


3-15-1985

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Recommended Citation

Michael R. Gradisher *The Supreme Court Strikes Down the Public Broadcasting Editorial Ban: Federal Communications Commission v. League of Women Voters*, 12 Pepp. L. Rev. 3 (1985)
Available at: <http://digitalcommons.pepperdine.edu/plr/vol12/iss3/4>

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The Supreme Court Strikes Down the Public Broadcasting Editorial Ban: *Federal Communications Commission v. League of Women Voters*

In Federal Communications Commission v. League of Women Voters, the United States Supreme Court struck down a statute on first amendment grounds which prohibited public broadcasters from editorializing. Those who favor the deregulation of broadcasting and the institution of a free market system hail the decision as a rare step in the right direction, after years of unquestioned congressional right to freely regulate broadcasting. They point to the Court's apparent willingness to reconsider its historical view of broadcasting, which has always received less first amendment protection than the print medium. However, the Court confirms its longstanding view that broadcasting may be regulated to maximize the freedom of speech for all concerned.

I. INTRODUCTION

Federally-funded public broadcasting stations are prohibited by section 399 of the Public Broadcasting Act of 1967¹ from editorializing on controversial issues. In *Federal Communications Commission v. League of Women Voters*,² the Supreme Court considered for the first time whether section 399 violates the first amendment rights of public broadcasters. Taking into account the interplay between the rights of the broadcaster, his audience, and the limited first amendment protection historically given to broadcasting, the Court ruled that section 399 was in fact unconstitutional.

This note examines the historical background of broadcast regulation, public broadcasting, and congressional spending power, and further analyzes the line of reasoning used by the Court in reaching its decision. The author concludes that *League of Women Voters* has the overall impact of reaffirming broadcast regulation and audience first amendment rights, despite the claim by some that this case represents a victory for deregulation.

1. 47 U.S.C. § 399 (1982) provides in pertinent part: "No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] . . . may engage in editorializing."

2. 104 S. Ct. 3106 (1984).

II. HISTORICAL BACKGROUND

A. Federal Regulatory Power Over Broadcasting

The development of radio heralded a new era in the field of communications. Congress initially viewed the invention as a potential lifesaving device, and, in 1910, enacted a statute requiring all United States ocean-going ships to carry radios in case of emergency.³

Increased usage of the electromagnetic spectrum by land-based amateur broadcasters, who frequently interfered with ship-to-shore transmissions, resulted in pressure from the military for a comprehensive regulatory scheme.⁴ Congress responded by enacting the Radio Act of 1912,⁵ which empowered the then-Secretary of Commerce and Labor to grant broadcasting licenses and to assign each licensee a specified wavelength slot of the electromagnetic spectrum.

The number of broadcast licensees increased prolifically in the early 1920's,⁶ prompting alarmed industry leaders to request further regulation by Congress.⁷ The existing congressional authority to regulate radio,⁸ which rested on the commerce clause,⁹ was soon found to be too weak to meet the growing needs of the fledgling industry. The Court in *Hoover v. Intercity Radio Co.*¹⁰ confirmed what some¹¹ had already suspected: the Secretary of Commerce had no power to refuse an application for license renewal.¹² Governmental power was further weakened by a decision forbidding the Secretary from regulating the operations of broadcast licensees.¹³

In the wake of these chaotic developments, Congress enacted the Radio Act of 1927.¹⁴ The Federal Radio Commission¹⁵ was estab-

3. 36 Stat. 629 (1910).

4. D. PEMBER, MASS MEDIA LAW 384 (1977).

5. 37 Stat. 302 (1912) (repealed 1927).

6. The number of broadcasting stations in the United States increased from 60 in 1922 to 588 in 1923 alone. R. MCMAHON, FEDERAL REGULATION OF THE RADIO AND TELEVISION BROADCAST INDUSTRY IN THE UNITED STATES, 1927-1959, at 19 (1979).

7. *Id.* at 18-19.

8. See 24 Op. Att'y Gen. 100, 101 (1902), which surmises that wireless telegraphy (an early form of radio transmitting Morse Code) falls into the interstate commerce category and hence is subject to federal regulation.

9. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

10. 286 F. 1003 (D.C. Cir. 1923).

11. See 29 Op. Att'y Gen. 579, 580-81 (1912) (Congress did not intend to place any discretion in the Secretary of Commerce concerning the issuance of licenses.).

12. The circuit court reasoned that the Secretary, as empowered by the Radio Act of 1912, carried out a mere ministerial function with regard to the issuing of broadcast licenses. The only discretionary function available to him was the selection of the wavelength bands. 286 F. at 1006-07.

13. *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926). "There is no express grant of power in the act to the Secretary of Commerce to establish regulations." *Id.* at 617.

14. 44 Stat. 1162 (1927) (repealed 1934).

lished to issue licenses in the furtherance of the "public convenience or interest or . . . necessity"¹⁶ and to regulate the use of the assigned frequencies.¹⁷ In addition, the Communications Act of 1934¹⁸ created the Federal Communications Commission (FCC)¹⁹ to regulate all radio,²⁰ telephone, and telegraph concerns, thereby centralizing government control over the entire communications industry.²¹

It soon became apparent that the first amendment²² applied differently to broadcasting than it did to other modes of expression. The broadcasting industry began to express a desire for less and not more regulation, and sought to test the constitutionality of content-based restrictions. This challenge took form in *National Broadcasting Co. v. United States*,²³ where the Supreme Court held, in part, that content-based review of a licensee's programming may be considered in determining whether the station has acted in the public interest, and hence ought to have its license renewed.²⁴ The Court reasoned that a broadcast licensee does not have a first amendment right to forever monopolize its assigned frequencies, free of any duty to the broadcast audience.²⁵

The Court's primary justification for this regulatory power rests in

15. The Commission was headed by five commissioners appointed by the President for terms of six years. A maximum of three commissioners could belong to the same political party; all were forbidden from having any financial interest in the industry. *Id.* at 1162-63.

16. *Id.* at 1163-64.

17. Congress' power to regulate radio by means of the 1927 Act was affirmed in *General Electric Co. v. Federal Radio Comm'n*, 31 F.2d 630 (D.C. Cir. 1929), on the theory that a lack of regulation would result in chaos, rendering "this peculiar public utility . . . practically useless." *Id.* at 633.

18. 48 Stat. 1064 (1934) (later codified at 47 U.S.C. § 151 (1982)).

19. The FCC was governed in a manner similar to that of the Federal Radio Commission. *See supra* note 15. The most notable change was an increase in the number of commissioners to seven, of which four could belong to the same political party. 47 U.S.C. § 154 (1982).

20. The 1934 Act substantially incorporated the provisions of the 1927 Act so far as radio was concerned. *See* 1 A. SOCOLOW, *THE LAW OF RADIO BROADCASTING* 55 (1939).

21. *Id.*

22. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

23. 319 U.S. 190 (1943). NBC's argument centered on the purported unconstitutionality of the FCC's "chain broadcasting" regulations (F.C.C. Reg. 3.101-3.108, as amended Oct. 14, 1941), which governed the "simultaneous broadcasting of an identical program by two or more connected stations"—modernly known as "networking." 319 U.S. at 194 n.1. The Court found such regulations were properly founded on a basis of power supplied by the Communications Act of 1934, 47 U.S.C. § 303 (1982), which granted the FCC the ability to regulate broadcasting networks. 319 U.S. at 217.

24. *Id.* at 226-27.

25. *Id.*

the concept of "spectrum scarcity."²⁶ This postulates that the limited number of possible wavelength allotments require a different application of the first amendment than would be used for other forums.²⁷ Other rationale advanced over the years supporting the idea of broadcasting uniqueness have been the "fiduciary for the public trust" concept of the broadcaster²⁸ and the "pervasive presence" of broadcast signals.²⁹

The gap between first amendment application to broadcasting and to newspapers³⁰ was further widened by *Red Lion Broadcasting Co. v. Federal Communications Commission*.³¹ In *Red Lion*, the Supreme Court upheld the "fairness doctrine," and FCC regulation³² requiring the proponents of opposing points of view to be allowed equal time in response to an editorial opinion or personal attack expounded by a broadcasting station.³³ The goal of producing an informed public is thereby enhanced by the presentation of both sides of an issue. In the absence of such a regulation, broadcast time would be available only to the highest bidders, who would thereby be per-

26. Justice Frankfurter best summed up the scarcity rationale: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. Because it cannot be used by all, some who wish to use it must be denied." *Id.* at 226.

27. *But see* Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982), in which FCC Chairman Mark Fowler takes the position that the "spectrum scarcity" rationale fails to stand up modernly in light of the availability of low power television, over-the-air subscription television, cable television, and new technological advances increasing the net number of broadcast outlets. *See also* Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 156-59 (1967). Professor Robinson asserts that 17% of the electromagnetic spectrum available to broadcasting has yet to be implemented, and that there are now more broadcasting stations in the United States than there are newspapers. *Id.* at 157, 158 n.318.

28. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail . . ." *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 390 (1969) (citation omitted).

29. *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978). The Supreme Court reasoned that a broadcast of George Carlin's "seven filthy words" monologue could unexpectedly confront someone in the privacy of his or her own home, without any prior warning of program content. *Id.* at 748.

30. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (a newspaper "right of reply" statute requiring equal space to be given to those who have been attacked was struck down as being violative of the first amendment).

31. 395 U.S. 367 (1969).

32. The fairness doctrine is codified at 47 C.F.R. §§ 73.1910, 73.1920 (1983).

33. In *Red Lion*, Fred J. Cook, author of *GOLDWATER — EXTREMIST ON THE RIGHT*, was denied an opportunity for equal time to rebut an attack made by the Reverend Billy James Hargis. Hargis accused Cook of working for a Communist-affiliated publication and writing a "book to smear and destroy Barry Goldwater," among other things. 395 U.S. at 371.

mitted to put forth their views to the exclusion of all others.³⁴

Thus, the consistent position of the FCC and the courts has been to regulate broadcasting and limit the expression of the individual broadcaster in such a manner as to increase the quality and availability of ideas to the public at large in such a manner as to enhance their first amendment interests.³⁵

B. *The Development of Public Broadcasting*

Public broadcasting began more slowly than its commercial counterpart; at the inception of the Communications Act of 1934, noncommercial stations comprised only two percent of all broadcast licensees.³⁶ This may be attributed to stalling by Congress on proposals to reserve specified frequency bands for public broadcasting, leaving that matter to the FCC.³⁷

The FCC eventually did reserve twenty FM channels for educational use in 1945.³⁸ Further development occurred in 1952, when 242 television channels were set aside strictly for education.³⁹ However, actual use of the channels was a different matter. By 1962, only fifty-four educational television stations were in operation, thereby leaving two-thirds of the nation's population without access to educational television.⁴⁰ The heart of the problem was indeed formidable—insufficient funding.⁴¹

A 1967 report by the influential Carnegie Commission on Educational Television⁴² kindled interest and renewed hope in the floundering public broadcasting industry. It called for the formation of a national corporate entity, funded by the federal government, to administer and finance public television through a network system.⁴³ This new public broadcasting network would provide cultural, political, and educational programming where there had been little or

34. *Id.* at 392.

35. See Comment, *Broadcast Deregulation and the First Amendment: Restraints on Private Control of the Publicly Owned Forum*, 55 N.Y.U. L. REV. 517, 526-27 (1980).

36. 78 CONG. REC. 8829 (1934).

37. *Id.* at 8828-29.

38. FCC, REPORT OF PROPOSED ALLOCATIONS FROM 25,000 KILOCYCLES TO 30,000 KILOCYCLES 77 (1945).

39. *Sixth Order and Report*, 41 F.C.C. 148 (1952).

40. S. REP. NO. 67, 87th Cong., 1st Sess. 3 (1961).

41. *Id.*

42. Carnegie Commission on Educational Television, *Public Television: A Program for Action* (1967).

43. *Id.* at 36-37.

none before.⁴⁴

Congress answered the call to action by enacting the Public Broadcasting Act of 1967.⁴⁵ The Act established the federally-funded⁴⁶ Corporation for Public Broadcasting (CPB),⁴⁷ a non-profit, private corporation⁴⁸ empowered to distribute funds to public broadcasting licensees.⁴⁹ The CPB's principle purpose was "to encourage the growth and development of public radio and television broadcasting . . .,"⁵⁰ a goal which it has by and large achieved.⁵¹

C. Congressional Spending Power and the First Amendment

Congress is empowered by the Constitution to spend for the general welfare of the nation.⁵² The definition of what constitutes the "general welfare" has been "liberally construed to cover anything conducive to national welfare"⁵³ What it encompasses is left up to congressional determination and is not reviewable by the courts.⁵⁴

44. Television should serve more fully both the mass audience and the many separate audiences that constitute in their aggregate our American society. There are those who are concerned with matters of local interest. There are those who would wish to look to television for special subject matter, such as new plays, new science, sports not televised commercially, music, the making of a public servant, and so on almost without limit. There are hundreds of activities people are interested in enjoying, or learning about, or teaching other people. We have been impressed by how much we might have from television that is not now available.

Id. at 14.

45. 47 U.S.C. §§ 390-399b (1982).

46. "There is hereby established in the Treasury a fund which shall be known as the Public Broadcasting Fund" *Id.* § 396(k)(1)(A).

47. "There is authorized to be established a nonprofit corporation, to be known as the 'Corporation for Public Broadcasting,' which will not be an agency or establishment of the United States Government." *Id.* § 396(b).

48. Congress went to great pains to insure the independence of the CPB from the federal government. See generally *id.* § 396(g)-(k).

49. "The Corporation shall reserve [funds] for distribution among the licensees and permittees of public television and radio stations" *Id.* § 396(k)(3)(A).

50. *Id.* § 396(a)(1).

51. See generally *Public Broadcasting Financing Act of 1978: Hearings on H.R. 11100, 12021, and 12073 Before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 109 (1978)* (remarks of Henry Geller, Assistant Secretary Designate, NTIA).

52. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare" U.S. CONST. art. I, § 8, cl. 1.

53. *United States v. Butler*, 297 U.S. 1, 64-65 (1936).

54. *Id.* An example of the Supreme Court's apparent reluctance (or recognized inability) to challenge the judgment of Congress in this regard is provided by *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, candidates for federal office challenged, inter alia, a provision of the Federal Election Campaign Act (2 U.S.C. § 431 (1982)) which awarded candidates matching federal funds upon the attainment of a specified minimum amount of independent campaign contributions. The Court upheld the statute against a first amendment challenge.

"Whether the chosen means appear 'bad,' 'unwise,' or 'unworkable' to use is irrelevant; Congress has concluded that the means are 'necessary and proper' to promote the

Indeed, the only limitations on this power are those found in the Constitution itself.⁵⁵

The effect of federal spending on first amendment rights was addressed at length in *Cammarano v. United States*.⁵⁶ In an action for the return of federal income tax paid, a businessman contended that, since his lobbying activities were protected by the first amendment, the expenses incurred in carrying out the activity could be deducted from his taxes. Although the Supreme Court implied that lobbying was an activity protected by the first amendment,⁵⁷ it considered any tax deduction to be a form of congressional subsidy, and therefore held that Congress was not required to subsidize lobbying if it chose not to do so.⁵⁸ The Court concluded that requiring someone to pay for a person's exercising of a right is quite different than a per se denial of that right.⁵⁹

*Regan v. Taxation With Representation*⁶⁰ advanced this doctrine one step further into those activities afforded a congressional subsidy in the form of tax-exempt status. Taxation With Representation (TWR) was a non-profit corporation whose principal purpose was to influence federal taxation legislation. Section 501(c)(3) of the Internal Revenue Code⁶¹ granted tax-exempt status to non-profit organizations, provided they did not expend a substantial portion of their activities on lobbying. Section 501(c)(4),⁶² however, allowed an *affiliate* of the section 501(c)(3) organization to lobby without affecting the tax-exempt status of the parent organization, so long as separate and independent financial records were kept. TWR brought an action for declaratory relief, seeking both tax-exempt status *and* the freedom to actively lobby without revocation of its tax-exempt status. It based its arguments on first amendment and equal protection grounds.⁶³

general welfare, and we thus decline to find this legislation without the grant of power in Art. I, § 8." 424 U.S. at 91.

55. *Buckley*, 424 U.S. at 91.

56. 358 U.S. 498 (1959).

57. The Supreme Court later held so expressly in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

58. 358 U.S. at 498.

59. "Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do" *Id.* at 513.

60. 103 S. Ct. 1997 (1983).

61. 26 U.S.C. § 501(c)(3) (1982).

62. *Id.* § 501(c)(4).

63. Congress had not imposed any such lobbying ban on veterans' organizations. TWR claimed this violated its right to equal protection under the fifth amendment,

The Supreme Court began its analysis in *Taxation With Representation* by affirming the notion that both tax deductions and tax-exempt status constitute indirect congressional subsidies. By denying tax-exempt status to legislation-influencing groups, Congress simply chose not to subsidize their lobbying with public funds,⁶⁴ a legitimate exercise of its spending power.⁶⁵

The concurrence⁶⁶ accepted the majority analysis but added its own caveat. If the non-profit organization were unable to establish its own affiliate strictly for purposes of lobbying,⁶⁷ the statute would then have been an abridgement of free speech on its face. The concurring justices understood the restriction to only prevent tax deductible contributions from being spent on lobbying, and in that vein accepted the constitutional validity of section 501(c)(3).⁶⁸

III. STATEMENT OF FACTS

Section 399 of the Public Broadcasting Act forbids editorializing by public broadcasting stations. The Pacifica Foundation, owner and operator of several public broadcasting outlets,⁶⁹ brought suit in April of 1979, along with Congressman Henry Waxman and the League of Women Voters of California,⁷⁰ against the FCC for declaratory relief prohibiting the enforcement of section 399. The Department of Justice gave notice that it would not defend the statute, saying that "reasonable arguments cannot be advanced to defend" section 399 against a first amendment challenge.⁷¹ Senate counsel, however, intervened

thus requiring a lifting of the lobbying ban across the board. The Court quickly dispensed with this notion, pointing out that Congress had decided to subsidize veterans' groups to in some small way compensate them for their past service to the nation, and thus had a "rational basis" for discriminating against non-veterans. 103 S. Ct. at 2003-04.

64. TWR relied on *Speiser v. Randall*, 357 U.S. 513 (1958), which forbade the attachment of an "unconstitutional condition" to a subsidy, and *Perry v. Sindermann*, 408 U.S. 593 (1972), which forbade the denial of any benefits to a person because of his exercise of a constitutional right. The Court distinguished these cases from *Taxation With Representation* in that TWR could still receive other funds for non-lobbying activities, and that TWR was not denied a benefit solely because of its lobbying. "This Court has never held that the Court must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right." 103 S. Ct. at 2001.

65. See *supra* notes 52-54 and accompanying text.

66. 103 S. Ct. at 2004. Justice Blackmun authored the concurring opinion, and was joined by Justices Brennan and Marshall.

67. See *supra* note 62 and accompanying text.

68. 103 S. Ct. at 2004-05.

69. Pacifica owned and operated noncommercial radio stations in New York, Los Angeles, Washington, D.C., Berkeley, and Houston. Brief for the United States 3, Federal Communications Comm'n v. League of Women Voters, 104 S. Ct. 3106 (1984).

70. Waxman's interest in the case was that of a viewer wishing to watch and hear editorials. The League of Women Voters desired to influence the editorial policy of Pacifica's noncommercial stations. 104 S. Ct. at 3133 (Stevens, J., dissenting).

71. Letter from Attorney General Benjamin R. Civiletti to Senate Majority

as *amicus curiae* in place of the FCC.⁷² The district court dismissed the action for want of justiciability, citing the lack of a "case or controversy" because of the government's refusal to enforce the editorial ban.⁷³

The Reagan Administration⁷⁴ announced in 1981 that it would defend the constitutionality of section 399.⁷⁵ The case was reopened in the district court,⁷⁶ with Senate counsel being allowed to withdraw. Congress, in an attempt to head off the first amendment challenge, amended section 399 to ban editorializing only by those stations receiving grants from the CPB.⁷⁷ In 1982, however, the district court ruled that section 399⁷⁸ violated the first amendment by preventing public broadcasters from exercising a protected avenue of speech.⁷⁹ The government appealed directly to the Supreme Court.⁸⁰

Leader Robert C. Byrd (Oct. 11, 1979), as cited by Brief for the United States 13-14, *Federal Communications Comm'n v. League of Women Voters*, 104 S. Ct. 3106 (1984).

72. Counsel for the Senate may appear as *amicus* under 2 U.S.C. § 288 (1984), unless such appearance would be untimely or would significantly delay the proceedings.

73. *League of Women Voters v. Federal Communications Comm'n*, 489 F. Supp. 517, 520 (C.D. Cal. 1980).

74. FCC Chairman Mark Fowler, a Reagan appointee, advocates the deregulation of broadcasting and the institution of a free market system. As Fowler explains:

Our thesis is that the perception of broadcasters as community trustees should be replaced by a view of broadcasters as marketplace participants. Communications policy should be directed toward maximizing the services the public desires. Instead of defining public demand and specifying categories of programming to serve this demand, the Commission should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace. The public's interest, then, defines the public interest.

Fowler & Brenner, *supra* note 27, at 209-10.

75. It seems strange that the FCC under President Reagan, being committed to deregulation, would desire to enforce the constitutionality of section 399. This incongruity may be explained by considering the new and equally conservative personnel at the Department of Justice, who perhaps chose to defend the statute simply as a matter of a tough "law and order" policy.

76. At this time the district court's ruling was under review in the Ninth Circuit Court of Appeals. 104 S. Ct. at 3113.

77. Pub. L. No. 97-35, title XII, § 1229, 95 Stat. 730 (1981) (as amended by 47 U.S.C. § 399 (1982)).

78. Section 399 also bans public broadcasting stations from supporting or opposing candidates for political office. *Id.* Plaintiffs here did not challenge this provision.

79. *League of Women Voters v. Federal Communications Comm'n*, 547 F. Supp. 379, 388 (C.D. Cal. 1982).

80. This appeal was made pursuant to 28 U.S.C. § 1252 (1982), which permits direct appeal to the Supreme Court from a final judgment ruling a federal law to be unconstitutional.

IV. THE SUPREME COURT'S ANALYSIS

A. *The Standard of Review*

Justice Brennan⁸¹ began the Court's analysis by determining the appropriate standard of review.⁸² The district court had found no reason to treat broadcasting differently than other media;⁸³ consequently, it held that section 399 must further a "compelling government interest"⁸⁴ test to survive first amendment scrutiny.⁸⁵

Justice Brennan quickly pointed out that the Court had never before employed the "compelling government interest" test in reviewing the constitutionality of broadcast regulations.⁸⁶ Unique considerations *are* involved in broadcasting which require a different treatment than other media in first amendment considerations.⁸⁷ "Spectrum scarcity" demands more regulation for broadcasting because television and radio are not available to all who wish to use them.

Justice Brennan cited three principles which govern the evaluation of broadcast regulations. First, Congress may regulate broadcasting and issue licenses⁸⁸ pursuant to the commerce clause.⁸⁹ Second, Congress has the right to assure the balanced presentation of discussion on important public concerns. Third, broadcasting is a "vital and in-

81. Justice Brennan was joined in the majority by Justices Blackmun, O'Connor, Marshall, and Powell.

82. 104 S. Ct. at 3115.

83. 547 F. Supp. at 384.

The district court relied on *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978), in deciding whether public broadcasting should receive less first amendment treatment than other media. The *Pacifica* Court had justified an FCC regulation restricting the broadcasting of "obscene" material on the basis of two distinctions between broadcast and print media: (1) the broadcast audience had no prior warning of program content; and (2) broadcasting is easily accessible to children. *Id.* at 748-59.

The district court in *League of Women Voters*, however, flatly rejected these factors as having no relevance to the editorial ban, and held that no justification existed for subjecting broadcast regulations to a less stringent first amendment standard.

84. Other standards of review previously used by the Court in first amendment cases are the "redeeming social value" test, used in obscenity cases (*see Roth v. United States*, 354 U.S. 476 (1957)); the "clear and present danger" test, used where subversive activity has been curtailed by state action (developed in *Schenck v. United States*, 249 U.S. 47, 52 (1919), and *Abrams v. United States*, 250 U.S. 616 (1919)); the "overbreadth" doctrine, used where laws regulate speech too broadly (*see Cantwell v. Connecticut*, 310 U.S. 296 (1940)); and the "void for vagueness" test, used where the bounds of a statute regulating speech have not been clearly delineated (*see NAACP v. Button*, 371 U.S. 415, 444 (1963)).

85. 547 F. Supp. at 384.

86. 104 S. Ct. at 3115.

87. *See supra* notes 26-27 and accompanying text.

88. For a glimpse of the broadcast licensing process, see B. COLE & M. OETTINGER, *RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE* 133-87 (1978).

89. The Supreme Court first affirmed this notion in *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage*, 289 U.S. 266 (1932).

dependent" form of communication that is protected by the first amendment.⁹⁰ For example, the fairness doctrine of *Red Lion*⁹¹ requires broadcasters to give equal time to those who have been personally attacked or have opposing points of view, but does *not* mandate the acceptance of all paid political advertisements, such as would be required of a common carrier.⁹² In short, restrictions placed on broadcasting media have been designed to protect the public's first amendment right to receive a balanced presentation of views bearing great public significance.⁹³

Justice Brennan concluded that the proper standard of review requires the restriction on speech to be "narrowly tailored to further a *substantial* governmental interest."⁹⁴ Its implementation requires an examination of both the public *and* the broadcaster's interests "in light of the particular circumstances of each case."⁹⁵

B. *Analysis of the Editorializing Ban*

Justice Brennan's application of the "substantial government interest" standard began with an analysis of section 399's ban on editorializing and its impact on editorial speech. The subject matter of editorials—opinions concerning significant political, economic, and social issues—lies "at the heart of First Amendment protection."⁹⁶ The presentation of controversial points of view designed to inspire public thought and debate is the most important kind of speech, and its necessity in an informed democracy demands first amendment protection of the highest degree.⁹⁷ A broadcaster's dual role of reporter and editorializer⁹⁸ requires him to present such a balanced discussion, satisfying his licensing requirement of operating in the "public

90. 104 S. Ct. at 3116.

91. See *supra* notes 31-33 and accompanying text.

92. *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

93. 104 S. Ct. at 3118.

94. *Id.* (emphasis added).

95. *Id.*

96. *Id.*

97. See *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (upholding an NAACP boycott of white merchants as a freedom of speech and expression); *Mills v. Alabama*, 384 U.S. 214 (1966) (striking down a statute forbidding campaign-related editorials on the day of election); and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (imposing a higher standard of proof on libel plaintiffs in actions against newspapers, thereby allowing the press more room to freely report and editorialize); see also *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Whitney v. California*, 274 U.S. 357 (1927); and *In re Complaint of Accuracy in Media*, 45 F.C.C.2d 297 (1973).

98. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

interest, convenience, and necessity.”⁹⁹

Another important consideration of the editorializing ban is its focus on content regulation.¹⁰⁰ In order to enforce section 399, the FCC must examine the content of the questioned broadcast to ascertain whether it qualifies as an editorial.¹⁰¹

In light of these considerations, Justice Brennan concluded that Congress, through section 399, has limited discussion on controversial public issues by an important class of persons, namely public broadcasters.¹⁰²

C. *Proposed State Interests Furthered by Section 399*

Justice Brennan’s view of the ban on editorializing raised a strong presumption of unconstitutionality. The government proposed three substantial state interests in support of section 399, contending that the ban was necessary: (1) preventing noncommercial stations from becoming instruments of government propaganda; (2) preventing private concerns from monopolizing public airtime with their own partisan points of view; and (3) preventing public funds from being spent in promotion of views with which the taxpayer may not agree.¹⁰³ The government argued that section 399 was “an indispensable means of preserving the public’s First Amendment interests.”¹⁰⁴ However, the Supreme Court, and more particularly Justice Brennan, thought otherwise.

1. Public broadcasting stations as instruments of government propaganda

Congress was very much aware of the possibility of undue federal influence on public broadcasters, and desired to leave the industry alone to proceed with business as it saw fit.¹⁰⁵ Section 399 was added

99. See 47 U.S.C. § 307 (1982).

100. 104 S. Ct. at 3119. A statute regulating the content of speech must be narrowly tailored to serve a substantial governmental interest. See, e.g., *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92 (1972), where the Court struck down a statute prohibiting the picketing of public schools while in session. The statute made an exception for labor picketing, thereby violating the first and fifth amendments because it served no substantial governmental interest and was not “content neutral.” *Id.* at 99.

101. 104 S. Ct. at 3119.

102. See *Consolidated Edison v. Public Serv. Comm’n*, 447 U.S. 530 (1980), where the Court stated that “[w]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited ‘merely because public officials disapprove the speaker’s views.’” *Id.* at 536 (citation omitted).

103. 104 S. Ct. at 3120.

104. *Id.* at 3121.

105. “We wish to state in the strongest terms possible that it is our intention that local stations be absolutely free to determine for themselves what they should or should not broadcast.” S. REP. NO. 222, 90th Cong., 1st Sess. 4 (1967).

by way of amendment to the Public Broadcasting Act as a precautionary measure.¹⁰⁶

Congress further ensured the segregation of the CPB and the government by drafting the Act with built-in precautions designed to keep Congress as far removed from the actual business of public broadcasting as possible. Such provisions include: (1) the forbidding of station ownership by the CPB;¹⁰⁷ (2) a requirement that CPB funds be distributed with "objectivity and balance;"¹⁰⁸ (3) the express disallowance of any federal agency or department from exercising any "direction, supervision, or control" over public broadcasting stations or the CPB;¹⁰⁹ (4) the establishment of long-term funding for the CPB;¹¹⁰ and (5) the listing of objective criteria for which local stations may receive CPB funding.¹¹¹ Thus, the whole of the Public Broadcasting Act has the effect of preserving autonomy of local public broadcasting stations while guarding against potential governmental abuse.¹¹²

Even if these limitations did *not* prevent government "bullying" of the CPB and local stations, Justice Brennan noted, there is an insufficient likelihood of federal influence or pressure to justify the ban of editorializing. Editorials are local in nature and people are primarily concerned with problems of their own communities.¹¹³ Such opinions on local matters are not likely to anger Congress to the point of reducing funding for *all* public broadcasters. Controversial *programming* dealing with important issues, which is not considered editori-

106. Some legislators were apparently influenced in part by previous anti-congressional editorials. See *Hearing on H.R. 6736 and S. 1160 Before the House Committee on Interstate Commerce and Foreign Commerce*, 90th Cong., 1st Sess. 64 (1967).

107. "[T]he Corporation is prohibited from . . . owning or operating any television or radio broadcast station . . ." 47 U.S.C. § 396(g)(3)(A) (1984).

108. "[T]he Corporation is authorized to . . . facilitate the full development of public telecommunications . . . with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature . . ." *Id.* § 396(g)(1)(A).

109. *Id.* § 398(a).

110. "There is authorized to be appropriated to the Fund, for each of the fiscal years 1981, 1982, 1983, 1984, 1985 and 1986, an amount equal to 50 percent of the total amount of non-Federal financial support received by public broadcasting entities . . ." *Id.* § 396(k)(1)(C).

111. Such criteria include the assessment of the individual station's financial need, and assuring that each eligible station receives a "basic grant." *Id.* § 396(k)(6)(A)-(B), (k)(7).

112. 104 S. Ct. at 3123.

113. The Court points out that, as part of his licensing requirement, the broadcaster must serve the public interest of the community by addressing local issues. *Id.* at 3123 n.20.

alizing,¹¹⁴ is often released on a national scale, and has yet to incur the wrath of Congress in the form of funding cutbacks. Finally, the ban is far too broad. There is little possibility, as the Court pointed out, of offending Congress by editorializing on the establishment of local parks or museums.¹¹⁵

Justice Brennan next addressed the threat of state and local government control of public noncommercial stations, many of whom are owned by such agencies.¹¹⁶ Once again, section 399 is overly broad in that it also applies to stations that are *not* owned by governmental agencies. Justice Brennan mainly relied on legislative history which indicates that Congress meant only to “‘assure complete freedom from any *Federal Government influence.*’”¹¹⁷ Congress extended federal aid to such stations knowing full well who owned them; consequently, Justice Brennan concluded that its failure to restrict state and local government control evidences the congressional intent to treat such stations in the same manner as those privately owned.¹¹⁸

Finally, Justice Brennan acknowledged the substantial government interest inherent in assuring the listening and viewing public that a station's editorials do not reflect government views. But this goal could easily be accomplished by less restrictive means: the use of a disclaimer. Such a disclaimer would instantly quell all doubts about whose views were actually being presented.¹¹⁹

Justice Brennan concluded that section 399 far exceeds any measure necessary to prevent public broadcasting from becoming a conduit for government propaganda.¹²⁰

2. Viewpoint monopolization by private concerns

Although Justice Brennan was willing to believe that preventing private groups from monopolizing editorials on the public airwaves is

114. See *In re Complaint of Accuracy in Media*, 45 F.C.C.2d 297 (1973).

115. 104 S. Ct. at 3124.

116. Two-thirds of all public television stations are licensed to state public broadcasting commissions, state universities, and local governmental agencies. THE CORPORATION FOR PUBLIC BROADCASTING, 1982 CPB PUBLIC BROADCASTING DIRECTORY 66-88 (1982), as cited by Brief of the United States 20, *Federal Communications Comm'n v. League of Women Voters*, 104 S. Ct. 3106 (1984).

117. *League of Women Voters*, 104 S. Ct. at 3125 (citing *The Public Television Act of 1967: Hearings on S. 1160 Before the Subcommittee on Commerce*, 90th Cong., 1st Sess. 9 (1967) (remarks of Sen. Pastore) (emphasis added)).

118. Justice Brennan's distinction between federal and state government is not sound. The first amendment was applied to the states through the fourteenth amendment in *Gitlow v. New York*, 268 U.S. 652 (1925), thereby forbidding *state* governments from abridging freedom of speech. Would the Justice believe differently if such stations were instead owned and operated by *federal* agencies?

119. 104 S. Ct. at 3125-26.

120. *Id.* at 3126.

a legitimate state interest, he doubted section 399's ability to accomplish this goal. The same opinions which public broadcasters cannot *expressly* make may still be delivered by *individuals* appearing on their programming.¹²¹ Section 399 therefore has the effect of preventing only station *management* from editorial expression. This places the broadcaster at odds with the Communication Act's affirmative requirement of airing such views in the public interest.¹²² Because it already allows private groups to somehow work their partisan messages into programming, the ban does nothing "to reduce the risk that public stations will serve solely as outlets for expression of narrow partisan views."¹²³

Regardless of section 399's ineffectiveness in suppressing viewpoints of private groups, the state interest may be furthered by less drastic means.¹²⁴ The fairness doctrine¹²⁵ ensures the balanced presentation of controversial viewpoints, so that partisan groups could not dominate a station's editorials, even if the station so desired.¹²⁶ Section 399's scope was too broad in this regard, Justice Brennan believed, and had the net effect of silencing editorial speech instead of encouraging it.¹²⁷

3. Expenditure of public funds to promote partisan viewpoints

The Court was not impressed by the government's argument that taxpayers should not be forced to subsidize speech with which they may disagree.¹²⁸ Justice Brennan pointed out that almost *every* congressional appropriation may anger some taxpayers to a degree.¹²⁹ If

121. *Id.*

122. *See supra* notes 112-13 and *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

123. 104 S. Ct. at 3127.

124. *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), upon which the Court relied, provides two criteria by which to measure the validity of a statute purportedly justified by a state interest.

First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the government interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Id. at 564.

125. *See supra* notes 31-33 and accompanying text.

126. 104 S. Ct. at 3127.

127. *Id.*

128. In fact, the Court thought so little of this contention that they disposed of it in a footnote. *Id.* at 3120 n.16.

129. *See Buckley v. Valeo*, 424 U.S. 1, 91-92 (1976) (*per curiam*).

Congress had been concerned about offending the public and making them pay the bill in the process, then the whole Public Broadcasting Act would be offensive, for opinions may still be expressed in subsidized programming.¹³⁰

Justice Brennan concluded that section 399's ban on editorializing was far too broad to be justified by any state interests, whether substantial or not. Furthermore, the public's right to be informed on important issues was diminished, rather than enhanced, by the statute.¹³¹

D. Section 399 as an Exercise of Congressional Spending Power

As a last-ditch effort to justify the ban, the government argued that section 399 was simply an exercise of Congress' power to not subsidize editorials. Under the rule of *Regan v. Taxation With Representation*,¹³² Congress could refuse to subsidize lobbying by denying tax-exempt status to an organization where lobbying comprised a "substantial part" of its activities, if it chose not to fund such lobbying.¹³³

Justice Brennan distinguished *Taxation With Representation* from the present case on one point alone. A noncommercial station is absolutely barred from editorializing if it receives *any* federal funding. Because it cannot segregate its funding according to source, it is even barred from the utilization of *private* funds for purposes of editorializing. In *Taxation With Representation*, the tax-exempt organization could segregate funding by establishing a financially independent affiliate which would conduct lobbying activities on its own, separate and apart from the parent organization.¹³⁴

Justice Brennan suggested that section 399 would pass constitutional muster if it provided for an affiliate organization and assured the independence of its financial status.¹³⁵ Thus, Congress could refuse to subsidize editorializing as a legitimate operation of its spending power, while the right of the public broadcaster to air his opinions, albeit directly, would be secure.¹³⁶

130. 104 S. Ct. at 3120 n.16.

131. *Id.* at 3127.

132. 103 S. Ct. 1997 (1983). For a more complete discussion of *Taxation With Representation*, see *supra* notes 60-68 and accompanying text.

133. *Id.* at 2000.

134. *Id.* This distinction lacks forcefulness in light of practicality. If the affiliate were funded by private sources, then logic dictates that ensuing contributions to the parent organization would be decreased by that very same amount. The end result would be that the federal funds would then be used by the parent organization in place of the private funds given to the affiliate. Both the parent organization and its affiliate in the end would be funded; what would constitute the technical "source" of the money should make little or no practical difference.

135. 104 S. Ct. at 3128.

136. The majority opinion in *Taxation With Representation* does not view the

E. Conclusion

Justice Brennan concluded the Court's analysis by holding that section 399 was too broad to serve any legitimate government interests, some of which were not sufficiently substantial to warrant protection. Because section 399's ban on editorializing infringed upon the delivery of an important constitutionally protected form of speech, it violated the first amendment.¹³⁷

V. THE DISSENTING OPINIONS

A. Justice Rehnquist

Justice Rehnquist began his dissent by accusing the majority of developing "a scenario in which the government appears as the 'Big Bad Wolf' and appellee Pacifica as 'Little Red Riding Hood.'" ¹³⁸ In reality, he continues, Little Red Riding Hood took the Big Bad Wolf's food knowing full well she would have to live with his conditions.

Justice Rehnquist principally relied upon *Taxation With Representation* as the basis of his dissent, accepting Congress' refusal to pay for editorials it does not wish to subsidize. Reviewing the history of the Public Broadcasting Act,¹³⁹ he concluded that Congress created the CPB for the purpose of furthering the production of quality educational, cultural, and public affairs programming. Congress did not want such programming tainted with partisan ideology.¹⁴⁰

In *Taxation With Representation*, the refusal to subsidize lobbying was upheld despite the fact that lobbying was an activity protected by the first amendment. Failure to subsidize a right does not mean that it has been infringed.¹⁴¹ The courts may not question Congress' exer-

power to establish a financially independent affiliate as controlling in their upholding of Congress' right to refuse the subsidy of lobbying. Justice Brennan's view of *Taxation With Representation* comes from the concurring opinion authored by Justice Blackmun, which agreed with the majority only because of the tax-exempt group's ability to lobby through its affiliate. See 103 S. Ct. at 2004 (Blackmun, J., concurring). Justice Brennan therefore reinterprets *Taxation With Representation* to tailor it to the views of the concurring opinion—an opinion in which he joined.

137. 104 S. Ct. at 3129.

138. *Id.* (Rehnquist, J., dissenting).

139. See *supra* notes 36-45 and accompanying text.

140. 104 S. Ct. at 3130. Note the differing views of Justices Rehnquist and Brennan as to what issues are addressed by editorials. Justice Brennan believes them to be matters of local interest, while Justice Rehnquist assumes they are political and ideological in nature.

141. 103 S. Ct. at 2003.

cise of spending power, a notion which *Taxation With Representation* confirmed.

Justice Rehnquist astutely pointed out that Justice Brennan relied upon the concurring opinion in *Taxation With Representation* to justify his disposal of the spending power argument.¹⁴² There is no feasible method of separating federal funding from other money, since *all* money is expended on aspects that affect programming: purchase of equipment, employee compensation, utilities, advertisements, and the like. Therefore, the only realistic way of preventing the federal funding of editorializing is by means of a wide, generalized ban.¹⁴³

Justice Rehnquist likened the present case to *Oklahoma v. United States Civil Service Commission*,¹⁴⁴ where the Supreme Court upheld section 12(a) of the Hatch Act,¹⁴⁵ which forbade civil service employees from participating in political activities. This regulatory power existed because those employees received all or part of their pay by way of federal subsidy.¹⁴⁶

Justice Rehnquist acknowledged that the government cannot attach *any* condition to funding as it sees fit. The condition must have a rational relationship to the congressional purpose.¹⁴⁷ Here, the editorializing ban is rational because Congress has decided not to finance an "exercise of partisan politics."¹⁴⁸ Congress has really not suppressed speech at all; the editorial ban is content-neutral¹⁴⁹ in that it enjoins *all* points of view. Such views may already be expressed in programming, provided no management endorsement accompanies them.¹⁵⁰

142. 104 S. Ct. at 3131. *See supra* note 136.

143. 104 S. Ct. at 3131.

144. 330 U.S. 127 (1947).

145. 18 U.S.C. § 61(1) (1982).

146. Justice Rehnquist appears to have taken *Civil Serv. Comm'n* out of context. The Hatch Act sought to improve "public service by requiring those who administer funds for national needs to abstain from active political partisanship." 330 U.S. at 143. As analyzed by Justice Brennan (*see supra* notes 103-31 and accompanying text), section 399 fails to further the state interests advanced by the government in the statute's defense.

147. 104 S. Ct. at 3132. The Justice derives this test from *Cammarano v. United States*, 358 U.S. 498, 513 (1959). Nondiscriminatory denial of deductions to gross income was allowed, if not "aimed at the suppression of dangerous ideas." *Id.*

148. 104 S. Ct. at 3132.

149. Once again, Justices Rehnquist and Brennan clash on conceptual definitions. Justice Brennan's approach to "content neutrality" considers the *category* of speech prohibited and the *method* of its prohibition, while Justice Rehnquist looks to the *substance* of the speech itself. *See supra* note 100 and accompanying text.

150. 104 S. Ct. at 3132. Can station management *really* present its views through programming? Creative control lies in the hands of production management, whose views may be at odds with those who run the station. Other opinions expressed in programming may be those of a guest on a talk show, or of another public broadcasting station sharing its programming. "It hardly answers one person's objection to a restriction on his speech that another person, outside of his control, may speak for him." 103 S. Ct. at 2005 (Blackmun, J., concurring).

The editorial ban is not an "unconstitutional condition" attached to federal funding,¹⁵¹ Justice Rehnquist asserted, because section 399 imposes a content-neutral ban. Unconstitutional condition cases usually involve a legislative purpose of *banning* certain forms of speech, rather than simply avoiding *subsidizing* them.¹⁵²

Justice Rehnquist concluded his dissent by affirming his belief that section 399 is a rational exercise of congressional spending power. He would therefore hold that section 399 does not run afoul of the first amendment.¹⁵³

B. Justice White

In a one sentence dissent, Justice White concurred with Justice Rehnquist. He believed section 399's other aspect, the ban on political endorsements, goes hand-in-hand with the editorializing ban. Because Congress can condition funding on the abstinence from political endorsements, it may likewise condition funding on the banning of editorial speech.¹⁵⁴

C. Justice Stevens

Justice Stevens dissented from the Court's ruling primarily because he feared that public broadcasting stations could possibly become instruments of government propaganda. "One need not have heard the raucous voice of Adolph Hitler over Radio Berlin to appreciate the importance of that concern."¹⁵⁵

Justice Stevens agreed with Justice White that the bans on both editorializing and political endorsements must be considered together. He criticized the majority for segregating the two, implying that this was done because the political endorsement ban would pass constitutional muster.¹⁵⁶ The Court, he said, has once again provided preferential first amendment protection for favored avenues of expression.¹⁵⁷

151. See *Perry v. Sindermann*, 408 U.S. 593 (1972), and *supra* note 64. Strangely enough, this argument was not addressed by the majority.

152. See *Speiser v. Randall*, 357 U.S. 513 (1958), and *supra* note 64.

153. 104 S. Ct. at 3132.

154. *Id.* (White, J., dissenting).

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

156. Justice Stevens believes that Pacifica's failure to challenge this aspect of section 399—their amended complaint deleted such a count—confirms the importance of the government interests furthered by the statute. *Id.* at 3134 n.2.

157. See *Young v. American Mini-Theatres*, 427 U.S. 50, 87 (1976) (Stewart, J., dissenting): "The fact that the 'offensive' speech here may not address 'important' top-

Justice Stevens could not accept as complete Justice Brennan's analysis of section 399's effect on speech. He stated that three important points must also be considered: (1) *Pacifica* is still capable of voicing its opinions through other modes of expression; (2) individual commentators may still express their personal views through *Pacifica* programming; and (3) the editorial restriction is content-neutral.¹⁵⁸ He further argued that section 399 protects noncommercial stations' commentators from being awarded or penalized for their stands on issues.¹⁵⁹

The major justification for the editorializing restriction, however, lies in the threat of government propaganda.¹⁶⁰ Section 399 prevents the government from guiding advocacy, which could otherwise result in an unwieldy degree of control when combined with the FCC's power to grant or deny broadcast licenses. The statutory safeguards cited by the majority¹⁶¹ are too vague to practically check government intervention. Congress, who better understands the "world of politics," has concluded that the danger is real. Its judgment, Justice Stevens believed, should not be disturbed when it rests on a rational basis.¹⁶²

Justice Stevens did not believe the fairness doctrine would balance out any de facto government takeover of the airwaves. This is impossible, he claimed, when the doctrine was established by the government and is enforced by the government.¹⁶³

Once again, Justice Stevens rejected the Court's view that section 399 constitutes an invalid content-based restriction. *Consolidated Edison Co. v. Public Service Commission*,¹⁶⁴ cited by the Court for guidance, concerned opinions on nuclear power inserted in customers' monthly bills. This form of speech was prohibited by the public utilities commission, and was struck down as constituting an invalid "viewpoint-based prohibition."¹⁶⁵ *Consolidated Edison*, however, is

ics—'ideas of social and political significance,' . . . does not mean that it is less worthy of constitutional protection." *Id.*

158. Justice Stevens' view of content neutrality parallels that of Justice Rehnquist. *See supra* note 149.

159. 104 S. Ct. at 3135. Justice Stevens also accepted the government's contention that taxpayers should not be forced to subsidize advocacy they oppose, although he failed to explain why this constitutes a legitimate state interest. *Id.* at 3136-37 n.7.

160. Editorials may not be effective conduits for propaganda. An outright expression of management views may not have the impact of subtle programming content and presentation. *See Comment, The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. MICH. J.L. REF. 541, 561-62 (1980).

161. 47 U.S.C. § 396 (1984). *See supra* notes 107-11 and accompanying text.

162. 104 S. Ct. at 3137.

163. If this were so, the Supreme Court, a "government" entity, could not be impartial in hearing a case involving the government as a party, such as in this case.

164. 447 U.S. 530 (1980).

165. 104 S. Ct. at 3138.

not applicable to the present case in that the ban on editorializing applied to *all* viewpoints, encompassing the entire ideological spectrum.

Because it equally restricts all forms of editorial opinion, and because it furthers the substantial interest of checking government propaganda, Justice Stevens would uphold the validity of section 399.¹⁶⁶

VI. IMPACT

The Supreme Court's decision in *Federal Communications Commission v. League of Women Voters* to allow public broadcasters the right to editorialize appears to bear three significant results. They are, in increasing order of importance: (1) a reinterpretation of the *Taxation With Representation* doctrine concerning government subsidies; (2) the ability of public broadcasters to take stands on controversial issues; and (3) a reaffirmation of Congress' power to regulate broadcasting in the public interest.

(1) Through his application of *Regan v. Taxation With Representation* to this case, Justice Brennan has changed its teachings to the extent adopted in Justice Blackmun's concurrence.¹⁶⁷ Simply stated, the new meaning of *Taxation With Representation* is now this: Congress may not forbid a subsidized organization from exercising a protected mode of speech unless the organization can effectively exercise that right by means of a reasonable alternative method. Justice Brennan's interpretation of *Taxation With Representation* is hardly surprising; he concurred with Justice Blackmun in that case and has consistently championed a liberal interpretation of the first amendment.¹⁶⁸ It remains to be seen, however, if this new rule will stand up to subsequent interpretation.

(2) For the first time since the inception of the Public Broadcasting Act of 1967, noncommercial broadcasting stations may expressly

166. *Id.*

167. See generally *supra* notes 60-68, 136 and accompanying text.

168. For an insight into Justice Brennan's views on the first amendment, see generally Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

Justice Brennan authored the Court's landmark decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), which gave newspapers a first amendment privilege against malice charges when reporting on public officials. The Justice's first amendment philosophy is succinctly portrayed in the following excerpt from the opinion: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

editorialize on issues of public concern. Section 399 has long deprived the viewing and listening public of an intelligent source of comments and ideas, one that will perhaps be more willing to go beyond the staid and noncontroversial stands taken by commercial radio and television stations.¹⁶⁹ Justice Stevens' concerns over the use of public broadcasting stations as instruments of propaganda appear to be unfounded in practicality. Editorials will, in all probability, continue to address only local issues which would not inspire the wrath of Congress. As would be expected, leaders in the industry view the decision warmly, believing that "public broadcasting's full First Amendment rights can only strengthen its identity as an independent and essential American journalistic institution free of governmental interference."¹⁷⁰

(3) Perhaps the most important aspect of *League of Women Voters* lies in its effect on the field of broadcast regulation as a whole. Some believe it represents a willingness on the Court's behalf to reconsider its specialized first amendment treatment of broadcasting, which would inevitably result in deregulation.¹⁷¹ This may be the first time that the Supreme Court has struck down a broadcasting content-based regulation on first amendment grounds.¹⁷²

FCC Chairman Fowler particularly welcomed the decision in this regard,¹⁷³ pointing out two footnotes in the decision which he felt "recognized that the scarcity argument may not be sound."¹⁷⁴ The first footnote indicated that the Court may reconsider its approach to scarcity as a rationale for regulation should new developments show otherwise.¹⁷⁵ The second footnote would permit reconsideration of

169. "As might be expected, the frequency and quality of commercial editorializing has not been overwhelming, because of the concern for the alienation of sponsors. Public broadcasting thus remains a largely untapped source for more extensive and meaningful editorializing." Comment, *The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. MICH. J.L. REF. 541, 550 (1980) (footnotes omitted).

170. *Public Broadcasters Granted Right to Editorialize*, BROADCASTING, July 9, 1984, at 34.

171. The Reagan Administration and the FCC support the deregulation of broadcasting. See *supra* note 74.

172. See BROADCASTING, *supra* note 170, at 33.

173. The adversarial process so ingrained in American jurisprudence does not appear to be well served in this case. The FCC (and for that matter, the entire executive branch as well) welcomes the prospect of government deregulation, yet is strangely called upon to defend the very thing it ideologically opposes.

174. *Two Tails that Could Wag the Dog in Winning First Amendment Rights*, BROADCASTING, July 9, 1984, at 27.

175. 104 S. Ct. at 3116 n.11, which reads, in pertinent part, as follows:

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. . . . We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

Id.

the fairness doctrine should it be shown to have a negative rather than positive effect on first amendment interests.¹⁷⁶

Given Fowler's expressed commitment to broadcast deregulation and his previous efforts in that regard, most notably the 1981 deregulation of radio licensing requirements,¹⁷⁷ such possibilities have serious implications. At stake is the future viability of congressional control over radio and television licensing, content, and operation. Fowler's FCC has made public its desire to repeal the fairness doctrine, which the FCC believes to be within its congressional grant of power to provide for the "public interest, convenience, and necessity."¹⁷⁸

The Court's decision, however, does not justify the deregulators' happy mood. Although he noted that circumstances could possibly change the Court's stance, Justice Brennan did not question the validity of the scarcity concept.¹⁷⁹ Indeed, the Court expressly affirms Congress' right to regulate the public airwaves,¹⁸⁰ and refers to the fairness doctrine again and again as a living, breathing, and legiti-

176. "As we recognized in *Red Lion*, however, were it to be shown by the Commission that the fairness doctrine 'has the effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in that case." *Id.* at 3117 n.12 (citation omitted).

177. For an analysis of radio deregulation, see Comment, *The FCC's New Equation for Radio Programming: Consumer Wants = Public Interest*, 19 DUQ. L. REV. 507 (1981).

178. *All the Way?*, BROADCASTING, Sept. 10, 1984, at 122.

Possible problems lie on the horizon for the FCC should it choose to follow this course of action. Section 315 of the Communications Act, 47 U.S.C. § 315 (1982), designed to afford political candidates equal time, provides in pertinent part: "Nothing in the foregoing sentence [providing for equal time for candidates] shall be construed as relieving broadcasters . . . from the obligation imposed upon them under this [Act] . . . to afford reasonable opportunity for the discussion of conflicting views of issues of public importance."

Thus Congress may have incorporated the fairness doctrine into law, depriving the FCC of its ability to repeal the doctrine as an administrative manner. See *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 n.8 (1973); *Red Lion Broadcasting v. Federal Communications Comm'n.*, 395 U.S. 367, 380 (1969); *Kennedy for President Comm. v. Federal Communications Comm'n.*, 636 F.2d 432, 448 (D.C. Cir. 1980).

179. The deregulators contend that the scarcity argument is no longer viable in light of the new technologies of cable television, satellite transmission, video cassette recorders, over-the-air subscription television, and the like. See *supra* note 27. The fallacy of this reasoning lies in the comparison of broadcast media to *non-broadcast* media. The new technologies are procured by affirmative effort on the part of the consumer, while over-the-air signals pervade virtually every corner of American society, regardless of solicitation. Thus the concept of scarcity cannot be rebutted by comparing apples with oranges.

180. 104 S. Ct. at 3116.

mate restriction on broadcasters' rights. The whole tone of the opinion upholds the basic notion that broadcasting may be regulated to further the first amendment interests of those who most need its protection: the listening and viewing public.

VII. CONCLUSION

It is heartening to know, in these days of deregulatory fervor, that the Supreme Court still values the first amendment rights of the broadcast audience along with those of the broadcasters themselves. Broadcasting is indeed a very powerful and influential tool; it should not be left in the hands of those who are not answerable to the public, those who own the airwaves. Deregulation imperils the free exchange of opposing points of view and deletes the broadcaster's fiduciary duty to act in the public interest.¹⁸¹ But as long as the champions of first amendment rights refuse to give up the struggle, we shall be free of the specter of broadcast deregulation.

MICHAEL R. GRADISHER

181. For a description of the problems facing minorities in their struggle for equal rights in broadcasting, see Weissman, *The FCC and Minorities: An Evaluation of FCC Policies Designed to Encourage Programming Responsive to Minority Needs*, 16 COLUM. J.L. & SOC. PROBS. 561 (1981). As of the date of that article's publication, only approximately 1.5% of all American broadcast stations were owned or controlled by minority interests. *Id.* at 579.