FCC v. League of Women Voters: Conditions on Federal Funding That Inhibit Speech and Subject Matter Restrictions on Speech

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FCC V. LEAGUE OF WOMEN VOTERS: CONDITIONS ON FEDERAL FUNDING THAT INHIBIT SPEECH AND SUBJECT MATTER RESTRICTIONS ON SPEECH

INTRODUCTION

In FCC v. League of Women Voters,¹ the United States Supreme Court declared unconstitutional a federal ban on editorializing by noncommercial broadcast stations that receive funding from the Corporation for Public Broadcasting. The decision, a five to four vote,² held that the editorializing ban incorporated in section 399 of the Public Broadcasting Act of 1967³ violates the first amendment⁴ of the United States Constitution.

Beyond removing an unnecessary restriction on free expression, League of Women Voters has two wide-ranging effects on first amendment doctrine in general. First, the Court rejected the proposition that Congress needs only a rational basis and a benign purpose to place conditions that inhibit free expression on the receipt of federal funding. The Court thus prevented Congress from using the spending power to limit free expression. Second, the Court affirmed that all content-based restrictions on expression are suspect and require close judicial scrutiny. The Court refused to bifurcate the constitutional standard for subject matter restrictions based on whether the ban is viewpoint-neutral or viewpoint-discriminatory. By aggregating and protecting against all subject matter restrictions, the Court both encourages unfettered discussion of controversial topics and removes the confusion surrounding subject matter restrictions.

² Justice Brennan wrote the Court's opinion and was joined by Justices Marshall, Powell, Blackmun, and O'Connor. Justice Rehnquist dissented, joined by Chief Justice Burger and Justice White. Justice Stevens dissented separately.

No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting]... may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office.


⁴ “Congress shall make no law... abridging the freedom of speech, or of the press... .” U.S. Const. amend. I.
CONGRESSIONAL AND JUDICIAL INVOLVEMENT WITH THE BROADCAST MEDIA

A. The Public Broadcasting Act of 1967

In 1967 the Carnegie Foundation released the results of a study focusing on the problems facing noncommercial television. The study recommended both increased public spending for educational television and creation of an independent nonprofit corporation to channel these funds from the federal government to local stations. Congress adopted these recommendations as the “blueprint” of the Public Broadcasting Act of 1967. Title II of that Act created the Corporation for Public Broadcasting (CPB).

The creation of the CPB reflected widespread concern that the government not become a censor by conditioning federal funds on the broadcast of particular programming. Instead, the CPB acts as a middleman between Congress and licensees. The Corporation receives funds from the federal government and distributes the largesse to noncommercial licensees, thereby insulating the recipients from governmental or political pressure. Congress also provided safeguards for the neutrality of the CPB. A bipartisan board of directors, appointed by the President with the advice and consent of the Senate, governs the CPB. The Corporation may not own or

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6 Id. at 33-34, 36-37.
7 Id. at 37-38.
8 League of Women Voters, 104 S. Ct. at 3112.
10 League of Women Voters, 104 S. Ct. at 3121. The Senate report on the Act stated in part:

There is a general agreement that for the time being, Federal financial assistance is required to provide the resources necessary for quality programs. It is also recognized that this assistance should in no way involve the Government in programming or program judgments. An independent entity supported by Federal funds is required to provide programs free of political pressures. The Corporation for Public Broadcasting, a nonprofit private corporation . . . provides such an entity . . . .

. . . .

Your committee has heard considerable discussion about the fear of Government control or interference in programming if [the Act] is enacted. We wish to state in the strongest terms possible that it is our intention that local stations be absolutely free to determine for themselves what they should or should not broadcast.


operate a broadcasting station and must function "in ways that will
most effectively assure the maximum freedom" for local licensees
regarding program content. No federal agency, officer, or em-
ployee may exercise control over the CPB or local broadcast
stations.

B. The Editorializing Ban

The editorializing ban in the Public Broadcasting Act of 1967
reflects Congress's concern that the government not be allowed to
influence broadcasters because of the latter's dependence on gov-
ernment outlays. Banning broadcaster editorials removes any op-
portunity for such influence. Interestingly, neither the administra-
tion's initial proposal nor the original Senate version of
the Act included a ban on editorializing. A House amendment added
the ban "out of an abundance of caution." Some congres-
sional supporters touted the ban as a means to prevent the CPB
from becoming a propaganda agency for either political party or
from presenting only a particular point of view. Although the goal
of maintaining broadcasters' autonomy is consistent with other pro-
visions of the Act, the legislative history reveals other, less altruistic
motives behind the adoption of section 399. Some members of Con-
gress endorsed the editorializing ban to silence a potential source of
political criticism. For instance, Representative Springer, a chief
proponent of the editorializing ban, noted that "[i]here are some of
us who have very strong feelings because we have been editorialized
against."
C. The Federal Communication Commission’s Policy On Licensee Editorializing and Section 399

The Federal Communication Commission (FCC) is the federal agency charged with regulating the broadcast industry. Prior to passage of the Public Broadcasting Act of 1967, the FCC used the general powers in its enabling legislation to regulate broadcaster editorializing. Congress commanded only that the FCC grant radio and television broadcast licenses to those who serve the “public interest, convenience, and necessity.”

In 1940 the FCC admonished a radio licensee because the broadcaster routinely editorialized. The agency stated that editorializing reflects “a serious misconception of [a licensee’s] duties and functions under the law.” The Commission asserted that a “truly free radio cannot be used to advocate the causes of the licensee.” In 1949, however, the FCC reversed its position and permitted broadcasters to editorialize subject to the “fairness doctrine”—an existing requirement that licensees present controversial issues in an evenhanded manner. The Commission recognized that the ban on editorializing had deprived the public of relevant information, thereby threatening the development of an informed electorate. Overt editorializing, the Commission reasoned, also will be helpful because “the public has less to fear from the open partisan than from the covert propagandist.” Given the fairness doctrine, the

only saw public television as a force for social good, but said it should and will crusade. Crusade for what? I suppose that by the time I have finished this speech, it might well be a crusade for my opponent in next year’s election.”; (Rep. Devine: “I understand that there is one educational TV station out on the west coast that a bunch of ’hippies’ are running . . . . This is one of the areas in which we have had to work very hard in order to try to provide some safeguards.”). Id. at 22 n.32 (citations omitted).

The remarkable legislative history of § 399 has not escaped notice by other commentators. See, e.g., Toohey, Section 399: The Constitution Giveth and Congress Taketh Away, 6 EDUC. BROADCASTING REV. 31, 34 (1972) (“The purpose of Section 399 was clear: to prevent Congress from creating a monster that might someday turn on its creator.”); Note, The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment, 13 U. MICH. J.L. REF. 541, 548-49 (1980) (“This debate suggests that the true reason for the inclusion of section 399(a) was to win the support of reluctant congressmen who feared the potential criticism of public broadcasters.”) (footnote omitted). For an extensive discussion of the role that legislative motive plays in judicial review of statutes, see Ely, Legislative and Administrative Motivation in Constitutional Law, 79 YALE L.J. 1205 (1970).
FCC concluded that editorials will both inform the public evenhandedly and indicate clearly what commentary is the personal opinion of the licensee.\textsuperscript{27}

Section 399 overrode the FCC's decision to allow public broadcaster editorializing. Exercising its administrative jurisdiction, the FCC has interpreted section 399 to preclude a licensee from broadcasting its own or its management's opinions, or the opinions of others who speak on behalf of the licensee.\textsuperscript{28} The FCC has stated, however, that section 399 does not prevent guests, interviewees, or employees of the broadcaster from stating their personal opinions.\textsuperscript{29} Further, public broadcasters may continue to present programming on controversial public issues.\textsuperscript{30} In short, the FCC has interpreted the editorializing ban to prevent only the expression of personal opinion by or on behalf of the licensee.

D. The First Amendment as Applied to the Broadcast Media

Traditionally, the Supreme Court has afforded the broadcast media a reduced level of first amendment protection because of the unique physical attributes of the medium. The critical characteristic of this medium is the limited number of frequencies over which broadcast signals may travel. Because of this physical limitation, known as "spectrum scarcity," the government licenses broadcasters\textsuperscript{31}—a practice no one would accept if applied to the print media. Without such intervention, however, there would be a "cacophony of competing voices," and no single broadcaster could be heard.\textsuperscript{32} The Court has recognized that broadcast frequencies are a scarce
resource and must be regulated in the public interest.\textsuperscript{33}

The fairness doctrine represents another government regulation unique to the broadcast medium. In the 1969 case \textit{Red Lion Broadcasting Co. v. FCC},\textsuperscript{34} the Supreme Court upheld the FCC's fairness doctrine against a first amendment challenge. The fairness doctrine, the Court found, imposes a twofold duty on broadcast licensees: "The broadcaster must give adequate coverage to public issues, . . . and coverage must be fair in that it accurately reflects the opposing views."\textsuperscript{35} The doctrine applies when a broadcaster presents one side "of a controversial issue of public importance."\textsuperscript{36} Although such a requirement applied to the print media would clearly violate the first amendment,\textsuperscript{37} the \textit{Red Lion} Court stated that because of spectrum scarcity "it is idle to posit an unabridgeable first amendment right to broadcast comparable to the right of every individual to speak, write, or publish."\textsuperscript{38} The Court reasoned that a broadcast licensee is a public fiduciary because the broadcaster is entrusted with a valuable and limited resource.\textsuperscript{39} The fairness doctrine arises from that fiduciary role because the licensee has an obligation to present "views . . . which would otherwise . . . be barred from the airwaves."\textsuperscript{40}

In 1973 the Court ruled in \textit{CBS v. Democratic National Committee}\textsuperscript{41} that \textit{Red Lion} does not support a first amendment right of access for paid editorial statements. The Court recognized that the government's role in the broadcast industry resembles a "tightrope"\textsuperscript{42} act because of the tension between the necessity for government regulation and the widely shared desire to allow broadcasters the "wid-

\begin{footnotes}
\footnote{394 U.S. 367 (1969).}
\footnote{Id. at 377.}
\footnote{In re Accuracy in Media, Inc., 45 F.C.C.2d 297, 299 (1973).}
\footnote{The Supreme Court has rejected an attempt to apply a right of access or a fairness doctrine to the print media. In \textit{Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 241 (1974), the Court struck down a Florida statute that required newspapers to give free reply space to political candidates whom the paper had criticized.}
\footnote{The important distinction between the broadcast and print media is that the former enjoy a legal monopoly necessitated by spectrum scarcity. \textit{See Red Lion}, 395 U.S. at 375-76. The monopoly status of broadcasters justifies the fairness doctrine as a means to ensure that the public is adequately and fairly informed. \textit{Id.} at 375-79. \textit{See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law} 902 (1983).}
\footnote{395 U.S. at 388.}
\footnote{395 U.S. at 389 ("There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary . . . "). \textit{See also FCC v. League of Women Voters}, 104 S. Ct. at 8116 ("[Given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public . . . ").}
\footnote{395 U.S. at 389.}
\footnote{412 U.S. 94 (1973).}
\footnote{Id. at 105.}
\end{footnotes}
est journalistic freedom." Although the fairness doctrine would ensure equal time for opposing views, a right of access for paid editorial statements might allow "the affluent [to] determine in large part the issues to be discussed" because the wealthy are most able to purchase broadcast time. Given that the "interest of the public is [the] foremost concern," the Court concluded that the first amendment does not mandate access for paid editorials.

Eight years later, in *CBS v. FCC*, the Court upheld an amended provision of the Communications Act of 1934 requiring broadcasters to grant access upon request to individual candidates for federal elective office. The Court distinguished Democratic National Committee, noting that the statute in *CBS v. FCC* created only a limited right of access. Relying on *Red Lion*, the Court concluded that FCC enforcement of this limited right of access did not violate the broadcaster's first amendment rights because "'[i]t is the right of the viewers and listeners, not the right of the broadcaster, which is paramount.'"

Thus, the unique physical characteristics of the broadcast medium have required the judiciary to balance the divergent first amendment rights of licensees, speakers, and the listening and viewing public. In *FCC v. League of Women Voters* the Supreme Court was faced again with federal regulation of speech allegedly in furtherance of the "paramount" first amendment rights of listeners and viewers.

II

THE CHALLENGE TO SECTION 399: *FCC v. LEAGUE OF WOMEN VOTERS*

In April 1979 the League of Women Voters brought suit in federal district court challenging the constitutionality of section 399
The plaintiffs argued that the ban on editorializing violated both the first amendment and the equal protection component of the fifth amendment. Senate counsel had the case adjudged moot and dismissed after the Justice Department announced that it would not defend the statute. While an appeal of the dismissal was pending, the Justice Department under a new administration announced that it would defend the amended section 399. The Ninth Circuit Court of Appeals then remanded the case to the district court because a justiciable controversy was now present.

On remand, the district court tested the constitutionality of section 399 by a rigorous standard: the government had to show a compelling interest that necessitated the ban and narrowly tailored means to achieve that interest. Although the district court recognized that the broadcast medium raises special considerations, the court refused to apply a less exacting standard because the government failed to demonstrate "any special characteristic of the broadcast media which would justify the application of less stringent . . . standards in the present case." The court granted the plaintiffs' motion for summary judgment on the ground that section 399 violates the first amendment but found that the fifth amendment equal protection claim was not sufficiently developed for summary judgment disposition.

The government appealed directly to the

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53 In October 1979 the Department of Justice (DOJ) informed Congress that it would not defend § 399. The Senate then intervened as amicus curiae in support of § 399 pursuant to 2 U.S.C. § 288(a). Senate counsel then obtained dismissal of the action because no controversy ripe for adjudication remained. While appeal of this order was pending, the DOJ, under a new administration, announced that it would defend § 399. At this point Congress amended § 399. In response to the 1981 amendments, the appellees amended their complaint, limiting their challenge to the ban on editorializing.

54 104 S. Ct. at 3113.
56 Id.
57 Id. at 388.
58 Id. The crux of appellees' fifth amendment challenge was that the classification of broadcasters embodied in § 399 constitutes a denial of equal protection. Appellees argued that radio stations that do not receive funds from the CPB, and therefore are allowed to editorialize, are just as likely to become government propaganda organs as those stations that receive funding from the CPB. Because the appellees prevailed on
Supreme Court,\textsuperscript{59} contending that "[t]he district court committed fundamental error by requiring the government to show that Section 399 rested on . . . a 'compelling interest.' "\textsuperscript{60}

By a five to four vote, the Supreme Court affirmed the district court's finding that section 399 violates the first amendment. Justice Brennan, writing for the majority, held that section 399 must be narrowly tailored to serve only a substantial government interest.\textsuperscript{61} The majority found that the proffered government interests were "either not sufficiently substantial or . . . not served in a sufficiently limited manner" to justify section 399's intrusion on first amendment rights.\textsuperscript{62} In dissent three justices\textsuperscript{63} argued that the editorializing ban is a valid condition on the receipt of government funding.\textsuperscript{64} Justice Stevens, dissenting in a separate opinion, asserted that because the editorializing ban is a viewpoint-neutral restriction, it constitutes only a limited intrusion on first amendment rights.\textsuperscript{65} Categorizing the government interests in section 399 as substantial, Justice Stevens believed that section 399 is a legitimate restriction under the first amendment.\textsuperscript{66}

A. The Supreme Court Majority Opinion

1. The Applicable Standard of Review

The majority agreed with the government's contention that the Court has not required that previous regulation of the broadcast media meet a compelling interest test.\textsuperscript{67} The Court noted that it had upheld the fairness doctrine in \textit{Red Lion} and a limited right of access for federal candidates in \textit{CBS v. FCC} because both requirements served substantial government interests.\textsuperscript{68} The Court stated that the district court's rigorous standard would be proper if the editorializing ban applied to newspapers, and in such a case the Court "would not hesitate to strike it down."\textsuperscript{69} In the instant case, however, given that the ban applies only to the broadcast media, the

\textsuperscript{59} Direct appeal to the Supreme Court is permitted in a civil action in which the United States is a party and a district court has held a federal statute unconstitutional. 28 U.S.C. \S\ 1252 (1982).

\textsuperscript{60} Brief for the United States at 28, \textit{League of Women Voters}, 104 S. Ct. 3106.

\textsuperscript{61} Id. at 3118.

\textsuperscript{62} Id. at 3129.

\textsuperscript{63} See supra note 2.

\textsuperscript{64} 104 S. Ct. at 3131-32 (Rehnquist, J., dissenting).

\textsuperscript{65} Id. at 3134-38 (Stevens, J., dissenting).

\textsuperscript{66} Id. at 3138.

\textsuperscript{67} Id. at 3115.

\textsuperscript{68} Id. at 3117-18.

\textsuperscript{69} Id. at 3115.
compelling interest test is unwarranted. Moreover, the Court refused to reexamine the technological basis of spectrum scarcity which underlies the legal division between the broadcast and print media, stating that such a determination is the responsibility of Congress or the FCC.\textsuperscript{70} Referring to the Court’s prior efforts to balance journalistic freedom against the public’s right to be fully and fairly informed, the Court stated that section 399 must be narrowly tailored to serve only a substantial government interest.\textsuperscript{71}

2. The Nature of the Ban on Editorializing

Before analyzing the government’s arguments in support of section 399, the Court examined two central features of the ban on editorializing. First, section 399 suppresses editorial opinion, speech that “lies at the heart of First Amendment protection.”\textsuperscript{72} Second, the ban on editorializing is defined solely in terms of content: “[I]n order to determine whether a particular statement by station management constitutes an ‘editorial’ proscribed by § 399, enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern ‘controversial issues of public importance.’ ”\textsuperscript{73}

The Court then stated that facially section 399 impinges on the first amendment right of free speech in its purest form because the ban singles out particular speakers and prevents them from communicating with their chosen audience.\textsuperscript{74} The Court analogized the editorializing ban to the actions of the New York Public Service Commission that were declared unconstitutional in \textit{Consolidated Edison v. Public Service Commission}.\textsuperscript{75} In response to the Commission’s ban on utility bill inserts that discussed the utility’s view on certain controversial issues, the \textit{Consolidated Edison} Court stated that “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”\textsuperscript{76} Given the FCC’s broad

\textsuperscript{70} Id. at 3116 n.11.
\textsuperscript{71} Id. at 3118.
\textsuperscript{72} Id. See also Mills v. Alabama, 384 U.S. 214, 219 (1966) (“Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution . . . selected to [keep our society] free.”); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (recognizing the “profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open”).
\textsuperscript{73} 104 S. Ct. at 3119 (quoting \textit{In re Accuracy in Media, Inc.}, 45 F.C.C.2d 297, 302 (1973)).
\textsuperscript{74} Id. at 3120.
\textsuperscript{75} 447 U.S. 530 (1980).
\textsuperscript{76} Id. at 537.
definition of an "editorial," the League of Women Voters Court found that section 399 restricts the discussion of "controversial issues of public importance." The Court then reasoned that Consolidated Edison "appears" to control the disposition of section 399 because the statute limits discussion of an entire topic.

3. The Government's Interests in the Editorializing Ban

The government advanced three principal arguments in support of section 399. It first argued that section 399 provides assurance that the federal government will not be able to subvert the autonomy of local licensees and thereby turn them into propaganda organs. The government asserted that the power of the purse may influence editorializing broadcasters to say what the government instructs them to say or, more subtly, to say what they think will please the government. Second, the government argued that section 399 will help prevent the broadcast media from becoming "a privileged outlet for the political and ideological opinions of station owners." Because broadcast frequencies are a scarce resource, the government contended that the ban is necessary to ensure even-handed use of that resource. Last, the government asserted that by prohibiting CPB-funded stations from editorializing, Congress has chosen not to subsidize broadcasters' editorials. Such a choice, the government argued, is protected by the Court's recent decision in Regan v. Taxation With Representation, which held that Congress's refusal to allow tax-exempt lobbying organizations to receive tax deductible contributions is a reasonable exercise of the spending power.

In response to the concern that absent the editorializing ban the government might improperly influence broadcasters, the Court stated that other provisions of the Public Broadcasting Act already minimize opportunities for federal intrusion. The Court pointed to the creation of the CPB as an example of existing protections

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77 See supra note 28.
78 104 S. Ct. at 3118 (quoting In re Accuracy in Media, Inc., 45 F.C.C.2d 297, 302 (1973)).
79 Id.
80 Brief for the United States at 35.
81 Id.
82 Id. at 34.
83 Id. at 33-34.
84 Id. at 42.
86 Id. at 550. Taxation With Representation maintained that § 501(c)(3) of the Internal Revenue Code imposed an unconstitutional condition on the exercise of its first amendment rights because the statute forces tax-exempt organizations to choose between lobbying and the receipt of tax deductible contributions.
87 League of Women Voters, 104 S. Ct. at 3123.
insulating licensees from political pressures. Further, the Court questioned the premise underlying the government's argument: that local editorializing will so anger Congress that the lawmakers will retaliate by not funding public broadcasting. Noting that there are hundreds of noncommercial educational broadcasters whose voices are likely to be diverse, rather than monolithic, the Court stated that the fear of retaliation en masse is unfounded. Moreover, the Court pointed out that many broadcast editorials will focus on purely local matters of little concern to the national government.

The Court similarly disposed of the government's argument that stations will become an outlet for a privileged few, finding that section 399 is both over and underinclusive with respect to this concern. To the extent that section 399 fails to prevent biased programming, it is underinclusive. Section 399, the Court noted, does little to prevent station owners from distorting their broadcasting to communicate their personal views. Despite the ban on editorials, broadcasters still have discretion over programming, commentary, panelist selection, and news reporting. In short, the court concluded that the editorializing ban falls short of its mark by dealing with only one form of potential broadcast abuse.

The Court found the editorializing ban overinclusive because it forbids speech that absent section 399 would be subject to the fairness doctrine. Broadcast stations, the Court reasoned, will not become outlets for the sole propagation of licensees' personal opinions because they are required to offer adequate coverage of opposing viewpoints. By ignoring the fairness doctrine, section 399 is overinclusive because it stifles speech unnecessarily.

Responding to the government's argument that section 399 is constitutional because it represents Congress's decision not to pay for licensees' editorials, the Court stated that reliance on Regan v. Taxation With Representation is misplaced. The Court distinguished Taxation With Representation by noting that the Internal Reve-
nue Code sections involved there allowed tax-exempt lobbying organizations to set up two distinct tax-exempt entities: one that does not lobby and receives tax deductible contributions and a second organization that lobbies and does not receive tax deductible contributions. The statutory scheme embodying section 399 does not allow a broadcaster to segregate its editorializing activities from its other activities. The Court agreed that Taxation With Representation would be applicable and section 399 would be constitutional if "noncommercial educational broadcasting stations [were permitted] to establish ‘affiliate’ organizations which could then . . . editorialize with non-federal funds."

Having dismissed all the government’s asserted interests in section 399, the Court found that the editorializing ban must fail under first amendment scrutiny. The ban intrudes on core first amendment rights by foreclosing discussion of controversial topics by broadcast licensees. Even under the reduced standard of “substantial interest,” the Court concluded that the preferred government justifications for section 399 “are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgment” of the first amendment rights imposed by the statute.

B. The Dissenting Opinions

Justice Rehnquist, joined by Chief Justice Burger and Justice White, argued in dissent that Taxation With Representation should determine the outcome in League of Women Voters. Justice Rehnquist viewed section 399 as a reasonable condition attached to the receipt of federal funds. He accused the majority of "seek[ing] to avoid the thrust" of Taxation With Representation by relying on that decision's concurring opinion. The Justice stated that Taxation With Representation stands for the proposition that "‘a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.’ "

Section 399, he argued, merely reflects the decision

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100 Such an organization may be a § 501(c)(3) entity. I.R.C. § 501(c)(3) (1982). This organization is tax-exempt and may receive tax deductible contributions but may not lobby. Id.

101 104 S. Ct. at 3128. This organization is a § 501(c)(4) entity. It may seek to influence legislation, but as a consequence it may not receive tax deductible contributions. I.R.C. § 501(c)(4) (1982). Organizations qualifying as § 501(c)(4) entities are tax-exempt. Id.

102 104 S. Ct. at 3128.

103 Id.

104 Id. at 3129.

105 104 S. Ct. at 3131 (Rehnquist, J., dissenting).

106 Id.

107 Id. (quoting Taxation With Representation, 461 U.S. at 459).
of Congress not to pay for editorializing. Justice Rehnquist concluded that the government's power to attach conditions to the distribution of its funds is not limitless, but he maintained that "when the government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy" and that the imposition of the condition is not aimed at the suppression of disfavored ideas.\textsuperscript{108}

In a separate dissent, Justice Stevens argued that the majority mischaracterized the nature of the section 399 editorializing ban: "There is simply no sensible basis for considering this regulation a viewpoint restriction—or, to use the Court's favorite phrase, to condemn it as 'content-based'. . . ."\textsuperscript{109} Although Justice Stevens admitted that the ban is technically content-based, he maintained that it does not have any of the impermissible features that frequently characterize content-based restrictions.\textsuperscript{110} Justice Stevens noted that section 399 bans all editorials regardless of what the speaker intends to say. In this respect, the Justice concluded, section 399 is viewpoint-neutral.\textsuperscript{111}

Justice Stevens argued that the Court's reliance on \textit{Consolidated Edison}\textsuperscript{112} was misplaced because "critical differences" exist between that case and \textit{League of Women Voters}.\textsuperscript{113} He noted that although the prohibition on utility bill inserts at issue in \textit{Consolidated Edison} was couched in general terms, it actually was directed toward silencing the utility companies. Justice Stevens reasoned that \textit{Consolidated Edison} "was a classic case of a viewpoint-based prohibition" of speech,\textsuperscript{114} whereas section 399 is viewpoint-neutral because the licensees affected by the editorializing ban undoubtedly reflect a myriad of views.\textsuperscript{115}

According to Justice Stevens, the government's interest in sec-

\textsuperscript{108} Id. at 3132.
\textsuperscript{109} 104 S. Ct. at 3138 (Stevens, J., dissenting).
\textsuperscript{110} Id. at 3134-35. Stevens stated that the viewpoint-neutrality of § 399 is of the "greatest significance" in his analysis. Id. at 3135.
\textsuperscript{111} Id.
\textsuperscript{112} 447 U.S. 530 (1980). The majority relied on \textit{Consolidated Edison} to show that a subject matter restriction intrudes on first amendment rights. A restriction of speech based on its subject matter or its topic is content-based. Such restrictions, however, are frequently viewpoint-neutral because the regulation restricts an entire subject rather than a particular point of view. \textit{See supra} notes 72-78 and accompanying text and \textit{infra} notes 141-71 and accompanying text.
\textsuperscript{113} 104 S. Ct. at 3137 (Stevens, J., dissenting).
\textsuperscript{114} Id. at 3138. Justice Stevens wrote separately in \textit{Consolidated Edison}, stating that the circumstances leading to the bill insert ban demonstrated that the utility commission was attempting to suppress the utilities' view on the nuclear power issue. \textit{Consolidated Edison}, 447 U.S. at 548 (Stevens, J., concurring in judgment).
\textsuperscript{115} 104 S. Ct. at 3138.
tion 399, which he characterized as of "overriding importance," must be balanced against this reduced first amendment infringement. He argued that the government’s interest in maintaining the integrity of the broadcast industry is particularly compelling because of the pervasiveness of the broadcast media in American society. These two factors, the viewpoint-neutrality of section 399 and the substantiality of the government’s interest, persuaded Justice Stevens that the editorializing ban is constitutional.

III
ANALYSIS

The Supreme Court’s conclusion that section 399 is unconstitutional is proper and consistent with first amendment precedent. The Court properly rejected the argument that the ban on editorializing is a valid condition on the receipt of federal funds. Although Congress need not fund educational broadcast stations, once it chooses to do so, it may not condition the receipt of funding on recipients’ forfeiture of first amendment rights. Furthermore, Justice Stevens’s argument that section 399 does not pose a serious threat to first amendment values because it is viewpoint-neutral is flawed. The Court’s condemnation of subject matter restrictions was warranted because such restrictions, although facially viewpoint-neutral, may hide viewpoint-discriminatory effects. Further, Justice Stevens’s bifurcated constitutional standard for viewpoint-neutral and viewpoint-discriminatory restrictions on expression is difficult to apply, and ignores the fact that all subject matter restrictions are somewhat discriminatory because they favor the status quo. The Court properly rejected such an approach, thereby encouraging unfettered discussion of controversial topics and removing the confusion about the constitutional standard for subject matter restrictions.

A. The Conditioned Spending Argument

The Court properly determined that Regan v. Taxation With Representation is inapplicable to the facts and circumstances presented in League of Women Voters. Taxation With Representation is inapposite because Congress structured the Internal Revenue Code to avoid subsidizing an organization’s lobbying without penalizing the organization for its first amendment activity. Specifically, Congress

116 Id. at 3136.
117 Id.
118 See infra notes 133-39 and accompanying text.
119 See infra notes 151-66 and accompanying text.
could deny the benefit of tax deductible contributions to organizations that lobby without simultaneously disallowing tax deductible contributions for a companion organizations' nonlobbying activities.

Although section 399 may reflect Congress's decision not to pay for broadcasters' editorializing, as Justice Rehnquist and the FCC argued, the editorializing ban is not as finely tuned as the tax code sections upheld in *Taxation With Representation*. To avoid subsidizing broadcasters' editorials, section 399 prohibits all CPB-funded licensees from editorializing. The prohibition applies to CPB-funded licensees regardless of whether the broadcaster actually used the funds to support its editorial practices. As the majority states, *Taxation With Representation* would control if Congress had set up a funding scheme that (1) prevented broadcasters from using federal funds to support editorial activity and (2) provided federal support for the broadcasters' noneditorial activity.

An analysis of *Cammarano v. United States* illuminates the funding scheme distinction. In that case the Court upheld a treasury regulation that denied business expense deductions for lobbying activities. The Court stated that "petitioners are not being denied a tax deduction because they engage in constitutionally protected activities." Rather, the Court noted, Congress had chosen not to subsidize their lobbying activities. In his concurrence, Justice Douglas clarified the difference between a decision not to subsidize protected activity and a penalty on the exercise of constitutional rights. The Justice reasoned that if the regulation denied all business deductions because the taxpayer spent money to influence legislation then it would be an unconstitutional penalty levied on first amendment activity.

Similarly, if *Taxation With Representation* was unable to receive any tax deductible contributions because of its lobbying activity, then the statutes in issue would penalize the exercise of protected rights. Section 399 moves beyond a benign decision not to subsidize licensee editorializing because it disallows editorializing by a subsidized licensee regardless of whether the licensee uses the federal funds for the editorials. It forces a noncommercial broadcast licensee to choose between federal support and the exercise of a fundamental right.

121 See supra notes 84-86, 105-08 and accompanying text.
122 *League of Women Voters*, 104 S. Ct. at 3128.
124 Id. at 513.
125 Id.
126 Id. at 515 (Douglas, J., concurring).
In League of Women Voters Justice Rehnquist argued that the Court avoided the "thrust" of Taxation With Representation, relying instead on its concurring opinions. Justice Rehnquist, author of the majority opinion in Taxation With Representation, asserted that it clearly held that the government's decision not to subsidize a fundamental right does not infringe on that right. Although the concurring Justices did emphasize that the special structure of the Code was a key to avoiding an unconstitutional penalty, the Taxation With Representation majority also voiced this concern. Justice Rehnquist himself wrote, "The Code does not deny [Taxation With Representation] the right to receive deductible contributions to support its non-lobbying activity, nor does it deny [Taxation With Representation] any independent benefit on account of its intention to lobby." Thus the Taxation With Representation Court also recognized that the structure of the Code insulated Congress's subsidy decision from constitutional infirmities.

Somewhat surprisingly, the Court did not rely on Sherbert v. Verner to counter Justice Rehnquist's conditional spending argument. In Sherbert the state of South Carolina denied unemployment compensation to a Seventh Day Adventist because she was unwilling to accept employment that entailed work on Saturdays. The state supreme court upheld the denial of benefits by the state agency. The Supreme Court observed that the state agency ruling would force a religious adherent to choose between valid religious beliefs and the receipt of government benefits. The Court stated that "governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." The Court stressed

127 104 S. Ct. at 3131 (Rehnquist, J., dissenting).
128 Id.
130 Id. at 545.
133 Sherbert, 374 U.S. at 404.

Sherbert v. Verner and the cases cited above stand in sharp contrast to jurists' views earlier in this century. Judge Holmes's remarks in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), are typical of the early judicial attitude toward conditions attached to a benefit provided by a government. In McAuliffe the city fired a policeman from his job for violating a regulation forbidding politicking. Denying the policeman's constitutional arguments, Judge Holmes stated, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."
that whether the benefits were a privilege or a right was inconsequential: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." Finding that the state did not have a compelling interest to justify the infringement of religious liberty the Sherbert Court struck down the state rule.

The Constitution does not compel the government to subsidize the exercise of all fundamental rights. Further, Congress's decision...
sion not to support the exercise of a fundamental right with the spending power should not be subject to strict judicial scrutiny. The government should not, however, be allowed to penalize the exercise of a fundamental right either by denying funding because an otherwise qualified person chooses to exercise a protected right or by requiring a person to surrender such a right as a prerequisite to the receipt of federal support. The Sherbert Court stated emphatically that conditions on public spending cannot stand, “[w]hatever their purpose,” if they “inhibit or deter the exercise of first amendment freedoms.” Justice Rehnquist’s position that there need be only a rational relationship between the condition and Congress’s purpose in providing the subsidy and that the condition not be aimed at the suppression of “dangerous ideas” lends itself to governmental overreaching at the expense of constitutional guarantees. A rational relationship standard offers the spectre of the government buying up fundamental rights through the distribution of its largesse.

Petitioners, two indigent women who were unable to get the requisite physician letter attesting to medical necessity, argued that the state regulation penalized their exercise of a fundamental right. The Court denied their claim, stating that the state is under no obligation to remove obstacles not of its own making. The Court reasoned that Sherbert v. Verner would apply only if Connecticut denied all welfare benefits to qualified women who obtained abortions. See also Harris v. McRae, 448 U.S. 297, 317 n.19 (“[A] refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”). The manner in which the government distributes its largesse, of course, is subject to constitutional scrutiny pursuant to the equal protection clause of the fifth or fourteenth amendments. See, e.g., San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (equal protection analysis applied to state’s method of funding public elementary and secondary schools).

Precedent does support Rehnquist’s assertion that the condition must satisfy only a rational relationship standard. This precedent, however, is old, and its value is questionable. See, e.g., American Communications Ass’n v. Douds, 339 U.S. 382 (1950). This case upheld what is commonly referred to as the nonCommunist affidavit provision of the Labor-Management Relations Act of 1947. Section 9(h) required officers of national labor unions to execute an affidavit stating that they are not members of the Communist Party. The government argued that this “condition” was valid because the penalty only denied noncomplying unions the privilege of accessing the NLRB. Id. at 389. The Court dismissed this argument but upheld the law because the affidavit provision had a rational relationship to the overall goal of peaceful labor-management relations. See also United Public Workers v. Mitchell, 330 U.S. 75 (1947) (upholding § 9(a) of Hatch Act which precluded certain employees of executive branch from taking active part in political campaigns because ban was rationally related to goal of politically neutral civil service). Justice Rehnquist cited Mitchell as support in League of Women Voters, 104 S. Ct. at 313 (Rehnquist, J., dissenting), but the persuasive value of the case is minimal. The Court had previously discredited Mitchell in Connick v. Meyers, 461 U.S. 138, 144 (1983).
B. Subject Matter Restrictions

In recent years the Supreme Court has divided governmental regulation of speech into two categories: those restrictions that are content-based and those that are content-neutral.\(^{141}\) Content-neutral restrictions regulate expressive activity without regard to the message sought to be conveyed by the speaker.\(^{142}\) Content-based restrictions regulate speech because of its meaning.\(^{143}\) The Court has subjected content-based restrictions of speech to heightened scrutiny because of the widely shared belief that the government must not favor or disfavor any particular point of view.\(^{144}\) As the Court has stated, "[t]he essence of . . . forbidden censorship is content control."\(^{145}\)

The Court's distinction between content-based and content-neutral restrictions has been the subject of considerable criticism. Professor Redish, for example, observes that "[w]hile governmental attempts to regulate the content of expression undoubtedly deserve strict judicial review, it does not logically follow that equally serious threats to first amendment freedoms cannot derive from restrictions imposed to regulate expression in a manner unrelated to content."\(^{146}\) Despite these and other doubts\(^{147}\) as to the efficacy of the distinction, the content-based/content-neutral dichotomy is "the most pervasively employed doctrine in the jurisprudence of free

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\(^{141}\) For a discussion of the development of this distinction, see Stephen, The First Amendment and Content Discrimination, 68 VA. L. REV. 203, 214-91 (1982).

\(^{142}\) See L. Tribe, American Constitutional Law § 12-2 (1978) (describing government's abridgement of speech when it is pursuing other goals).

\(^{143}\) Id. (describing government action aimed at suppressing specific viewpoints).

\(^{144}\) Id. ("any government action aimed at communicative impact is presumptively at odds with the first amendment"). See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 776 (1976) (invalidating government prohibition on exchange of price information of over-the-counter drugs); Erznoznick v. City of Jacksonville, 422 U.S. 205, 211 (1975) (striking down municipal ordinance that regulated display of outdoor films based on their content). Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972) (invalidating ordinance prohibiting picketing because it allowed labor picketing but disallowed all other demonstrations).

\(^{145}\) Police Dep't v. Mosely, 408 U.S. 92, 96 (1976).


\(^{147}\) Justice Marshall's dissent in Clark v. Community for Creative Nonviolence, 104 S. Ct. 3065, 3073 (1984), reflects considerable dissatisfaction with the content-based/content-neutral dichotomy. The Justice noted, "By narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity." Id. at 3079. Marshall observed that a content-neutral restriction may not fall with equal force on all potential speakers because inequalities in wealth may make access to alternative forums impossible for some speakers. Id. at n.14.
expression.” 148

The meaning and application of the distinction in the case of restrictions of speech based on its subject matter, however, has baffled the Court. 149 Subject matter restrictions define the proscribed speech not by the speaker’s viewpoint but by the topic of the proposed speech. For instance, in United States Civil Service Commission v. National Association of Letter Carriers, 150 federal legislation prohibited certain public employees from expressing opinions “‘on public affairs, personalities and matters of public interest’” if their comments are directed toward the success of a political party. 151 The legislation thus restricted an entire subject area rather than a single viewpoint. Consider also the restriction at issue in Lehman v. City of Shaker Heights, 152 which allowed individuals to lease commercial advertising space on city buses but disallowed the placement of political messages on the vehicles. 153 As in Letter Carriers, this restriction proscribed an entire subject area rather than one viewpoint. In Consolidated Edison Co. v. Public Service Commission 154 the Court determined the constitutionality of a ban on utility bill inserts that dealt with controversial issues of public policy. This regulation also defined the proscribed activity in terms of its subject matter: controversial issues of public importance. 155

The Court’s inconsistent treatment of these and other restrictions on the subject matter of speech illustrates its confusion. In Consolidated Edison and Police Department of Chicago v. Mosely, 156 for instance, the Court equated subject matter restrictions with content-based, viewpoint-discriminatory regulations and subjected them to strict judicial scrutiny. 157 In Lehman, Letters Carriers, Greer v. Spock, 158

151 Id. at 556 (quoting United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947)).
153 Id. at 300.
155 Id. at 537.
156 408 U.S. 92 (1972) (invalidating city ordinance that prohibited picketing near school building but exempted peaceful labor picketing on first amendment and equal protection grounds).
157 The Mosley Court required the city to demonstrate that its regulation served a “substantial” interest. Id. at 99. In Consolidated Edison the Court required that the bill insert ban serve a compelling state interest. 447 U.S. at 540.
and Young v. American Mini Theaters,\textsuperscript{159} on the other hand, the Court treated the restrictions as content-neutral and subjected them to a relaxed standard of review.\textsuperscript{160} Observing the Court's disparate treatment of subject matter restrictions, Professor Stone noted, "The confusion generated by subject-matter restrictions is hardly surprising, for such restrictions fall between viewpoint-based and content-neutral restrictions, sharing some of the characteristics of each."\textsuperscript{161}

In \textit{League of Women Voters} the Court once again faced a regulation that defines the proscribed speech in terms of its subject matter. Section 399 prohibits CPB-funded licensees from editorializing.\textsuperscript{162} The FCC, the agency charged with enforcing section 399, defined an editorial as the use of broadcast facilities "for the propagation of the licensees' own views on public issues."\textsuperscript{163} Thus, section 399, as applied, defines the proscribed speech in terms of its subject matter, the licensees' views on public issues, without reference to the viewpoint of any single commentator.

The Court's analysis of section 399's ban on editorializing demonstrates that a majority of the Court is willing to equate subject matter restrictions with content-based, viewpoint-discriminatory restrictions on speech. The Court objected to section 399 because it attempts "to limit discussion of controversial topics and thus to shape the agenda for public debate."\textsuperscript{164} Although the Court tested the constitutionality of section 399 with a slightly less exacting standard than that usually applied to viewpoint-discriminatory restrictions, this is attributable to the traditionally low level of scrutiny applied to governmental regulation of the broadcast industry.\textsuperscript{165}

Although viewpoint-neutral subject matter restrictions on speech are arguably less worrisome intrusions on free speech than viewpoint-discriminatory restrictions, the \textit{League of Women Voters} Court properly chose to equate the two categories of regulation. Viewpoint-discriminatory restrictions skew the operation of the free marketplace of ideas by limiting the flow of information and opinion to the public, thereby disrupting the process of democratic self-gov-

\textsuperscript{159} 427 U.S. 50 (1976) (upholding city zoning ordinance that required theaters showing sexually explicit films to be dispersed throughout city).  
\textsuperscript{160} As Justice Brennan noted in his dissent in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), "[a]lthough Greer, Lehman and Jones permitted content-based restrictions, none of the cases involved viewpoint discrimination." \textit{Id.} at 61 (Brennan, J., dissenting).  
\textsuperscript{161} Stone, \textit{supra} note 148, at 241.  
\textsuperscript{162} See \textit{supra} notes 15-19 and accompanying text.  
\textsuperscript{163} \textit{In re} Accuracy in Media, Inc., 45 F.C.C.2d 297, 302 (1973).  
\textsuperscript{164} \textit{League of Women Voters}, 104 S. Ct. at 3120.  
\textsuperscript{165} See \textit{supra} notes 31-49 and accompanying text.
A desire to maintain the workings of the marketplace, where ideas are accepted or rejected on their merits, clearly justifies the Court's strict scrutiny of viewpoint-discriminatory restrictions. Although by definition viewpoint-neutral restrictions do not favor any idea over another, such restrictions, including section 399, also interrupt the free flow of information, thus disrupting individual decisionmaking and the process of informed self-government. Moreover, subject matter restrictions are, to some extent, inevitably viewpoint-discriminatory because they necessarily favor the status quo. For example, the legislative history of section 399 suggests that several legislators supported the editorializing ban simply because they feared speech. Specific Congressmen may have worried about criticism from the political left or from the right, but they all had the same illegitimate purpose: the suppression of criticism.

Subject matter restrictions also may hide viewpoint-discriminatory effects, and in some cases these effects may be difficult to discover. The ban on utility bill inserts at issue in Consolidated Edison provides an example of a facially viewpoint-neutral subject matter restriction that was discriminatory in practice. Although the bill insert ban was allegedly viewpoint-neutral because it banned all inserts, it was plainly aimed at a particular speaker's viewpoint on a specific issue. The Court's opinion in Consolidated Edison suggested that subject matter restrictions always warrant strict judicial scrutiny. The obvious viewpoint-discriminatory effects of the regulation then under review diluted the holding, however. The effects of section 399 were more ambiguous because of the presumption that CPB-funded licensees reflect a myriad of viewpoints. Thus, the Court's refusal to tolerate the arguably viewpoint-neutral restriction at issue in League of Women Voters demonstrates that the Court is unwilling to engage in the difficult task of searching for

166 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government . . . . "). The principal proponent of the fundamental role that the first amendment plays in the democratic process is A. Meiklejohn. See A. MEIKLEJOHN, POLITICAL FREEDOM (1965).

167 The Mosely Court recognized this: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." 447 U.S. at 538.

168 See supra notes 19-23 and accompanying text.

169 The public utility commission denied the public the right to use the utilities' bills as a medium and simultaneously restricted the utilities' ability to present their views on controversial issues of public importance. The public never had access to the utilities' billing system, however, whereas the utility was prohibited from continuing to engage in an ongoing practice. 477 U.S. at 532.

170 Id. at 537-40 (prohibition of viewpoint-discriminatory restrictions extends to subject matter restriction).
hidden viewpoint-discriminatory effects.\textsuperscript{171}

**Conclusion**

In *FCC v. League of Women Voters* the Supreme Court held unconstitutional a ban on editorializing by CPB-funded licensees. The Court's holding demonstrates that it is unwilling to allow the government to use its spending power as a lever to entice recipients to forfeit their constitutional rights. Given the ubiquitous role that the federal government plays in our society, the Court's decision should be lauded.

Further, the Court refused to consider section 399 a less threatening restriction of speech merely because it is a viewpoint-neutral subject matter regulation. The danger such restrictions present is that they may hide viewpoint-discriminatory effects. Indeed, at a minimum, all subject matter restrictions discriminate to a certain extent by favoring the status quo. Moreover, even if such a regulation is viewpoint-neutral, the curtailment of speech on important public issues runs counter to our commitment to wide-ranging debate. Thus, the Court's close scrutiny of section 399 is well founded and in general removes the confusion that has surrounded subject matter restrictions.

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\textsuperscript{171} In *Consolidated Edison* Justice Stevens saw through the facial neutrality of the bill insert ban and concluded that it was an impermissible viewpoint restriction. *Id.* at 546 (Stevens, J., concurring in judgment). Nevertheless, the Justice chose only to concur in the judgment because of the majority's broad language condemning all subject matter restrictions. Justice Stevens thus favors a middle course with regard to subject matter restrictions; his dissent in *League of Women Voters* follows from his conclusion that § 399 is viewpoint-neutral and his valuation of the government's proffered justifications for the editorializing ban.