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Broadcasters' First Amendment Rights: A New Approach?

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NOTE

Broadcasters' First Amendment Rights: A New Approach?

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I. INTRODUCTION

The passage of the Public Broadcasting Act of 1967¹ offered the blueprint for the modern system of public broadcasting and regulation and largely freed noncommercial broadcasting² to become a viable alternative to the commercial broadcasting³ offered

1. 47 U.S.C. § 390 (1982).

2. For the purposes of this Article, "noncommercial broadcaster" is defined as a television or radio licensee that does not receive paid advertising or operate for profit. The term is interchangeable with "public broadcaster." For the statutory definition, see *id.* § 397.

3. This Note defines "commercial broadcaster" as a television or radio licensee that receives paid advertising and operates for a profit. The term is interchangeable

by the three national networks. Since becoming intimately involved in noncommercial broadcasting by providing partial funding, the federal government has imposed regulations on noncommercial broadcasters far more rigid than the restrictions imposed on commercial broadcasters. Recently, however, in a decision that some might regard as heralding greater equality between the first amendment rights of commercial and noncommercial broadcasters and continuing the trend toward loosening restrictions on broadcasters, the United States Supreme Court in *FCC v. League of Women Voters*⁴ ruled that a ban on editorializing by noncommercial broadcasters as prescribed in section 399 of the Public Broadcasting Act of 1967⁵ violated the first amendment rights of public broadcasters.⁶

Part II of this Note begins by discussing the Supreme Court's traditional approach to regulations that limit broadcasters' first amendment rights. Next, part III reviews the relevant history of public broadcasting and the justifications for the Court's differential treatment of noncommercial broadcasters and commercial broadcasters. Part III also examines efforts made to loosen regulations imposed on noncommercial broadcasters, but focuses on section 399's tight restrictions on broadcasters' freedom of speech. In parts IV and V the Note raises the possibility that *League of Women Voters* signals a new attitude of the Supreme Court toward its traditional first amendment analysis of government regulation of federally subsidized noncommercial broadcasters. Part VI then focuses on the decision's present significance for noncommercial broadcasters and their audience. In part VII, the Note exam-

with "private broadcaster."

4. 104 S. Ct. 3106 (1984).

5. 47 U.S.C. § 399 (1982) provides in relevant part: "No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting (CPB)] . . . may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office." Thus, the editorial prohibition applies only to noncommercial broadcasters who receive CPB grants, whereas the political endorsement prohibition applies to all noncommercial broadcasters.

As originally enacted in 1967, 47 U.S.C. § 399 provided: "No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office." A new subsection designated as § 399(b) was added to § 399 in 1973. The addition is not relevant to the instant litigation, but did require Congress to redesignate the original § 399 as § 399(a). In 1981, Congress deleted the new subsection and § 399(a) was again designated as § 399. Although the courts referred to the statute under scrutiny in the instant action as § 399(a) throughout much of the litigation, this Note will refer to "§ 399" to avoid confusion.

6. 104 S. Ct. at 3127.

ines two questions left unanswered by *League of Women Voters*: whether editorializing may be defined as "lobbying activities" so that noncommercial broadcasters lose their tax exempt status, and whether the decision's analysis dictates that section 399's ban on political endorsements is also unconstitutional. In response to the first question, this Note calls for Congress and the Treasury to provide guidelines for when, if ever, editorials could constitute lobbying activities. In answering the second question, the Note concludes that despite the remote possibility of increased politicization of public broadcasting the majority's opinion in *League of Women Voters* makes inevitable the demise of section 399's ban on political endorsements.⁷

II. TRADITIONAL JUDICIAL APPROACHES TO ANALYZING BROADCASTERS' FIRST AMENDMENT RIGHTS

Broadcasting traditionally has received more limited first amendment protection than other media. The United States Supreme Court early in the development of broadcasting established the principle that the first amendment should be applied to broadcast media differently than to printed media. In *National Broadcasting Co. v. United States*,⁸ the Court indicated that the unique characteristics of broadcasting, most particularly the limited availability of spectrum space, made governmental regulation a necessary impingement of the first amendment guarantee of free speech.⁹ The Court also recognized that the licensing system that Congress established in the Communications Act of 1934 was a valid exercise of the commerce power and that the standard Congress chose for granting broadcast licenses did not abridge or deny free speech.¹⁰

Later decisions have articulated the Supreme Court's reasons for adhering to a policy of differentiating between broadcast and other media. These decisions also have sought to justify the obvious discrepancies in the Court's treatment of broadcasting and other media forms. In *Red Lion Broadcasting Co. v. FCC*¹¹ the

7. In *League of Women Voters*, only that part of § 399 dealing with the ban on editorializing was under consideration; the appellees did not challenge the constitutionality of the section's ban on political endorsements.

8. 319 U.S. 190 (1943).

9. *Id.* at 226.

10. *Id.* Congress chose "the public interest, convenience, or necessity" standard for the licensing of broadcasting stations. *Id.* at 226-27.

11. 395 U.S. 367 (1969). *Red Lion Broadcasting* carried a program that consti-

Court explained the principal ground for the distinction drawn in the first amendment standards for broadcast media. The Court affirmed that "broadcasting is a medium affected by a First Amendment interest," but reasoned that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."¹² The Court, in explaining its decision that broadcasting licensees' first amendment rights are subordinate to the rights of viewers and listeners, observed that unless licensing restrictions and a duty to conduct operations as proxies or fiduciaries of a community's trust with obligations to present representative views are imposed upon broadcasters the airwaves would become overcrowded and virtually useless as channels for communication.¹³ The notion that the limited number of available radio frequencies justifies imposing duties on a broadcaster is called the "spectrum scarcity doctrine."

Red Lion is of further interest because the Court affirmed the validity of the Federal Communication Commission's (FCC) "fairness doctrine."¹⁴ This doctrine had evolved over years of federal regulation of broadcast media and had become a part of statutory law.¹⁵ The fairness doctrine imposes on broadcasters two affirmative duties: broadcasters' coverage of issues of public importance must fairly reflect different viewpoints and must be sufficient to inform the public.¹⁶ To effect these ends, the fairness doctrine requires broadcasters to provide free time for the presentation of opposing viewpoints when paid sponsors are unavailable and requires the broadcaster to initiate programming on public issues if no one

tuted a personal attack on an individual. The FCC ordered *Red Lion* to provide the person with a transcript and reply time regardless of the person's ability to pay. The Court held that the Federal Communication Commission's (FCC) actions did not exceed its authority and that the fairness doctrine's personal attack and political editorial rules did not violate the first amendment.

12. *Id.* at 386 (citations omitted).

13. *Id.* at 388-89. "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great and public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press." *Id.* at 394.

14. *Id.* at 374-75.

15. The FCC first enunciated the "fairness doctrine" in *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1257-58 (1949). The doctrine is codified at 47 U.S.C. § 315(a) (1982).

16. *See* 47 U.S.C. § 315(a) (1982).

else does so.¹⁷

In *Columbia Broadcasting System v. Democratic National Committee*¹⁸ the Court affirmed the viability of the "scarcity doctrine," as a basis for distinguishing broadcast from other media. The court stated that different first amendment values apply to broadcast media because broadcasters use a finite resource. Moreover, the Court recognized the difficulty in balancing the first amendment rights against the public interest. The Court noted that the balancing process is confused by a regulatory scheme established over a half century ago. Rapid technological changes further complicate the balancing process because once-suitable solutions become quickly outdated.¹⁹

The Court held that Congress could not require broadcasters to accept editorial advertising because "it would be anomalous for us to hold, in the name of promoting constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged To do so in the name of the First Amendment would be a contradiction Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest."²⁰ Notwithstanding the rationale offered for the Court's decision in *CBS v. Democratic National Committee*, the ban on editorializing by noncommercial broadcasters remained intact until *League of Women Voters*.

In *FCC v. Pacifica Foundation*²¹ the Court added a new twist to the first amendment analysis of broadcasters' rights. The Court held that while the Communications Act expressly prohibits censorship of the media, the imposition of sanctions on the broadcasting of obscene, indecent or profane language does not constitute censorship.²² The Court in *Pacifica* offered two new justifications

17. See *Red Lion*, 395 U.S. at 393-96; see also S. HEAD & C. STERLING, *infra* note 26, at 475.

18. 412 U.S. 94 (1973); See also *Red Lion*, 395 U.S. at 396-401 for the clearest articulation of the "scarcity doctrine." In *Columbia Broadcasting* a group of individuals filed a complaint with the FCC alleging that a broadcaster had violated their first amendment rights by refusing to sell them time to broadcast announcements expressing their views opposing the Vietnam War. The group alleged that the station's coverage of antiwar views did not meet the fairness doctrine's requirements. The Court held that the "public interest" standard of the Communications Act of 1934 does not require broadcasters to accept editorial advertisements. 412 U.S. at 101-02.

19. 412 U.S. at 101-02.

20. *Id.* at 120-21.

21. 438 U.S. 726 (1978).

22. *Id.* at 738.

for distinguishing the rights of broadcasters from other speakers. First, the Court reasoned that broadcast over the airwaves reaches the individual, not only in public, but also in the privacy of the home where one's right to be left alone clearly outweighs the first amendment rights of the broadcaster.²³ Second, the Court noted that broadcasting, unlike other media, is uniquely accessible to children, who should be protected from exposure to offensive expression.²⁴

Armed with well-established justifications for differentiating between broadcasting and other forms of speech, the Supreme Court in *League of Women Voters* nonetheless chose to reject the arguments in favor of different first amendment rights for noncommercial broadcasters. Whether the Court's rejection of its traditional approach to analyzing broadcasters' first amendment rights in *League of Women Voters* signals a shift by the Court to increased latitude for broadcasters to express freely controversial ideas is discussed in part V of this Note.²⁵

III. REGULATION OF PUBLIC BROADCASTING: AN HISTORICAL OVERVIEW

A. Public Broadcasting: Evolution of the Statutory Framework

Although federal involvement in noncommercial broadcasting was not a new phenomenon, the year 1967 clearly marked the beginning of a more precisely defined role for the federal government in the funding of and active participation in the development of public broadcasting. Early federal involvement came in the form of regulatory efforts which focused on the licensing of noncommercial radio and television. The federal government also made some attempt to resuscitate the public broadcasting industry by reserving spectrum space on FM, AM, and later, VHF and UHF frequencies for the exclusive use of noncommercial broadcasters.²⁶

23. *Id.* at 748.

24. *Id.* at 749.

25. See *infra* notes 165-81 and accompanying text.

26. S. HEAD & C. STERLING, BROADCASTING IN AMERICA 384-85 (4th ed. 1982). In 1938, the FCC reserved 25 AM channels for the use of noncommercial broadcasters. In 1940, when FM allocations were made for the first time, the FCC reserved 5 of the 40 allocated FM channels for noncommercial broadcasters. According to Head and Sterling, a crucial precedent had been set by reserving frequencies to broadcast noncommercial educational programs. *Id.* at 255. Furthermore, when the FM band was reallocated in 1945, the FCC reserved 21 out of 100 channels for educational broadcasting. *Id.* The reservation of television channels for noncommercial broadcasters was a source

Additional federal aid was slower in coming. Public broadcasting was left entirely on its own to secure funds for operations until 1962 when Congress, for the first time, moved to directly appropriate federal funds for the use of noncommercial educational broadcasters.²⁷ The Educational Television Facilities Act of 1962²⁸ provided for the distribution of thirty-two million dollars in federally funded matching grants under the authority of the former Department of Health, Education, and Welfare.²⁹ The Act called for the grants to be distributed over a period of five years in order to provide federal subsidies for the construction of noncommercial television facilities.³⁰

Until 1967, the Educational Television Facilities Act of 1962 grants constituted the extent of direct federal aid to public broadcasters. In 1967, the Carnegie Corporation formed the first of its special commissions composed of representatives from widely varying professions who were to examine the past and present state of public broadcasting and develop means of obtaining increased federal funding.³¹ Carnegie I, as the Commission's report came to be called, recognized that public broadcasting had failed to realize its full potential because of insufficient financing, all of which came from private donations, foundation grants, and state and local government appropriations.³² The Commission's report not only emphatically urged the federal government to come to the rescue of public broadcasting, but also developed a "program for action" that included legislative proposals which Congress implemented without substantial change.³³

of intense debate owing in part to the pressures from commercial broadcasting. The FCC, however, in 1952 began reserving channel allotments for noncommercial television broadcasters and the number of reserved allotments gradually rose to about 600. *Id.* at 256, 258.

27. See Educational Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64.

28. *Id.*

29. *Id.* at § 391.

30. *Id.* at § 390.

31. See generally CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION (1967) [hereinafter cited as CARNEGIE I]. In 1979, another commission, CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING: A PUBLIC TRUST (1979) [hereinafter cited as CARNEGIE II] supplemented the first Carnegie Commission.

32. CARNEGIE I at 33-34, 36-37. The recommendations voiced in CARNEGIE I addressed the problems of "public television," but Congress later applied these recommendations to noncommercial radio broadcasters as well. *FCC v. League of Women Voters*, 104 S. Ct. at 3111 n.3.

33. Congress did not incorporate the Commission's proposals for long-term fund-

The work of the first Carnegie Commission, which President Lyndon Johnson endorsed,³⁴ led to Congress' passage of the Public Broadcasting Act of 1967,³⁵ amending the Communications Act of 1934.³⁶ As a declaration of policy, the Public Broadcasting Act³⁷ (the Act) stated that Congress could serve the public's interest best by encouraging the growth and development of public radio and television broadcasting.³⁸ The Act emphasized that programming diversity, which Congress viewed as furthering the general welfare of the viewing public, depended upon "freedom, imagination, and initiative on both local and national levels."³⁹ Congress also declared that public telecommunication services should be responsive to the interest of members of both the local and national public.⁴⁰ To ensure that public broadcasting remained free from outside interference and control, Congress determined that a private corporation should be created to bring about the development of public broadcasting.⁴¹

Soon after the Act became law, the nonpolitical corporation that the Carnegie Commission envisioned came into existence pursuant to the guidelines set forth in the Act.⁴² Chief among the activities of the Corporation for Public Broadcasting (CPB)⁴³ was its establishment of interconnection systems⁴⁴ for the distribution of broadcast services, the development of diverse programming, and

ing and for giving the President the power to appoint members of the CPB. S. HEAD & C. STERLING, *supra* note 26, at 259.

34. S. HEAD & C. STERLING, *supra* note 26, at 259.

35. 47 U.S.C. § 390 (1982).

36. 47 U.S.C. § 151 (1982).

37. *See id.* § 396(a), (g).

38. *Id.*

39. *Id.* § 396(a)(3).

40. *Id.* § 396(a)(5).

41. *Id.* § 396(a)(7). For a general discussion of the limitations on the exercise of power by this private corporation, the Corporation for Public Broadcasting, see *infra*, note 129.

42. *See generally*, 47 U.S.C. § 396(b) (1982). Section 398 of the Act prohibits federal interference with the CPB's activities.

43. Section 396(b) of the Act specifically states that Congress is to name the non-profit corporation formed to facilitate the aims of the Act the Corporation for Public Broadcasting. Section 396(g) sets forth the purposes and activities of the Corporation.

44. Interconnection means "the use of microwave equipment, boosters, translators, repeaters, communication space satellites, or other apparatus or equipment for the transmission and distribution of television or radio programs to public telecommunications entities." 47 U.S.C. § 397(3) (1982).

"Interconnection system" means any system of interconnection facilities used for the distribution of programs to public telecommunications entities. *Id.* § 397(4) (1982).

the distribution of federal funds.⁴⁵

Later, the CPB established the Public Broadcasting Service (PBS) to operate interconnection facilities.⁴⁶ Following an intensely rivalrous and prolonged struggle with CPB, PBS emerged as a representative of station interests rather than CPB interests.⁴⁷ The battle between CPB and PBS underscored the sensitivity of noncommercial broadcasting's competing interests and perhaps provided an early signal of the conflicting attitudes towards non-commercial broadcasting's purposes. Furthermore, the struggle between CPB and PBS "provide[d] only a hint of the repetitive and stubborn nature of the continued arguments [that] centered on programming and funding decisions"⁴⁸ and which have provided fuel for the arguments of regulatory zealots.

B. Public Broadcasting: The Stepchild of the Congress and the FCC

From the time the federal government stepped into the funding scheme of public broadcasting, most debate has focused on the need to insulate public broadcasters' programming decisions from political pressures such as the threat of loss of funds.⁴⁹ Even a casual survey of congressional and FCC measures aimed at "protecting" public broadcasting from the threats of politicians, however, reveals that the "protective" regulations imposed on public broadcasters are far more restrictive than necessary. For example, the Act sets forth the formula for the distribution of funds to licensees and permittees of public television and radio⁵⁰ rather than entrusting the equitable distribution of funds to the judgment of the

45. *Id.* § 396(g).

46. S. HEAD & C. STERLING, *supra* note 26, at 260.

47. *Id.* at 261.

48. *Id.*

49. Fears of political pressure being exerted on noncommercial broadcasters have not been completely unfounded. For example, incidents during Richard Nixon's presidency illustrate the difficulty of insulating a broadcasting system from political pressure when broadcasting depends on the federal government for substantial economic support. S. HEAD & C. STERLING, *supra* note 26, at 275. Head and Sterling describe incidents such as the administration's public attacks on noncommercial broadcasters and President Nixon's veto of a bill "patiently nursed through Congress" that would have provided two-year funding for public broadcasting as examples of political pressures being exerted on public broadcasters. *Id.*

Commercial broadcasters are not free of political pressures either, as evidenced by the attempt of conservative Senator Jesse Helms to take control of the Columbia Broadcasting System (CBS) by urging conservatives to buy stock in the network.

50. 47 U.S.C. § 396(k) (1982).

nonpolitical CPB.⁵¹ Although the CPB is a nongovernmental entity and Congress does have a legitimate interest in seeing that funds are properly spent, critics of the distribution formula argue that the formula coupled with the requirements of annual audits of the CPB is little more than an attempt to ensure that the CPB remains politically loyal to Congress.⁵² The Act also conditions receipt of federal funds upon station compliance with Congress' requirement that each station establish a community advisory board, the duties of which Congress has prescribed by statute.⁵³ In past years Congress has strengthened rather than loosened the Act's guidelines governing the formation of these advisory boards.⁵⁴ Although the Act provides that the community advisory boards shall "have [no] authority to exercise any control over the daily management or operation of the station,"⁵⁵ the requirement that noncommercial broadcasters must nonetheless defer to a largely symbolic board underscores Congress' unwillingness to support complete journalistic freedom for noncommercial broadcasters, possibly because of fears that Congress itself would be the subject of noncommercial broadcasters' attacks.

Another restrictive regulation that applies only to noncommercial broadcasters is the total ban on commercial advertising.⁵⁶ Congress, however, has indicated recently a willingness to reconsider its position on noncommercial broadcasters' acceptance of paid advertisements.⁵⁷ The FCC has modified its fundraising poli-

51. See generally *id.* §§ 396(b), 398.

52. See, e.g., Note, *Freeing Public Broadcasting from Unconstitutional Restraints*, 89 YALE L.J. 719, 729 n.69 (1980). Annual audits of the CPB are mandated in 47 U.S.C. § 396(1) (1982).

53. See 47 U.S.C. § 396(k)(9)(A)-(E) (1982).

54. Initially, § 396 merely mandated that each station receiving grants establish a community advisory board. As amended in 1981, Pub. L. No. 97-35 § 1227(g), the statute now further intrudes on stations' discretionary decisions in establishing the board by imposing upon the stations the duty to assure that board members regularly hold and attend meetings. 47 U.S.C. § 396(k)(9)(A) (1982).

55. 47 U.S.C. § 396(k)(9)(C) (1982).

56. 47 C.F.R. § 73.621 (e) (1984). The provision states that "No promotional announcements on behalf of for profit entities shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees. However, acknowledgements of contributions can be made." *Id.* (emphasis in original).

57. Congress in 1981 authorized the newly created Temporary Commission on Alternative Financing for Public Telecommunications to develop a "demonstration program" regarding advertising. Act of Aug. 13, 1981, Pub. L. No. 97-35, tit. XII, subtit. B, ch. 1, § 1233, 95 Stat. 357, 733. Congress authorized the CPB, in consultation with the Temporary Commission, to select at most 10 public television and 10 public radio stations to participate in the program. To ensure uninterrupted programming, a hallmark

cies for noncommercial broadcasters, which conceivably may allow some form of paid advertisements.⁵⁸ Congress also required public broadcasters who received government funds to retain for sixty days an audio recording of each broadcast in which the subject of discussion touched on "any issue of public importance."⁵⁹ In 1978, however, the United States Court of Appeals for the District of Columbia declared this requirement unconstitutional.⁶⁰

Although difficult to interpret, section 396(g)(1)(A) is another example of a unique restriction that Congress has placed on public broadcasters. Section 396(g)(1)(A) of the Act requires noncommercial licensees to adhere strictly to "objectivity and balance in all programs or series of programs of a controversial nature."⁶¹ The comparable provision⁶² under the Communications Act of 1934,⁶³ which applies to noncommercial and commercial broadcasters alike, requires only that a licensee afford "reasonable opportunity for the discussion of conflicting views on issues of public importance."⁶⁴ The difference between the two requirements is not readily apparent.⁶⁵ Both CPB and PBS have argued that section 396(g)(1)(A) is merely a restatement of the fairness doctrine, which applies to both commercial and noncommercial broadcasters.⁶⁶ The

of public broadcasting, the Act allowed the selected stations to run advertisements at the beginning or end of programs. If the program length exceeded two hours, the Act allowed the station to run advertisements during a break scheduled for station identification or at other times not unduly disruptive of the program. *Id.*

58. See *In re* Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting, 97 F.C.C.2d 255 (1984) (noting liberalized Commission policies on public broadcasters' fundraising activities by amending 47 C.F.R. §§ 73.503, 73.621 (1984)); *In re* Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, 90 F.C.C.2d 895 (1982); *In re* Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, 86 F.C.C.2d 141 (1981) (eliminating the blanket proscription against promotion of products and services and instituting "consideration received" rule).

59. 47 U.S.C. § 399(b) (Supp. V 1975). Former § 399(b) of the Act required broadcasters to make available upon request, for the reasonable cost of reproduction, a copy of such recording to private individuals or the FCC. 47 U.S.C. § 399(b)(3)(A)-(B) (deleted in 1981).

60. *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978).

61. 47 U.S.C. § 396(g)(1)(A) (1982).

62. *Id.* § 315(a).

63. 47 U.S.C. § 151 (1982).

64. *Id.* § 315(a).

65. One writer has noted that "the only thing certain about the terms 'objectivity and balance' is that they apply only to programs funded by the CPB." Branscomb, *A Crisis of Identity: Reflections on the Future of Public Broadcasting*, in *THE FUTURE OF PUBLIC BROADCASTING* 23-24 (D. Cater & M. Nyhan eds. 1976).

66. *Id.* at 23.

discrepancies in the language of the two bills, however, have led one commentator to conclude that "the requirements of Section 396(g)(1)(A) [are] far more stringent in terms of balancing views to cover far more subject matter" than section 315(a) of the Communications Act of 1934.⁶⁷

Another problem noncommercial broadcasters face in determining their obligations under section 396(g)(1)(A) is that of ascertaining the scope of the phrase "programs or series of programs" of a controversial nature. This phrase could be interpreted to require "'objectivity and balance' within a single program, in a single-title series, in all programs involving the same issue, in all controversial programming, or in an entire program package for a season."⁶⁸ Courts, however, have failed to provide licensees with guidelines for these determinations.

In addition to the unique restrictions placed on noncommercial broadcasters under section 396(g)(1)(A), noncommercial broadcasters must also comply with regulations imposed generally on all broadcasters. The FCC's fairness doctrine⁶⁹ and the personal attack and political editorial rules are two examples of generally applicable broadcasting regulations.⁷⁰

C. *Loosening the Regulatory Stranglehold*

Although the achievement of complete equality between regulation of commercial and noncommercial broadcasters is unlikely in the near future, developments in recent years have brought noncommercial broadcasters greater freedom. Some of these developments are purely statutory; others are attributable to judicial activism. These developments point the way toward increased independence in noncommercial broadcasters' choice of broadcast content, a trend the *League of Women Voters* decision indicates is

67. *Id.* at 24.

68. *Id.*

69. *See Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 296 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). For a discussion of the fairness doctrine, see *supra* note 15 and accompanying text.

70. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), upheld the constitutionality of § 315(a) of the Communications Act of 1934, which required licensees that endorsed or opposed legally qualified candidates for public office in editorials to transmit within 24 hours a copy of the broadcast to the candidate opposed. 47 C.F.R. § 73.1940 (1984). This regulation outlines further requirements that apply when a broadcaster attacks a candidate within 72 hours of an election. In that instance, broadcasters must notify the candidate sufficiently far in advance to allow him or her ample time to prepare a response to the attack. *Id.*

likely to continue.

One example of Congress' willingness to loosen the reins of noncommercial broadcast regulation was the authorization in 1981 of an advertising "demonstration program"⁷¹ as a means for evaluating whether advertising by noncommercial broadcasters might offer an attractive funding alternative. Although the demonstration program stated strict guidelines for the content and timing of advertisements,⁷² Congress' willingness, for the first time, to allow noncommercial broadcasters to tap a new source for obtaining necessary operating funds possibly portends the federal government's decreased direct involvement in public broadcasting affairs.⁷³

Legislation that increased the license period from three years to five years for television licensees and from three years to seven years for radio licensees is a further statutory change that helps to free noncommercial and commercial broadcasters from undue regulations.⁷⁴ The longer renewal periods undoubtedly should afford broadcasters two advantages. First, applicants for renewals will have additional time to muster evidence establishing grounds justifying license renewal. Second, applicants will probably not have to appear before the FCC, which is largely a politically partisan body,⁷⁵ as often as before.

Perhaps the most significant boost towards reduced intervention in the affairs of noncommercial broadcasters came in the form of a 1978 decision from the United States Court of Appeals for the

71. See *supra* notes 57-58 and accompanying text.

72. See *supra* note 57.

73. Allowing noncommercial broadcasters to accept some paid advertisements could have both positive and negative results. If both types of broadcasters accept paid advertisements, the line between what constitutes commercial and noncommercial broadcasting inevitably will begin to blur. However, noncommercial broadcasters who accept paid advertisements could reduce their reliance on governmental subsidies. Reduced reliance on federal subsidies would be of great benefit to noncommercial broadcasters. The ever-present problem of inadequate funding has increased in magnitude in recent years owing to substantial cutbacks in federal appropriations. For a broad overview of developments in funding for noncommercial broadcasters for fiscal years 1982-1986, see 1981 CONG. Q. ALMANAC at 16 (describing appropriations and funding cuts with President's budget request) and at 554 ("CPB's advance funding, designed by Congress to protect public broadcasting from political pressures and to help long-range planning, was violated when Congress agreed to some of [President] Reagan's cuts in funds already appropriated for fiscal 1983."). See also *infra* note 187 for a review of appropriations for fiscal years 1976-1986.

74. Pub. L. No. 97-35, § 1241(a), 95 Stat. 736 (1981).

75. The FCC is composed of five commissioners appointed by the President for terms of seven years. The number of members who may belong to the same political party is limited to the number equal to the least number of commissioners constituting a majority of the FCC's full membership. 47 U.S.C. § 154(a), (b)(5), (c) (1982).

District of Columbia Circuit, *Community-Service Broadcasting of Mid-America, Inc. v. FCC*.⁷⁶ The court held that section 399(b) of the Public Broadcasting Act⁷⁷ and FCC regulations promulgated thereunder were invalid because the regulations denied petitioners, a number of noncommercial educational broadcasting stations, the equal protection of the laws of the United States guaranteed by the fifth amendment.⁷⁸ Section 399(b) had required all noncommercial stations that received *any* federal funding to record and retain for sixty days all broadcasts "in which any issue of public importance [was] discussed."⁷⁹ Chief Judge Wright, writing for the majority, found strong support in the legislative history of section 399(b) for the view that the recording requirement's purpose was related to suppressing free expression on issues of public importance.⁸⁰ Judge Wright suggested that the statute furthered an impermissible government purpose to restrict free speech on the basis of its content.⁸¹ He concluded that even if the statute's enactment was within Congress' constitutional power, the statute did not identify any important and substantial government interest that it furthered, nor did the government show that section 399(b)'s incidental restriction of first amendment freedoms was no greater than necessary to further that interest.⁸² Although the constitutionality of the ban on editorializing and political endorsements was not at issue in *Community-Service Broadcasting*,⁸³ that decision may

76. 593 F.2d 1102 (D.C. Cir. 1978).

77. 47 U.S.C. § 399(b) (Supp. V 1975).

78. 593 F.2d at 1103.

79. 47 U.S.C. § 399(b) (Supp. V 1975).

80. 593 F.2d at 1112.

81. *Id.*

82. *Id.* at 1114. The court applied the four criteria established in *United States v. O'Brien*, 391 U.S. 367 (1968), for a constitutional analysis of the restraints on first amendment freedoms. The *O'Brien* test provides that a statute which imposes at least incidental restraints on first amendment freedoms can be upheld only: (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 377. *O'Brien* was not a broadcast regulation case. *O'Brien* and three companions burned their Selective Service registration cards on the steps of a Boston courthouse. The Supreme Court upheld *O'Brien's* conviction for violating a federal law prohibiting the destruction or mutilation of Selective Service certificates. The Court found that the federal statute on its face did not abridge first amendment freedom of speech rights.

83. 593 F.2d at 1108 n.11. Before the 1981 amendments, the ban on editorials and political endorsements was contained in 47 U.S.C. § 399(a). Congress in 1981 deleted § 399(b) and redesignated § 399(a) as § 399, which is the statute involved in *League of Women Voters*.

have provided the impetus and guidelines for the decision of the United States Supreme Court in *League of Women Voters*.

D. *Section 399: A Stubborn Survivor*

Despite the recent statutory changes and judicial decisions that have gradually loosened the regulatory grip on noncommercial broadcasters, section 399 remains the most outstanding example of content restriction imposed upon public broadcasting licensees. A brief examination of the legislative history of section 399 reveals the reasons for its passage and offers an explanation for Congress' retention of the section. The Senate version of the Public Broadcasting Act did not contain the prohibition against noncommercial broadcasters' editorializing. Rather, the House version added the ban⁸⁴ "[o]ut of an abundance of caution."⁸⁵ One commentator has argued, however, that the legislative history of section 399⁸⁶ reveals that "the anti-editorializing provision was inserted as a 'carrot' for recalcitrant congressmen, who felt they were very vulnerable to the media and were unwilling to finance a potentially critical medium."⁸⁷ The Senate managers achieved an impliedly narrowed construction of the provision by agreeing to accept the provision only if "the prohibition against editorializing was limited to providing that no noncommercial educational broadcast station [could] broadcast editorials representing the opinion of the *management* of such station."⁸⁸ Courts have adopted this interpretation of section 399.⁸⁹ Thus, the ban only prevented editorializing by management or by representatives of management on the behalf of management.⁹⁰

84. Lindsey, *Public Broadcasting: Editorial Restraints and the First Amendment*, 28 FED. COM. B.J. 63, 79-80 (1975).

85. H.R. REP. NO. 572, 90th Cong., 1st Sess. 15, reprinted in 1967 U.S. CODE CONG. & AD. NEWS 1799, 1810.

86. See *Hearings on H.R. 6736 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 42 (1967). An example of the strong feelings concerning the practice of editorializing is found in a statement made by the provision's most vocal advocate: "There are some of us who have very strong feelings because they have been editorialized against." *House Hearings* at 641 (remarks of Rep. Springer); see also 113 CONG. REC. 26,391 (1967) (remarks of Rep. Joelson).

87. Lindsey, *supra* note 84, at 81.

88. CONFERENCE REP. NO. 794, 90th Cong., 1st Sess. 12, reprinted in 1967 U.S. CODE CONG. & AD. NEWS 1834, 1835 (emphasis added).

89. See *Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973) (construing ban on editorializing as being limited only to "licensees, their management or those speaking on their behalf for the propagation of the licensees' own views on public issues"); see also Walker & Salveter, 32 Rad. Reg. 2d (P & F) 839, 846 (1975).

90. For a discussion of the tactics used by management to get around this ban on

Section 399 survived two legislative attempts to repeal the provision⁹¹ and incurred only minor changes in the 1981 amendments to the Act. As amended,⁹² the provision applied the editorial ban to only noncommercial educational broadcasters that received CPB grants. The amendments retained the complete ban on political endorsements made by *all* noncommercial educational broadcasters.⁹³ Furthermore, Congress deleted subsection (b), which the D.C. Circuit had held unconstitutional in an earlier case,⁹⁴ and redesignated the provision as section 399. The amended section 399 constituted the statute that the Supreme Court considered ultimately in *League of Women Voters*.⁹⁵ Although commentators had for years expressed doubts about section 399's constitutionality,⁹⁶ the statute did not attract the attention of any court until 1979 when *FCC v. League of Women Voters* was first brought.

IV. THE *League of Women Voters* DECISION

The appellees⁹⁷ in *FCC v. League of Women Voters* initially challenged the constitutionality of former section 399⁹⁸ in a suit brought before the United States District Court for the Central

editorializing, see *infra* notes 184-85 and accompanying text.

91. Legislation proposed by Senator William Proxmire, The First Amendment Clarification Act of 1977, S. 22, 95th Cong., 1st Sess., and by Congressman Robert Drinan, The First Amendment Implementation Act of 1975, H. 2189, 94th Cong., 1st Sess., would have repealed § 399. Neither bill was enacted.

The house bill introduced in 1975 was reintroduced in the 95th Congress in modified form by Congressman Van Deerlin. The bill in its original form would have repealed the prohibition of § 399 against editorials, but would have left intact the prohibition against endorsing or opposing political candidates. Congress passed the bill without repealing any of § 399. The Act is entitled the Public Telecommunications Financing Act of 1978, 92 Stat. 2405, Pub. Law 95-567, 95th Cong., 2d Sess. (1978).

92. Act of August 13, 1981, Pub. L. No. 97-35, tit. XII, subtit. B, ch. 1, § 1229, 95 Stat. 357, 730.

93. *Id.*

94. See *supra* notes 76-83 and accompanying text for a discussion of Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978).

95. The plaintiffs in *League of Women Voters* had to amend the complaint numerous times to reflect the statutory changes. See *infra* notes 97-104 and accompanying text for a discussion of the case's turbulent procedural history.

96. See, e.g., Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Note, *The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. MICH. J.L. REF. 541 (1980).

97. Appellees included the League of Women Voters of California, Pacifica Foundation (a nonprofit corporation that owns and operates noncommercial broadcasting stations), and Congressman Henry Waxman, a regular listener of noncommercial broadcasting).

98. See *supra* note 5 for an explanation of the numerous revisions of § 399.

District of California in April 1979.⁹⁹ Shortly thereafter, the Department of Justice under the Carter Administration determined that it would not defend the statute's constitutionality. The Department believed that section 399 violated the first amendment's guarantees of freedom of speech and freedom of the press by unduly restricting the ability of public broadcasters to engage in commentary that reflected station management's views on matters of public interest.¹⁰⁰ The United States Senate responded by adopting a resolution ordering Senate counsel to intervene as *amicus curiae* in support of section 399.¹⁰¹ The suit, however, was dismissed subsequently for want of a justiciable controversy because the federal government refused to enforce the statute.¹⁰²

While the appellees' appeal from the earlier disposition was pending before the United States Court of Appeals for the Ninth Circuit, a change in presidents brought a change in the executive branch's policy towards the statute. Following the Justice Department's announcement under the Reagan Administration that it would defend the statute, the Ninth Circuit remanded the case to the district court which, now that a concrete controversy existed, allowed Senate counsel to withdraw and vacated the earlier order of dismissal. In the interim, Congress amended section 399 to restrict the editorial ban to grant-receiving broadcasters while preserving the blanket prohibition on the making of political endorsements.¹⁰³ Appellees accordingly amended their complaint in response to the statutory changes. In an important alteration, the appellees dropped the challenge to section 399's prohibition on political endorsements and focused entirely on the editorializing prohibition.¹⁰⁴

Rejecting the government's contention that section 399's ban on editorializing served a compelling government interest by preventing noncommercial broadcasters from becoming "propaganda organs for the government,"¹⁰⁵ the district court granted summary judgment in favor of the appellees.¹⁰⁶ The district court found that the protection of the FCC's fairness doctrine, the di-

99. 104 S. Ct. 3106, 3112-13 (1984).

100. *Id.* at 3113 & n.8 (quoting letter from Attorney General Benjamin R. Civiletti to Senate Majority Leader Robert C. Byrd (Oct. 11, 1979), app. 13-14).

101. S. Res. 328, 96th Cong., 2d Sess. (1979).

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

103. Pub. L. No. 97-35, tit. XII, § 1229, 95 Stat. 730 (1981).

104. *League of Women Voters v. FCC*, 547 F. Supp. 379, 382 (C.D. Cal. 1982).

105. *Id.* at 386.

106. *Id.* at 387.

verse funding sources available to noncommercial broadcasters, and the Public Broadcasting Act's built-in safeguards outweighed the fear of government control.¹⁰⁷ As a result, section 399's restriction on editorializing did not promote a governmental interest sufficient to merit the impingement of first amendment freedoms caused by the editorial ban.¹⁰⁸ The district court based its decision entirely on first amendment grounds and specifically declined to adopt plaintiff's equal protection argument.¹⁰⁹ The court did note in dicta that plaintiff's equal protection claim might have had merit if the appellees had presented more evidence.¹¹⁰

On direct appeal from the district court,¹¹¹ the United States Supreme Court affirmed the district court's holding. The Supreme Court held that the government interest that section 399's editorial ban sought to advance was neither sufficiently substantial nor sufficiently limited to justify the ban's abridgement of the journalistic freedoms protected by the first amendment.¹¹² Although the Court noted that the fundamental principles guiding evaluation of broadcast regulation are well-established,¹¹³ the Court nonetheless painstakingly reiterated those principles in the instant case. Justice Brennan, writing for the majority,¹¹⁴ restated the notion that Congress has power under the commerce clause to regulate the use of the scarce and valuable national resource of the broadcast medium.¹¹⁵ Congress, in exercising its commerce clause power, may seek to assure that broadcasters provide the public with "a balanced presentation of information on issues of public impor-

107. *Id.* at 386.

108. *Id.*

109. *Id.* at 388.

110. *Id.*

111. See 28 U.S.C. § 1252 (1982). Section 1252 permits direct appeal to the Supreme Court from a judgment that an Act of Congress is unconstitutional. *McLucas v. DeChamplain*, 421 U.S. 21, 31 (1975).

112. 104 S. Ct. 3127.

113. *Id.* at 3116.

114. Justices Marshall, Blackmun, Powell, and O'Connor joined Justice Brennan's opinion. Justice White filed a separate dissenting statement. Justice Rehnquist, Chief Justice Burger, and Justice White joined Justice Rehnquist, who filed a dissenting opinion. Justice Stevens also filed a separate dissenting opinion.

115. 104 S. Ct. at 3116. In a footnote, the Court acknowledged that the rationale for the spectrum scarcity doctrine has come under increasing attack recently because cable and satellite television gave communities access to a wide variety of stations. This abundance of stations may render the scarcity doctrine obsolete. *Id.* at 3116 n.11.

For a thorough discussion of the possible significance of footnote 11, see *infra* notes 169-74 and accompanying text.

tance."¹¹⁶ Broadcasters, however, remain "entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with their public [duties]'" because broadcasting is a vital and independent form of communication.¹¹⁷ The Court restated its position that a restriction on broadcaster discretion can be upheld only when "the restriction is narrowly tailored to further a substantial government interest."¹¹⁸

In determining whether section 399's restrictions satisfied requirements for permissible broadcast regulation, the Court focused its analysis on two problems with the ban on editorializing. First, Congress aimed the ban on editorial opinion specifically at a form of speech at the heart of first amendment protection.¹¹⁹ Second, Congress defined the scope of the ban exclusively on the basis of content.¹²⁰ In discussing the first problem, the Court emphatically reaffirmed its commitment to protecting speech in the form of editorial opinion.¹²¹ According to the Court, the editorial plays a spe-

116. 104 S. Ct. at 3116. The Court reaffirmed its position stated in the landmark case of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that newspapers which attack political candidates may not be required to grant them free reply space without violating first amendment guarantee of free press). While the Court has never permitted the regulation of print media, the Court has recognized that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) (upholding the constitutionality of the FCC's fairness doctrine and FCC rules requiring stations to furnish audio tape, transcript, or broadcast summary and to provide response time to persons attacked in broadcasts). As support for the Court's contention that it should continue to apply different standards to broadcasters, the Court cited *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973) (upholding limited right of access for federal candidates pursuant to § 312(a)(7) of the Communications Act of 1934) for the proposition that broadcasting frequencies are a scarce resource. The Court apparently continues to find the spectrum scarcity doctrine viable notwithstanding increasing attacks from technological experts. For a discussion of this aspect of the Court's decision, see *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87 (1984).

117. 104 S. Ct. at 3116-17 (citing *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973)).

118. 104 S. Ct. at 3118 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969)).

119. 104 S. Ct. at 3118. For the proposition that the preservation of editorial freedom and discussion of public issues are foremost concerns of the first amendment, see *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("expression on public issues has always rested on the highest rung of the hierarchy because of First Amendment values" (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1981))); see also *Mills v. Alabama*, 384 U.S. 214 (1966) (holding unconstitutional a ban on election day newspaper endorsements); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust and wide-open").

120. 104 S. Ct. at 3119.

121. See *supra* note 119.

cial role in the discovery and dissemination of political truth.¹²² In discussing the second problem, the Court noted that the provision was a perfect example of a regulation crafted to deny a specific group the right to address a selected audience on controversial public issues.¹²³ According to the Court, regulation of speech motivated solely by the desire to suppress expression of a particular viewpoint on a controversial issue of public interest is the purest example of a law that abridges the freedom of speech and of the press.¹²⁴

The Court rejected the government's assertion that the "special circumstances" of noncommercial broadcasters pose hazards so great that section 399 is necessary to preserve the public's first amendment interests.¹²⁵ The Court conceded that the objectives of preventing governmental or private bias is broadly consistent with the goals of broadcasting regulation.¹²⁶ Unlike the regulations upheld in previous cases,¹²⁷ however, section 399 leaves no room for editorial discretion because the provision completely prohibits broadcasters from speaking out on public issues even in a balanced and fair manner. The Court acknowledged that the government's involvement in public broadcasting might pressure traditionally independent stations into becoming forums devoted solely to presenting views acceptable to the federal government¹²⁸ and that Congress was aware of these dangers. Accordingly, when funding local stations Congress sought to preserve the stations' independence and community orientations. The Court held, however, that section 399 simply did not substantially advance the government's interest in protecting public broadcasters from federal control because the Public Broadcasting Act already protected local stations from governmental interference without restricting the stations'

122. 104 S. Ct. at 3119.

123. *Id.* at 3120.

124. *Id.* (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 546 (1980) (New York Public Service Commission's regulation prohibiting utility companies from placing inserts in monthly bills discussing controversial issues of public importance held to violate first and fourteenth amendments by directly impinging on freedom of speech).

125. 104 S. Ct. at 3121.

126. *Id.* at 3120.

127. *Id.* at 3121. In *Red Lion* the Court upheld the fairness doctrine and the political attack and editorial rules. See 395 U.S. 367 (1969). In *Columbia Broadcasting* the Court found that the "public interest" standard does not require broadcasters to accept editorial advertisements. 412 U.S. at 130.

128. 104 S. Ct. at 3121.

ability to editorialize on issues of public concern.¹²⁹ Moreover, the Court reviewed the statute's legislative history and found that Congress added section 399 not because Congress viewed the provision as vital to preserving "the autonomy and vitality of local stations but rather 'out of an abundance of caution.'"¹³⁰

In addition to its observation that existing statutory safeguards and long term appropriations for CPB already insulated local stations from government pressure, the Court stated that section 399's remedy of suppressing the category of editorial speech was unlikely to reduce substantially the risk of undue influence or pressure on local stations by the federal government in the form of retaliatory cuts in appropriations.¹³¹ Because hundreds of local stations exist throughout the country, the Court expressed its belief that editorials would "prove to be as distinctive, varied, and idiosyncratic as the various communities they represent."¹³² Furthermore, individual broadcasters are likely to address editorial opinions to local issues which do not tend to provoke federal governmental interference because the issues do not have a national impact.¹³³ The Court noted that the prohibition of editorial speech by local noncommercial broadcasters overlooked the more likely risk of the federal government's interference with the more controversial programs distributed nationally to local stations and funded by the CPB.¹³⁴ The Court pointed out that the Act does not attempt to eliminate this greater risk. The Act imposes no other substantive restrictions on editorial expression except those of balance and fairness on nationally produced and distributed public broadcasting programs.¹³⁵

The Court also observed that the ban was not "sufficiently tailored to the harms it [sought] to prevent to justify its substantial

129. *Id.* at 3122. For example, the CPB cannot own or operate stations. 47 U.S.C. § 396(g)(3) (1982). The CPB must adhere to "objectivity and balance" in disbursing funds. 47 U.S.C. § 396(g)(1)(A) (1982). The CPB cannot contribute to or support candidates for political office. 47 U.S.C. § 396(f)(3) (1982). No "department, agency, officer, or employee of the U.S. [may] exercise any direction, supervision, or control over educational television or radio broadcasters, or over the Corporation or any of its grantees or subcontractors," 47 U.S.C. § 398(a) (1982). Finally, Congress now makes appropriations of funds for longer terms than year by year. 47 U.S.C. § 396(k)(1)(C) (1982).

130. 104 S. Ct. at 3121.

131. *Id.* at 3123.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 3124.

interference with broadcasters' speech,"¹³⁶ because editorial speech includes an infinite variety of expression unrelated to governmental affairs.¹³⁷ Furthermore, the Court rejected the Justice Department's argument that government influence would come from state and local authorities.¹³⁸ According to the Court, the ban applied to private noncommercial community organizations that independently own and operate local stations, and the Act's legislative history indicated that Congress was concerned only with preventing federal government influence.¹³⁹ The Court also noted that the government's claimed interest in preventing noncommercial broadcasters from becoming "privileged outlets" for the expression of views of owners and managers¹⁴⁰ was dubious.¹⁴¹ The Court explained that the government was making contradictory arguments. On the one hand, the government contended that despite section 399 broadcasters could disseminate or hide a variety of controversial views through interviewers and the manner in which the broadcaster reported the news.¹⁴² On the other hand, the government argued that section 399 advanced a substantial interest in keeping stations from airing controversial or partisan opinions.¹⁴³ The Court concluded that the sole effect of section 399 was to prevent a station from communicating views on the station's or its management's behalf. The prohibitive provision, therefore, did not merit the sacrifice of first amendment protections for the speculative gain of reducing the risk that stations might serve as outlets for the expression of unbalanced views.¹⁴⁴

The Court also expressed concern that section 399 did not serve the public's "paramount right" to be fully informed on matters of public importance by noncommercial broadcasters because the statute's effect was to diminish rather than add to the volume and quality of coverage of controversial issues.¹⁴⁵ Finally, the Court rejected the argument that section 399's editorial ban represented

136. *Id.*

137. *Id.* at 3125. The Court suggested the possibility of broadcasting disclaimers with every editorial, which would have the virtue of clarifying the responses that might be made under the fairness doctrine.

138. *Id.*

139. *Id.*

140. *Id.* at 3126 (quoting Brief for Appellant at 34).

141. 104 S. Ct. at 3126.

142. *Id.*

143. *Id.*

144. *Id.* at 3127.

145. *Id.*

a valid exercise of Congress' spending power. Justice Brennan carefully distinguished *Regan v. Taxation With Representation*¹⁴⁶ by observing that, unlike the appellee in *Taxation With Representation*, stations cannot segregate their activities based on funding sources¹⁴⁷ because section 399 does not allow noncommercial broadcasters to establish affiliates who could use station facilities to editorialize with nonfederal monies. The Court did suggest that a revised statute, which would permit noncommercial broadcasters to establish affiliate organizations that could then use station facilities to editorialize with nonfederal funds, would be valid.¹⁴⁸

Justice Rehnquist's dissent offered several arguments in support of section 399's constitutionality. First, Justice Rehnquist argued that Congress could have chosen to create a federally owned broadcasting network, but deliberately chose to support autonomous noncommercial broadcast facilities and to establish interconnection facilities.¹⁴⁹ Second, Justice Rehnquist offered the simple argument that "Congress has rationally determined that the bulk of the taxpayers whose monies provide the funds for grants by the CPB would prefer not to see the management of local educational stations promulgate its own private views on the air at taxpayer expense," and that "[a]ccordingly Congress simply has decided not to subsidize stations which engage in that activity."¹⁵⁰ Third, Justice Rehnquist stated that *Taxation With Representation* clearly affirmed the idea that Congress need not subsidize the exercise of a fundamental right, and that the majority flatly avoided the thrust of the *Taxation With Representation* holding.¹⁵¹ Fourth, Justice Rehnquist explained that section 399 was indistinguishable from section 12(a) of the Hatch Act,¹⁵² which the Court upheld in

146. 461 U.S. 540 (1983). In *Taxation With Representation* the Court held that pursuant to the spending power, Congress could reasonably refuse to subsidize the lobbying activities of tax-exempt charities by not allowing the organizations to use tax deductible contributions to support lobbying activities. The Court, however, indicated that the organizations could in some circumstances create affiliates to conduct nonlobbying activities using tax deductible contributions while establishing separate affiliates to undertake lobbying activities without using tax exempt contributions. *Id.* at 551.

147. 104 S. Ct. at 3128.

148. *Id.*

149. *Id.* at 3130 (Rehnquist, J., dissenting).

150. *Id.*

151. *Id.* at 3131 (Rehnquist, J., dissenting).

152. *Id.* The Hatch Act, 5 U.S.C. § 732 (1982), prohibits, *inter alia*, certain government employees from participating in political campaign management or volunteer efforts. Justice Brennan noted, however, that it was only in the context of rejecting Oklahoma's tenth amendment claim that the Court employed the language that Justice Rehnquist quoted from *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127

Oklahoma v. United States Civil Service Commission.¹⁵³ Last, Justice Rehnquist stated that the instant case was "entirely different from the so-called 'unconstitutional condition' cases, wherein the Court stated that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.'"¹⁵⁴

In his one sentence dissenting statement, Justice White concluded that Congress may award funds conditioned upon abstaining from political endorsement and that bans on editorializing and political endorsement "stand or fall together."¹⁵⁵

Justice Stevens' dissent focused on the "overriding interest in forestalling the creation of propaganda organs for the Government,"¹⁵⁶ a concern which "[o]ne need not have heard the raucous voice of Adolph Hitler over Radio Berlin to appreciate."¹⁵⁷ Justice Stevens concluded that the statute did not preclude broadcasters from expressing their opinions through other means; that guest commentators were still free to express opinions; and that the statute was "neutral in its operation . . . [because] it prohibit[ed] all editorials without any distinction being drawn concerning the subject matter or the point of view that might be expressed."¹⁵⁸ Justice Stevens believed that Congress enacted the statute to avoid the risk that speakers would be rewarded or penalized for saying things that are either appealing or offensive to the sovereign.¹⁵⁹ Justice Stevens was concerned most with keeping government out of the "propaganda arena."¹⁶⁰ Stevens believed that section 399 served this purpose because it prevented government from crossing the line between neutral regulation and subsidization of partisan opinions.¹⁶¹

Justice Stevens also distinguished *Consolidated Edison Co. v. Public Service Commission*¹⁶² by noting that the restriction on

(1947). 104 S. Ct. at 3128 n.27.

153. 330 U.S. 127 (1947) (holding constitutional a part of the Hatch Act that prohibits any local or state employee who is employed in any activity that receives funding from the United States from taking part in political activities).

154. 104 S. Ct. at 3132 (Rehnquist, J., dissenting) (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)).

155. 104 S. Ct. at 3132 (White, J., dissenting).

156. 104 S. Ct. at 3138 (Stevens, J., dissenting).

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

158. *Id.* at 3135 (Stevens, J., dissenting).

159. *Id.*

160. *Id.* at 3136 (Stevens, J., dissenting).

161. *Id.*

162. 447 U.S. 530 (1980).

speech in that case was clearly a viewpoint-based prohibition, unlike the prohibition achieved under section 399.¹⁶³ Stevens noted that the prohibition challenged in *League of Women Voters* in no way could be considered "content based" because the prohibition applied equally to all station owners, and that Congress based the prohibition not on the offensiveness of the messages but on the offensiveness of subsidizing speech.¹⁶⁴

V. A NEW APPROACH TO FIRST AMENDMENT ANALYSIS OF BROADCASTERS' RIGHTS?

As described earlier, the federal government has developed an elaborate system of broadcasting regulations and the Supreme Court has acknowledged that a certain degree of regulation is an appropriate means of furthering important first amendment interests, even though regulating speech represents a diminution of free expression rights.¹⁶⁵ In *League of Women Voters* the Court struck down a regulation that directly suppressed free expression, even though the Court could have upheld the regulation by drawing upon existing precedent.¹⁶⁶ An obvious question arises whether this case represents the Court's receptivity to or a recognition of the need to reconsider the basic premise that broadcasting should be subject to more regulation than other media. Some commentators have argued that the Court is not yet embarking on a markedly different course from the traditional first amendment analysis of broadcast regulations.¹⁶⁷ The evident caution that characterizes the majority opinion of the Court, however, arguably signals the Court's willingness to reevaluate its first amendment analysis with regard to broadcasters. In *League of Women Voters* the Court not only chose to leave intact its prior decisions, but also clarified the standard the Court will apply to broadcasters. This further refine-

163. 104 S. Ct. at 3138 (Stevens, J., dissenting).

164. *Id.*

165. See *supra* notes 8-25, 49-68 and accompanying text.

166. For a complete discussion of *League of Women Voters*, see *supra* notes 97-164 and accompanying text. For a discussion of earlier precedents, see *supra* notes 8-25 and accompanying text.

167. See generally Grodisher, *The Supreme Court Strikes Down the Public Broadcasting Editorial Ban*, 12 PEPPERDINE L. REV. 699 (1985) (arguing that "*League of Women Voters* has the overall impact of reaffirming broadcast regulation and audience first amendment rights." *Id.* at 699. *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 212 (1984) (arguing that, although the result is unsurprising, the Court's decision in *League of Women Voters* is important in that it reveals the Court's degree of willingness to "adapt constitutional doctrine to the technological and economic conditions that distinguish the modern regulatory state from the . . . marketplace of ideas").

ment indicates that the Court may be ready to reconsider its traditional analysis of broadcasting regulation.

Three footnotes to the *League of Women Voters* decision provide convincing evidence that the Supreme Court, given some prompting by Congress or the FCC, may revise the traditional approach to analyzing the constitutionality of broadcast regulation. Justice Brennan wrote that the distinctive feature of congressional broadcast regulation has been Congress' effort to ensure that the FCC grants licenses to use radio and television frequencies only to those broadcasters who satisfy the "public interest, convenience and necessity."¹⁶⁸ In footnote eleven, however, Justice Brennan¹⁶⁹ raises some doubt about the continued validity of regulations based on the spectrum scarcity doctrine. He points out in the text of the opinion that spectrum scarcity is the new medium of broadcast's primary distinguishing characteristic, which has required some adjustment in first amendment analysis.¹⁷⁰ Justice Brennan, however, notes that the notion that "spectrum scarcity" provides the prevailing rationale for broadcast regulation has increasingly come under attack in recent years.¹⁷¹ Opponents of the spectrum scarcity doctrine, including the incumbent Chairman of the FCC, argue that new technology, such as cable and satellite television, provides communities with a wide variety of programming alternatives that makes the scarcity doctrine obsolete.¹⁷² Despite this argument, Justice Brennan indicated that the Court is unprepared to abandon its "long-standing" approach, unless Congress or the FCC sends a signal that technological developments have advanced to the point of requiring some revision of the system of broadcast regulation.¹⁷³ In footnote eleven, the Court practically invited Congress and the FCC to demonstrate that the spectrum scarcity doc-

168. 104 S. Ct. at 3116 (citing 47 U.S.C. § 309(a) (1982)).

169. 104 S. Ct. at 3116 n.11. Justice Brennan wrote:

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete We are not prepared, however, to reconsider our long-standing 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. (citation omitted).

170. *Id.* at 3116.

171. *Id.* at 3116 n.11.

172. *Id.*

173. *Id.*

trine is no longer a valid basis for broadcast regulation.¹⁷⁴ The tone of Justice Brennan's discussion suggests that if Congress or the FCC takes measures to further loosen the regulatory grip on broadcast licensees and the licensing procedure, then the Court will in turn reevaluate its approach to deciding whether restrictions on broadcaster expression violate the first amendment.

In another significant footnote, footnote twelve, the Court observed that the fairness doctrine, which imposes another limitation on broadcasters' first amendment rights, has come under attack recently from the FCC itself.¹⁷⁵ Justice Brennan noted that the FCC has suggested that Congress reconsider the continued validity of the fairness doctrine because the rules, by effectively chilling speech, do not serve the public interest.¹⁷⁶ Although carefully adding that the Court was expressing no opinion about the legality of an FCC decision to either modify or abandon the fairness doctrine, in his next sentence, however, Justice Brennan restated the recognition in *Red Lion* that if the FCC showed that "the fairness doctrine 'has the effect of reducing rather than enhancing' speech, [the Court] would then be forced to reconsider the constitutional basis of [the *Red Lion*] decision."¹⁷⁷ Again, the Court appeared to be expressing a receptivity to the idea of reevaluating traditional first amendment analysis of broadcasters' rights. Given a proper case, the Court may in fact reexamine the validity of restricting broadcasters' first amendment rights through such means as the fairness doctrine and the spectrum scarcity doctrine.

The Court's treatment of the *FCC v. Pacifica Foundation* decision is a further indication of the Court's receptivity to reviewing its own traditional first amendment analysis of broadcast regulations. Although indecent expression was not at issue in *League of*

174. *See id.*

175. *Id.* at 3117 n.12. Justice Brennan noted:

[T]he FCC, observing that "[i]f any substantial possibility exists that the [fairness doctrine] rules have impeded, rather than furthered, First Amendment objectives, repeal may be warranted on that ground alone," has tentatively concluded that the rules, by effectively chilling speech, do not serve the public interest, and has therefore proposed to repeal them. . . . Of course, the Commission may, in the exercise of its discretion, decide to modify or abandon these rules, and we express no view on the legality of either course. 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. (citations omitted).

176. *Id.*

177. *Id.*

Women Voters, the Court, nevertheless, carefully distinguished the two cases, noting the differences in the holdings and rationales. In a footnote, the Court did reaffirm its holding in *Pacifica*,¹⁷⁸ concluding that the FCC may regulate broadcasts containing indecent language because the governmental interests in reducing the risks of offending unsuspecting listeners and exposing unsupervised children to the indecency outweighed the broadcaster's first amendment rights.¹⁷⁹ The Court distinguished *Pacifica*, however, because the regulations examined in *League of Women Voters* restricted expression at the core of the first amendment rather than indecent expression.¹⁸⁰ In addition, the government in *League of Women Voters* made no claim that editorial expression by noncommercial broadcasters would create a substantial nuisance similar to that in *Pacifica*.¹⁸¹ The Court may have both carefully distinguished and reaffirmed *Pacifica* because of the Court's future intentions. If the Court eventually does reject the validity of the fairness doctrine and the spectrum scarcity doctrine, the *Pacifica* doctrine would offer the only means whereby the Court could restrict broadcaster expression, unless the Court somehow could create a new doctrine to justify different treatment of broadcasters' expression under the first amendment.

Because the Court raised some questions regarding the continued validity of the two basic justifications for its analysis of broadcasters' first amendment rights, and because the decision augments the dearth of recent case law concerning the extent to which broadcasters are free to express ideas without governmental restraint, *League of Women Voters* may be one of the most important cases in recent years to discuss the first amendment rights of broadcasters. The case is significant for a host of additional reasons.

VI. PRACTICAL EFFECTS OF *League of Women Voters* ON BROADCASTERS AND THEIR AUDIENCES

Even if *League of Women Voters* proves not to change significantly the Supreme Court's first amendment analysis of restrictions on broadcaster expression, the case has several important practical effects. The most obvious effect of the decision is its

178. 438 U.S. 726 (1978); see *supra* notes 21-24 and accompanying text for further discussion of this case.

179. 104 S. Ct. at 3117-18 n.13.

180. *Id.*

181. *Id.*

direct result: noncommercial broadcasters for the first time in eighteen years are free to editorialize on controversial matters without the threat of sanction. The extent to which noncommercial broadcasters choose to exercise their freedom to editorialize remains to be seen, though history indicates that the viewing public need not be unduly concerned that noncommercial licensees suddenly will deluge the airwaves with editorials.¹⁸² Even without the FCC ban, noncommercial broadcasters traditionally have not expressed editorial opinions to any great extent.

If noncommercial broadcasters do in fact proceed to exercise their freedom to editorialize, individual viewers and listeners stand to benefit. As one commentator posits, noncommercial broadcasters are more likely to "present editorials which are more intellectually satisfying than those . . . half-heartedly presented by commercial broadcasters."¹⁸³ Unlike commercial broadcasters who may feel pressure from sponsoring advertisers and A.C Nielsen ratings, public broadcasters are answerable primarily to their local viewing and listening public. Accordingly, noncommercial broadcasters should be less hesitant to address vital community concerns and problems than commercial licensees.

Another practical effect of the decision is that noncommercial broadcasters will be more straightforward in their expression of editorial opinion. After *League of Women Voters* viewers will be aware that a particular station message unquestionably constitutes the view of station management because noncommercial broadcasters will label such broadcasts as editorials. Management may be

182. Some noncommercial broadcasters did editorialize before Congress imposed the ban despite what a House Report indicated. See H.R. REP. No. 572, 90th Cong., 1st Sess. reprinted in 1967 U.S. CODE CONG. & AD. NEWS 1799. This report explained that currently no noncommercial stations broadcast editorials. The committee that wrote the report, however, had "heard from several witnesses including Secretary of Health, Education, and Welfare John Garner, Ford Foundation President McGeorge Bundy, Utah Governor Calvin L. Ramster, and State University of New York Chancellor Dr. Samuel B. Gould . . . that many noncommercial stations . . . engaged in editorializing on various issues." Lindsey, *supra* note 84, at 80 (citing *Hearings on H.R. 6746 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 97, 386, 404, 640 (1967)).

After the FCC effectively disavowed its holding in *Mayflower Broadcasting Co.*, 8 F.C.C. 333 (1940) (barring editorializing by all broadcast licensees), in the report *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), years passed before broadcasters editorialized in significant numbers. As two authors have described, "[t]here was no stampede among licensees to exercise their newly won freedom." Fang & Whelan, *Survey of Television Editorials and Ombudsman Segments*, 17 J. BROADCASTING 363 (1973). Fang and Whelan's study examines editorializing trends among commercial broadcasting licensees based on topics of editorials, length and number of editorials broadcast, and methods of delivering editorials.

183. Lindsey, *supra* note 84, at 96.

less inclined to disguise its views, a tactic made possible under the FCC's earlier interpretation of section 399,¹⁸⁴ by having station employees deliver their "personal views" on controversial issues.¹⁸⁵

The decision to allow editorializing by noncommercial broadcasters will also provide licensees with a new source of programming material. The addition of editorial presentations can only have the effect the enriching programming diversity and stimulating greater public interest and involvement in station affairs—a desirable result in itself. Because many people view public stations as the last true source of "localizing," whereby stations reflect the local community rather than relying on network or syndicated material,¹⁸⁶ broadcasters who decide to editorialize will inevitably attract attention to, and promote a heightened interest in the station. This localization process may have the desirable effect of increasing the number of viewers and, in turn, the amount of private gifts to local stations. On the other hand, the threat exists that members of the community which particular editorials offend will withdraw their financial support. But this threat is not unique to the expression of editorial opinion because the fairness doctrine dictates that broadcasters currently must present programs dealing with controversial issues of public importance. Thus, even if a station chose not to editorialize, donors could still withdraw financial support because of displeasure with a station's particular selection of controversial programming. One possible solution to this problem would be to earmark more government dollars for public broadcasting. This solution, however, is unlikely to be employed because government authorities are increasingly tightening the appropriation of monies. The appropriations for public broadcasting in recent years clearly attest to this trend.¹⁸⁷

184. See *In re Accuracy In Media, Inc.*, 45 F.C.C.2d 297, 302 (1973); see also Walker & Salveter, 32 Rad. Reg. 2d (P & F) 839, 846 (1975) (discussing the legislative history of § 399 and quoting from *In re Accuracy In Media*).

185. Lindsey, *supra* note 84, at 86.

186. S. HEAD & C. STERLING, *supra* note 26, at 253-54.

187. Appropriations for Fiscal Years 1976-1986 are set forth below: (Figures in thousands of dollars)

1976	1977	1978	1979	1980	
78,500	103,000	107,150	120,200	152,000	
1981	1982	1983	1984*	1985*	1986*
162,000	172,000	137,000	137,500	155,500**	159,000

*Estimate

** Although Congress appropriated \$155.5 million for 1985, the Reagan Administration sought a \$45 million reduction. For 1986 the Administration requested an appropriation of \$75 million. Appendix to the Budget of the United States for Fiscal Year 1984. Because

Finally, the removal of the ban on editorializing will not result in management's use of editorials to present propaganda or to monopolize the airwaves by presenting only the views of management. Editorials, because they are the most visible expression of station opinion, are not effective vehicles for propagandizing.¹⁸⁸ Any managerial propaganda abuse would more likely occur in day-to-day programming decisions, an area of broadcaster expression not addressed in *League of Women Voters*.¹⁸⁹ One example of the more subtle potential for abuse in daily programming discretion is the selection of guests for panel discussions.¹⁹⁰ Additionally, once a station clearly classifies a broadcaster's expression as an editorial, the fairness doctrine governs¹⁹¹ and has the effect of forcing even noncommercial broadcasters¹⁹² to provide a reasonable opportunity for rebuttal.¹⁹³ Because the fairness doctrine dictates that management give opposition an opportunity to respond to an editorial, fears that management will monopolize the airwaves to present only positions favoring the government are not justified. The fairness doctrine's application to noncommercial broadcasters' editorial expressions, by requiring equal presentation of opposing viewpoints, unavoidably prevents monopolization of public broadcasting.¹⁹⁴

VII. QUESTIONS LEFT UNANSWERED BY *League of Women Voters*

One question *League of Women Voters* leaves unresolved is under what circumstances, if any, Congress may threaten noncommercial broadcasters with loss of their tax-exempt status for engaging in extensive "lobbying activities." As the Court noted in *Regan*

Congress authorizes appropriations for the CPB two years in advance, the Administration made requests for cuts in 1985 and 1986 in the 1984 budget.

According to the Appendix to the Budget of the United States for Fiscal Year 1985, Congress appropriated \$159.5 million for 1986, and the Administration sought a \$20 million reduction in funding levels. This attempt "underscore[s] the importance of encouraging user and private support for the public broadcasting industry, allowing for the continued reduction of Federal support." Appendix to the Budget of the United States for Fiscal Year 1985.

Budget appropriations for the last three years and projected outlays for 1986 are below the high water mark funding level set in 1982, although Congress gradually has increased appropriations for the CPB since the drastic cuts in 1983.

188. See Note, *supra* note 96, at 561.

189. *Id.* at 561-62.

190. *Id.*

191. See 47 U.S.C. § 315(a) (1982). The Supreme Court affirmed the constitutionality of this provision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

192. See 47 U.S.C. § 398(1) (1982).

193. *Id.*

194. See Lindsey, *supra* note 84, at 88.

v. Taxation With Representation,¹⁹⁵ Congress can, in the exercise of its spending power refuse to subsidize lobbying activities of tax-exempt charitable organizations by refusing to allow such organizations to use tax deductible gifts to conduct lobbying activities.¹⁹⁶ In *Taxation With Representation* the Court observed that under section 501(c)(3) of the Internal Revenue Code¹⁹⁷ certain organizations could create affiliates to conduct nonlobbying activities using the tax deductible monies and establish separate affiliates under section 501(c)(4) to pursue lobbying efforts without such restrictions.¹⁹⁸

The problem in applying sections 501(c)(3) and 501(c)(4) to noncommercial broadcasters is threefold. First, no clear standards exist for determining in what circumstances Congress could construe an editorial as a lobbying activity. Obviously, on-air pleas for viewers and listeners to urge Congress or state governments to appropriate more money for public broadcasting would constitute lobbying efforts. Other editorials, however, may be harder to classify. Second, Congress has decided to impose penalties on tax-exempt organizations that attempt to influence legislation.¹⁹⁹ The

195. 461 U.S. 540 (1983).

196. *Id.* at 550.

197. 26 U.S.C. § 501(c)(3) (1982).

198. 461 U.S. at 544; *see also* 26 U.S.C. § 501(c)(4) (1982).

199. *See* 26 U.S.C. § 4911 (1982). The Code states the following concerning "influencing legislation:"

(d)(1) GENERAL RULE.—Except as otherwise provided in paragraph (2), for purposes of this section, the term "influencing legislation" means—

(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and

(B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

(2) EXCEPTIONS.—For purposes of this section, the term "influencing legislation", with respect to an organization, does not include—

(A) making available the results of nonpartisan analysis, study, or research;

(B) providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be;

(C) appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization;

(D) communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications described in paragraph (3); and

(E) any communication with a government official or employee, other than—

Code sections define legislation quite broadly,²⁰⁰ giving Congress the freedom to label almost any editorial statement directed at local community issues as an attempt to influence legislation. This predicament could endanger the tax-exempt status of most non-commercial broadcasters. Third, and most importantly, the opportunity under section 501(c)(4) to establish a separate lobbying affiliate may not be a viable option for noncommercial broadcasters. The whole purpose of allowing editorials is to facilitate the unimpeded flow of discussion concerning matters of local and national concern. Broadcasters can communicate editorials only through station facilities. Thus, unless an explicit exception is made for public broadcasters, who cannot create affiliates to do their editorializing, the Court may have conferred a meaningless right upon broadcasters.

A second question left unresolved by *League of Women Voters* is whether its analysis applies equally to section 399's ban on political endorsements. In the instant case the Court did not address the constitutionality of the ban on political endorsements contained in section 399. Nonetheless, one of the greatest effects of the decision in the instant case is that the analysis used by the Court to invalidate the portion of the statute in question in *League of Women Voters*, if applied to the ban on political endorsements, will inevitably result in the demise of the political endorsement prohibition. Perhaps the only bar to the complete invalidation of section 399 is that the Court has not yet heard a case challenging the constitutionality of the ban on political endorsements; the appellees in *League of Women Voters* dropped their original challenge to the ban on political endorsements in the course of the litigation.²⁰¹

The question of whether the government should prevent non-commercial broadcasters from endorsing or opposing political can-

(i) a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or

(ii) a communication the principal purpose of which is to influence legislation.
26 U.S.C. § 4911 (d)(1), (2).

200. Congress has defined "legislation" to include "action with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure." *Id.* § 4911(e)(2).

201. *League of Women Voters v. FCC*, 547 F. Supp. 379 (C.D. Cal. 1982). On October 2, 1981, plaintiffs made an important alteration in the scope of litigation by dropping their challenge to § 399's prohibition of public broadcasters' supporting or opposing political candidates. *Id.* at 382.

didates undoubtedly will excite more public debate than did the question of whether the government should have prevented non-commercial broadcasters from editorializing. The Supreme Court, however, could decide the issue with relative ease. In *League of Women Voters* two Justices who upheld the constitutionality of the editorial prohibition clearly indicated that if presented with a ripe controversy, they would uphold the political endorsement ban as well.²⁰² However, the majority's analysis in *League of Women Voters*, if followed, virtually mandates a ruling that section 399's political endorsement ban must fall as well. As with the ban on editorializing, the Act has defined the prohibition against political endorsements exclusively in terms of the content of the suppressed speech. In addition, like the ban on editorializing, the ban on political endorsements is a regulation aimed at denying a specific group the right to address selected audiences on controversial issues of public importance. The Court held in *League of Women Voters* that this type of ban is "the purest example of a 'law . . . abridging the freedom of speech, or of the press.'"²⁰³ In a case involving the political endorsement ban, however, the Court could reach the tortured conclusion that the ban protects broadcasters from political pressures. The Court found this argument to be inadequate with regard to prohibiting editorials. The differences between editorializing and endorsing a political candidate do not seem sufficient to justify a finding that a ban on political endorsements is necessary to protect broadcasters from governmental pressures. Both editorials and political endorsements are expressions of opinion on issues of public debate. Concededly, expression of opinion about a politician may attract more governmental interest and, therefore, more governmental pressure than expression of opinion about a local issue. The two fatal aspects of the editorializing ban—its content-based classification and its denial of a specific group's right to address controversial public issues—would seem, however, to dictate rejection of the political endorsement ban as well. The same statutory safeguards that the Court found would avoid the asserted risks of government intervention in the editorial context also govern political endorsements.

202. Justice White's dissenting statement indicated that he would uphold the constitutionality of the political endorsement ban because he believed that Congress could condition a grant of funds on abstention from political endorsements by broadcasters. 104 S. Ct. at 3132. Justice Rehnquist expressed the same view in his dissenting opinion. *Id.*

203. 104 S. Ct. at 3120 (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring)).

VIII. CONCLUSION

The decision in *League of Women Voters* will be hailed as a great victory by some and a political Pandora's box by others. *League of Women Voters* arguably represents an indication by the Court that it is ready to revise its traditional first amendment analysis of broadcast regulations. Three footnotes indicate that, given the proper case, the Court may reject the validity of established doctrines, such as the fairness and spectrum scarcity doctrines, and uphold regulation of only limited types of broadcaster expression, such as indecent speech.²⁰⁴ Even if the decision proves not to be the beginning of major change in broadcast analysis, the decision certainly continues the clear trend toward loosening the regulations imposed uniquely on public broadcasters. Thus, this decision represents a small step towards achievement of greater equality between the first amendment protections for broadcasting and other media.²⁰⁵

League of Women Voters will have several practical effects. First, noncommercial broadcasters will be free for the first time in eighteen years to editorialize. This freedom, if exercised, should present listeners with more direct and more intellectually satisfying editorials than those currently presented by commercial broadcasters. Second, noncommercial broadcasters will be more straightforward in openly labeling an expression of opinion as an editorial. The need no longer exists for stations to disguise their views to avoid the prohibition of section 399. Third, the additional source of programming material in the form of editorial expression will enrich program diversity and stimulate greater diversity and local interest in and contributions to local broadcasters.

The decision in *League of Women Voters* leaves unresolved two questions that may prompt action by Congress and litigants. The possibility, after this decision, that Congress may find public broadcasters in violation of laws proscribing the excessive use of tax deductible contributions for financing lobbying activities should prompt Congress to clarify what constitutes lobbying activities in the context of noncommercial broadcasting. Additionally, the decision provides support for a challenge to the constitutionality of the ban on political endorsements contained in section 399. Finally, if broadcasters choose to exercise their constitutionally protected editorial freedom affirmed in *League of Women Voters*,

204. See *supra* notes 168-81 and accompanying text.

205. See *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 206-07 (1984).

perhaps public broadcasting will move a step closer to the goal described by essayist E.B. White that public broadcasting should "restate and clarify the social dilemma and the political pickle."²⁰⁶

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206. Lindsey, *supra* note 84, at 63 (quoting Letter from NEW YORKER magazine essayist E.B. White to the Carnegie Commission, *reprinted in* CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION: A PROGRAM FOR ACTION at 13 (1967)).