

# University of Michigan Journal of Law Reform

---

Volume 13

---

1980

## The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment

John C. Grabow  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Communications Law Commons](#), [First Amendment Commons](#), and the [Legislation Commons](#)

---

### Recommended Citation

John C. Grabow, *The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. MICH. J. L. REFORM 541 (1980).

Available at: <https://repository.law.umich.edu/mjlr/vol13/iss3/3>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mLaw.repository@umich.edu](mailto:mLaw.repository@umich.edu).

## THE PUBLIC BROADCASTING ACT: THE LICENSEE EDITORIALIZING BAN AND THE FIRST AMENDMENT.

*This instrument can teach, it can illuminate; yes, it can even inspire. But it can do so only to the extent that humans are determined to use it to those ends. Otherwise, it is merely lights and wires in a box.<sup>1</sup>*

The average American household watches television nearly six and one-half hours per day.<sup>2</sup> The only activity that dominates more of our time is sleeping, although some have categorized the two as synonymous.<sup>3</sup> The impact of television on our lives is staggering, but attempts to channel that power into a positive force have so far been of limited success.<sup>4</sup>

Public broadcasting<sup>5</sup> has been one of the most promising attempts to free television from restrictions of audience maximization and commercial mediocrity.<sup>6</sup> Unfortunately, public broadcasting in its present form has not met that challenge. The Report of the Carnegie Commission on the Future of Public Broadcasting, released in early 1979, stated: "Sadly, we conclude

---

<sup>1</sup> J. MACY, *TO IRRIGATE A WASTELAND* ix (1974) (quoting Edward R. Murrow).

<sup>2</sup> CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING, *A PUBLIC TRUST* 21 (1979) [hereinafter cited as *CARNEGIE REPORT II*].

<sup>3</sup> J. MACY, *supra* note 1, at 1.

<sup>4</sup> See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("the broadcast media have established a uniquely pervasive presence in the lives of all Americans."). See generally J. BLUMLER & D. MCQUAIL, *TELEVISION IN POLITICS: ITS LIES AND INFLUENCES* (1969); K. LANG & G. LANG, *POLITICS AND TELEVISION* (1968); R. LIEBERT, J. NEALE & E. DAVIDSON, *THE EARLY WINDOW: EFFECTS OF TELEVISION ON CHILDREN AND YOUTH* (1973); R. MACNEIL, *THE PEOPLE MACHINE* (1968); M. McLUHAN, *UNDERSTANDING MEDIA* (1965); J. MCGINNISS, *THE SELLING OF THE PRESIDENT 1968* (1969); *TELEVISION AND SOCIAL BEHAVIOR: A TECHNICAL REPORT TO THE SURGEON GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR* (5 vols., E. Rubenstein, G. Comstock & J. Murray, eds., 1972); F. WOLF, *TELEVISION PROGRAMMING FOR NEWS AND PUBLIC AFFAIRS* (1972).

<sup>5</sup> Due to the greater influence of television relative to radio, this article will generally focus on public television, although it is also applicable to public radio in most instances.

<sup>6</sup> See R. BLAKELY, *THE PEOPLE'S INSTRUMENT: A PHILOSOPHY OF PROGRAMMING FOR PUBLIC TELEVISION* 34-48 (1971); J. MACY, *supra* note 1, at 2-4; *CARNEGIE REPORT II*, *supra* note 2, at 21-32, 295-301.

that the invention did not work, or at least not very well. . . . Hence, as public broadcasting enters its early adolescence, it suffers from chronic underfunding, growing internal conflict, and a loss of a clear sense of purpose and direction."<sup>7</sup> Despite its strong criticism of the present system,<sup>8</sup> the Commission retains hope for the future of public broadcasting.<sup>9</sup> One area which the Commission found most in need of improvement is public affairs programming.<sup>10</sup> A statutory restriction in the Public Broadcasting Act of 1967<sup>11</sup> that prohibits public broadcasting licensees<sup>12</sup>

<sup>7</sup> CARNEGIE REPORT II, *supra* note 2, at 11, 25.

<sup>8</sup> The Carnegie Commission called for a total restructuring of public broadcasting. Under its recommendation, the Corporation for Public Broadcasting, *see* part I C *infra*, would be replaced by a new entity, the Public Telecommunications Trust. A separate organization, the Program Services Endowment, would be responsible for the underwriting and support of programming. The Commission's report calls for a substantial increase in funding to \$1.2 billion annually (570 million federal dollars). Federal funds would come from general tax revenues, offset by a fee on licensed use of the broadcast spectrum. *Id.* at 13-16.

The Corporation for Public Broadcasting has recognized that changes are inevitable as a result of the new Carnegie Report and the attention being focused on public broadcasting. The Corporation President, Robben Fleming, recently announced plans for internal reorganization of the Corporation into a management unit and a program fund in an apparent attempt to avert more drastic changes from outside. *See* N.Y. Times, Mar. 28, 1979, § C, at 24, col. 1.

<sup>9</sup> The Commission reflected:

We see, instead, the reverent and the rude, the disciplined and the rambunctious—a celebration of American freedom in all its unpredictable varieties. This revelation of diversity will not please some, notably the book burners and the dogmatists among us. It will startle and anger others, as well it should. But we have found in our own lives that anger yields to understanding. . . .

We remember the Egyptians for the pyramids, and the Greeks for their graceful stone temples. How shall Americans be remembered? As exporters of sensationalism and salaciousness? Or as builders of magical electronic tabernacles that can in an instant erase the limitations of time and geography, and make us into one people?

The choice is in our hands and the time is now.

CARNEGIE REPORT II, *supra* note 2, at 300-01.

The principle of a system of public broadcasting has not been universally supported. *See, e.g.*, B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION* 123 (1975). "The intellectual community has never been happy with commercial television in the United States. The number of academics claiming that they never watch television is exceeded only by the number of antennae on their homes." Owen believes public broadcasting is an inefficient cure for the problems resulting from commercial network concentration because public broadcasting stations occupy valuable spectrum allocations with programs that attract "miniscule" audiences. *Id.* at 133.

<sup>10</sup> [T]here is one objective that public broadcasting must locate at its center of its activity if it is ever to be considered a mature voice in society. Public broadcasting must have a strong editorial purpose. *Without this strong editorial purpose expressed in diverse, even controversial ways, and without an ability to construct a context for understanding the events that occur around us and the meaning of history, public broadcasting will never be taken seriously.*

CARNEGIE REPORT II, *supra* note 2, at 29-30.

<sup>11</sup> Pub. L. No. 90-129, 81 Stat. 365 (1967) (current version at 47 U.S.C.A. §§ 390-399

from editorializing or supporting candidates for office<sup>13</sup> has proven a major obstacle to the growth of public broadcasting into a mature voice of public affairs.

This article contends that the public is deprived of an important source of information on public affairs issues as a result of the section 399(a) prohibition on editorializing.<sup>14</sup> After an examination of the legislative history of Section 399(a),<sup>15</sup> and the heritage of broadcast regulation in the United States,<sup>16</sup> the article concludes that the prohibition on editorializing is an improper restriction on free expression in violation of the First Amendment.<sup>17</sup>

## I. THE SYSTEM OF PUBLIC BROADCASTING

### A. *The Early Years*

The roots of public broadcasting date back to 1919 when radio station 9XM began broadcasting from the University of Wisconsin.<sup>18</sup> Federal involvement in noncommercial broadcasting was limited during these early years. The Federal Communications Commission (FCC) first reserved frequencies on the radio spectrum for educational radio in 1939.<sup>19</sup> Television channels were not reserved for noncommercial and educational users until 1945.<sup>20</sup> A year later, television station KUHT of the University of Houston began broadcasting.<sup>21</sup>

Most of the early licenses were assigned to educational institu-

---

(West Supp. 1979)).

<sup>13</sup> The Public Broadcasting Act does not explicitly define the term "public broadcasting," though it defines "noncommercial educational broadcast station" to include (1) television or radio stations eligible to be licensed by the FCC as noncommercial educational stations and which are owned and operated by a nonprofit private foundation, corporation, or association; and (2) stations owned and operated by municipalities which transmit noncommercial educational programs. 47 U.S.C.A. § 397(6) (West. Supp. 1979).

This article will refer to all public broadcasting stations, television and radio, as "public licensees."

<sup>14</sup> 47 U.S.C. § 399(a) (1976). This subsection states: "No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for public office."

<sup>15</sup> See text accompanying notes 67-69 *infra*.

<sup>16</sup> See part II A *infra*.

<sup>17</sup> See part III A *infra*.

<sup>18</sup> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. See part III B *infra*.

<sup>19</sup> S. FROST, EDUCATION'S OWN STATIONS 464 (1937).

<sup>20</sup> 47 C.F.R. §§ 4.131-4.133 (1939).

<sup>21</sup> See 17 Fed. Reg. 4054-4059 (1952).

<sup>22</sup> J. MACY, *supra* note 1, at 10.

tions for instructional programming.<sup>22</sup> As television became more popular, non-profit community organizations saw the potential for new, non-instructional programming.<sup>23</sup> These community stations relied on diverse sources of funding including auctions, private contributions, corporate underwriting, and foundation grants. In the 1950's, noncommercial stations received strong funding and program support from the National Educational Television and Radio Center of the Ford Foundation (NET).<sup>24</sup> Funding problems remained critical, however, and most stations were forced to limit their broadcasting time as a result.<sup>25</sup>

The first direct government funding for public broadcasting did not take place until 1962 with the passage of the Educational Television Broadcasting Facilities Act.<sup>26</sup> This Act authorized the expenditure of thirty-two million dollars for public television over a five-year period, the spending to be controlled by the Secretary of Health, Education, and Welfare (HEW).<sup>27</sup> Funding was limited to the purchase of equipment and the construction of television facilities;<sup>28</sup> funding of program production and operating costs thus remained a continuing problem.<sup>29</sup>

### B. *The First Carnegie Report*

Against this background of serious underfunding for public television, the Carnegie Foundation created a private commission in 1965 to study the problems of noncommercial television. The Commission's landmark 1967 report<sup>30</sup> (the Carnegie Report) set the pattern for current federal involvement in public television. The Carnegie Report called for a new and broader mission for public television, bringing the immense power of television

---

<sup>22</sup> CARNEGIE REPORT II, *supra* note 2, at 34.

<sup>23</sup> *Id.*

<sup>24</sup> F. POWLEDGE, PUBLIC TELEVISION: A QUESTION OF SURVIVAL 3 (1972).

<sup>25</sup> J. MACY, *supra* note 1, at 44.

<sup>26</sup> Pub. L. No. 87-447, 76 Stat. 64 (1962). (current version at 47 U.S.C.A. §§ 391-394, 397-398 (West Supp. 1979)).

<sup>27</sup> *Id.*, 76 Stat. 65 (codified at 47 U.S.C.A. § 391 (West 1962)) (amended 1967, 1973, 1976 & 1978).

<sup>28</sup> *Id.* (codified at 47 U.S.C.A. § 392 (West 1962)) (amended 1967, 1976 & 1978).

<sup>29</sup> In the early 1960's, the average public licensee had approximately \$100,000 a year to spend on programming, an amount often spent by commercial networks for one-half hour of programming. See Address by E. William Henry, International Radio and Television Society (Oct. 2, 1964), reprinted in PROBLEMS AND CONTROVERSIES IN TELEVISION AND RADIO 43, 47 (H. Skorhia & J. Kitson, eds., 1968).

<sup>30</sup> CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION (1967) [hereinafter cited as CARNEGIE REPORT I].

technology "into the full service of man"<sup>31</sup> in a way that commercial constraints on television had made impossible. Recognizing that patterns of funding had left public broadcasting stations in "a daily struggle for survival,"<sup>32</sup> the Commission saw the need for greatly expanded federal funding of public television.<sup>33</sup>

In calling for this expanded federal role, the Commission faced squarely the risk of increased governmental control of public television. To prevent this, the Commission recommended that Congress create a nonprofit, non-governmental "Corporation for Public Television" to receive and disburse federal as well as private funds, to provide leadership for the system, and to shield public broadcasters from improper governmental and political pressure.<sup>34</sup> The Commission also recommended the establishment of an excise tax on the sale of television sets to insulate the proposed Corporation from the political appropriations process.<sup>35</sup>

### C. *The Public Broadcasting Act of 1967*

The Carnegie Report won widespread public approval and provided the impetus for the enactment of the Public Television Act of 1967.<sup>36</sup> The influence of the Carnegie Report can be seen throughout the resulting legislation, particularly in Title II, which created the Corporation for Public Broadcasting (CPB).<sup>37</sup> Some of the Report's recommendations, however, were not enacted, including the proposed excise tax. This decision left funding to periodic congressional appropriations, a system that continues to plague public broadcasting.<sup>38</sup>

---

<sup>31</sup> *Id.* at 13.

<sup>32</sup> *Id.* at 33.

<sup>33</sup> *Id.* at 3, 76-77, 135-91.

<sup>34</sup> *Id.* at 5, 36-37.

<sup>35</sup> *Id.* at 68.

<sup>36</sup> Pub. L. No. 90-129, 81 Stat. 365 (1967) (current version at 47 U.S.C.A. §§ 390-399 (West Supp. 1979)).

<sup>37</sup> Title I extended the Educational Television Facilities Act of 1962. Title III authorized a study of instructional television by HEW.

<sup>38</sup> See Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEXAS L. REV. 1123, 1155 (1974); Chase, *Public Broadcasting and the Problem of Government Influence: Towards a Legislative Solution*, 9 U. MICH. J.L. REV. 64, 75 (1975).

Since 1967, three entities have been added to the public broadcasting system. The Public Broadcasting Service (PBS) was formed in 1970 to operate the interconnection system, which distributes national programming to local public stations. The interconnection system initially utilized common carrier facilities and since 1979 has used a satellite system. PBS is governed by the local stations. Funding is provided by the CPB. See generally CARNEGIE REPORT II, *supra* note 2, at 40.

The Corporation is a nonprofit District of Columbia corporation governed by a fifteen-member Board of Directors, each of whom is appointed by the President subject to confirmation by the Senate.<sup>39</sup> No more than eight of the directors may be members of the same political party.<sup>40</sup> The Corporation's specific powers include raising and disbursing funds, conducting research, arranging for an interconnection system, and encouraging the creation of new noncommercial stations.<sup>41</sup> The Corporation is granted the "usual powers" of a nonprofit District of Columbia corporation but is expressly prohibited from owning or operating any stations, networks, or interconnection facilities, producing programs, and from contributing to or supporting any candidate for office.<sup>42</sup> The Corporation is also required to follow a standard of "objectivity and balance" in all controversial programs.<sup>43</sup> Finally, section 399(a) of the Act prohibits noncommercial licensees from editorializing or supporting or opposing candidates for political office.<sup>44</sup>

## II. THE PUBLIC BROADCASTING EDITORIALIZING BAN

One of the basic themes of the Carnegie Report, that local stations must be the bedrock of the public television system,<sup>45</sup> is

---

National Public Radio (NPR), established in 1970, performs a similar function for public stations. As with PBS, NPR operates the interconnection system with funding from the CPB. In addition, it directly produces programming for its member stations. See generally CARNEGIE REPORT II, *supra* note 2, at 40.

Local stations were given greater control over national programming independent of the CPB when the PBS established the Station Program Cooperative (SPC) in 1974 with support from the CPB and the Ford Foundation. The SPC selects and provides funding for many public affairs programs formerly under the exclusive control of the CPB. See generally CARNEGIE REPORT II, *supra* note 2, at 47-48.

<sup>39</sup> 47 U.S.C.A. § 396(b), (c)(1) (West Supp. 1979).

<sup>40</sup> *Id.* § 396(c)(1).

<sup>41</sup> *Id.* § 396(g).

<sup>42</sup> *Id.* § 396(g)(3), (f)(3).

<sup>43</sup> The CPB is authorized to provide programs to "telecommunications entities" with "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature." *Id.* § 396(g)(1)(a). This standard is generally considered stricter than the fairness doctrine, 47 U.S.C. § 315(a) (1976), which requires broadcasters to provide for the discussion of conflicting views on controversial subjects. See Note, "Balance and Objectivity" in *Public Broadcasting: Fairer than Fair?*, 61 VA. L. REV. 643, 653-59 (1975). The fairness doctrine also requires broadcasters to offer air time to individuals personally attacked or editorially opposed by the station. 47 C.F.R. §§ 73.1910, 73.1920, 73.1930 (1979). See also *Accuracy in Media v. FCC*, 521 F.2d 288 (D.C. Cir. 1975) (affirming an FCC ruling that it has no power to enforce 47 U.S.C. § 396(g)(1)(a); the provision provides only a set of goals to which the CPB should aspire, controlled only by congressional oversight).

<sup>44</sup> 47 U.S.C.A. § 399(a) (West Supp. 1979).

<sup>45</sup> CARNEGIE REPORT I, *supra* note 30, at 33-35, 46-52.

evident throughout the Public Broadcasting Act. The Act's declaration of policy states that the development of public broadcasting is in the public interest; that expansion of diverse programming depends on "freedom, imagination, and initiative" at both the local and national levels; and that the CPB should encourage the development of public broadcasting and "afford maximum protection from extraneous interference and control."<sup>46</sup>

Section 398 of the Act explicitly prohibits federal interference or control.<sup>47</sup> Even before the passage of the Act, moreover, section 326 prohibited any censorship of stations by the FCC.<sup>48</sup> The section 399(a) ban on editorializing is the only major restriction on local licensees contained in the Act.<sup>49</sup> The legislative history of Section 399(a) must be examined to understand why this seemingly inconsistent provision was added.

### A. Legislative History

The legislative history of Section 399(a) is limited. Neither the Johnson Administration proposal<sup>50</sup> nor the Senate version<sup>51</sup> of

<sup>46</sup> 47 U.S.C.A. § 396(a)(1), (3), (7) (West Supp. 1979).

<sup>47</sup> Nothing contained in sections 390 to 399 of this title shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over public telecommunications. . . .

Nothing in this section shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the content or distribution of public telecommunications programs and services.

*Id.* § 398(a), (c).

<sup>48</sup> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 326 (1976).

Though not explicitly amended after the development of television, § 326 has been presumed applicable. *See, e.g.,* National Ass'n of Independent Television Producers & Distributors v. FCC, 516 F.2d 526 (2d Cir. 1975) (television prime time access rule consistent with § 326 and First Amendment).

<sup>49</sup> Another restriction, that noncommercial licensees must retain audio recordings of each of its broadcasts of controversial programs, 47 U.S.C.A. § 399(b) (West Supp. 1979), was added to the Act in 1973. Act of Aug. 6, 1973, Pub. L. No. 93-84, § 2, 87 Stat. 219 (1973). That requirement was found unconstitutional in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978), and has since been deleted by the FCC. *See generally* part III B *infra*. The only other restrictions on local licensees in the Act are that they must keep financial records and undergo an annual audit, 47 U.S.C.A. § 396(g)(3)(b) (West Supp. 1979), and adhere to equal opportunity in employment. *Id.* § 398(b)(1).

<sup>50</sup> Johnson, Special Message to Congress: Education and Health in America, 1967 PUB.



the Public Broadcasting Act contained a prohibition on editorializing. The ban was first added in the House version of the bill.<sup>52</sup> The Report of the House Committee on Interstate and Foreign Commerce stated that there was considerable testimony that no noncommercial station editorialized and that the prohibition was added "out of abundance of caution."<sup>53</sup> The committee found the ban consistent with the section 396 objectivity and balance requirement; the report emphasized that the provision was "not intended to preclude balanced, fair and objective presentations."<sup>54</sup> In joint conference, the Senate conferees accepted the House ban, explaining their action in language similar to the House Report's, adding that the ban was understood only to preclude stations from representing the opinion of the station management.<sup>55</sup>

Supporters of the legislation stated that section 399(a) was one of several provisions of the Public Broadcasting Act added as a safeguard to prevent the CPB from "becoming a propaganda agency for either political party or from presenting only a particular point of view."<sup>56</sup> Examination of the congressional hearings, however, suggests an additional motive. The Committee was inaccurate in reporting that there was testimony that no noncommercial station editorialized.<sup>57</sup> One of the Committee's most important witnesses, then-Secretary of HEW, John Gardner, testified that public stations *do* editorialize, though he was unaware of any stations endorsing political candidates.<sup>58</sup> 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.<sup>59</sup> This debate

PAPERS 244, 250.

<sup>51</sup> S. 1160, 90th Cong., 1st Sess. (1967).

<sup>52</sup> H.R. 6736, 90th Cong., 1st Sess. § 201 (1967).

<sup>53</sup> H.R. REP. No. 572, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 1799, 1810.

<sup>54</sup> *Id.*

<sup>55</sup> CONF. REP. No. 794, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 1834, 1835. *See* note 65 and accompanying text *infra* for FCC interpretation.

<sup>56</sup> 1967 C.Q. ALMANAC 1042.

<sup>57</sup> H.R. REP. No. 572, *supra* note 53, at 1810.

<sup>58</sup> *Hearings on H.R. 6746 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 97 (1967).

<sup>59</sup> The debate was almost unanimously critical of editorializing by the media. Congressman Springer felt that neither commercial nor noncommercial stations should be able to endorse candidates. Springer felt Congress should "close this loophole now." 113 CONG. REC. 26388 (1967). Congressman Joelson, apparently referring to the recently announced decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), asserted that public officials were "sitting ducks." He stated, "the right of editorializing should be

suggests that the true reason for the inclusion of section 399(a) was to win the support of reluctant congressmen who feared the potential criticism of public broadcasters.<sup>60</sup>

### B. FCC Interpretation

1. *Commercial editorializing*—The FCC originally decreed that all editorializing was contrary to the public interest. In 1940, the FCC held in *Mayflower Broadcasting Corporation* that “[a] truly free radio cannot be used to advocate the causes of the licensee.”<sup>61</sup> The FCC cautiously reversed that decision nine years later in its report on *Editorializing by Broadcast Licensees*.<sup>62</sup> The report stated that overt editorializing by broadcasters, which had subsequently become subject to the general requirements of fairness, is not contrary to the public interest.<sup>63</sup> Since those early years of broadcasting, the FCC has taken a more favorable view of editorializing by commercial broadcasters. In fact, the FCC has considered a station’s presentation of editorials as a positive factor in license applications and renewals.<sup>64</sup>

2. *Section 399(a)*—The FCC has interpreted section 399(a) to preclude only those editorials on public broadcast stations which are by licensees, their management, or those speaking on their behalf.<sup>65</sup> Station employees, for instance, may express their per-

---

very, very carefully scrutinized.” 113 CONG. REC. 26391 (1967). Congressman McClure foresaw public television stations “crusad[ing] for my opponent in next year’s election” if public licensees were given the power to editorialize and endorse candidates. *Id.* at 26399.

<sup>60</sup> Lindsey, *Public Broadcasting: Editorial Restraints and the First Amendment*, 28 FED. COM. B.J. 63, 81 (1975); Toohey, *Section 399: The Constitution Giveth and Congress Taketh Away*, 6 EDUC. BROADCASTING REV. 31, 34 (1972): “[T]he purpose of Section 399 was clear: to prevent Congress from creating a monster that might someday turn on its creator. Therefore, to achieve its own self-protective ends Congress simply legislated away a significant part of educational broadcasters’ right of free speech.”

<sup>61</sup> 8 F.C.C. 333, 340 (1940).

<sup>62</sup> 13 F.C.C. 1246 (1949).

<sup>63</sup> *Id.* at 1253.

<sup>64</sup> The FCC formally recognized the importance of editorializing in its 1960 policy report on programming. The Commission included as one of fourteen programming elements necessary to serve the needs of the community, “(7) editorialization by licensees.” 25 Fed. Reg. 7295 (1960). *Cf.* WHDH, Inc., 16 F.C.C.2d 1, 10 (1969) (applicant which would be owned by a charitable foundation which had IRS restrictions limiting ability to editorialize were assessed a slight demerit); RKO General, Inc., 44 F.C.C.2d 149, 219 (1969) (station’s failure to editorialize “runs squarely athwart Commission policy”); Evening Star Broadcast Co., 27 F.C.C.2d 316, 332 (1971) (“noteworthy is the fact that the licensee has regularly editorialized . . . on matters of immediate concern to all residents of the District”).

<sup>65</sup> Accuracy in Media, Inc., 45 F.C.C.2d 297, 302 (1973).

sonal views on public issues as long as they make clear that they are not expressing the views of the station.<sup>66</sup>

Even as interpreted by the FCC, however, section 399(a) inhibits an important area of free expression. Public broadcasters do not have the right, as their commercial counterparts have, to take public stands on issues of political importance. The negative effects of this prohibition go beyond the infringement of the broadcaster's rights. The viewing public is denied an importance voice, particularly on local issues. As might be expected, the frequency and quality of commercial editorializing has not been overwhelming,<sup>67</sup> because of concern for the alienation of sponsors.<sup>68</sup> Public broadcasting thus remains a largely untapped source for more extensive and meaningful editorializing.<sup>69</sup>

<sup>66</sup> Walker & Salveter, 32 RAD. REG. 2d (P&F) 839 (1975).

<sup>67</sup> Despite the reversal of the FCC policy against editorializing, *see* note 62 and accompanying text *supra*, there was little immediate experimentation by commercial stations with their new editorial freedom. In fact, the first editorials were not broadcast by local stations but rather by the CBS television network. F. WOLF, *supra* note 4, at 88. Most local stations did not begin even limited editorializing independently of the networks until the early 1960's. *Id.* (citing W. WOOD, ELECTRONIC JOURNALISM 62 (1967)). The level of commercial editorializing remains negligible today. In 1976, a nationwide survey found that only 58.3% of commercial television stations editorialize. Of those which editorialize, 57.8% did so less than once per week. BROADCASTING YEARBOOK C-300 (1976).

<sup>68</sup> The Carnegie Commission stated:

The United States is the only Western nation relying so exclusively upon advertising effectiveness as the gatekeeper of its broadcasting activities. The consequences of using the public spectrum primarily for commercial purposes are numerous, and increasingly disturbing. The idea of broadcasting as a force in the public interest, a display case for the best of America's creative arts, a forum of public debate—advancing the democratic conversation and enhancing the public imagination—has receded before the inexorable force of audience maximization.

CARNEGIE REPORT II, *supra* note 2, at 21-22. *See also* F. Wolf, *supra* note 4, at 137-38.

<sup>69</sup> There has been no comprehensive study of the feelings of public licensees toward editorializing. A 1975 survey restricted to public radio station managers found, however, that public licensees generally thought editorializing on their stations would provide a positive public service resulting in no social or political harm. D. Feingold, Section 399 of the Communications Act of 1934: A Legal and Quantitative Study of the Prohibition of Broadcast Editorials on Non-Commercial Educational Broadcasting 122-23 (May, 1975) (unpublished Masters of Arts thesis, Central Missouri State University). One station manager commented: "Since commercial stations are afraid to editorialize on anything more controversial than jaywalking, it falls upon the public broadcaster to provide this forum of information." *Id.* at 123.

If § 399(a) is found unconstitutional or is deleted by Congress, the response of public licensees will be difficult to predict. One important external factor on their decision to editorialize, which is applicable to nonprofit "community" licensees only, is the tax laws. Section 501(c)(3) of the Internal Revenue Code of 1954 exempts from federal income taxation:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, . . . or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which*

### III. THE CONSTITUTIONALITY OF SECTION 399(a)

#### A. *Broadcasting and the First Amendment*

In recent years, courts have faced the problems raised by the claims of powerful media interests in interpreting the First

---

*is carrying on propaganda, or otherwise attempting, to influence legislation, . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.*

I.R.C. § 501(c)(3) (1979) (emphasis supplied). The loss of tax deductibility of contributions from the general public to public stations under the federal income tax, *id.* §§ 170 & 642(c) (1978), estate tax, *id.* §§ 2055 & 2106(a)(2) (1978), and gift tax, *id.* § 2527 (1978), all of which incorporate the 501(c)(3) requirements, would be of even greater importance.

Concern over the loss of exempt status from editorializing would seem unwarranted, either under the substantial lobbying and propaganda activity limitation or under the political campaign activity limitation. The Internal Revenue Service (IRS) has never found a nonprofit organization's lobbying or propagandizing activities "substantial" where only minimal effort and expense was involved. See Whalen, *Political Activities of Section 501(c)(3) Organizations*, 29 S. CAL. TAX. INSTIT. 195, 205 (1977). Editorials by nonprofit "community" licensees, even if broadcast on a regular basis, would not seem to constitute a "substantial" part of the station's "total activities" as required by § 501(c)(3). In addition, a nonprofit organization can now elect to have its political expenditures judged under the new objective § 501(i) test. This alternative test utilizes a sliding scale of permissible political expenditures calculated as a percentage of the organization's total exempt expenditures. See *id.* at 215-21.

Of greater importance is the I.R.C. § 501(c)(3) prohibition of activity in political campaigns, including the making of statements. This prohibition, unlike the substantial legislative or propaganda limitation, is absolute. The courts and the IRS have not, however, applied it literally. The IRS has not taken action so long as the campaign activity constitutes only a subsidiary objective of an organization's activities. See P. TREUSCH & N. SUGARMAN, *TAX-EXEMPT CHARITABLE ORGANIZATIONS* 168 (1979). This flexible interpretation would be necessary if § 399(a) were deleted and the IRS were faced with the editorializing about or endorsing of candidates by nonprofit "community" licensees. The Federal Elections Campaign Act of 1971, 47 U.S.C. § 312(a)(7) (1976), which is applicable to all broadcasters, threatens the revocation of a station's license "for willful or repeated failure to allow reasonable access" to candidates for federal office. This obligation is in direct conflict with the § 501(c)(3) political campaign activity prohibition. Most likely the IRS would be forced to treat political editorializing by nonprofit "community" licensees as an exception to § 501(c)(3). See D. TOOHEY, R. MARKS & A. LURAKER, *LEGAL PROBLEMS IN BROADCASTING* 152 (1974).

Some commentators argue that the denial of any organization's exempt status as a result of its engaging in political activity is unconstitutional. See, e.g., Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 71 N.Y.U. INST. ON FED. TAX 1415 (1973); Note, *Political Speech of Charitable Organizations under the Internal Revenue Code*, 41 U. CHI. L. REV. 352 (1974). To date, the courts have been unreceptive. See, e.g., *Commarano v. United States*, 358 U.S. 498, 513 (1959) (upholding as consistent with the First Amendment nondiscriminatory denial of income tax deduction for expenditures to promote or defeat legislation); *Haswell v. United States*, 500 F.2d 1133, 1148 (Ct. Cl. 1974) (denial of tax deduction for contributions to association formed to preserve passenger railroad service; "[t]he exercise of the freedom of speech is not free from taxation.").

Amendment.<sup>70</sup> These problems are difficult because First Amendment theory developed in response to altogether different concerns.<sup>71</sup> In no other area has the Supreme Court responded with as striking a deviation from traditional First Amendment principles as in its attempts to fashion coherent standards for the broadcasting medium.<sup>72</sup> The Court has recognized that broadcasting is a medium with First Amendment rights and has attempted to formulate First Amendment standards which vary according to the characteristics of that medium.<sup>73</sup> The Court has justified the application of less rigorous First Amendment standards to broadcasting regulation than to the traditional print medium because “[u]nlike other modes of expression, radio inherently is not available to all.”<sup>74</sup> The “scarcity doctrine”<sup>75</sup> underlying the Court’s treatment of broadcasting is based on the premise that the electromagnetic broadcast spectrum is a valuable public resource in scarce supply. Without government regu-

<sup>70</sup> See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (indecent language on radio); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (gag rules); *Columbia Broadcasting System, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973) (access to paid television advertising); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (newspaper’s privilege and grand jury subpoenas); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (prior restraint on publication of “Pentagon Papers”); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (television fairness doctrine).

<sup>71</sup> “[T]he First Amendment was not really subjected to judicial interpretation and rationalization until just after World War I, and then the principle claimants of First Amendment rights were relatively powerless people—anarchists, socialists, and syndicalists.” Blasi, *Journalistic Autonomy as a First Amendment Concept*, in *IN HONOR OF JUSTICE DOUGLAS: A SYMPOSIUM ON INDIVIDUAL FREEDOM AND THE ENVIRONMENT* 555, 567 (R. Keller ed. 1979) (citing, i.e., *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); and *Abrams v. United States*, 250 U.S. 616 (1919)). See also Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUNDATION RESEARCH J.* 523, 523 (1977) (“The theory underlying a clause of the Constitution often depends more on the claims that have been pressed over the years in the name of the clause than on the grievances and value judgments that originally induced its adoption.”).

<sup>72</sup> See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 747 (1978) (“And of all forms of communications, it is broadcasting that has received the most limited First Amendment protection.”).

<sup>73</sup> Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 307 (1969), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The *Tornillo* Court struck down a state equal reply statute applicable to newspapers without even citing *Red Lion*, which had upheld a similar provision, the television fairness doctrine, 47 U.S.C. § 315(a) (1976). Cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (statute authorizing denial of license to “sacrilegious” motion pictures held void; “[e]ach method [of expression] tends to present its own peculiar problems.”).

<sup>74</sup> *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943) (FCC chain broadcasting rules under power of Communications Act of 1934 do not violate First Amendment).

<sup>75</sup> The Supreme Court first expressed the scarcity doctrine in *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-14 (1943).

lation, overcrowding of the spectrum would supposedly result in signal interference and chaos.<sup>76</sup> When many who wish to utilize the airwaves must be excluded, the argument concludes, those who are licensed to use the airwaves must act as a fiduciary to the general public. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>77</sup>

This fiduciary role subjects broadcasting licensees to numerous requirements inapplicable to their print counterparts. Broadcasters must apply for a license before using the airwaves;<sup>78</sup> they must provide equal time to political candidates;<sup>79</sup> and they must adhere to the fairness doctrine by providing for the discussion of conflicting views on controversial subjects<sup>80</sup> and offering air time to individuals personally attacked or editorially opposed by the station.<sup>81</sup>

Whether the scarcity of available airwave space was ever more than a fiction is unclear, but technological advances such as the creation of the UHF portion of the spectrum and cable television render it an unconvincing rationale today.<sup>82</sup> A more persuasive explanation for these different First Amendment standards can be found in two elements of the historical development of broadcasting. First, there existed a belief that broadcasting was primarily an entertainment medium and only secondarily a source of serious news programming needing full First Amendment protection.<sup>83</sup> Second, the history of broadcasting regulation lacks an instance of outrageous government injustice which has

---

<sup>76</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969) ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").

<sup>77</sup> *Id.* at 390.

<sup>78</sup> 47 U.S.C. § 301 (1976).

<sup>79</sup> *Id.* § 315(a).

<sup>80</sup> *Id.*

<sup>81</sup> 47 C.F.R. §§ 73.1910, 73.1920, 73.1930 (1979).

<sup>82</sup> See, e.g., Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 223; Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 6-9 (1976). Despite rejection of the scarcity doctrine, Bollinger supports differential treatment of broadcasting and newspapers at least as far as access regulation is concerned. He feels this achieves the positive benefits of access in a highly concentrated medium with minimal erosion of First Amendment tradition and need for government intervention. See also B. OWEN, *supra* note 9, at 103-07 ("The spectrum is not in 'scarce supply' to any greater extent than steel, plastics, or pencils." *Id.* at 107.); Note, *Regulation of Indecency in Political Broadcasting*, 13 U. MICH. J.L. REF. 69 (1979).

<sup>83</sup> See Bazelon, *supra* note 82, at 219 ("The main factor in my mind that explains the different First Amendment regime applied to TV and radio is the lack of genuine journalistic effort in the beginning of telecommunications news.").

forced the courts to respond with countervailing safeguards.<sup>84</sup>

### B. Section 399(a) and the First Amendment<sup>85</sup>

Although broadcasters are subject to regulation in the public interest, the Court has never suggested that government censorship is tolerable. On the contrary, the Court's rationale for allowing broadcast regulation has been to *maximize* the number of voices to serve the public's right to be informed.<sup>86</sup> The damage to the public is particularly acute under section 399(a) because the broadcasting medium has become the dominant force in public affairs today.<sup>87</sup>

Protection of uninhibited discussion of public affairs is at the core of the First Amendment.<sup>88</sup> In *Mills v. Alabama*,<sup>89</sup> the Su-

<sup>84</sup> Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. L. & Econ. 15, 18 (1967):

If one reviews the legal developments under the Radio Act of 1927 and the Communications Act of 1934, one cannot quite suppress the feeling that what is lacking is one good case of injustice by government—which has been corrected by the courts. What broadcasting has needed is its own *Zenger* case.

See also note 71 and accompanying text *supra*.

<sup>85</sup> A case challenging the constitutionality of § 399(a) was recently dismissed, *League of Women Voters of Cal. v. FCC*, No. CV 79-1562 mml (PX) (C.D. Cal.) (March 14, 1980) (on file with UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM). Three plaintiffs maintained standing: the Pacifica Foundation as the owner of several California public radio stations because it was denied the right to editorialize about political candidates and public issues; the League of Women Voters; and Congressman Henry Waxman (D-Cal.), the latter two plaintiffs representing all listeners and viewers who were denied access to information and opinion on public issues. The suit, seeking to strike § 399(a) on First Amendment as well as Fifth Amendment equal protection grounds, was dismissed for lack of ripeness. See N.Y. TIMES, Mar. 16, 1980, § 1, at 21, col. 5.

<sup>86</sup> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . 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. This right may not constitutionally be abridged either by Congress or by the FCC.

*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (citations omitted).

<sup>87</sup> "In terms of the role of free speech in the functioning of a system of self-government, radio and television broadcasting have taken the place of the stump and the soap box in 1791." Kalven, *supra* note 84, at 15 (quoting John Pemberton, former Executive Director of the ACLU).

<sup>88</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The first amendment affords the broadest protection to political expression [as to public issues and qualifications of candidates for office.]); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (striking down recovery for libel against newspaper by political candidate; "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (striking down libel recovery of public official where there was no proof of actual malice; "the central meaning of the First Amendment" is a "profound national

preme Court struck down an Alabama statute prohibiting a newspaper from editorializing on election day, finding it "difficult to conceive of a more obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press."<sup>90</sup> Government suppression of free expression is "presumptively at odds

commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement . . . attacks on government and public officials.").

See generally A. MEIKLEJOHN, *POLITICAL FREEDOM* (2d ed. 1960) (though championing an absolute guarantee of First Amendment rights, Meiklejohn defines the ambit of the Amendment to political speech in furtherance of self-government); Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971) (limiting the scope of First Amendment protection to "explicitly political" speech advocating change through democratic processes); Blasi, *The Checking Value in First Amendment Theory*, *supra* note 71 (emphasizing the "checking value" of the First Amendment, arguing that the preeminent concern of the First Amendment framers—to check abuses of power by public officials—remains paramount today).

Section 399(a) violates the First Amendment under the rationale of any of these three theories of the First Amendment. Political editorializing by public licensees would certainly further the informed electorate necessary for Meiklejohn's vision of self-government. Although Bork may argue for a very narrow area of First Amendment protection, his theory would also afford full protection to the speech abridged by § 399(a). Political editorials are "explicitly political," which Bork defines to include "evaluation, criticism, electioneering and propaganda" directed at changing "governmental behavior, policy or personnel" through majoritarian processes. Bork, *supra*, at 27-28. Because of the vested power of political elites, moreover, the "checking value" suggests the need for an organized, countervailing elite force, a role best suited for the professional press. Blasi, *supra* at 524. On the other hand, the ultimate failure of the checking value, the rise of a totalitarian state, would threaten most if government were able "to gain complete control of the channels of mass communication." *Id.* at 542. The public broadcasting system is structured to prevent government control, see notes 107-110 and accompanying text *infra*, and the existence of strong commercial networks eliminates the danger of government controlling all mass communications. Public broadcasters have been critical of government abuses in the past, see note 113 *infra*, and would be more effective with the power to editorialize. The checking value theory of the First Amendment thus supports the freedom to editorialize for public broadcasting.

<sup>89</sup> 384 U.S. 214 (1966).

<sup>90</sup> *Id.* at 219. The Court continued:

[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that the editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

*Id.*

Though *Mills* involved a newspaper editorial, dicta in *Red Lion* suggested that the Supreme Court would reach the same result in the broadcasting context. "There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views . . . Such questions would raise more serious First Amendment issues." *Red Lion Broadcasting Co. v. FCC*, 319 U.S. 367, 396 (1969) (emphasis added).



with the [F]irst [A]mendment.”<sup>91</sup> Courts have imposed the strictest of scrutiny on such infringements. Unless the statute involves speech not fully protected by the First Amendment,<sup>92</sup> or the suppression is essential to further a compelling government interest,<sup>93</sup> the statute or governmental action will be found constitutionally defective. On its face, section 399(a) prohibits speech on the basis of content—only speech expressing the station’s opinions on issues of public importance and on political candidates is regulated. But, “[t]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>94</sup> The speech prohibited by section 399(a), editorials and support of political candidates, is clearly protected by the First Amendment;<sup>95</sup> the statute can therefore be upheld only if there is a

<sup>91</sup> L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 581 (1978).

<sup>92</sup> See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Roth v. United States*, 354 U.S. 476 (1957) (same); *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (defamation).

<sup>93</sup> See note 96 *infra*.

<sup>94</sup> *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972) (ordinance barring nonlabor picketing near school buildings violates equal protection since there is no compelling governmental interest to justify a classification affecting First Amendment interests).

*Cf. Stone, Restrictions of Speech Because of its Content; The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). Professor Stone notes the Court’s differentiation between content-neutral restrictions that restrict communications without regard to their message and content-based restrictions that restrict communications on the basis of their message. Stone advocates the recognition of a third category, subject-matter restrictions that restrict communication of an entire subject, as opposed to restrictions placed upon a specific viewpoint or idea. Under Stone’s suggested framework, § 399(a) would fit under this new category because a general subject matter, editorializing by station management, would be completely prohibited without regard to the specific viewpoint expressed. Stone recognizes, however, that the Court has yet to follow this approach. For instance, Stone would classify *Mosley* as a subject-matter case. The Court in *Mosley*, however, while recognizing the subject-matter nature of the Chicago ordinance, “proceeded on the assumption that subject-matter restrictions are to be treated no differently from other sorts of content-based restrictions.” *Id.* at 86.

<sup>95</sup> See notes 87-90 and accompanying text *supra*.

Because § 399(a) was enacted by Congress to prohibit all editorializing by public licensees, it does not have all of the technical elements of a classic prior restraint in which the power to censor speech resides in an ad hoc administrative or judicial decisionmaker. Nevertheless, § 399(a) has the most fundamental attribute of a prior restraint on expression: an official restriction imposed upon speech in advance of publication of broadcast. One of the basic goals of the framers of the First Amendment was to prevent a recurrence in this country of the system of licensing in England which required the approval of state or church authorities before publication. See Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 652 (1955). First Amendment doctrine reflects this goal. Any “system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (striking down informal blacklisting which censored and inhibited the circulation of publications). Recent cases have reaffirmed the continued vitality of the doctrine. See, e.g., *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (pretrial gag order); Southeast-

compelling governmental interest for the ban.<sup>96</sup>

The actual reason for the passage of section 399(a) suggested by its legislative history, congressional fear of criticism,<sup>97</sup> is far from a compelling state interest and of questionable legitimacy.<sup>98</sup> Even if one were to accept as true the stated congress-

ern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (ban on musical "Hair" from municipal auditorium); New York Times Co. v. United States, 403 U.S. 713 (1971) (injunction preventing peaceful distribution of leaflets).

See generally *Near v. Minnesota*, 283 U.S. 697 (1931) (statute permitting abatement of "malicious, scandalous, and defamatory" newspapers invalidated); Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977); Murphey, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 898 (1978).

<sup>96</sup> See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978) (striking down restrictions on corporate expenditures to influence referendum proposals because there was no compelling state interest to justify the infringement on freedom of speech). The "compelling interest" standard is a very strict one. One author stated that "sightings of compelling interests have been rarer than sightings of abominable snowmen. . . ." Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 61 (1976).

Content-based restrictions cannot be justified by the claim that the expression has been voiced in another time, place, or manner, or expressed by another speaker. L. TRIBE, *supra* note 91, at 603. See, e.g., *Spence v. Washington*, 418 U.S. 405, 411 (1974) (conviction for placing peace symbol on American flag not justified by argument that views could be expressed by "other means"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (striking down state ban on prescription drug price advertising for infringing First Amendment rights of consumers to information; no justification that consumers could obtain information from other sources). Restrictions on broadcasting speech because of its content have been upheld only where they have been found necessary for the protection of children or where the material has been deemed patently offensive. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding FCC ruling that it has power to regulate radio broadcasts that are indecent but not obscene). The Court has allowed these exceptions due to the "uniquely pervasive presence" of broadcasting which is "uniquely accessible" to children and unwilling listeners. See also *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom Capital Broadcasting Co. v. Acting Attorney Gen.*, 405 U.S. 1000 (1972) (upholding prohibition on television cigarette advertising because of the greater influence of commercials in the electronic media on children).

<sup>97</sup> See notes 59-60 and accompanying text *supra*.

<sup>98</sup> The Court has been sensitive to the importance of the legislative motive behind statutes restricting free expression. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a statute prohibiting the teaching of the theory of evolution in the public schools because true motive was to establish a religious viewpoint); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (striking Louisiana tax on large newspapers published in the state because motivation was to penalize newspapers critical of state government and Huey Long regime). The Court has recognized, however, the inherent difficulty in ascertaining the dominant legislative motive behind the passage of a statute. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . ." *United States v. O'Brien*, 391 U.S. 367, 384 (1968) (upholding conviction for violation of statute prohibiting destruction of draft registration certificates). The Court's rationale for not inquiring into the legislative motivation behind the statute in *O'Brien* would not extend to a case challenging § 399(a) because in *O'Brien* the Court was unwilling only to "void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it." *Id.* (emphasis added). See generally Ely, *Legislative and Administrative Mo-*

sional rationale for the ban, the prevention of governmental propagandizing,<sup>99</sup> such a rationale is unsupported and fails to provide a compelling interest to justify this infringement on protected speech. Section 399(a) is directed at diverse local stations which are unlikely to speak in a single, monolithic voice, much less the voice of the government or a political party. Only thirty percent of public television stations are owned by states or municipalities. Another thirty-two percent are owned by universities and school systems. Thirty-eight percent are owned by private, nonprofit "community" organizations whose only connection with the federal government is the acceptance of partial federal funding.<sup>100</sup> Though all public television stations receive partial federal funding through the CPB, eight hundred public radio stations receive no federal support whatsoever.<sup>101</sup> Overall, federal funding provided only 27.3 percent of the total public broadcasting funding for fiscal year 1977.<sup>102</sup> Licensee acceptance of this level of federal funding, channelled through the CPB, is insufficient to present a danger of public licensees becoming a propaganda arm of the federal government. Any argument that section 399(a) is a necessary safeguard to prevent government control over public broadcasting and their editorial statements is particularly tenuous in light of the recent Supreme Court decision in *Buckley v. Valeo*.<sup>103</sup> In upholding the public campaign fund for presidential candidates of the Presidential Election Campaign Fund Act of 1971,<sup>104</sup> the Court dismissed the concern that this public funding could lead to governmental control of political parties and a resulting loss of political freedom as "wholly speculative and hardly a basis for invalidation of the

---

tivation in *Constitutional Law*, 79 YALE L.J. 1205 (1970).

<sup>99</sup> See notes 53-56 and accompanying text *supra*.

<sup>100</sup> CPB Management Information Systems, June, 1979.

State and municipally-owned stations in this discussion will be referred to as "state" licensees to distinguish them from private, nonprofit stations, which will be called "community" licensees. Although a community licensee might not be immune from all local political pressures, greater control could certainly be asserted over a state licensee owned and run by a government entity than over an independent community licensee. Stations owned by state universities and school systems present an intermediate situation. While owned by a governmental entity, the relationship of the university or school broadcasting organization to the state and local governmental powers may vary considerably.

<sup>101</sup> CARNEGIE REPORT II, *supra* note 2, at 29 (citing FCC Listings, Sept. 1978). The ownership of CPB-recognized public radio stations receiving federal funds is: university—63%; community—21%; local municipalities—11%; and state—5%. CPB Management Information Systems, June 1979.

<sup>102</sup> Total 1977 public broadcasting income was \$416,548,000. Federal funds provided \$113,729,000, or 27.3%, of that amount. See CARNEGIE REPORT II, *supra* note 2, at 341.

<sup>103</sup> 424 U.S. 1 (1976). See generally Polsby, *Buckley v. Valeo*, 1976 SUP. CT. REV. 1.

<sup>104</sup> 26 U.S.C. §§ 9001-9012, 9031-9042 (1976).

public financing scheme on its face."<sup>106</sup>

Furthermore, even if the fear of government propagandizing by public licensees were legitimate, Congress should solve this problem in a way that least restricts First Amendment values.<sup>106</sup> The congressional decision to ban all editorializing through section 399(a) is an unacceptable solution because Congress has in fact already built sufficient safeguards into the public broadcasting system to prevent government control. The basic structure of public broadcasting was designed to prevent just such abuse.<sup>107</sup> The CPB was explicitly created as an independent body to "afford maximum protection to such broadcasting from extraneous interference and control."<sup>108</sup> If any editorial abuses were to occur, the fairness doctrine<sup>109</sup> and the equal time provision<sup>110</sup> are proper remedies. If the adverse consequences feared can be averted by more speech, then more speech is mandated.<sup>111</sup> Governmental suppression is "conclusively" unnecessary.<sup>112</sup>

<sup>106</sup> 424 U.S. 1, 93 n.126.

<sup>106</sup> See, e.g., *Elrod v. Burns*, 427 U.S. 347, 363 (1976) ("The state must further some vital governmental end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights"); *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) ("If the State has open to it a less drastic way of satisfying its legitimate interests it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). See generally *Note, Less Drastic Means and the First Amendment*, 78 *YALE L.J.* 464 (1969).

<sup>107</sup> See part I C *supra*.

<sup>108</sup> 47 U.S.C.A. § 396(a)(6) (West Supp. 1979).

<sup>109</sup> 47 U.S.C. § 315(a) (1976); 47 C.F.R. §§ 73.1910, 73.1920, 73.1930 (1979). See notes 80-81 and accompanying text *supra*.

<sup>110</sup> 47 U.S.C. § 315(a) (1976). See note 79 and accompanying text *supra*.

<sup>111</sup> See Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 *LAW & CONTEMP. PROB.* 530, 535 (1966) ("[T]he remedy of silence is not the way of the First Amendment").

<sup>112</sup> *L. TRIBE*, *supra* note 91, at 603. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (The choice between "the dangers of suppressing information and the dangers of its misuse if it is freely available [is a choice] that the First Amendment makes for us.").

If Congress believes the fairness doctrine and the equal time provision constitute insufficient protection against editorial abuses, it should impose a greater duty to provide access to opposing viewpoints rather than the wholesale restriction on free expression presently found in § 399(a). See *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (broadcasters have no duty to provide access to persons wishing to buy commercial time for editorial advertisements urging controversial positions). Justice Douglas indicated that he *would* find a right of access for public broadcasters:

If these cases involved [the CPB] we would have a situation comparable to that in which the United States owns and manages a prestigious newspaper. . . . The Government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired. For by the First Amendment it may not

Although there is arguably no basis for the fear that editorializing by public licensees would result in propagandizing by the federal government,<sup>113</sup> a more legitimate concern is that a state or municipally-owned licensee would come under the control of local political forces. This argument does not validate section 399(a), however, because section 399(a) is not limited to "state" licensees but is applicable to all public licensees including "community" licensees.<sup>114</sup> At the very least, therefore, section 399(a) is defectively overbroad.<sup>115</sup> Even if section 399(a) were amended

editorializing by public licensees would result in propagandizing by the federal government, . . . More specifically, the programs tendered by the respondents in the present cases could not then be turned down.

*Id.* at 149-50 (Douglas, J., concurring in the result). *But see* Canby, *supra* note 38, at 1124 (criticism of the Douglas dicta, stating that public broadcasters must inevitably edit).

<sup>113</sup> See notes 99-105 and accompanying text, *supra*. The major controversy public broadcasting has in fact faced is not the charge of pro-government propagandizing but rather that of anti-administration bias. The bitter dispute between the Nixon administration and public broadcasting culminated with Nixon's veto of a two-year, \$155 million appropriation to the CPB in 1972. See Richard Nixon, *Veto of Public Broadcasting Bill*, 1972 PUB. PAPERS 718, 718-19. Patrick Buchanan, a Nixon speechwriter, articulated the administration view on a television talk show in 1973:

Now, when that came down to the White House, we took a look at it, and we also looked at the situation over there. I did personally. I had a hand in drafting the veto message. And if you look at the public television, you will find you've got Sander Vanocur and Robert MacNeil, the first of whom, Sander Vanocur, is a notorious Kennedy sycophant, in my judgment, and Robert MacNeil, who is anti-administration. You have the Elizabeth Drew show on, which is, she personally, is definitely not pro-administration. I would say anti-administration. *Washington Week in Review* is unbalanced against us, you have *Black Journal*, which is unbalanced against us . . . you have Bill Moyers, which is unbalanced against the Administration. And then for a fig leaf they throw in William F. Buckley's program.

CARNEGIE REPORT II, *supra* note 2, at 43. The Carnegie Commission criticizes the CPB during this crisis, suggesting that the Corporation board sacrificed public affairs programming in an attempt to mollify the Nixon administration. See generally *id.* at 41-51. See also Chase, *supra* note 38, at 76-88.

<sup>114</sup> See note 100 *supra*.

<sup>115</sup> A statute is void if it "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities" protected by the first amendment. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (striking down state prohibition on picketing because activity protected by the First Amendment was within its reach). See also *United States v. Robel*, 389 U.S. 258, 265-66 (1967) (striking down statute which prohibited all members of Communist Party from working in any defense facility; "[the statute] casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot.").

A regulation may be invalidated for overbreadth for several possible reasons: because the government interest sought to be implemented is insufficient in relation to the inhibitory effect on First Amendment freedoms; because the means employed bears insufficient relation to the asserted governmental interest; or because the end could be achieved by a "less drastic means," less restrictive on First Amendment freedoms. See

to apply only to state licensees, the prohibition would remain objectionable. As with all broadcasters, the fairness doctrine and equal time provision should adequately protect the public from any editorial abuses by state licensees. This remedy cannot guarantee the total absence of the government's point of view on a station; as long as the government does not monopolize the airwaves, however, there is no constitutional justification for prohibiting altogether the expression of the government position on a subject. "The ultimate danger is not that the government's point of view gets across, it is that the views of others do not. . . ." <sup>116</sup> There is nothing in the First Amendment that prevents the government from "affirmatively promoting" expression. <sup>117</sup> One scholar of the First Amendment believes the current concentration of power over communications acquired by the mass media has so threatened the system of freedom of expression that government expression has now become "a necessary and healthy part of the system." <sup>118</sup>

Editorials would not be effective vehicles for propagandizing. An editorial is the most visible expression of a station's position on an issue or a candidate. More serious abuses may occur in the

note 106 *supra*; W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 815-22, 841-55 (1975). See also Israel, *Elfrandt v. Russell: The Demise of the Oath?*, 1966 SUP. CT. REV. 193, 217-19; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

<sup>116</sup> Canby, *supra* note 38, at 1127.

<sup>117</sup> [T]here is nothing in the negative force of the First Amendment, as a general matter, that would prevent the government from using public funds to support various features of the system of freedom of expression. On the other hand, the negative features of the First Amendment do impose some restrictions upon the way government funds are expended. In general these limitations would be the same as in the case of the government furnishing physical facilities: there could be no discrimination between users and no regulation of content.

T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 651 (1970) (emphasis added). *Contra*, Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979) (advocating the recognition of an implied prohibition against government dissemination of political ideas in the First Amendment).

<sup>118</sup> T. EMERSON, *supra* note 117, at 698. Emerson finds the affirmative promotion of freedom of expression by the government "[t]he most challenging problem in First Amendment theory today." *Id.* at 627. The traditional system of freedom of expression was "essentially laissez-faire in character" with the First Amendment playing a negative role, protecting the system from government interference. *Id.* "At one time it may have been thought sufficient for the government to furnish an occasional public library and a one-room schoolhouse. But that degree of involvement is inadequate for a modern technological society." *Id.* at 672.

Alexander Meiklejohn also supports the government taking affirmative steps to enrich public debate. Most important is a system of education able to "inform and cultivate the mind and will of the citizen," providing him with "the wisdom, the independence, and, therefore, the dignity of a governing citizen." Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 257. See note 88 *supra*.

day-to-day programming decisions every station must make. The selection of programs, the times when they are broadcast, the choice of guests for panel discussions—all could be more easily abused to advocate subtly a particular position. This result cannot be so easily achieved by a clearly labelled editorial, which is obviously a purely partisan statement.

Although it was not suggested by Congress when it enacted section 399(a), a possible rationale for section 399(a) is that in accepting the "privilege" of federal funds a station must also accept this restriction on the use of these funds.<sup>119</sup> The government has no obligation to fund public broadcasting. The government may of course impose reasonable conditions upon the use of federal funds.<sup>120</sup> If the government chooses to provide such funds, however, it cannot condition the acceptance of these funds on otherwise unconstitutional requirements. The "unconstitutional condition" doctrine prevents the government from doing indirectly what an express constitutional provision forbids it to do directly.<sup>121</sup> If the suppression of editorializing violates

---

<sup>119</sup> The overbreadth problem, *see* note 115 *supra*, is again present. Section 399(a) applies to some public licensees receiving no federal funds. *See* note 101 *supra*. Moreover, § 399(a) prohibits *all* editorializing by public licensees instead of that conducted only on programs specifically funded by CPB grants.

<sup>120</sup> *See, e.g.,* *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (upholding government contracts containing provisions regulating water usage; "beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges"); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968) (striking down Alabama regulation denying federal welfare aid to children of a mother "cohabiting" with man to whom she is not married; "[t]here is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed. . .").

<sup>121</sup> *Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968). *See also* *Bruff, Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 HASTINGS L.J. 129 (1969); *Note, Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

An early expression of the doctrine is found in *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593-94 (1924). Justice Sutherland stated:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitu-

the First Amendment, Congress cannot achieve the same result by imposing unconstitutional conditions on its granting of funds to public broadcasting.

Section 399(a) might also be viewed as a reasonable restriction on political expression by government employees which is analogous to the Hatch Act<sup>122</sup> and similar state provisions. The analogy, however, is inapposite. The Hatch Act forbids "federal employees" from taking "an active part in political management or political campaigns."<sup>123</sup> Section 399(a), on the other hand, is not limited to government employees. The Hatch Act, moreover, is directed at political activity, not the political expression that section 399(a) prohibits.<sup>124</sup>

---

tion of the United States may thus be manipulated out of existence.

The famous dictum of Justice Holmes in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892), that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," has been repudiated by the Court. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 361 (1976) ("The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly."); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interests in freedom of speech"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("[I]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of a placing of conditions upon a benefit or privilege").

<sup>122</sup> 5 U.S.C. § 7324(a)(2) (1976).

The Hatch Act is arguably inconsistent with the unconstitutional conditions doctrine. *See Van Alstyne, supra* note 121, at 1447; Note, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 298-305 (1974). But the Supreme Court has consistently rejected this argument. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding Hatch Act limitations on political activities by federal employees); *United Public Workers v. Mitchell*, 330 U.S. 75 (1946) (same); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding an Oklahoma act regulating the political activities of state employees).

<sup>123</sup> 5 U.S.C. § 7324(a)(2) (1976).

<sup>124</sup> "[P]lainly identifiable acts of political management and political campaigning may constitutionally be prohibited" on the part of federal employees. *Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973) (emphasis added). The Court found that the prohibition was compelled by the legislative judgment that "partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences." *Id.* at 564.

However legitimate these concerns may be, they would not apply to public licensee editorializing. Unlike the role of most governmental employees, which is to impartially execute the laws, a public licensee's primary role is to provide informative programming to its viewers and listeners. Because the editorial power is not inconsistent with this informational role, the damage to responsible decision-making and the erosion of public confidence in government institutions that the Hatch Act seeks to prevent would not occur.



### C. Section 399(a) and Equal Protection

Section 399(a) prohibits editorializing by *public* broadcasters only, leaving commercial broadcasters free to editorialize. The critical question in all equal protection inquiries is "whether there is an appropriate governmental interest furthered by the differential treatment."<sup>125</sup> Where no fundamental rights are affected by the classification, it is sufficient that there be a legitimate governmental interest to which the classification reasonably relates.<sup>126</sup> When the equal protection claim is "intertwined with First Amendment interests"<sup>127</sup> as here, however, strict scrutiny is required. These unequal burdens on First Amendment rights can be justified only by a compelling governmental interest.<sup>128</sup> Just as section 399(a) fails strict scrutiny under First Amendment analysis,<sup>129</sup> the statute also violates the equal protection of the laws guaranteed by the Fifth Amendment due process clause.<sup>130</sup>

---

<sup>125</sup> *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>126</sup> *See, e.g., Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955) (upholding statute prohibiting opticians from fitting eyeglasses without prescription from doctor).

<sup>127</sup> *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

It should be noted that the Court in *Mosley* employed an important but previously little-used doctrine. Ordinarily, in testing the constitutionality of content-based restrictions, the Court focuses primarily on whether the restricted speech is sufficiently harmful to important state interests to warrant the restriction. In *Mosley*, however, the Court emphasized the difference in treatment between labor and nonlabor speech and focused on whether the *distinction* itself was justified. The Court looked not to the harmfulness of the nonlabor speech as such, but to the *relative* harmfulness of labor and nonlabor speech. The issue, in other words, was cast in equal protection as well as first amendment terms.

Stone, *supra* note 94, at 87 n.27. Cf. A. MEIKLEJOHN, *supra* note 88, at 27 ("[There is an] equality of status in the field of ideas.").

<sup>128</sup> *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 335 (1972) ("[T]he State must show a substantial and compelling reason for imposing durational residence requirements [on the right to vote]"); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (invalidating one-year waiting period for new residents seeking welfare; "since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by whether it promotes a compelling state interest"); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (restrictions on new political parties gaining a place on presidential election ballot in Ohio found violative of equal protection; "[t]he State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate.").

<sup>129</sup> *See* notes 91-124 and accompanying text *supra*.

<sup>130</sup> *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."). *Accord, Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

D. Section 399(a) and Community-Service

A case challenging the constitutionality of section 399(a) was recently dismissed on procedural grounds without reaching the merits of the First Amendment or Fifth Amendment claims.<sup>131</sup> Section 399(b), however, which required public stations to keep audio recordings of all broadcasts of public importance, was found unconstitutional in 1978 by the Court of Appeals for the District of Columbia ruling *en banc* in *Community-Service Broadcasting of Mid-America v. FCC*.<sup>132</sup> The court's analysis of the taping requirement supports striking down the editorializing ban as unconstitutional.

Judge Wright, speaking for five members of the court, invalidated section 399(b) as a violation of equal protection under the Fifth Amendment. The court held that since section 399(b) involves a noncontent distinction affecting fundamental First Amendment rights, the distinction between commercial and noncommercial broadcasters must further a "substantial" governmental interest that is "narrowly tailored" to serve that interest. Judge Wright was unable to find a substantial interest justifying the recording requirement.<sup>133</sup>

Judge Wright also found section 399(b) in violation of the First Amendment under two levels of analysis.<sup>134</sup> First, section 399(b) was not "content neutral" because the recording requirement applied only if the subject matter of the programming involved issues of public importance. Section 399(b) thus failed

---

<sup>131</sup> See note 85 *supra*. A Maine statute prohibiting public television stations which receive state funds from either supporting political candidates or "advocating or opposing any specific program . . . of governmental action" was found unconstitutional by the Maine Supreme Court in 1970. *State v. University of Maine*, 266 A.2d 863 (Me. 1970). The Maine Supreme Court found the statute inconsistent with the fairness doctrine which required the discussion of conflicting views on controversial subjects. The court added:

The designation of their licensed activities as "educational television broadcasting" would indeed be a misnomer if state law could effectively preclude them from presenting programs which are by their very nature essential to the educational process. [T]he State . . . has no . . . valid interest in protecting [its citizens] from the dissemination of ideas as to which they may be called upon to make an informed choice.

*Id.* at 868. See also Note, *Maine's Educational Television Network: Legal Difficulties*, 22 MAINE L. REV. 239 (1970).

<sup>132</sup> 593 F.2d 1102 (D.C. Cir. 1978).

<sup>133</sup> *Id.* at 1123. Judge Wright rejected the government's arguments that the recording requirement was necessary to preserve significant programming, to enforce the "objectivity and balance" requirements of 47 U.S.C.A. § 396(g)(1)(a), and to provide a means of federal oversight over federal funds.

<sup>134</sup> This part of the court's opinion was joined only by one judge, Judge Wilkey.

strict scrutiny under the First Amendment.<sup>135</sup> Second, even if the government interest in the recording requirement could be seen as unrelated to the suppression of free expression, Judge Wright would still find section 399(a) deficient under less strict First Amendment scrutiny. The government failed to show that the "incidental restrictions" on First Amendment freedoms were no greater than "essential" to further a "substantial government interest."<sup>136</sup>

This analysis is fully applicable to section 399(a).<sup>137</sup> The editorializing ban regulates speech on the basis of its content,<sup>138</sup> the speech is fully protected,<sup>139</sup> and there is no compelling interest in its suppression.<sup>140</sup>

Judge Robinson's concurrence in *Community-Service* clarifies the question of the constitutionality of the editorializing ban. He declined to utilize First Amendment analysis because he did not agree that section 399(b) "facially" impinged on First Amendment interests.<sup>141</sup> In examining possible justifications for the recording requirement in his equal protection analysis, he noted that the FCC did not suggest that the recording requirement was designed to facilitate the section 399(a) editorializing ban of which it is structurally a part. Judge Robinson concluded that "[t]his reticence is due no doubt to uncertainty over whether section 399(a) could itself withstand constitutional scrutiny, for it is not a chill but a hard freeze and the legislative history is replete with troubling statements."<sup>142</sup>

The striking down of section 399(b) in *Community-Service* is thus a strong indication that the same fate awaits section 399(a).

<sup>135</sup> 593 F.2d 1102, 1111 (D.C. Cir. 1978).

<sup>136</sup> *Id.* at 1114-22. *Cf.* *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (upholding conviction for burning draft card to protest the Vietnam War; "substantial" government interest in draft registration).

<sup>137</sup> The less strict "substantial government interest" test need not be applied to § 399(a) because the editorializing ban prohibits speech on its face rather than by a mere incidental restraint.

<sup>138</sup> See note 94 and accompanying text *supra*.

<sup>139</sup> See notes 86-88 and accompanying text *supra*.

<sup>140</sup> See notes 91-124 and accompanying text *supra*.

<sup>141</sup> 593 F.2d 1102, 1124-25 (D.C. Cir. 1978) (Robinson, J., concurring in the result).

<sup>142</sup> *Id.* at 1128 n.25.

Judge Robinson reviewed the legislative history of § 399(b) and concluded that since the House version emerged from the joint conference, the House debate must be given "special significance . . . as an expression of the purpose the new statute was intended to serve." *Id.* (quoting *United States v. Bartley*, 581 F.2d 984, 988 n.30 (D.C. Cir. 1978)). Judge Robinson believed that the limitation that only editorials representing the management's opinion would be restricted, which emerged from the joint conference, "hardly served to dispel qualms about how the prescription on such editorializing might fare constitutionally." *Id.* See notes 54-63 and accompanying text *supra*.

If the 399(b) recording requirement had a chilling effect on protected speech, section 399(a) indeed constitutes an outright "freeze."

#### IV. LEGISLATIVE SOLUTIONS

A bill is currently pending before the House of Representatives which would delete section 399(a). The proposed Communications Act of 1979,<sup>143</sup> would drastically restructure current broadcasting regulation.<sup>144</sup> This Act would remove section 399(a) "to permit public broadcasters to exercise the same journalistic freedom as is afforded to commercial broadcasters. No station of course would be required to editorialize."<sup>145</sup> Despite this proposal, it is unlikely that Congress itself will delete section 399(a), either in this bill or in the future.<sup>146</sup> A House bill which after amendment became the Public Telecommunications Financing Act of 1978<sup>147</sup> would have modified section 399(a) to allow editorializing while retaining the prohibition against supporting political candidates.<sup>148</sup> President Carter<sup>149</sup> supported such a change. The Senate version did not,<sup>150</sup> however, and the modification

<sup>143</sup> H.R. 3333, 96th Cong., 1st Sess. (1979).

<sup>144</sup> The new act would replace the FCC with a less powerful Communications Regulatory Commission. *Id.* § 211. The CPB would be replaced in 1983 by the Endowment for Program Development. *Id.* §§ 615, 621.

<sup>145</sup> STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., H.R. 3333, "THE COMMUNICATIONS ACT OF 1979" SECTION-BY-SECTION ANALYSIS 74 (Comm. Print 1979).

<sup>146</sup> Congressman Waxman, who was a plaintiff in the court challenge to § 399(a), believes it is unlikely Congress will delete the prohibition in the future. Affidavit of Plaintiff Henry A. Waxman, League of Women Voters of Cal. v. FCC, No. CV 79-1562mm (PX) (C.D. Cal.). Congressman Waxman's assessment of the Congressional mood is reinforced by the recent vote of the Senate to defend the constitutionality of § 399(a) in the *League of Women Voters* litigation. See note 85 *supra*.

<sup>147</sup> Pub. L. No. 95-567, 92 Stat. 2405 (1978) (codified at 47 U.S.C.A. §§ 390-398 (West Supp. 1979)).

<sup>148</sup> H.R. 12605, 95th Cong., 2d Sess. § 402 (1978).

<sup>149</sup> [1978] U.S. CODE CONG. & AD. NEWS 5349, 5353. President Carter stated: Unlike commercial broadcasters, public broadcasters are forbidden by current law to editorialize on issues of public importance. The ban makes sense for stations licensed to a state or local government instrumentality. But Congress has recently amended the tax code to allow private non-profit organizations to advocate positions on public issues. The Public Broadcasting Act should be similarly amended to allow non-governmental licensees to exercise their First Amendment rights.

This change would not require editorials, but it would permit them. Public broadcasters should have an equal opportunity with commercial broadcasters to participate in the free marketplace of ideas.

<sup>150</sup> S. 2883, 95th Cong., 2d Sess. (1978).

Reaction in the Senate was almost unanimously negative to the proposal to delete § 399(a). Senator McClure stated that editorializing would "allow noncommercial broad-

was dropped in the joint conference.<sup>151</sup>

## CONCLUSION

The section 399(a) editorializing ban should be declared unconstitutional. Section 399(a) presently allows the government to prohibit an important area of expression in violation of the most important values of the First Amendment. As public broadcasting struggles to find a significant role in a commercially dominated broadcasting system, it must be given the freedom to experiment and grow. The national publicity generated in 1979 by the release of the new Carnegie Report provides an ideal opportunity to focus attention on section 399(a) as an obstacle to this growth.<sup>152</sup>

The potential impact of section 399(a) goes beyond damage to the freedom of public licensees. What Judge Wright said of section 399(b) in *Community-Service* is equally applicable to section 399(a). "In this case the spectre of government censorship and control hovers, not only over public broadcasting, but over all broadcasting. For if this legislation is constitutional as to public broadcasting, similar legislation as to all broadcasting is standing in the wings."<sup>153</sup> The government will continue to have a role in the regulation of broadcasting, at least in the foreseeable future. That role must be carefully scrutinized, however, and should never be allowed to interfere with free expression as it presently does with the section 399(a) prohibition of editorial-

casters to become embroiled in politics and political debate, [and] would, in my opinion, destroy the integrity and nonpartisan framework of the public service. . . . On several occasions PBS has offered programs which have seemed to many viewers to contain blatantly partisan content or even left-wing propaganda." 1978 CONG. REC. S15452 (remarks of Sen. McClure). More damaging to the chances of deleting § 399(a) is the viewpoint held by Senator Hollings, Chairman of the Senate Communications Committee, that if public broadcasters were allowed to editorialize, it would be the "death knell of public broadcasting." *Id.* at S15453 (remarks of Sen. Hollings).

<sup>151</sup> H. CONF. REP. NO. 95-1774, 95th Cong., 2d Sess. (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5389, 5402.

<sup>152</sup> The Carnegie Commission declared:

*Public broadcast journalism must be carried on by professionals prepared to accept and live by the requirements of responsibility that go hand in hand with freedom. We believe, for example, that a mature journalistic role for public broadcasting will require that the institution speak out on matters of public policy, attempt to uncover wrongdoing, and occasionally criticize those in high places. Such criticism must be truthful and fair, but we believe that appropriate standards should be allowed to develop within the system, rather than by statute.*

CARNEGIE REPORT II, *supra* note 2, at 30 (latter emphasis added).

<sup>153</sup> *Community-Service Broadcasting of Mid-America v. FCC*, 593 F.2d 1102, 1123 (D.C. Cir. 1978).

izing. It is appropriate to remember Justice Douglas' words:

It is said, of course, that Government can control the broadcasters because their channels are in the public domain in the sense that they use the airspace that is the common heritage of all the people. But parks are also in the public domain. Yet people who speak there do not come under government censorship. . . . It is the tradition of Hyde Park, not the tradition of the censor, that is reflected in the First Amendment.<sup>164</sup>

—*John C. Grabow*

---

<sup>164</sup> *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.* 412 U.S. 94, 162 (1973) (Douglas, J., concurring in the result).

