidate debates present the narrow exception to the rule [that public broadcasting is not a public forum] . . . [because] a candidate debate . . . is different from other programming.")

⁹⁷ See Part III.B.2.a, *infra*, for a discussion of how this analysis extends a similar objective inquiry into other public forum cases.

⁹⁸ *Forbes*, 523 U.S. at 684 (Stevens, J., dissenting).

⁹⁹ *Id.* at 689. Justice Stevens expressed particular concern about that fact that *Forbes*'s constitutional claim was being rejected "on the basis of [AETC's] entirely subjective, ad hoc judgments about the dimensions of its forum." *Id.* at 690.

Thus, the fact that the AETC was structured to pursue *journalistic*—not *political*—goals indicates that the Court could proceed differently if political pressures clearly did drive content decisions and not standards of journalistic discretion. Such a consideration of the structure of the public broadcaster would then alleviate Stevens’s concerns that the AETC could be used as a mouthpiece for the ruling political party.

In both *League of Women Voters* and *Forbes*, the Court declined to consider public broadcasters to be government entities. Instead, recognition of the fact that they were organized in a way that was consistent with independent *private* and autonomous broadcasters led to the conclusion that noncommercial broadcast speech would receive similarly relaxed First Amendment scrutiny.

B. *Implications of the Objective Approach for First Amendment Jurisprudence*

The Court need not accept an objective approach for the sole purpose of realizing the intended structure of public broadcasting. An objective approach can provide a meaningful solution where First Amendment analysis fails to provide robust protection of speech or suffers from circular logic. Furthermore, such a method has already, in fact, been employed in First Amendment analysis of expressive institutions outside the public broadcasting context and would thus be more likely to gain acceptance by a majority of the Court. Examining the objective attributes of a government agency or government-funded entity offers clearer guidance on how to apply the Court’s precedents in several doctrinal areas.

1. Situating the Objective Approach Within the First Amendment Landscape: *Keller v. State Bar of California*

The Court has previously used an objective analytical procedure instead of giving deference to government assertions about its interests in an expressive institution. In *Keller v. State Bar of California*, the Court considered whether the California Bar association violated the First Amendment by using compulsory membership dues to fund lobbying and other ideological activities with which some members disagreed.¹⁰⁰ The California Supreme Court had ruled that the bar association was a regulated governmental agency, and this status allowed it to use its dues for any legitimate purpose, without First Amendment

¹⁰⁰ 496 U.S. 1, 4-5 (1990).

constraint.¹⁰¹ Reversing that decision, a unanimous Supreme Court disregarded the fact that the bar was a regulated state agency, looking instead at its “specialized characteristics” that “distinguish it from the role of the typical government official or agency.”¹⁰²

In determining whether the state bar was in fact a government entity for First Amendment purposes, the Court considered, *inter alia*, the types of services the bar provided and the relationship between the institution and its constituency.¹⁰³ Based on these characteristics, it found a “substantial analogy” between the state bar and employee unions, explicitly disagreeing that the bar association acted like a government agency.¹⁰⁴ Because it was organized in a way that closely resembled unions, the Court proceeded on the assumption that the bar association should be accorded the same constitutional status as unions, at least with respect to the First Amendment.¹⁰⁵ Thus, applying *Aboud v. Detroit Board of Education*¹⁰⁶ and its progeny, the Court held that the organization could not use mandatory dues to pay for those activities not “germane” to the reasons for which the state bar exists.¹⁰⁷

As a result, the Court appears to embrace an approach that examines the objective characteristics of the entity to determine how the First Amendment will apply to it. Indeed, the Court explained that this lack of deference to the government’s assertions rested upon a general jurisprudential principle:

Of course the Supreme Court of California is the final authority on the “governmental” status of the State Bar of California for purposes of state law. But its determination that respondent is a “government agency,” and therefore entitled to the treatment accorded a governor, a

¹⁰¹ *Keller v. State Bar of Cal.*, 767 P.2d 1020, 1029 (1989).

¹⁰² *Keller*, 496 U.S. at 12.

¹⁰³ *Id.* at 11-12.

¹⁰⁴ *Id.* at 12 (“There is . . . a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other.”).

¹⁰⁵ *See id.* at 12 (noting that just as agency-shop laws may permissibly prevent the benefits negotiated by union members to spill over to free-riding, nonunion members, lawyers—all of whom benefit from the bar association’s work—might be required to pay a “fair share” of the association’s costs irrespective of the First Amendment).

¹⁰⁶ 431 U.S. 209 (1977). *Aboud* upheld “agency-shop” rules that compelled teachers to pay union membership dues even if the union engaged in ideological activities with which the teacher disagreed. *Id.* at 235. However, the union could not, consistent with the First Amendment, fund those activities with the mandatory dues collected from teachers. *Id.* at 235-36. This essentially required the unions to keep segregated funds going forward.

¹⁰⁷ *Keller*, 496 U.S. at 13-14.

mayor, or a state tax commission, for instance, is not binding on us when such a determination is essential to the decision of a federal question.¹⁰⁸

In the public broadcasting context, then, the Court could employ *Keller's* analysis to determine whether a state broadcasting commission would actually be a government entity for constitutional purposes. An objective approach could thus lead to a determination, contrary to the implications of *Lebron*, that the First Amendment protects the autonomy of the public broadcaster as a nongovernmental entity.

2. Addressing the Shortcomings of Traditional First Amendment Analysis

a. *Public Forum Doctrine and Government Employee Cases*

An analysis of public broadcasting's objective characteristics would redress the circularity inherent in the Court's tendency to make determinations about forum category based on the government's subjective intention. In fact, Justice Kennedy advocated a similar approach in his opinion in *International Society for Krishna Consciousness, Inc. v. Lee* (*ISKCON*). Although he concurred in the result, Kennedy noted that the Court's analysis was flawed because it asserted that the "public forum status of public property depends on the government's defined purpose for the property, or on an explicit decision by the government to dedicate the property to expressive activity."¹⁰⁹ The correct inquiry, in his view, "must be an objective one, based on the actual, physical characteristics and uses of the property."¹¹⁰ Speech should be protected, Justice Kennedy argued, so long as it is not incompatible with those objective attributes and uses.¹¹¹ A similar objective analysis was likely driving Justice Kennedy's opinion in *Forbes*, as that case contained no mention of the subjective forum principles to which he objected in *ISKCON* and appeared to acknowledge the editorial auton-

¹⁰⁸ *Id.* at 11.

¹⁰⁹ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 698 ("If the objective, physical characteristics of the property at issue and the actual public uses and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.")

omy inherent in the creation of public broadcasting.¹¹² In a way, *Forbes* further extended Kennedy's analysis of the objective characteristics of the *physical* space in *ISKCON* to the organizational structures of different institutions operating within that space.¹¹³

This inquiry into what type of entity the government objectively created applies to government employee cases as well, particularly under the analyses in this area by Professors Baker and Post. Examining the objective characteristics of a government entity would enable courts to undertake an analysis of compatibility between the entity's efficient operation and the restrictions imposed on speech.¹¹⁴ In *Connick*, for example, determining the level of disruption caused by employee speech required an assessment of what the government was actually trying to do in maintaining the agency office. If this determination is based purely on the interests proffered by the government at trial, however, speech will never be protected, for the same reasons that plague the Court's forum analysis. Instead, the objective characteristics of the space—its organizational structure, the contractual job descriptions given to employees, etc.—provide the neutral principle that maximizes speech protection. Thus, were the public broadcaster to be considered a government agency for First Amendment purposes, the fact that Congress endowed the broadcaster with the structural characteristics of an autonomous body should lead courts to preserve its editorial independence.

b. *Analyzing Conditions on Funding*

An approach that considers the objective characteristics of an institution would also give greater clarity to the Court's analysis of speech-related conditions on government funding. While *Velazquez* prohibits speech restrictions that contravene the "usual functioning" of an institution, the Court did not offer any guidance on how to determine that function.¹¹⁵ Focusing on what the legislature objectively

¹¹² Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998) ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming.").

¹¹³ See *supra* Part III.A.2.

¹¹⁴ See Baker, *supra* note 69, at 9-10 ("[A] condition that restricts a constitutionally protected activity should only be permissible if the activity is fundamentally incompatible with the purpose for which the government makes the resources available.").

¹¹⁵ Legal Services Corp. v. Velazquez, 531 U.S. 533, 543 (2001) (noting the difficulty of defining the customary functions of the public broadcaster, considering how

created, however, provides a framework for that analysis and still restricts the extent to which government can define the scope of a funding program. Thus, a consideration of the “usual functioning” of a public broadcaster would begin with an inquiry into how the public broadcasting system was constructed. Consequently, the autonomy built into the system by statute would be given full effect in the face of potential speech-related conditions on federal funding.

IV. APPLYING THE OBJECTIVE APPROACH: A STRUCTURAL ANALYSIS OF PUBLIC BROADCASTING

Having seen how an analysis of public broadcasting’s objective characteristics is useful for determining its First Amendment status, the empirical question remains as to how such an approach would apply to the public broadcast system. This Part briefly considers how a reviewing court would scrutinize the structure of a public broadcasting entity. Although they are interconnected within the U.S. system, and Congress desired autonomy for both, the federal and state levels of public broadcasting face somewhat distinct hypothetical challenges to their independence. Thus, this Part will begin with a brief examination of the organizational structure of the CPB at the federal level and its implications for First Amendment analysis. It then performs the same analysis at the state level, using New Jersey public broadcasting as a sample case.

A. The Structure of Public Broadcasting at the Federal Level

As has already been described, with the Public Broadcasting Act of 1967, Congress structured the Corporation for Public Broadcasting intending to maximize the editorial autonomy of public broadcasting.¹¹⁶ Indeed, the CPB’s structural elements bear out this intention and ground that autonomy in objective attributes. For instance, the CPB has an internal system of governance, organized to have a politically diverse membership¹¹⁷ serving staggered, limited terms.¹¹⁸ These

many roles it is supposed to play in society according to congressional mandate); *see supra* Part II.B.2.

¹¹⁶ *See supra* Part I (noting the creation of a CPB trust, and that in the selection process for the CPB’s Board of Directors, the President cannot base his selection on political affiliation).

¹¹⁷ *See* 47 U.S.C. § 396(c)(1) (2000) (“No more than 5 members of the Board appointed by the President may be members of the same political party.”).

features imbue the entity with an autonomy not enjoyed by other government agencies, whose leadership can easily be removed at the will of the executive branch. Therefore, the CPB should not be considered a government entity for First Amendment purposes, regardless of the result under state action doctrine. This conclusion would give recognition to the fact that Congress found the autonomy of the broadcaster to be so important that they built it into the organizational structure of the institution.

Furthermore, the fact that the CPB is prohibited from using political criteria to select officers and employees,¹¹⁹ combined with the bipartisanship of its directorship mandated by statute, demonstrates that the “usual functioning” of the public broadcaster depends on its ability to make editorial decisions free from partisan interests. Under *Velazquez*, then, this analysis could prohibit a CPB director (such as the chairman) from placing content-based restrictions on program funding that were motivated by political concerns. Thus, though the CPB may nominally be considered a “government agency” under the Court’s state action doctrine, determinations of the validity of programming decisions must be screened for their separation from partisan interests, consistent with the structure and functioning of the organization.

B. *The Structure of Public Broadcasting at the State Level*

A large number of state public broadcasting systems are supervised by state-operated independent commissions.¹²⁰ Of these, New Jersey’s system is typical; it provides a useful test case because it is one of the relatively few state systems whose activity has faced constitu-

¹¹⁸ *Id.* § 396(c)(5) (providing for six-year terms for members of the Board of Directors).

¹¹⁹ *Id.* § 396(e)(2) (“[N]o political test or qualification shall be used in selecting . . . officers, agents, and employees of the Corporation.”).

¹²⁰ For examples of state statutory provisions creating state-operated independent commissions to monitor state public broadcasting systems, see ALA. CODE §§ 16-7-1 to 16-7-5 (LexisNexis 2001); ARK. CODE ANN. §§ 6-3-101 to 6-3-105 (1999); GA. CODE ANN. § 20-13-1(a) (2005); IOWA CODE ANN. § 256.84 (West 2003); KY. REV. STAT. ANN. § 168.010 (LexisNexis 1999); LA. REV. STAT. ANN. § 17:2501 (2001); MD. CODE ANN., EDUC. §§ 24-201 to 24-207 (LexisNexis 2004); MISS. CODE ANN. § 37-63-1 (West 1999); NEB. REV. STAT. § 79-1313 (2003); N.J. STAT. ANN. § 48:23-3 (West 1998); R.I. GEN. LAWS § 16-61-2(a) (1996); S.C. CODE ANN. § 59-7-10 (2004); W. VA. CODE ANN. § 10-5-2 (LexisNexis 2003). See also Cotlar, *supra* note 76, at 57-58 & n.6 (providing an overview of statewide public broadcasting systems in the United States).

tional challenge.¹²¹ By state statute, New Jersey's system is supervised and controlled by the New Jersey Public Broadcasting Commission.¹²² Though the Commission is explicitly "established in the Executive Branch of the State Government," like the 1967 Act's description of the CPB, the New Jersey Public Broadcasting Authority Act of 1968 makes a nominal attempt to assert the Commission's independence from the government.¹²³ As we have seen, however, it is not entirely clear that this would be controlling for First Amendment purposes.¹²⁴ Thus, a consideration of the objective characteristics of the Commission is useful to determine the constitutional standards that would apply.

Despite its apparent creation as a government entity, the Commission has an internal structure of democratic governance that ensures its decisions will be made independent of political pressure. While five members of the fifteen-member Commission must be administrative officials, a large majority (ten members) are private New Jersey residents.¹²⁵ These citizen-members serve staggered terms of five years each and must be selected "without regard to political belief or affiliation."¹²⁶ The Commission elects its own officers, including the chairman and vice chairman, by an internal vote of its members.¹²⁷

That the Commission has its own governance and cannot be selected based on political affiliation strongly indicates that it should be insulated from partisan pressures under the First Amendment. Like the AETC in *Forbes*, such a self-sufficient structure connotes a degree of autonomy that would be violated if the Commission were treated by a traditional First Amendment analysis taken under the assumption that the public broadcaster is a government actor.¹²⁸ Furthermore, by

¹²¹ See *McGlynn v. N.J. Pub. Broad. Auth.*, 439 A.2d 54, 63 (N.J. 1981) (clarifying the "balance, fairness and equity" provision of N.J. STAT. ANN. § 48:23-7(h)); *Arons v. N.J. Network*, 775 A.2d 778, 784 (N.J. Super. Ct. App. Div. 2001) (holding that under the statutory provisions, the New Jersey Public Broadcasting Authority has discretion with respect to balanced news coverage and related programming).

¹²² N.J. STAT. ANN. § 48:23-4(a).

¹²³ *Id.* § 48:23-3 ("[T]he authority is hereby allocated within the Department of Public Utilities, but notwithstanding said allocation, the authority shall be independent of any supervision or control by the department or by any board or officer thereof.").

¹²⁴ See *supra* Part II.A.

¹²⁵ N.J. STAT. ANN. § 48:23-4(b).

¹²⁶ *Id.* § 48:23-4(c).

¹²⁷ *Id.* § 48:23-4(f).

¹²⁸ See *supra* Part III.A.2 (noting that an objective analysis of the institutions involved likely drove the Court's separation of the debate forum from other programming).

considering the organizational structure of the broadcaster in an objective way to help determine its “usual functionings,” the Court could very well be hostile to any editorial decisions made in the name of partisan concerns. That is, if the broadcasting institution is organized in such a way as to be insulated by pressure from ruling political interests, then *any* decisions made as a result of that pressure may be invalid under the First Amendment.

Of course, defining what is a “legitimate” exercise of editorial discretion is a broad subject of debate about the social role of journalism. While that debate is outside the scope of this Comment, it is important to note that by focusing on the institutional autonomy clearly imbued in the structure of the New Jersey Public Broadcasting Commission, objective First Amendment analysis allows the *broadcasters*, rather than the government, to define their role and respond to the needs of the community. Regardless of how that role is defined, decisions made in the name of partisan interests—rather than accepted standards of editorial discretion—should be struck down under *Velazquez* and *League of Women Voters*.¹²⁹

CONCLUSION

Incidents like the one that led to Kenneth Tomlinson’s resignation as the CPB Chairman certainly raise important concerns about the governance of public broadcasting in the United States. That Congress intended the U.S. system of public broadcasting to be walled off from partisan concerns is without question, and when that wall is breached, the integrity of the system is called into question. An objective jurisprudential approach under the First Amendment provides hope for a solution, though. Traditional First Amendment analysis puts the nongovernmental status of public broadcasting into question, and fails to fully protect the editorial autonomy Congress envisioned with the Public Broadcasting Act of 1967. Consistent with the Court’s decisions in *Forbes* and *League of Women Voters*, however, an analysis that asks what exactly is created, based on *objective* criteria of the structure, more fully achieves this congressional intent. An application of this principle to the state and federal tiers of the public broadcasting sys-

¹²⁹ Analysis of the objective characteristics of the New Jersey Public Broadcasting Commission further supports this proposition, as its individual employees (including journalists and in-house content providers) must be chosen “solely on grounds of fitness to perform their duties” and not based on party affiliation. N.J. STAT. ANN. § 48:23-6 (West 1998).

tem would allow courts to recognize public broadcasting autonomy while shielding against partisan influence on content decisions. Thus, with its autonomy secure, public broadcasting would be free under the First Amendment to fully explore the myriad social roles Congress envisioned, free from government influence.