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BEYOND LIGHTS AND WIRES IN A BOX: ENSURING THE EXISTENCE OF PUBLIC TELEVISION*

*Meredith C. Hightower***

INTRODUCTION

Public Television is capable of becoming the clearest expression of American diversity, and of excellence within diversity. Wisely supported . . . it will respect the old and new alike, neither lunging at the present nor worshipping the past. It will seek vitality in well-established forms and in modern experiment. Its attitude will be neither fearful nor vulgar. It will be, in short, a civilized voice in a civilized community.¹

In 1967, Congress passed the Public Broadcasting Act (the "Act")² with the intention of providing diverse, balanced programming for the benefit of the public at large.³ In 1991, various

* The title of this Article stems from a statement that Edward R. Murrow once made about television in general: "This instrument can teach, it can illuminate; yes, it can even inspire. But it can do so only to the extent that humans are determined to use it to those ends. Otherwise, it is merely lights and wires in a box." JOHN W. MACY, JR., *TO IRRIGATE A WASTELAND: THE STRUGGLE TO SHAPE A PUBLIC TELEVISION SYSTEM IN THE UNITED STATES* ix (1974).

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¹ THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, *PUBLIC TELEVISION: A PROGRAM FOR ACTION* 18 (1967) [hereinafter *CARNEGIE I*].

² Pub. L. No. 90-129, 81 Stat. 365 (1967) (codified at 47 U.S.C. §§ 390-399 (1988 & Supp. IV 1992)).

³ See 47 U.S.C. § 396(g)(1)(A) (1988 & Supp. IV 1992) (purpose was

commentators, educators, politicians and others argued that the Act's mandate was not being followed.⁴ Criticisms were furiously

promotion of programs of "high quality, diversity, creativity, excellence, and innovation"); *see also* ROBERT J. BLAKELY, *THE PEOPLE'S INSTRUMENT: A PHILOSOPHY OF PROGRAMMING FOR PUBLIC TELEVISION* 14 (1971); S. REP. NO. 222, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1772 (stating that the intent of the Act is to improve program quality so "this natural resource may be used to its fullest for the betterment of individual and community life . . ."); S. REP. NO. 222, *reprinted in* 1967 U.S.C.C.A.N. 1773 (major objective was to "provid[e] a mechanism whereby programs of high quality, responsive to the cultural and educational needs of the people, can be made available . . ."); S. REP. NO. 222, *reprinted in* 1967 U.S.C.C.A.N. 1777-78:

[P]ublic [T]elevision must be provided with such abundant programming as to offer for each local station both diversity and choice. Although the aims of noncommercial broadcasting should be directed toward cultural and informational programs, it should not be so highly specialized, however, that it caters only to the most esoteric tastes.

For an exhaustive survey of the history and structure of public broadcasting in the United States, *see generally* GEORGE H. GIBSON, *PUBLIC BROADCASTING: THE ROLE OF THE FEDERAL GOVERNMENT, 1912-1976* (1977); MACY, *supra* note *. For a fuller discussion of the history of Public Television and of the Public Broadcasting Act in this Article, *see infra* notes 10-65 and accompanying text.

⁴ *See* discussion *infra* notes 94-125 and accompanying text.

Public broadcasting currently receives approximately 16% of its annual expenditures from congressional appropriations. *See* Henry Morgenthau, *Airwaves for Sale*, N.Y. TIMES, Mar. 4, 1994, at A27. The most recent congressional appropriations process conducted to determine the amount of funding to be provided for Public Television for 1994 through 1996 provided an opportunity for the voicing of criticisms of Public Television.

While the appropriations process has never been free of controversy, in 1991 the usual stir surrounding the process took on a new cast. *See* MARILYN LASHLEY, *PUBLIC TELEVISION: PANACEA, PORK BARREL, OR PUBLIC TRUST?* 15-16 (1992) (noting how articles highlighting the problems of Public Television usually appear around the time for hearings on reappropriation). The traditional criticisms of programming content for being either too liberal, too controversial, or too focused on the tastes of the upper-middle class were harsher than those of previous years. *See id.* (noting that harsh criticism produced some of the "most far-flung headlines ever penned" with regard to Public Television); *see also* Kit Boss, *Public TV Too Liberal, Say Conservatives*, SEATTLE TIMES, Apr. 5, 1992, at L8 (noting "[w]hile criticism of PBS is not new, the climate surrounding it is," according to public broadcasting executives and media observers). Additionally, critics contended that in the face of an increasingly advanced technological

levelled at Public Television, yet the invective subsided when Congress eventually voted to reauthorize funding for Public Television through 1996.⁵ Recently, however, the doors were opened to a new round of debate when Lewis H. Lapham wondered "what PBS [The Public Broadcasting Service]⁶ would look like if it attempted to do what it was intended to do."⁷

How can PBS effectively do what it was intended to do? It is this question that fuels the discussion that will take place in this Article. This Article argues that critics of Public Television, like Lapham and various members of Congress, miss the point. The issue is not whether Public Television, per se, is unnecessary, even in light of a changing technological world. The proper starting point for discussion is that Public Television in its *current* form is ineffectual and will remain so unless the manner in which the medium is funded is significantly altered. The focal point of any debate on Public Television should not be its disutility in light of technological developments, or the controversial or politically liberal content of its programming. The focus should be on how Public Television's hands are tied by the source of its funding.

When Congress passed the Public Broadcasting Act, its goal was for Public Television to serve as an alternative to the fare

society, Public Television was no longer a necessary part of the broadcasting landscape. See discussion *infra* note 96 and accompanying text.

⁵ In August 1992, Congress authorized \$310 million for Public Television for fiscal year 1994, \$375 million for fiscal year 1995, and \$425 million for fiscal year 1996. Public Telecommunications Act of 1992, Pub. L. 102-356, 106 Stat. 951 (1992).

Public Television is forward funded by two years, therefore, funds appropriated for a particular year provide financing for that year and give the current estimates for two successive years. See, LASHLEY, *supra* note 4, at 65 n.1.

⁶ For a fuller discussion of the Public Broadcasting Service, see *infra* note 60 and accompanying text.

⁷ Lewis H. Lapham, *Adieu, Big Bird: On the Terminal Irrelevance of Public Television*, HARPER'S MAG., Dec. 1993, at 43 (Lapham was the host of *Bookmark*, a series that aired on PBS from 1989-91). Lapham's question is an oft-repeated one. Since its inception, commentators, educators, politicians and others have questioned the role of Public Television in the day-to-day lives of those for whom it was created—the American public. See discussion *infra* notes 62-65 and accompanying text.

offered on commercial television—fare which for the most part did nothing to expand the minds of the American public⁸—and as a medium which would transform and surpass the then-stagnant offerings on noncommercial television.⁹ The attainment of this goal

⁸ See H. REP. NO. 572, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 1801 (regarding need for legislation, presidents of each of the three major commercial networks noted that “economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal.”). CBS President Dr. Frank Stanton noted that because the networks “have to serve the greatest number of people in order to do [their] job, [Public Television] will be able to do special interest kinds of programming that [the networks] can’t do.” *Id.* at 1807.

A colloquy that took place during the hearings on the Act illustrates the dissatisfaction with commercial broadcasting and the hope that Public Television would “serve the interests in education, culture, good sense, and good taste” that were not being served by commercial television:

Senator [Norris] Cotton [New Hampshire]: I don’t know whether you gentlemen have had time to listen to television, but, I think it is perfectly sickening. It is far below the standard of my mind, many of the programs I get commercially

Secretary [John] Gardner [Department of Health, Education and Welfare]: One of the major objections to commercial television today is that it is something of a straitjacket, and perhaps necessarily so in the nature of the medium Because [commercial broadcasting is] appealing to a very large audience, they try to find a common denominator and that does limit choices.

RONALD A. CASS, *REVOLUTION IN THE WASTELAND: VALUE AND DIVERSITY IN TELEVISION* 34-35 (1981) (quoting *Subcomm. on Communications, Senate Comm. on Commerce, Hearings on S. 1160*, 90th Cong., 1st Sess. 53-54 (1967)) (alterations added).

⁹ See THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING, *A PUBLIC TRUST* 9 [hereinafter *CARNEGIE II*] (1979) (“Public broadcasting was conceived as a major new national institution, an ambitious concept that would transcend the limited fare, centered principally on public education, offered by several hundred non-commercial television and radio stations then in existence.”).

In making the distinction between Public Television and instructional television, Congress noted that “[p]ublic broadcasting is that system which may be utilized to provide educational, cultural, and discussion programs which serve the general community” S. REP. NO. 222, *reprinted in* 1967 U.S.C.C.A.N. 1782. Instructional television was designed “primarily to provide in-school

is restricted by the current funding scheme.

This Article focuses on three areas. First, this Article examines past attempts on the part of the legislative and executive branches of government to control Public Television through their hold on its purse strings. Second, in a First Amendment context, this Article analyzes congressional attempts to control the content of Public Television programming. Finally, out of a belief that debates about the content of Public Television programming and the utility of Public Television in the face of technological developments are actually means of avoiding the ultimate kernel of the controversy over Public Television—funding—this Article presents a suggestion for alternatively funding Public Television which may make Public Television less of a point of controversy when it is again time to argue for refunding the system.

Before engaging in an examination of the issues presented above, a look at the history of the Act is necessary.

I. THE PUBLIC BROADCASTING ACT OF 1967

The purpose of public broadcasting is to enhance the quality of our dreams.¹⁰

[P]rograms of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities¹¹

To understand fully the nature of the most recent debate over Public Television, it is necessary to look to the congressional intent behind the creation of Public Television, as well as to the problems that Congress's specific statutory mandate generated.

instruction and formal education material to students in accredited or recognized schools." *Id.*

¹⁰ BLAKELY, *supra* note 3, at 37.

¹¹ 47 U.S.C. § 396(g)(1)(A).

A. *The Report of the Carnegie Commission on Educational Television*

In 1965, the Carnegie Corporation of New York awarded a grant to form the Carnegie Commission on Educational Television (the "Commission").¹² The Commission was given a year and a half to investigate the status of educational television and to publish a report of its findings and advice.¹³ In 1967, the Commission published *Public Television: A Program for Action*, a book containing these findings and recommendations regarding the viability of a national educational television system.¹⁴ The Commission stated that it had reached the conclusion that the United States was in need of "a well-financed, well-directed educational television system" in order to meet the complete needs of the American public.¹⁵ According to the Commission: "The firm base upon which educational television is founded, and the potentiality it possesses to serve the general welfare, warrant the investment of public funds and public energies; the public interest in its expansion is unmistakable"¹⁶

Although the Commission's name and mission indicate that it was to focus specifically on the preexisting educational television system,¹⁷ the Commission separated educational programming into

¹² See GIBSON, *supra* note 3, at 123.

¹³ See GIBSON, *supra* note 3, at 123.

¹⁴ See CARNEGIE I, *supra* note 1.

¹⁵ See CARNEGIE I, *supra* note 1, at 3.

¹⁶ See CARNEGIE I, *supra* note 1, at 3 (omission in original).

¹⁷ Although noncommercial radio broadcasting had been in existence since the early 1920s, the major stimulus for noncommercial television broadcasting came in 1952, when Federal Communications Commission ("FCC") Commissioner Frieda B. Hennock fought for and won the reservation of television channels for educational stations. See THE RESEARCH AND POLICY COMMITTEE OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, BROADCASTING AND CABLE TELEVISION: POLICIES FOR DIVERSITY AND CHANGE 46-47 (1975) [hereinafter BROADCASTING & CABLE TELEVISION]. During the 1950s, educational broadcasting—supported by state and local taxes, private contributions, and foundation funding—grew slowly; however, such support was not enough. *Id.* at 47.

two parts: instructional television, television to be used in the general formal educational setting, and what the Commission called "Public Television," television aimed at the community-at-large, and chose to deal primarily with Public Television.¹⁸ To illustrate

In 1962, after one year of debate, Congress amended the Communications Act of 1934 to allow federal funds to be used to help the development of educational television. *See id.*; ANTHONY SMITH, *THE SHADOW IN THE CAVE: THE BROADCASTER, HIS AUDIENCE, AND THE STATE* 221 (1973). The Educational Television Facilities Act of 1962 ("ETFA") authorized \$32 million in matching grants to be awarded by the Department of Health, Education and Welfare over a five-year period, for the construction of educational-television stations. *See* SYDNEY W. HEAD, *BROADCASTING IN AMERICA: A SURVEY OF TELEVISION AND RADIO* 379 (2d ed. 1972); *see also* BROADCASTING & CABLE TELEVISION, *supra*, at 46. The EFTA included a proviso that no single grant was to exceed the amount of \$1 million. SMITH, *supra*, at 220.

This legislation represented the first direct federal aid to noncommercial television broadcasting, although the effort had previously received indirect federal funds through a variety of educational assistance programs like the National Defense Act of 1958, which provided up to \$110 million to "encourage and improve" the teaching of certain subjects with some of this money going toward research and experimentation on instructional television. HEAD, *supra*, at 212, 213 n.48. The ETFA was also important because it placed for the first time a responsibility at the national level for improving the quality of television broadcasting. SMITH, *supra*, at 220; HEAD, *supra*, at 378.

The ETFA helped to activate 92 new stations and expand 69 existing stations. HEAD, *supra*, at 212. By the end of 1966, 126 educational-television stations were on the air. CARNEGIE II, *supra* note 9, at 34. By 1968, 156 stations had been activated. HEAD, *supra*, at 212.

¹⁸ CARNEGIE I, *supra* note 1, at 2, 3; *see also* MACY, *supra* note *, at 23. The Commission's suggestion was to establish a noncommercial television system that would have a broader view than the old educational concept. *See* HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THIS BUSINESS OF TELEVISION* 39 (1991); *see also* HEAD, *supra* note 17, at 213 n.49 (noting that the Carnegie Commission described the image projected by educational television service as "somber and static").

The Committee for Economic Development noted that "perhaps the most visible change [with regard to educational television] resulting from the report was the introduction of the term *public television*." BROADCASTING & CABLE TELEVISION, *supra* note 17, at 47; *see also* CARNEGIE II, *supra* note 9, at 35 ("A new term, 'public television,' was introduced to dramatize the emphasis on programming for general enrichment and information, as well as for classroom instruction.").

The Commission chose to concentrate on Public Television based on the

the difference between instructional television and Public Television, the Commission discussed three types of television: commercial television, instructional television and Public Television.

Commercial television was described as television which "seeks to capture the larger audience" and relies primarily on that audience's desire to be entertained.¹⁹ Instructional television is television which calls upon society's predisposition to "work, build, learn, and improve."²⁰ According to the Commission, instructional television "asks the viewer to take on responsibilities in return for a later reward."²¹ If viewed on a continuum, commercial television and instructional television would lie at opposite ends.²² Along this continuum, Public Television would lie somewhere in the middle, as it encompasses "all that is of human interest and importance which is not at the moment appropriate or available for support by advertising, and which is not arranged for formal instruction."²³

In the Commission's eye, Public Television was to be "a system that in its totality will become a new and fundamental institution in American culture."²⁴ The Commission wrote:

[S]ince the technology of television lends itself readily to uses that increase the pressure toward uniformity, there must be created means of resisting that pressure, and of enlisting television in the service of diversity. We

belief that it "both require[d] and [was] ready for immediate action." CARNEGIE I, *supra* note 1, at 3. Additionally, "[t]he [C]ommission believed that noncommercial television could do more than instruct its viewers; it could serve the larger public good." BROADCASTING & CABLE TELEVISION, *supra* note 17, at 47. This Article, like the Commission's report, focuses on Public Television, as opposed to strictly educational television.

¹⁹ CARNEGIE I, *supra* note 1, at 2.

²⁰ CARNEGIE I, *supra* note 1, at 2.

²¹ CARNEGIE I, *supra* note 1, at 2.

²² See CARNEGIE I, *supra* note 1, at 2.

²³ CARNEGIE I, *supra* note 1, at 2. The programming presented on Public Television was not to be for the classroom, nor was it to be economic for commercial sponsorship, and its audience could range from the tens of thousands to the tens of millions. CARNEGIE I, *supra* note 1, at 3.

²⁴ CARNEGIE I, *supra* note 1, at 4.

recognize that commercial television is obliged for the most part to search for the uniformities within the general public, and to apply its skills to satisfy the uniformities it has found. Somehow we must seek out the diversities as well, and meet them, too, with the full body of skills necessary for their satisfaction.²⁵

The Commission believed that television had to more fully serve not only the mass audience, but the numerous audiences that formed the fabric of American society.²⁶ To this end, the Commission presented several proposals for the creation of a viable Public Television system that would "appeal to excellence in the service of diversity."²⁷

The Commission recommended, *inter alia*, that Congress create a federally chartered, nonprofit, nongovernmental corporation authorized to receive and distribute governmental and private funds for the expansion and improvement of programming.²⁸ This corporation, called the Corporation for Public Television, would, among other things, support the production of Public Television programs by local stations for "more-than-local" use through appropriate grants and contracts, support research and development and technical experimentation to improve program production, and

²⁵ CARNEGIE I, *supra* note 1, at 13-14.

²⁶ CARNEGIE I, *supra* note 1, at 14.

²⁷ CARNEGIE I, *supra* note 1, at 14. The Commission felt that "until excellence and diversity have been joined, we do not make the best use of our miraculous instrument." CARNEGIE I, *supra* note 1, at 14; *see also* CASS, *supra* note 8, at 33 ("The Carnegie view was that noncommercial broadcasting should provide the public at large with broadly educational and cultural programs that would raise the general level of taste and understanding. In other words, the Commission wanted to create a mechanism for making publicly available the sort of valuable and diverse programming commercial television could not or would not provide."); BROADCASTING & CABLE TELEVISION, *supra* note 17, at 46-47 ("The promise of greater quality, diversity, and choice in television programming was publicly proclaimed in 1967 by the Carnegie Commission on Educational Television One of the report's key contributions was its emphasis on diversity in programming.").

²⁸ CARNEGIE I, *supra* note 1, at 5; *see also* MACY, *supra* note *, at 22; Kathy Gregolet, Comment, FCC v. League of Women Voters: *Freedom of Public Broadcasters to Editorialize*, 39 U. MIAMI L. REV. 573, 575 (1985).

provide means to recruit and train technical, artistic and specialized personnel.²⁹ The corporation, to be comprised of a twelve-member board of directors,³⁰ would "exist to serve the local station but [would] neither operate it nor control it."³¹ The Commission considered the creation of this corporation to be "fundamental to its proposal" and went as far as stating that it would "be most reluctant to recommend the other part of its plan unless the corporate entity is brought into being."³²

Other major recommendations made by the Carnegie Commission included the establishment of a tax on the sale of television sets in order to generate "increased, stable, and insulated funding" for the activities of the proposed corporation;³³ establishment by the corporation of interconnection facilities that would allow for the simultaneous broadcast of programs across the

²⁹ CARNEGIE I, *supra* note 1, at 5-8; *see also* MACY, *supra* note *, at 22-23.

³⁰ CARNEGIE I, *supra* note 1, at 37. The 12 members of the board would be "distinguished and public-spirited citizens, of whom six will be initially appointed by the President of the United States with the concurrence of the Senate, and the remaining six initially elected by those previously appointed." CARNEGIE I, *supra* note 1, at 37. After these initial appointments, one-third of those members appointed by the president and one-third of those elected by the other members of the board would serve two-year terms, with the president appointing two members every two years for six-year terms, and the entire board electing two members every two years for six-year terms. CARNEGIE I, *supra* note 1, at 37. The board was to appoint its own chairman and a full-time chief executive officer. CARNEGIE I, *supra* note 1, at 38.

In appointing and electing members of the board, the president and the board were to choose those who would provide broad representation of the various regions of the country, various professions, and "the various areas of talent and experience appropriate to this enterprise." CARNEGIE I, *supra* note 1, at 38.

³¹ CARNEGIE I, *supra* note 1, at 5.

³² CARNEGIE I, *supra* note 1, at 5.

³³ CARNEGIE II, *supra* note 9, at 36. The Commission's goal was to "free the Corporation to the highest degree from the annual governmental budgeting and appropriations procedures: the goal we seek is an instrument for the free communication of ideas in a free society." CARNEGIE I, *supra* note 1, at 8. The tax was to begin at two percent and rise to a ceiling of five percent, with the revenues to be made available to the Corporation through a trust fund. CARNEGIE I, *supra* note 1, at 8.

nation;³⁴ distribution of federal funds in support of general operations to stations by the Department of Health, Education and Welfare ("HEW");³⁵ and federal funding of a facilities program through HEW to extend Public Television service nationwide.³⁶

The Commission's recommendations found a great supporter in President Lyndon B. Johnson. In his January 1967 State of the Union address, Johnson stated: "We shall develop educational television into a vital public resource to enrich our homes We should insist that the public interest be fully served through the public's airwaves."³⁷ Johnson presented the Commission's recommendations to Congress.³⁸ In 1967, Congress took the Commission's recommendations to heart, drafting and subsequently passing the Public Broadcasting Act of 1967 (the "Act").³⁹

³⁴ CARNEGIE II, *supra* note 9, at 36.

³⁵ CARNEGIE II, *supra* note 9, at 36.

³⁶ CARNEGIE II, *supra* note 9, at 36.

³⁷ MACY, *supra* note *, at 25; *see also* S. REP. NO. 222, *reprinted in* 1967 U.S.C.C.A.N. 1774 ("Noncommercial television today is reaching only a fraction of its potential audience—and achieving only a fraction of its potential worth. Clearly, the time has come to build on the experiences of the past 14 years, the important studies that have been made, and the beginnings we have made.") (remarks of President Johnson in his message to Congress recommending legislation).

³⁸ MACY, *supra* note *, at 25. Commentators have suggested that President Johnson's support for the public broadcasting medium came from his desire to maintain consensus (or at least the appearance thereof) during the Vietnam period. *See* ERIK BARNOUW, *TUBE OF PLENTY: THE EVOLUTION OF AMERICAN TELEVISION* 398 (2d rev. ed. 1990); DOUGLAS KELLNER, *TELEVISION AND THE CRISIS OF DEMOCRACY* 201 (1990). After the Act was passed, Johnson even chose Frank Pace, Jr. a former Secretary of the Army and a former chief executive officer of General Dynamics, to chair the new corporation created by the Act. BARNOUW, *supra*, at 398-99. Upon assuming his position, Pace stated that he had already commissioned research into how Public Television might be used for riot control. BARNOUW, *supra*, at 399.

³⁹ Pub. L. No. 90-129, 81 Stat. 365 (1967) (codified as amended at 47 U.S.C. §§ 390-399 (1988 & Supp. IV 1992)). The recommendations in the Carnegie Commission report are widely acknowledged as providing the basis for the Act. *See, e.g.*, BROADCASTING & CABLE TELEVISION, *supra* note 17, at 47; BLUMENTHAL & GOODENOUGH, *supra* note 18, at 40; CASS, *supra* note 8, at 34 ("When the Public Broadcasting Act of 1967 emerged . . . the basic thrust of the Carnegie Commission's report had been transformed into law.").

B. The Public Broadcasting Act of 1967

Although the basic beliefs that informed the Commission's report were embodied in the Public Broadcasting Act of 1967, some of the Commission's recommendations were modified, reflecting presidential and congressional response to public debate and pressure from pre-existing noncommercial broadcasters and other interested groups.⁴⁰ The resulting legislation differed from the Commission's recommendations in several respects.

First, while the Commission recommended that station operating funds be provided through HEW and that the proposed corporation deal only with programming, research, interconnection and other functions, Congress concluded that stations should receive operating support from the corporation to insulate them from any pressures that might be applied by a government agency such as HEW.⁴¹

Second, bowing to pressures from television set manufacturers and those in both Congress and the Johnson administration who saw the imposition of a tax on the sales of television sets as "rigid and regressive," rather than provide funds through a tax on the sales of television sets, Congress resolved to provide annual appropriations to the corporation, as if the corporation were a governmental agency.⁴²

Third, fearing the establishment of a "fourth network," Congress rejected the Commission's proposal that the corporation

⁴⁰ CARNEGIE II, *supra* note 9, at 36.

⁴¹ CARNEGIE II, *supra* note 9, at 37.

⁴² CARNEGIE II, *supra* note 9, at 37; *see also* HEAD, *supra* note 17, at 332. Yet the Act made it clear that the Corporation "[would] not be an agency or establishment of the United States Government." 47 U.S.C. § 396(b) (1988 & Supp. IV 1992).

At first, the Act only provided for annual appropriations for the Corporation with a presidential promise to develop another plan for long-term, insulated funding. CARNEGIE II, *supra* note 9, at 37; *see also* HEAD, *supra* note 17, at 213. This lack of a definite funding scheme would later pose problems for Public Television. *See* BLUMENTHAL & GOODENOUGH, *supra* note 18, at 40-41 (discussing Nixon administration's veto of funding for Public Television).

operate interconnection facilities, and prohibited the corporation from doing so.⁴³

Finally, whereas the Commission did not consider public radio broadcasting, Congress made radio and television companions in the new federally supported system.⁴⁴ Therefore, rather than calling the new corporation the Corporation for Public Television, as the Commission had suggested, Congress—to illustrate the inclusion of radio in the new system—named the new entity the Corporation for Public Broadcasting (the “CPB” or the “Corporation”).⁴⁵

Although Congress recognized the Commission’s most fundamental proposal through its creation of the Corporation for Public Broadcasting,⁴⁶ the proposal was not incorporated into the Act unchanged. Several of the Carnegie Commission’s recommendations with regard to the creation of a corporation whose primary mission would be to “extend and improve Public Television programming”⁴⁷ were altered by Congress when it created the

⁴³ CARNEGIE II, *supra* note 9, at 37. The idea that Public Television might become a national fourth network surfaced frequently during the early days of its inception. *See* CARNEGIE II, *supra* note 9, at 41; BROADCASTING & CABLE TELEVISION, *supra* note 17, at 47; GIBSON, *supra* note 3, at 153; *Hearings on H.R. 6376, Public Broadcasting Act of 1967*, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S.C.C.A.N. 1832 (“It would be in order . . . to strengthen and clarify the language which refers to the limitations on the powers of the Corporation, particularly as it refers to networking The possibility that the Corporation could emerge as the high mogul of a new nationwide network should be specifically laid to rest.”) (minority views of Representatives Samuel L. Devine, James T. Broyhill, James Harvey, Albert W. Watson, Tim Lee Carter and Clarence J. Brown, Jr.).

After Public Television became a working reality, the specter of “The Fourth Network” was raised again by Nixon administration officials displeased with the anti-administration bias they believed existed in public broadcasting. *See* GIBSON *supra* note 3, at 175. The impact of the Nixon administration on Public Television is discussed *infra* at notes 69-93 and accompanying text.

⁴⁴ CARNEGIE II, *supra* note 9, at 37. The ETFA was also extended for three years, this time making radio eligible for matching grants as well. HEAD, *supra* note 17, at 213; CARNEGIE II, *supra* note 9, at 37-38.

⁴⁵ CARNEGIE II, *supra* note 9, at 37.

⁴⁶ *See supra* notes 28-32 and accompanying text.

⁴⁷ CARNEGIE I, *supra* note 1, at 5.

Corporation for Public Broadcasting.

For example, under the Act, the Commission's recommendation that the Corporation's board of directors be composed of twelve members, six of whom would be initially appointed by the president with the remaining six elected by those previously appointed,⁴⁸ was modified by Congress to create instead a fifteen-member board with all members to be presidential appointees subject to confirmation by the Senate.⁴⁹ Moreover, as a result of this modification, the idea of a board composed of both government appointees and private citizens became one of a board composed entirely of government appointees, thereby creating a closer tie between the federal government and Public Television than was intended by the Commission.⁵⁰ Additionally, as noted above, Congress fundamentally altered the Commission's proposals with regard to the sort of functions the Corporation would serve.

The Corporation's principal role was to be the distribution of the annual congressional appropriation to Public Television stations

⁴⁸ See *supra* note 30 and accompanying text.

⁴⁹ CARNEGIE II, *supra* note 9, at 37. The Act did, however, attempt to protect the Corporation from political control or influence of a partisan nature by mandating that no more than 8 members of the 15-member board were to come from the same political party. 47 U.S.C. § 396(c)(1) (1988 & Supp. IV 1992). Yet this attempt was criticized by the second Carnegie Commission: [T]he Corporation's ability to carry out its broad mandate depended greatly on the quality of the presidential appointments made to its board. Unless the board members were capable of nonpolitical leadership. . . the system might well falter. *This objective was not appreciably advanced by a legislative requirement that a bare majority of the board be drawn from one political party.*

CARNEGIE II, *supra* note 9, at 41 (emphasis added). The Commission's criticisms were borne out by the partisan nature of future appointments to the Board. See LASHLEY, *supra* note 4, at 36, 39 (noting that Richard Nixon appointed ten allegedly highly partisan members and that Ronald Reagan made highly partisan appointments to the Board in return for campaign support).

In 1981, the Board was reduced to 10 members, of which no more than 6 could be members of the same political party. Pub. L. No. 97-35, tit. XII §1225(a)(1), 95 Stat. 726 (1981). In 1992, the membership of the board was further reduced to 9 members, of which no more than 5 could be of the same party. Pub. L. No. 102-356 §5(a), 106 Stat. 949-50 (1992).

⁵⁰ See BLUMENTHAL & GOODENOUGH, *supra* note 18, at 40.

and producers.⁵¹ To this end, as an entity established to foster a strong and effective system for public broadcasting,⁵² it was given responsibility for receiving and distributing federal and nonfederal funds, for the production and distribution of national programming, and for channelling funds toward the development of local and regional programs.⁵³

Among the purposes and activities of the Corporation, the Act lists encouraging the development of a wide range of program suppliers and maintaining high-quality program standards,⁵⁴ assuring balanced reporting on controversial topics,⁵⁵ making contracts and grants for production of programs,⁵⁶ nurturing new station development,⁵⁷ conducting research and training⁵⁸ and establishing and maintaining a program archive.⁵⁹ Additionally, the Corporation was charged with assisting in the task of interconnecting stations in a network that would allow the stations to

⁵¹ See BLUMENTHAL & GOODENOUGH, *supra* note 18, at 40 ("In reality, CPB is mainly an entity that finances new program development and production [and] pays for station activities . . ."); see also A. FRANK REEL, *THE NETWORKS: HOW THEY STOLE THE SHOW* 157 (1979) (CPB was designed to channel a "modest" amount of federal funds into the public broadcasting system).

Congress authorized \$9 million to support the CPB for fiscal year 1967-68. HEAD, *supra* note 18, at 380.

⁵² See 47 U.S.C. § 396(a)(10) (1988 & Supp. IV 1992) ("[A] private corporation should be created to facilitate the development of public telecommunications . . ."). As a matter of policy, Congress declared: "[I]t is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunication services available to all citizens of the United States . . ." 47 U.S.C. § 396(a)(7) (1988 & Supp. IV 1992).

⁵³ BROADCASTING & CABLE TELEVISION, *supra* note 17, at 47.

⁵⁴ 47 U.S.C. § 396(g)(1)(A) (CPB is to facilitate full development of broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial broadcast stations).

⁵⁵ 47 U.S.C. § 396(g)(1)(A) (in its facilitation of programming, CPB would have "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature.").

⁵⁶ 47 U.S.C. § 396(g)(2)(B) (1988 & Supp. IV 1992).

⁵⁷ 47 U.S.C. § 396(g)(1)(C) (1988 & Supp. IV 1992).

⁵⁸ 47 U.S.C. § 396(g)(2)(G) (1988 & Supp. IV 1992).

⁵⁹ 47 U.S.C. § 396(g)(2)(D) (1988 & Supp. IV 1992).

program and schedule in accordance with local desires, as well as to broadcast programs nationally.⁶⁰

⁶⁰ 47 U.S.C. § 396(g)(1)(B) (1988 & Supp. IV 1992) (CPB was to assist in setting up network interconnection so that all stations that wished to could broadcast programs at times chosen by the stations.).

The Public Broadcasting Service ("PBS") was the 'network' that the Public Broadcasting Act required the Corporation to create. Because CPB was congressionally prohibited from interconnecting the stations on its own, it established a study group consisting of station managers, executives from the CPB, and members of the Ford Foundation. In 1970, based on the recommendations of this study group, PBS was created. CARNEGIE II, *supra* note 9, at 38-39.

Based on the recommendations of the study group, CPB established PBS as a membership organization that would be financed by CPB, but controlled by the stations themselves through a governing board that would also include representatives of CPB, the National Educational Television and Radio Center and the public. CARNEGIE II, *supra* note 9, at 39.

PBS was viewed as the stations' organization. In addition to operating the congressionally mandated interconnection, PBS's function was to select, schedule and promote programs for Public Television stations, as well as to promote and schedule programming nationally. CARNEGIE II, *supra* note 9, at 39. (PBS began distributing programs to stations in 1970); *see also* BROADCASTING & CABLE TELEVISION, *supra* note 17, at 47; REEL, *supra* note 51, at 157 (noting that PBS was established as a programming agency for group of some 260 public television stations); CARNEGIE II, *supra* note 9, at 57. Each station, however, was to retain its own autonomy. REEL, *supra* note 51, at 158; CARNEGIE II, *supra* note 9, at 57 (noting that PBS does not control stations' schedules). PBS does not produce its own programming. BLUMENTHAL & GOODENOUGH, *supra* note 18, at 41.

This retention of autonomy is based on support for the concept of "localism," a term which one commentator has called "shorthand" for enhanced station autonomy and discretion. *See* LASHLEY, *supra* note 4, at 51. Another commentator has stated: "Local programming should be inviolate, untouchable, sacrosanct, protected by law . . ." Marvin Kitman, *Public TV's Shame*, NEWSDAY, June 23, 1991, at 23; *see also* S. REP. NO. 222, *reprinted in* 1967 U.S.C.A.N. 1778 ("[I]t should be remembered that local stations are the bedrock of this system . . .").

Broadcasting policy based on a concept of localism seeks to provide a diverse array of communities with stations that are responsive to the needs of those communities. *See* DOUGLAS H. GINSBURG ET AL., REGULATION OF THE ELECTRONIC MASS MEDIA 157-58 (2d ed. 1991). Through FCC licensing and spectrum allocation policies, each community should have one or more broadcast stations of its own. *Id.*

The concept of localism has frequently affected broadcasting law. *See, e.g.,*

Although the Carnegie Commission had the chance to see its suggestions put into effect, the resulting system was much different than the one that the Commission had proposed. The variance from the Commission's proposal would ultimately lead to clashes over how the nascent system should be funded, and based on the content of its programming, whether it should be federally funded at all. These two issues will be discussed later in this Article,⁶¹ yet it is important to first note that even before any programming ever aired on Public Television, questions with regard to its content were raised.

C. *Questioning the Purpose of Public Television*

Although the tone surrounding the passage of the Act could generally be described as optimistic and enthusiastic,⁶² there was not a lack of dissent with regard to the establishment of Public Television. The articulated purpose and goals of the new system did not go unquestioned. The minority views of several congressmen expose the doubts held by some with regard to the utility of Public Television.

Representatives Samuel L. Devine, James T. Broyhill, James

Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (both cases striking down "must-carry" rules requiring cable operators to carry local broadcast signals); *see also* GINSBURG ET AL., *supra*, at 388-89; PATRICK PARSONS, CABLE TELEVISION AND THE FIRST AMENDMENT 71-73, 116-117 (1987). The validity of must-carry rules included in the 1992 Cable Television Consumer Protection and Competition Act was recently considered by the U.S. Supreme Court. *See* Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445 (1994), *vacating*, 819 F. Supp. 32 (D. D.C. 1993) (considering issue of whether must-carry rules set forth in §§ 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534, 535 (Supp. IV 1992), are consistent with First Amendment; finding that must-carry rules are content-neutral and thus not subject to strict scrutiny). For a more detailed discussion of the concept of localism with regard to Public Television, *see infra* notes 74-90 and accompanying text.

⁶¹ *See infra* notes 69-125 and accompanying text.

⁶² *See, e.g.*, CARNEGIE II, *supra* note 9, at 38 (noting that enactment of the Act was "the most important event in the history of noncommercial broadcasting"; Act "dramatized the promise of public broadcasting . . .").

Harvey, Albert W. Watson, Tim Lee Carter and Clarence J. Brown, Jr. contended that "Public Television seems to be very much like the elephant being described by three blind men, each of whom felt a different part of the animal."⁶³ They also compared the backers of the legislation to "a small boy who is so anxious to have a new toy that he would rather have a less than satisfactory one than wait until Monday morning for the stores to open."⁶⁴ It was this anxiety and lack of forethought that worried the members of the minority. They believed that those who favored the passage of the Act were willing to overlook the problems inherent in the cobbled-together compromise which the Carnegie Commission's report had become.

Additionally, the minority members attacked the articulated goal of the Act in establishing a Public Television system, namely its provision of a diverse slate of "different" programming. The minority stated:

[Public Television] appears to be the spur which has brought forth . . . this bill. An oversimplified definition would call this phase "cultural uplift." It is visualized by its most enthusiastic supporters as the great and overshadowing element in noncommercial broadcasting. It will be the highbrow answer to mundane commercialism. It will sparkle, it will soar, it will also sear and singe. It will be a force for social good (as . . . [its] enthusiasts see the social good) . . . It could, and in the opinion of some . . . should, and will crusade. We know that we are not alone in feeling some misgivings about creating a mechanism for the kind of broadcasting which might result from ambitions such as these.⁶⁵

⁶³ *Hearings on H.R. 6376, Public Broadcasting Act of 1967*, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S.C.C.A.N. 1831.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1831-32. The minority would have preferred the commitment of more resources and support to instructional television which, in their view, involved the use of radio and television to "take the carefully prepared and approved classroom material into the classroom under the aegis of the appropriate educational system." *Id.* at 1831. In addition, the minority believed that "other educational broadcasting"—in their view, a concept more difficult to

Therefore, before a single word had been uttered through the new medium of Public Television and before there was actually any "content" to be criticized, the seeds of contention over Public Television's content were sown. These initial apprehensions over the fare presented on Public Television would come to be echoed throughout the years of its existence, and with more force due to the fact that after 1970, there was actual programming to be criticized.

The following section focuses on the criticisms levelled at Public Television after it began offering programming, and the actions taken against the medium on the basis of the type of programming offered.

II. THE GOVERNMENT ATTACKS PUBLIC TELEVISION

The only sharpness in Public Television's image is one that we believe is unfortunate. It is (still) considered elitist . . . educational, and appealing more to those with an above average education.⁶⁶

The Public Broadcasting Act of 1967 is unnecessary, inefficient, inequitable, and subject to dangerous political influences. But perhaps I do not mention its worst feature. It is a striking example of what is coming to be a common situation, in which the educational community sets itself apart from the rest of humanity.⁶⁷

define than instructional television but apparently including "mostly course material to be presented in the home for credit or improvement of specific skills"—should have received increased attention. *Id.* According to the minority, "[t]he good to be accomplished by a great expansion of this type of broadcasting [was] boundless" *Id.*

⁶⁶ Harold Mendelsohn, *The Neglected Majority: Mass Communications and the Working Person*, in TALKING BACK: CITIZEN FEEDBACK AND CABLE TECHNOLOGY 24, 36 (Ithiel de Sola Pool ed., 1973) (quoting 1970 national survey conducted by Louis Harris and Associates for the CPB).

⁶⁷ SMITH, *supra* note 17, at 226 (quoting Ronald H. Coase).

I have watched . . . "Listening to America" with Bill Moyers. If you ever saw propaganda or imbalance, that is it.⁶⁸

This section illustrates that the issue at hand in the recent debates over reappropriating funds for Public Television was not solely where funding for Public Television should come from, but also who has the right to define the political culture of the nation. This section begins with an examination of how political maneuvering has held Public Television hostage in the past.

A. Public Television and the Nixon Era

As noted above, President Johnson's provision of an initial annual appropriation for Public Television, with a promise to determine methods of long-term funding at a later date, laid the foundation for future difficulties encountered by the budding system.⁶⁹ The complications engendered by Johnson's fateful omission became evident during the presidency of Richard Nixon.

Although the press—both broadcast and print—and the branches of American government have not traditionally been known for their harmonious relationship,⁷⁰ the relationship between the press and the Nixon administration was especially acrimonious. Beginning in 1970, the Nixon administration waged a war against televised news on the basis that it felt the administration was being treated unfairly and that newscasts were increasingly biased against the administration.⁷¹ Vice President Spiro Agnew was the "chief

⁶⁸ 138 CONG. REC. S7430 (daily ed. June 3, 1992) (remarks of Sen. Robert Dole).

⁶⁹ See *supra* note 42 and accompanying text.

⁷⁰ See, e.g., FRED POWLEDGE, *THE NIXON ADMINISTRATION AND THE PRESS: THE ENGINEERING OF RESTRAINT* 5 (1971). Powledge describes the relationship between the press and the government as "an elaborate game." *Id.* The government's role in this game is to provide only the information it wants to provide, while the press's role is to not accept this information at face value and to dig deeper beneath the surface of the information presented. *Id.* at 4-5.

⁷¹ See GIBSON, *supra* note 3, at 170; see also POWLEDGE, *supra* note 70, at 6.

spokesman" in the administration's intense efforts to intimidate and harass broadcasters.⁷²

Public Television did not escape the jaundiced eye of the administration. In fact, because of its newness and its dependence

⁷² GIBSON, *supra* note 3, at 170; *see also* KILLING THE MESSENGER: 100 YEARS OF MEDIA CRITICISM 64 (Tom Goldstein ed., 1989) (describing Agnew as Nixon's "point man against the press") [hereinafter KILLING THE MESSENGER]; POWLEDGE, *supra* note 70, at 6. Agnew made a series of speeches in which he blasted the news media. A 1969 speech given in Des Moines, Iowa in which Agnew attacked the news media for its commentary on President Nixon's speech on Vietnam, is viewed as the speech that began the vice president's assault on the press. *See* POWLEDGE, *supra* note 70, at 8. Agnew argued that "nowhere in [the American] system were there fewer checks on vast power" than where the television news medium was concerned. Spiro Agnew, *Speeches on the Media*, in KILLING THE MESSENGER, *supra*, at 66. Additionally, this vast power was concentrated in the hands of a small "fraternity" whose views "[did] not represent the views of America." KILLING THE MESSENGER, *supra*, at 69. While stating that he was "not asking for government censorship or any other kind of censorship," Agnew subtly threatened the broadcast press by mingling his scathing criticisms with a recognition that the networks "enjoy[ed] a monopoly sanctioned and licensed by government." KILLING THE MESSENGER, *supra*, at 69-70. Various commentators criticized Agnew's speech as being "disgraceful, ignorant, and base"; an "unprecedented attempt to intimidate a news medium which depends for its existence upon government licenses"; "an appeal to prejudice"; and "one of the most sinister speeches I have ever heard made by a public official." KILLING THE MESSENGER, *supra*, at 74 (Agnew recounting the effect of his Des Moines speech in a subsequent speech given in Alabama). In subsequent speeches, one given a week after the Des Moines speech, and another given two years later in Boston, Agnew criticized, respectively, East Coast newspapers—particularly *The New York Times*—and CBS' broadcasting of several public affairs programs, including one criticizing the Department of Defense. *See* KILLING THE MESSENGER, *supra*, at 73-85 (full text of Alabama and Boston speeches).

President Nixon was not an innocent party to these attacks. A memorandum from the deputy director of White House communications regarding the administration's attempts to "shot-gun[] the media and anti-administration spokesmen on unfair coverage" noted "21 requests from the President in the last 30 days requesting specific action relating to what could be considered unfair coverage." WILLIAM EARL PORTER, *ASSAULT ON THE MEDIA* 244 (1976) (Memorandum from Jeb Magruder to H.R. Haldeman); *see also* KILLING THE MESSENGER, *supra*, at 64 (noting that Nixon himself edited Agnew's 1969 Des Moines speech); POWLEDGE, *supra* note 70, at 6 (noting Nixon's "reluctance" to put a stop to the assaults on the media).

on federal funding, Public Television was even more vulnerable to attack than the established and advertiser-supported networks. Clay T. Whitehead, as the director of the Office of Telecommunications Policy ("OTP"), was responsible for leading the attacks on public broadcasting.⁷³ Publicly, Whitehead's assault against Public Television was founded upon a belief in grassroots localism and a concern for what the administration viewed as the local broadcasting stations' loss of programming control.⁷⁴

In official statements, administration officials noted that the Public Broadcasting Act had emphasized the need for local production and control, and asserted that Public Television had abandoned this concept of localism and was attempting to create a fourth national network through increasingly centralized programming and scheduling functions performed by CPB and PBS.⁷⁵ For example, Whitehead voiced several concerns with the state of public broadcasting. First, he asserted that the independence of local stations suffered at the hands of CPB which was not devoting

⁷³ Whitehead has been called "the Agnew of public broadcasting." See GIBSON, *supra* note 3, at 171.

The OTP was established in 1970 as an executive agency to manage the broadcast spectrum and provide direct oversight of national telecommunications policy. See LASHLEY, *supra* note 4, at 34. Yet by 1971, the OTP had become so heavily involved in Public Television policy that its general counsel, now U.S. Supreme Court Justice Antonin Scalia, drafted a proposed, long-term financing bill for the medium. See LASHLEY, *supra* note 4, at 34.

⁷⁴ See GIBSON, *supra* note 3, at 171. As illustrated by Vice President Agnew's attacks on the power of the commercial network system, the Nixon administration desired to minimize the control of networks in general in favor of control at the local level. Whitehead, without making specific reference to Public Television, reinforced this aim in a 1972 speech where he called the placing of broadcasting power and responsibility at the local level a "uniquely American principle" and stressed "the need for more local responsibility" since "[t]his kind of local responsibility is the keystone of our private enterprise broadcast system operating under the First Amendment protections." Speech by Clay T. Whitehead, Director of the Office of Telecommunications Policy, in PORTER, *supra* note 72, at 301.

⁷⁵ See GIBSON, *supra* note 3, at 174; CARNEGIE II, *supra* note 9, at 41-42; LASHLEY, *supra* note 4, at 51 (noting that OTP staff loudly proclaimed that "public broadcasting was centralizing its forces and that the individuality of local stations was not being recognized on a national level.") (citation omitted).

enough to local support and local production.⁷⁶ Second, he believed that the autonomy of the local stations was undercut by the power held and exercised by CPB and PBS.⁷⁷ Third, he stated that there was not enough of a "proper balance" between local and national programming or, between cultural, entertainment, news, public affairs and educational and instructional programming.⁷⁸ The latter part of Whitehead's final concern betrays the true goal of the OTP's attack against Public Television. While outwardly basing its criticisms upon a concern for the "unique American principle" of localism, the office was actually concerned with the *content* of Public Television programming, and specifically, Public Television programming that seemed to have an anti-Nixon slant.⁷⁹

Whitehead fought to redirect CPB funds away from producers who provided "objectionable programs" to local stations.⁸⁰ The text of a memorandum from Whitehead to White House Chief of Staff, H.R. Haldeman, illustrates the tactics that the OTP used, and planned on using, to exert pressure on Public Television. Whitehead, discussing the recent hiring of newsmen Sander Vanocur and Robert MacNeil, informed Haldeman of "what we are

⁷⁶ GIBSON, *supra* note 3, at 180.

⁷⁷ GIBSON, *supra* note 3, at 180.

⁷⁸ GIBSON, *supra* note 3, at 180. Balance in this context appears to refer to the range of programming offered by Public Television. See GIBSON, *supra* note 3, at 180.

⁷⁹ See, e.g., BARNOUW, *supra* note 38, at 447 (noting that White House observers of Public Television were angered by the content of the series *The Great American Dream Machine*, and also outraged by *Who Invited US?* and *Behind the Lines*, programs that addressed the government's interventionist foreign policy and the FBI's use of its agents to discredit anti-war groups).

⁸⁰ See LASHLEY, *supra* note 4, at 51. The president also expressed his "unhappiness over [the] development of public TV." See LASHLEY, *supra* note 4, at 51; see also Jeffrey P. Cunard, Note, *Freeing Public Broadcasting From Unconstitutional Restraints*, 89 YALE L.J. 719, 733 n.91 (1980) [hereinafter *Freeing Public Broadcasting*] (citing October 1971 White House memorandum indicating that the "President's basic objective" was "to get the left-wing commentators who are cutting us up off Public Television at once, indeed yesterday if possible") (citation omitted).

doing behind the scenes on the Vanocur/MacNeil situation.”⁸¹ For example, Whitehead told Haldeman that stories discussing how the newsmen’s “obvious liberal bias would reflect adversely on public television” had been planted in the press.⁸² Following the planting of these stories, the OTP began to “encourage speculation about Vanocur and MacNeil’s salaries,” eventually leading CPB President, John Macy, to release the figures to Representative Lionel Van Deerlin.⁸³ Whitehead next planned to “continue to call attention to balance on public television” and to “encourage station managers throughout the country to put pressure on . . . CPB to balance [its] programming or risk the possibility of local stations not carrying these programs.”⁸⁴

The Nixon administration’s campaign did not prevent Congress from passing a two-year, \$155 million authorization for CPB in 1972.⁸⁵ Once the authorization reached the Oval Office, however, it was vetoed by President Nixon⁸⁶ in a veto message penned by Whitehead.⁸⁷ In this message, Nixon deplored the fact that CPB,

⁸¹ CARNEGIE II, *supra* note 9, at 44 n.10 (citing memorandum to H.R. Haldeman, Nov. 24, 1971).

⁸² CARNEGIE II, *supra* note 9, at 44 n.10.

⁸³ CARNEGIE II, *supra* note 9, at 44 n.10. This tactic had an obvious impact. During the 1972 set of hearings on re-funding Public Television, Representative Richard H. Ichord stated:

And when one is discussing the Public Broadcasting System in general, I must say that I was aghast to discover that it was paying the very handsome salary of 85,000 dollars—twice what Congressmen and Senators earn—to one Sander Vanocur to impose his special slants and prejudices on the PBS news operation. If the PBS continues to utilize congressionally appropriated funds to directly or indirectly smear the operations of Congress, I assure you that I can hardly be persuaded to continue to vote approval of these funds.

SMITH, *supra* note 18, at 224 n.18 (citation omitted).

⁸⁴ CARNEGIE II, *supra* note 9, at 44-45 n.10.

⁸⁵ CARNEGIE II, *supra* note 9, at 43.

⁸⁶ CARNEGIE II, *supra* note 9, at 43; *see also* LASHLEY, *supra* note 4, at 50; GIBSON, *supra* note 3, at 185.

⁸⁷ *See* GIBSON, *supra* note 3, at 185. *The New York Times* later reported that Whitehead had proposed a deal that funding would be exchanged for balanced programming. *See Freeing Public Broadcasting*, *supra* note 80, at 733 n.91 (citing 1974 *New York Times* article) (citation omitted).

originally intended as a creature for the service of the local stations, had become a power center and focal point for control of the entire public broadcasting system.⁸⁸ He then stated that the question of financing for public broadcasting could not be resolved "until the structure of public broadcasting was more firmly established, and we have a more extensive record of experience on which to evaluate its role in national life."⁸⁹

⁸⁸ See *Freeing Public Broadcasting*, *supra* note 80, at 733 n.91; see also CARNEGIE II, *supra* note 9, at 43 (stating that Nixon cited evidence that public broadcasting "was deserting the concept of localism").

⁸⁹ GIBSON, *supra* note 3, at 185; see also CARNEGIE II, *supra* note 9, at 43 (reporting Nixon's assertion that "until the industry could return to this basic mission [i.e., localism], long-term funding was unwise.").

Observers were quick to note that the president's stated basis for vetoing the authorization—his support for localism—was merely a screen for his displeasure with Public Television's programming. See GIBSON, *supra* note 3, at 185 (noting that the press was quick to highlight Whitehead's previously expressed belief that public money should not be spent on controversial views). Representative Robert O. Tiernan stated that the purpose of the veto was to prevent aggressive coverage of Nixon's bid for reelection and to turn the electronic media to the Administration's own ends. GIBSON, *supra* note 3, at 185-86. Representative Torbert H. MacDonald claimed that one need only look to the efforts on the part of Whitehead and to Nixon's eventual veto for an illustration of how political pressure could be applied to reduce Public Television to a bland and cowering medium; the administration's record with regard to Public Television, he asserted, was one of "implied or direct threats, promises and divisive tactics." GIBSON, *supra* note 3, at 186.

The comments of Patrick Buchanan, then a White House speech writer, evinced the goals of the president and the administration in vetoing the authorization. Appearing on the *Dick Cavett Show* in early 1973, Buchanan stated:

[W]hen [the congressional authorization] came down to the White House, we took a look at it, and we also looked at the situation over there [I]f you look at the public television, you will find you've got Sander Vanocur and Robert MacNeil . . . Sander Vanocur is a notorious Kennedy sycophant . . . and Robert MacNeil who is anti-administration. You have the Elizabeth Drew show on, . . . she personally, is definitely not pro-administration. I would say anti-administration. *Washington Week in Review* is unbalanced against us, you have *Black Journal*, which is unbalanced against us . . . you have Bill Moyers, which is unbalanced against the Administration Mr. Nixon, I'm delighted to say, hit that ball about 450 feet down the right

Nixon's veto, combined with the tension among PBS, CPB and the local stations that had resulted from discussions about localism, led to considerable upheaval for Public Television.⁹⁰ Yet it also led to multiyear federal funding that was meant to strengthen public broadcasting's ability to engage in long-range planning and to secure public broadcasting's insulation from political pressures.⁹¹ In 1975, President Gerald Ford signed legislation that provided for congressional authorization of funds for CPB three years in advance, as opposed to the year-by-year process which had led to

field foul line . . . and now you've got a different situation in Public Television.

CARNEGIE II, *supra* note 9, at 43 n.8.

After the veto, many programs criticized by the administration were either canceled or toned down. LASHLEY, *supra* note 4, at 50.

⁹⁰ The confluence of criticisms of the role of local stations and the Nixon veto led to shakeups within the public broadcasting structure. Three particular actions taken by the CPB board led to a major reorganization of PBS. First, except for one program, CPB voted to discontinue funding of all public affairs programming; second, CPB rescinded a commitment to provide multiyear funding to the National Public Affairs Center for Television; and third, the board voted to take certain functions, including programming functions, away from PBS. CARNEGIE II, *supra* note 9, at 45-46. This led PBS to reorganize to consolidate the power of the individual stations. CARNEGIE II, *supra* note 9, at 46; *see also* BLUMENTHAL & GOODENOUGH, *supra* note 18, at 41.

In 1973, leaders of PBS and CPB reached an agreement (the "partnership agreement") designed to reestablish the disintegrated relationship between the two entities. CARNEGIE II, *supra* note 9, at 46. The partnership agreement provided that PBS would continue to operate the interconnection on behalf of its member stations under the direction of its station-controlled board; CPB would leave to PBS's station members the financing of programming, promotion, public information, research, and representation; and, while CPB was allowed to make all final decisions about programs financed through its TV activities department, CPB staff would consult on program decisions with the programming staff at PBS. CARNEGIE II, *supra* note 9, at 46-47. Importantly, the partnership agreement established a significant increase in CPB's discretionary funds to stations. CARNEGIE II, *supra* note 9, at 47. This increase in discretionary funds led President Nixon to pass a two-year, \$110 million authorization in 1973, praising the bill for furthering the cause of localism. CARNEGIE II, *supra* note 9, at 47.

⁹¹ *See* CARNEGIE II, *supra* note 9, at 51 (noting that multiyear funding was supposed to be an arrangement "that would be stable, long-term, and insulated.").

problems during the Nixon administration.⁹²

The events of the Nixon era illustrate the profound effect that disagreement with the content of Public Television programming can have on the medium. The Nixon administration's assault against Public Television, culminating in Nixon's 1972 veto, not only led to a softening of the programming aired, but threatened the very survival of public broadcasting.⁹³

Although multiyear funding was initiated to insulate Public Television from political pressure, as the recent appropriations debate illustrates, discontent with the content of Public Television programming is still a threat to the safety of the medium; multiyear funding did not spell the end of Public Television's problems with regard to the content of its programming.

B. A Question of Content, 1991-1992

The tone of the 1991-92 congressional debates over refunding Public Television in many ways echoed that of the Nixon administration's campaign against Public Television over twenty years earlier. Although critics of the medium offered arguments that Public Television was elitist,⁹⁴ that many of the programs

⁹² See CARNEGIE II, *supra* note 9, at 51.

⁹³ See LASHLEY, *supra* note 4, at 52.

⁹⁴ See, e.g., George Will, *Public TV Is Just Another Middle-Class Entitlement*, ATLANTA J. & CONST., Apr. 23, 1992, at A19 (asserting that audiences for Public Television are largely "affluent, educated, and articulate" and the medium was therefore "another middle-class entitlement"). Apparently, such accusations of elitism did not fall on deaf ears. During the Senate debate over the passage of the reauthorization bill, Senator Trent Lott echoed Will's sentiment when he contended that public broadcasting was watched and heard more by the rich than the poor and stated: "[This] clearly amounts, for the most part . . . to an upper-middle-class entitlement program." 138 CONG. REC. S7401 (daily ed. June 3, 1992); see also Martin Tolchin, *Public Broadcasting Wins Senate Battle for Federal Money*, N.Y. TIMES, June 4, 1992, at A1 (noting that New York Senator Daniel Moynihan countered by asking whether Senate was aware of viewing that went on in poorer, minority sections of cities) [hereinafter *Battle for Federal Money*]. For an answer to the charges of elitism, see Fred W. Friendly, Letters to the Editor, *Call to Privatize Public TV Defies Reason*, N.Y. TIMES, May 18, 1992, at A16 (noting that although one of the arguments against Public Television is that it is elitist, more than half of its viewing households

offered on Public Television were "indecent,"⁹⁵ and that Public Television was obsolete due to the emergence of cable television,⁹⁶ these complaints barely veiled the true nature of Congress'

earn less than \$40,000 a year, and a third earn less than \$20,000).

⁹⁵ Critics were especially offended by *Tongues Untied*, a documentary chronicling the lives of Black homosexuals, which aired in the summer of 1991 as part of the Public Television series *P.O.V.* North Carolina Senator Jesse Helms cited *Tongues Untied* as a program which "blatantly promoted homosexuality as an acceptable life style" and included "homosexual men dancing around naked." 138 CONG. REC. S2655 (daily ed. Mar. 3, 1992); see also Martin Tolchin, *Public Broadcasting Bill is Sidelined*, N.Y. TIMES, Mar. 5, 1992, at A14 [hereinafter *Sidelined*]. On the day the reauthorization bill was passed by the Senate, Senator Lott mentioned *Tongues Untied*, noting that CPB "still had not learned its lesson" since it planned to show *The Lost Language of Cranes*, a program about the relationship between a father, who had not come to terms with his homosexuality, and his son. See *Battle for Federal Money*, *supra* note 94. Senator Lott stated that the show was one "that's going to horrify a lot of Americans." See *Battle for Federal Money*, *supra* note 94.

The final version of the reauthorization bill passed by Congress contained an amendment introduced by Senator Robert Byrd that restricted "indecent" public and commercial television and radio broadcasts to between midnight and 6 a.m., unless the station went off the air at midnight, in which case broadcasts could begin at 10 p.m. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954 (1992). Byrd stated that he was increasingly disturbed by "the smutty language, violence and lack of morality" in many television programs. Daniel Cerone, *Broadcasters Hit Senate Limit On 'Indecent Programming'*, L.A. TIMES, June 5, 1992, at F24. Although the Byrd Amendment was eventually declared unconstitutional by the U.S. Court of Appeals for the District of Columbia, see *Action for Children's Television v. FCC*, 11 F.3d 170, 183 (D.C. Cir. 1993) (holding § 16(a) of the Public Telecommunications Act of 1992 unconstitutional), at the FCC's request, the court has since ordered a rehearing of the case and the original decision has been vacated. See *Action for Children's Television v. FCC*, 15 F.3d 186 (D.C. Cir. 1994).

⁹⁶ Laurence Jarvik, a scholar at the conservative Heritage Foundation in Washington, D.C. stated: "Many cable stations carry the education and cultural programs that it was once thought could be provided only by Public Television." See Walter Goodman, *Pull the Plug on PBS?*, N.Y. TIMES, Mar. 22, 1992, at 33 [hereinafter *Pull the Plug*]. Jarvik called the public broadcasting system "obsolete, overly expensive and doomed to be the center of continuous political controversy." *Id.*; see also Noel Holston, *No Question About It, PBS Should Remain*, STAR TRIB., May 5, 1992, at 5E (noting that PBS' detractors argue that it no longer deserves government support because cable channels—particularly Discovery, A&E, and Nickelodeon—have rendered it obsolete); Bill Carter,

Conservatives Call for PBS to Go Private Or Go Dark, N.Y. TIMES, Apr. 30, 1992, at A1 (illustrating overlap between elitism and new technology arguments, conservatives argue that cultural programs similar to those shown on PBS are available on several cable channels and audience for PBS is made up of elite and affluent who ought to be able to afford cable to view these programs) [hereinafter *Private or Dark*]; Ed Siegel, *A Few Words In Defense of Public Broadcasting*, BOSTON GLOBE, May 12, 1992, at 58 (asking if Public Television is "superfluous" because of cable, where profusion of same quality programming could be found on cable's channels) [hereinafter *Words in Defense*].

Although this argument is seemingly the most viable (and therefore the most dangerous) argument against Public Television, the critics who weighed in with this observation disregarded the fact that cable still is not available everywhere and that many cannot afford to pay for cable. See Morgenthau, *supra* note 4, at A27 (noting that argument is "shortsighted" because although fee-based telecommunications may be "the wave of the future . . . there will always be large numbers of people who would be hard-pressed to pay for such services"); Holston, *supra* (asserting that following critics' logic, public libraries should be abolished since every town has a bookstore; just as everyone cannot afford a \$20 hardcover copy of a book, everyone cannot afford the \$20 or more per month for cable service); see also Walter Goodman, *A Running Debate About Public TV*, N.Y. TIMES, May 18, 1992, at C18 [hereinafter *Running Debate*] (noting that cable is not free and a lot of homes are not "hooked in"); Carter, *supra* (PBS executives state that relying on cable for the kind of programming provided by PBS would disenfranchise many of the poor and minority groups the service was intended to reach); Newton N. Minow, *Perspective on Television; Much Vaster, Still Mostly a Waste; Technology Has Brought Us an Explosion of Choice, but Has Failed to Turn the Wasteland Into a Promised Land*, L.A. TIMES, May 9, 1991, at B7 (noting that cable had expanded vastly, but choice through cable comes at a price not all can afford and cable is not available to entire nation) (as chairman of the FCC in 1961, Minow coined a description of television as a "vast wasteland."); Rob Deigh, Letters to the Editor, *Public TV: For the Public—All of It*, WASH. POST, Aug. 27, 1989, at C6 (cable is available only to those who can pay for it and who live in areas that make it available; about 55% of American households subscribe to cable while Public Television is universal and reaches 98%—for free) (Deigh was director of Corporate Information for the PBS in Washington, D.C.). One commentator noted that it was elitist to infer that only those who can afford cable should be able to view quality programming. *Words in Defense, supra* (noting that half the country still does not want or cannot afford cable). Despite optimism that a recent cut in cable rates would lead "a large portion of the public" to see a drop in cable rates," see Elizabeth Kolbert, *F.C.C. Orders Cuts in Cable T.V. Rates of 7% on Average*, N.Y. TIMES, Feb. 23, 1994, at A1, the inability of many Americans to afford cable is most likely not lessened by the cut in rates. In fact, an earlier attempt to adjust rates

discontent with Public Television: liberally slanted public affairs programming.⁹⁷

led to some consumers observing a *rise* in the amount of their bills. See James Barron, *Cable TV Formula Raises Some Rates*, N.Y. TIMES, Sept. 1, 1993, at A1 (noting that who saved and who paid depended on where customer lived and what cable service customer used). One commentator notes that we live in a time when the cost of new technologies "threatens to widen the gulf between the information 'haves' and 'have-nots.'" Morgenthau, *supra* note 4 (suggesting that gulf could be narrowed by public broadcasting).

Additionally, more choice may not necessarily entail *better* choices. See Minow, *supra* (enlarged choice does not satisfy the public interest; originality is an endangered species); see also *Running Debate*, *supra* ("upscale" channels are not as enterprising as Public Television and their quality is not as high); Holston, *supra* (debatable whether "richness and range" of PBS are surpassed by cable; PBS is only national network hospitable to often "critical or angry outsider[]" documentarians who attempt to say something no one else on television is saying, which is perhaps why PBS was in trouble); *Private or Dark*, *supra* (noting that PBS executives respond to criticisms by stating their overall mix of programming is not matched elsewhere); *Pull the Plug*, *supra* (question is whether what cable produces is up to standards of such PBS staples as *Frontline*, *Nova*, and *The MacNeil/Lehrer Newshour*, and even if it was, the extent to which such quality would be ruined "in the usual annoying fashion" by "chopp[ing the programs] up by commercials").

Proponents of this criticism also seemed to forget that cable television is just as market-driven as commercial television, and therefore has little incentive to provide many of the programs provided by PBS. See Walter Goodman, *In the Debate Over PBS, the Subject Is Objectivity*, N.Y. TIMES, June 3, 1992, at C20 (diversity brought to television by cable is not good substitute because cable channels are controlled by market and do not begin to match Public Television offerings); see also *Running Debate*, *supra* (noting inability or unwillingness of commercial television to deliver programs like *Frontline*, *Nova*, and *The MacNeil/Lehrer Newshour*); Andrea H. Retzky, Letters to the Editor, *Cable Can't Take the Place of Public Television*, N.Y. TIMES, May 15, 1992, at A28 (stating that cable would already be competing in this market if educational programming were considered commercially viable).

⁹⁷ This does not mean that the other arguments against Public Television are not worth considering. However, because of their strong resemblance to attacks made by the Nixon administration, and the dangers of such attacks, only the accusations of liberal bias will be addressed here.

Additionally, the tenor of the debate over Public Television indicated that the expression of these concerns merely masked the political animus that actually fueled the assault on Public Television. See *Pull the Plug*, *supra* note 96; see also *Running Debate*, *supra* note 96 (stating that title of May 12, 1992 *Nightline*

The struggle to reauthorize funding for Public Television started in the House of Representatives, where a federal authorization of \$275 million for 1994 was approved in November, 1991.⁹⁸ Meanwhile, in the Senate, a group of Republican senators led by Senate Minority Leader Robert Dole⁹⁹ placed a hold on the legislation during the final hours of the last session before Thanksgiving, 1991, just before the Senate was to vote on the bill.¹⁰⁰ It was not until January, 1992 that Dole's office contacted Senate Democrats, the Senate Commerce subcommittee, or PBS officials to explain what was happening.¹⁰¹ An aide to Senator Dole noted that the senators involved in the hold saw the authorization process as an opportunity to express their concerns with the status of Public Television.¹⁰² These concerns were with the

program featuring debate between Bill Moyers and George Will recognized the essence of the discussion, namely the attack from the right on PBS for its skew to the left; title of program was *Conservatives Trying To Kill Off Public Broadcasting*; *Private or Dark*, *supra* note 96 (illustrating that it was not until later in the debate that charges evolved into a suggestion that PBS was no longer a necessary or worthwhile source of programming because cable offered same programming); Boss, *supra* note 4 (noting that despite "flap" over *Tongues Untied*, PBS programs were mostly being attacked not for their alleged indecency, but for their supposed political bias).

⁹⁸ See *Private or Dark*, *supra* note 96.

⁹⁹ Dole has been opposed to public broadcasting since its inception and was an opponent of the original 1967 Act that created the system. See Sharon Bernstein, *PBS Vows to Take Offensive Against Critics*, L.A. TIMES, June 25, 1992, at F1 [hereinafter *Offensive Against Critics*].

¹⁰⁰ See Sharon Bernstein, *Senate Stalls PBS Money, Blames 'Bias,'* L.A. TIMES, Jan. 20, 1992, at F1 [hereinafter *Senate Stalls*]. The hold was secretly placed on the bill as a tactical move meant to prevent the bill from being discussed. See Sharon Bernstein, *Public Broadcasting Braces for a Fight*, L.A. TIMES, Feb. 28, 1992, at F1 [hereinafter *Fight*].

¹⁰¹ *Senate Stalls*, *supra* note 100.

¹⁰² *Senate Stalls*, *supra* note 100 (Republican senators stated that they would not release the hold until public broadcasting officials responded to their concerns).

This view was expressed during the debates over the passage of the original Public Broadcasting Act of 1967. See *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 294 (D.C. Cir. 1975) ("[I]f . . . we have occasion to feel that there is slanting, a bias, or an injustice, we instantly and immediately can do something about it"; Congress "can make very uncomfortable, and give a very unhappy

alleged "liberal bias" the senators perceived as running rampant throughout Public Television.¹⁰³

Prior to the reauthorization hearings, conservative organizations like the Heritage Foundation and the Committee on Media Integrity had been part of a carefully administered assault on Public Television aimed at exposing "its left-wing propensities."¹⁰⁴ Awareness of the Republican hold on the reauthorization legislation came amid a flurry of activity against Public Television by these conservative organizations.¹⁰⁵ Apparently, Senate Republicans were influenced by the various reports and attacks issued by various conservative groups, as several of the Republican senators, including Dole, expressed a concern over what they perceived as a

experience to, the directors of [CPB]" and "can shut down some of their activities in the Appropriations Committee and in the appropriating process of Congress") (quoting remarks of Senator Norris Cotton) (citation omitted); *Id.* ("Ultimately Congress may show its disapproval of any activity of the Corporation through the appropriation process" and that through its "control over the 'purse strings,' Congress reserved for itself the oversight responsibility for the Corporation").

¹⁰³ See *Fight*, *supra* note 100 (reporting that a top Dole advisor stated that the senator was concerned that public broadcasting was too liberal and that Dole was supporting efforts to stall funding for that reason).

¹⁰⁴ See *Private or Dark*, *supra* note 96 (noting that since November, 1991 Public Television had come under a well-organized attack by conservative organizations who charged that public affairs programming on the system exhibited what they called a "liberal tilt"); see also *Offensive Against Critics*, *supra* note 99 (noting that David Horowitz, the leader of the Committee on Media Integrity, took credit for beginning the push against Public Television and was soon joined by Laurence Jarvik of the Heritage Foundation); Walter Goodman, *Documentaries That Lean Left*, N.Y. TIMES, May 6, 1991, at C13 [hereinafter *Lean Left*]; see also *Pull the Plug*, *supra* note 96 (discussing Horowitz and the Committee for Media Integrity); *Senate Stalls*, *supra* note 100 (noting that Horowitz had been actively lobbying Dole and other senators about what he perceived as a leftist bias in public affairs programming). Horowitz stated, "Conservatives and Republicans, who represent a majority of the electorate, feel very alienated from Public Television." Boss, *supra* note 4. Horowitz likened PBS to "a vanity press for the Democrats." Boss, *supra* note 4.

¹⁰⁵ See, e.g., *Senate Stalls*, *supra* note 100 (reporting Heritage Foundation's release of a report in January, 1991 calling for the abolition of government support for Public Television).

lack of balance in public broadcasting.¹⁰⁶ Eerily paralleling the actions of the Nixon administration of over twenty years before, a highly-placed GOP source said that Senate conservatives might try to keep a tighter rein on public broadcasting by changing the way it was funded from the multiyear system put into place in 1975, to a system that would be funded for only one year at a time.¹⁰⁷ If successful, the conservatives would trigger a return back to the uncertainty that marked Public Television's existence during the Nixon era.

Senate Democrats recognized the Republicans' actions less as a call for balanced programming than an attempt to force public broadcasting to toe the Republican administration line.¹⁰⁸ An additional impetus for the senators' attack on public broadcasting was their fear of what the medium would say about them. As one public broadcasting executive noted, "One element of this is that politicians themselves have discovered the power of television. If you want to control the way we understand the world, you'll want to circumscribe the ways we present it."¹⁰⁹

In February, 1992, Senator Dole refused a request from Senate Majority Leader George Mitchell asking that the authorization bill

¹⁰⁶ See, e.g., *Senate Stalls*, *supra* note 100. Horowitz later credited his claims that public broadcasting officials received excessive pay for getting the Senate's attention as much as the claim that public affairs programming was biased to the left. Sharon Bernstein, *CPB Funding Bill Faces Compromise*, L.A. TIMES, May 16, 1992, at F1 [hereinafter *Compromise*].

¹⁰⁷ *Senate Stalls*, *supra* note 100.

¹⁰⁸ See *Senate Stalls*, *supra* note 100; see also William J. Eaton & Sharon Bernstein, *GOP Senators Blast Public Broadcasting*, L.A. TIMES, Mar. 4, 1992, at A8 (noting that Democratic defenders of Public Television believed that "GOP ideologues" wanted to force a "right-wing agenda" onto the public airwaves). One commentator later noted that PBS' *Frontline* had done more than any other program to expose the wrongdoing that took place in the Reagan administration and that this was the real reason for the attack against Public Television. *Words in Defense*, *supra* note 96.

¹⁰⁹ Boss, *supra* note 4 (quoting John Schott, executive director of the Independent Television Service). Arthur Kropp, the president of People for the American Way, a group that supports freedom of expression, noted: "[I]mages are very powerful, particularly when public officials are scared to death about getting defeated." Boss, *supra* note 4.

be allowed to come to the floor for a vote.¹¹⁰ Mitchell then acted to force a vote to override Dole's refusal, which would lead to the bill being introduced on the Senate floor.¹¹¹ Senate Democrats managed to force the bill to the floor, but on March 4, 1992, faced with threats of the introduction of a flurry of amendments that would affect the bill, they pulled the bill from the Senate floor.¹¹²

Senator Dole continued his criticisms of Public Television for its liberal bias. The day before Senate Democrats pulled the bill from the floor, Dole posed the following question to the Senate: "[C]an anyone stand on this floor and claim that public broadcasting is not liberal?"¹¹³ He criticized PBS' choice of political commentators for the presidential elections stating, "[W]hen PBS announced its coverage of the 1992 presidential elections would be handled by Bill Moyers . . . and William Greider, two excellent journalists who also happen to be two excellent liberal Democrats, I knew the fix was in."¹¹⁴

By April, Dole and Senator Daniel Inouye, the chairman of the Senate Commerce subcommittee that oversees Public Television,

¹¹⁰ See *Fight*, *supra* note 100.

¹¹¹ *Fight*, *supra* note 100. The Senate voted 87-to-7 for cloture, a procedure that removed the hold on the bill. See *Public Television, Radio Funding*, L.A. TIMES, Mar. 30, 1992, at B4.

¹¹² See *Sidelined*, *supra* note 95 (noting that threatened amendments, including an effort to attach an unrelated anti-crime bill as an amendment, appeared to be so cumbersome that the bill's backers chose temporary retreat); see also *Compromise*, *supra* note 106.

Additional threatened amendments included one which would have required public disclosure of salaries paid to CPB executives and to some of the performers who appear on Public Television programs. *Sidelined*, *supra* note 95. In this regard, it seems as if Senate Republicans had studied at the knee of OTP chief Clay Whitehead who used similar tactics to undermine Public Television for the Nixon administration. See *supra* notes 81-82 and accompanying text (discussion of Whitehead's memorandum to H.R. Haldeman addressing salaries of newsmen Sander Vanocur and Robert MacNeil).

¹¹³ 138 Cong. Rec. S2645 (daily ed. Mar. 3, 1992); see also *Sidelined*, *supra* note 95.

¹¹⁴ 138 Cong. Rec. S2645 (daily ed. Mar. 3, 1992). Dole also stated that he had "never been more turned off, and more fed up with the increasing lack of balance, and the unrelenting liberal cheerleading I see and hear on the public airwaves." *Id.*; see also *Private or Dark*, *supra* note 96.

were reported to be meeting with each other to work out differences over the proposed legislation.¹¹⁵ According to a Democratic congressional aide, there was an "unwritten agreement" that the Republicans' concerns would be discussed and that the Senate would "go to the floor with amendments that address[ed those] concerns" when the Senate returned from Easter recess on April 27, 1992.¹¹⁶ Conservative groups continued to exert pressure by maintaining their assault against public broadcasting.¹¹⁷ By mid-May, Senate Democrats were reportedly close to accepting Republican amendments and compromise wording in the bill.¹¹⁸

After being held up by conservative senators for seven months, on June 3, 1992, the Senate rejected a Republican measure to freeze government financing of CPB and voted to approve the amended authorization bill.¹¹⁹ The approved legislation was then sent to a Senate-House conference committee to reconcile the differences with the bill that had been approved by the House in November, 1991.¹²⁰ On August 4, 1992, by a voice vote with no audible dissent, the House gave final congressional approval to the beleaguered reauthorization bill;¹²¹ President George Bush signed

¹¹⁵ See, e.g., Joyce Price, *Democrats Seek Deal on Public Broadcast Funds*, WASH. TIMES, Apr. 19, 1992, at A11.

¹¹⁶ *Id.*

¹¹⁷ One chief piece of evidence offered by the conservative groups as proof of the "liberal tilt" to PBS' programming was a study conducted by S. Robert Lichter of the Center for Media and Public Affairs, an organization financed by conservatives, that studied how the news media treat social and political issues. See *Private or Dark*, *supra* note 96. Lichter, claiming to have studied all of the prime-time public affairs documentaries aired on PBS for the 1987-88 television season, concluded that "[t]he ideas expressed were far more consonant with the beliefs and preferences of contemporary American liberals than those of conservatives." See *Private or Dark*, *supra* note 96.

¹¹⁸ *Compromise*, *supra* note 106.

¹¹⁹ See *Battle for Federal Money*, *supra* note 94. The Senate rejected the freeze proposal by a 75-to-22 vote, and approved the bill by a vote of 84-to-11. See *Votes in Congress*, N.Y. TIMES, June 7, 1992, at 41 (listing various congressional votes).

¹²⁰ See William J. Eaton, *Senate Approves \$1.1 Billion for Public Broadcasting*, L.A. TIMES, June 4, 1992, at A9.

¹²¹ See William J. Eaton, *Broadcast Bill Ok'd By House*, L.A. TIMES, Aug. 5, 1992, at F1.

the bill into law on August 27, 1992.¹²²

Although Public Television supporters in Congress succeeded in their attempts to continue funding the medium, the battle was hard-won. The passed legislation contained several amendments reflecting conservative concerns with the nature of programming on Public Television.¹²³ These amendments were intended to inhibit Public Television's airing of programs the conservatives did not like. Additionally, the reauthorization battle was so overtly political that it left many PBS executives dispirited and gloomy about the future of the medium.¹²⁴ Conservative opposition made the role of Public Television as an alternative to the commercial networks—and therefore, by nature, an adversary of those networks—a tenuous one.¹²⁵

The fact that debates over Public Television's content have often been coupled with arguments over whether the system should be federally funded raises the question of whether the First Amendment prevents Congress from dismantling Public Television on the basis of its discontent with the programs the system broadcasts. The following section examines the role that the First Amendment can play in protecting Public Television from negative congressional action based on the content of Public Television programming.

¹²² See *Bush Signs Bill Hiking Funding for Public TV*, L.A. TIMES, Aug. 27, 1992, at A22. The bill authorized \$310 million for public television for fiscal year 1994, \$375 million for fiscal year 1995 and \$425 million for fiscal year 1996. Public Telecommunications Act of 1992, Pub. L. 102-356, 106 Stat. 951 (Aug. 26, 1992).

¹²³ See, e.g., *supra* note 95 and accompanying text.

¹²⁴ See *Private or Dark*, *supra* note 96.

¹²⁵ See *Lean Left*, *supra* note 104 (noting that Public Television's "very existence is a rebuke to a profit-driven society").

III. THE FIRST AMENDMENT AS A PROTECTION FOR PUBLIC TELEVISION

The First Amendment recognizes, wisely, we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.¹²⁶

I intend to see . . . every possible safeguard written into the legislation necessary to assure complete freedom from any Federal Government interference over programming.¹²⁷

How can the Federal Government provide a source of funds to pay part of the cost of educational broadcasting and not control the final product?¹²⁸

The federal government has the power to control that which it subsidizes and experience shows that when the federal government has that power, that power is eventually exercised.¹²⁹

In this section, this Article argues that the history and purpose of the First Amendment, and the jurisprudence that sustains that history and purpose, prevent Congress from discontinuing funding Public Television on the basis of its programming content. After a brief examination of the First Amendment's history, this Article

¹²⁶ *City of Houston v. Hill*, 482 U.S. 451, 472 (1987) (holding that municipal ordinance making it unlawful to interrupt police officer in performance of his duties was unconstitutionally overbroad under First Amendment).

¹²⁷ *Accuracy in Media, Inc. v. FCC*, 521 F.2d at 293 n.19 (quoting remarks of Sen. Pastore during Senate hearings on legislation that would eventually become Public Broadcasting Act of 1967).

¹²⁸ H. REP. NO. 572, *reprinted in* 1967 U.S.C.C.A.N. 1805 (statement from the Report of the House Committee on Interstate and Foreign Commerce).

¹²⁹ Statement of Senator Strom Thurmond, *quoted in* EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* 627 (1992).

examines the nature of its applicability to the broadcasting medium, and to public broadcasting in particular. This Article then raises and answers the question of whether a decision on the part of Congress to stop funding public broadcasting, based on its dissatisfaction with the content of Public Television programming, could be attacked and invalidated on First Amendment grounds.¹³⁰ This question is especially pertinent in light of the battle-ridden history of Public Television funding, and the widespread belief in Public Television circles that what happened in 1991-92 could, and will, happen again.¹³¹

Although jurists and commentators have disagreed on the extent to which the First Amendment should protect speech,¹³² most

¹³⁰ Although others have focused on the role of the First Amendment with regard to the actions of the CPB and PBS, *see, e.g., Freeing Public Broadcasting*, *supra* note 80, this section focuses on congressional action, because the actions of Congress can definitively be viewed as encompassed by the First Amendment, and some question still exists as to whether CPB and PBS are state actors. *See Network Project v. Corporation for Pub. Broadcasting*, 4 Media L. Rep. (BNA) 2399 (D. D.C. 1979) (appellants alleged that CPB had censored and controlled content of Public Television in contravention of the First Amendment; court rejected appellants' claim finding that there was no state action in public broadcasting structure and First Amendment was therefore inapplicable). *But see Freeing Public Broadcasting*, *supra* note 80, at 724-27 (analysis leading to conclusion that CPB and PBS are state actors).

¹³¹ *See Offensive Against Critics*, *supra* note 99 (quoting PBS President Bruce Christensen: "The inoculation for the disease has to come well before the infection.").

¹³² As Paul Stephan points out, "One would err to speak of [F]irst [A]mendment doctrine as if a well-defined consensus existed about the principles underlying [F]irst [A]mendment analysis." Paul B. Stephan, III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 207 (1982) (noting that neither Supreme Court nor scholars have developed comprehensive theory of what guarantee means and how it should be applied). Justice Hugo Black, for example, believed that the First Amendment guaranteed an absolute right. *See, e.g., Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting) (stating that First Amendment's command to "make no law" literally means "no law," "without any 'ifs,' 'buts,' or 'whereases'"). This absolutist position was also taken by First Amendment theorists Alexander Meiklejohn and Thomas I. Emerson. *See Alexander Meiklejohn, The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961); THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 17 (1970) (Emerson uses term "full protection" rather than absolute

would agree that the purpose of the Amendment is to place a check on the power of the government to control speech that it does not

protection; “[f]reedom of expression can flourish . . . only if expression receives full protection under the First Amendment. This is to say that expression must be protected against governmental curtailment at all points . . .”).

Such an absolutist position, however, has never been accepted by the Supreme Court, and has been rejected by other jurists and First Amendment theorists. *See, e.g.,* *Elrod v. Burns*, 427 U.S. 347, 360 (1976) (plurality opinion, Brennan, J.) (“[T]he prohibition on encroachment of First Amendment protections is not an absolute.”); *Branzburg v. Hayes*, 408 U.S. 665, 746 (1972) (Stewart, J., dissenting) (calling absolutism “simplistic and stultifying”); *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting) (“The freedom to speak is not absolute . . .”); MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* § 2.01 (1984 & Supp. 1992) (“Absolutism simply will not wash [N]o one can responsibly hold the position that the First Amendment is an absolute in the sense that it literally protects all speech,” citing punishments for perjury and fraudulent statements, and antitrust laws as examples of restraints on the freedom to speak).

Justice Felix Frankfurter, one of the most vehement opponents of the absolutist position stated that the “literalness” of an absolutist position “treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future.” *Dennis v. United States*, 341 U.S. 494, 521 (1951) (Frankfurter, J., concurring).

Two facts with regard to the absolutist view of the First Amendment should be noted. First, even those jurists who rejected the absolutist position at times flirted with the notion of the First Amendment as an absolute. *See* NIMMER, *supra*, at § 2.01 n.5 (noting that Justice Douglas later “moved very close” to Black’s absolutist position; Justice Stewart occasionally considered absolutist position); *see also* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 109 (1980) (noting that Justices Black and Douglas claimed they were absolutists “though Black more insistently than Douglas”). Second, as Melville Nimmer noted: “[T]he absolutists when pushed are not all that absolute.” NIMMER, *supra*, at § 2.01 n.6 (noting that Black, Meiklejohn, and Emerson all had limits to their concepts of the amendment as an absolute mandate); *see also* ELY, *supra*, at 109 (noting that validity of absolutist approach must be faced head-on and it must be recognized that “one simply cannot be granted a constitutional right to stand on the steps of an inadequately guarded jail and urge a mob to lynch the prisoner within”).

like.¹³³ The views on how and to what extent to do this, however, vary widely.¹³⁴

A. *The First Amendment: A Historical Perspective*

First Amendment theorist Melville Nimmer noted that “[i]n the beginning” all that existed were the words of the First Amendment and very little else.¹³⁵ The drafters of the First Amendment left no record of the intent behind the First Amendment.¹³⁶ The congressional debate on the First Amendment merely assumed the importance of the freedom of speech without making any attempt to expound on just why such a freedom is important.¹³⁷

Commentators have been forced to guess at just what the framers of the First Amendment had in mind when they chose the language embodied therein. Leonard Levy asserts that the framers intended that the language be read expansively: “The First Amendment injunction, that there shall be no law abridging the freedom of speech, was boldly stated if narrowly understood. The bold statement, not the narrow understanding, was written into the fundamental law *What they said is far more important than what they meant.*”¹³⁸ Therefore, any meaning given to the words

¹³³ See, e.g., *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Recognizing the occasional tyrannies of governing majorities, [the Framers] amended the Constitution so that free speech . . . should be guaranteed.”).

In pertinent part, the First Amendment states: “Congress shall make no law . . . abridging the freedom of speech” U.S. CONST. amend. I.

¹³⁴ See *supra* note 132 and accompanying text; see also M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 164 (1989) (noting lack of agreement about what First Amendment is supposed to do).

¹³⁵ See NIMMER, *supra* note 132, at § 1.01.

¹³⁶ See NIMMER, *supra* note 132, at § 1.01.

¹³⁷ See NIMMER, *supra* note 132, at § 1.01.

¹³⁸ See DANIEL L. FELDMAN, *THE LOGIC OF AMERICAN GOVERNMENT: APPLYING THE CONSTITUTION TO THE CONTEMPORARY WORLD* 183-84 (1990) (quoting LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 348-49 (1985)) (emphasis added).

The ratifiers of the Amendment also engaged in very little debate regarding

of the First Amendment has come through the gloss placed by the judiciary during the last half century on *what the framers said* in the First Amendment.¹³⁹

Although judicial interpretation has not led to the application of the First Amendment as an absolute mandate,¹⁴⁰ precedent does support the view that the First Amendment exists to protect the "free trade in ideas" in American society;¹⁴¹ to ensure that this trade is—in Justice William Brennan's now classic phrasing—"uninhibited, robust, and wide-open";¹⁴² and to prevent the government from censoring ideas which it finds objectionable.¹⁴³ As Owen Fiss notes, the purpose of the First Amendment is "to protect the ability of people, as a collectivity, to decide their own fate."¹⁴⁴

the value of the freedoms meant to be protected by the First Amendment. *Id.* Additionally, there is no remaining record of such debates. *Id.* In this regard, John Hart Ely states: "[T]he only reliable evidence of what 'the ratifiers' thought they were ratifying is the language of the provision they approved." ELY, *supra* note 132, at 17.

¹³⁹ See NIMMER, *supra* note 132, at § 1.01; see also FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT xv (1976) ("[P]rior-restraint, freedom-of-the-press protections we live under are much more the product of Holmes, Brandeis and Black than of Jefferson [or] Madison.").

¹⁴⁰ See *supra* note 132 and accompanying text.

¹⁴¹ The notion of "free trade in ideas" comes from Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁴² *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁴³ See *supra* note 133 and accompanying text; see also Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 785 (1987) (stating that rule against content regulation has favored position in First Amendment jurisprudence based on hope that such a rule will produce broadest possible debate).

¹⁴⁴ Fiss, *supra* note 143, at 786; see also *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."). This concept of the First Amendment is also promoted by Meiklejohn. See generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); see also FELDMAN, *supra* note 138, at 218 (noting that Meiklejohn believed that First Amendment's free speech provisions should be understood in the context of American democracy as a whole). This notion of the First Amendment finds its roots in the views of James Madison, who stated, "A popular government without popular information

On this basis, the First Amendment is perhaps the one widely embraced limitation placed on governmental actions.¹⁴⁵ Yet this warm reception of the First Amendment is based on the principle of "freedom of speech" in the abstract.¹⁴⁶ As Melville Nimmer wisely points out, "support for the right of any particular speaker to exercise his right of free speech may drop away quickly among those to whom the message conveyed is abhorrent."¹⁴⁷ It is at such a time that "all manner of rationalization as to why this particular speech should not be permitted" will be heard.¹⁴⁸

Courts have faced the unenviable task of trying to navigate a course that effectively interprets the First Amendment's command and applies it to a constantly changing society. This task has necessarily entailed the "fashion[ing of] a jurisprudence that permits society to 'abridge' speech to the degree necessary to advance other compelling interests."¹⁴⁹

or the means of acquiring it is but a prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives." KELLNER, *supra* note 38, at vii (quoting James Madison). Justice Brandeis eloquently articulated this basis of support for the First Amendment in his concurring decision in *Whitney v. California*:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that . . . the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principal of American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

¹⁴⁵ See FISS, *supra* note 143, at 782-83 (noting "peculiar status" of free speech in nation's constitutional scheme); see also NIMMER, *supra* note 132, at § 1.01 (noting that principle of freedom of speech "always has been and still is warmly accepted by all strata of American society, and through virtually the entire political spectrum").

¹⁴⁶ See NIMMER, *supra* note 132, at §1.01.

¹⁴⁷ See NIMMER, *supra* note 132, at §1.01. For example, expression that falls within the confines of "fighting words," defamatory remarks, and obscenity has been subject to lesser protection under the First Amendment than other forms of expression. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 994 (12th ed. 1991).

¹⁴⁸ NIMMER, *supra* note 132, at §1.01.

¹⁴⁹ GINSBURG ET AL., *supra* note 60, at 309.

Thus, the exigencies of the times have dictated the extent to which, and the way in which, First Amendment ideals have been applied. One example of how the application of the First Amendment differs depending on the context in which it is applied is the manner in which the Amendment has been applied to the broadcasting medium.¹⁵⁰

B. Applying the First Amendment to Broadcasting

1. Broadcasting, Generally

Broadcasting traditionally has received more limited First Amendment protection than other media.¹⁵¹ As Ithiel de Sola

¹⁵⁰ On this point, see ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 3-4 (1983):

The mystery is how the clear intent of the Constitution, so well and strictly enforced in the domain of print, has been so neglected in the electronic revolution. The answer lies partly in changes in the prevailing concerns and historical circumstances from the time of the founding fathers to the world of today; but it lies at least as much in the failure of Congress and the courts to understand the character of the new technologies. Judges and legislators have tried to fit technological innovations under conventional legal concepts.

See also *id.* at 6-7:

The electronic transformation of the media occurs not in a vacuum but in a specific historical and legal context . . . [T]he law has rested on a perception of technology that is sometimes accurate, often inaccurate, and which changes slowly as technology changes fast. Each new advance in the technology of communications disturbs a status quo.

¹⁵¹ Compare, for example, the differing treatments of the press and the broadcast media in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In *Tornillo*, the Court struck down a Florida statute that required newspapers to provide free reply space for political candidates who had been criticized in the newspapers. 418 U.S. 241. Yet five years earlier, in *Red Lion*, the Court upheld a similar requirement for broadcasters. 395 U.S. 367 (upholding as constitutional FCC's fairness doctrine which imposed affirmative duties of devoting a significant amount of time to coverage of "controversial issues of public importance" in a balanced manner and affording a reasonable opportunity overall for presentation of significant contrasting or opposing viewpoints). Although, in the words of one commentator, the complaints in the *Tornillo* and *Red Lion* cases

Pool once noted, "The principles of . . . the First Amendment have been applied to broadcasting in only atrophied form."¹⁵² This principle of different treatment was established by the U.S. Supreme Court early in the evolution of the broadcasting industry.¹⁵³ The Court accounted for the distinction in treatment by reasoning that the unique characteristics of broadcasting, particularly the limited availability of space on the broadcast spectrum,¹⁵⁴ made governmental regulation of the medium a necessary encroachment on the First Amendment's guarantee of free speech.¹⁵⁵ Later decisions have followed this rationale to support the imposition of limitations and conditions on broadcasting.

In *Red Lion Broadcasting v. Federal Communications Commission* ("FCC"),¹⁵⁶ the Court affirmed the principle that broadcasting was "a medium affected by a First Amendment interest," yet still reached the conclusion that "differences in the characteristics of new media justify differences in the First

were "almost mirror images of each other," the *Tornillo* Court never discussed or even cited to the earlier *Red Lion* opinion. FRIENDLY, *supra* note 139, at 193. Friendly notes that what these two seemingly contradictory decisions suggest, and "what the Supreme Court assumes," is that newspapers and other printed media are fully entitled to First Amendment protections, while the broadcast media are not. FRIENDLY, *supra* note 139, at 197.

¹⁵² POOL, *supra* note 150, at 2.

¹⁵³ See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

¹⁵⁴ The critical characteristic differentiating the broadcast media from other mediums is the limited number of frequencies over which broadcast signals may travel. This physical limitation is known as "spectrum scarcity." See Benjamin Marcus, Note, *FCC v. League of Women Voters: Conditions on Federal Funding That Inhibit Speech and Subject Matter Restrictions on Speech*, 71 CORNELL L. REV. 453, 457 (1986); L. Allyn Dixon, Jr., Note, *Broadcasters' First Amendment Rights: A New Approach?*, 39 VAND. L. REV. 323, 326 (1986); see also POOL, *supra* note 150, at 113-16 (1983). Pool believed that spectrum was actually "an abundant source, but a squandered and misused one." See also POOL, *supra* note 150, at 151.

¹⁵⁵ *National Broadcasting Co.*, 319 U.S. at 226. The *National Broadcasting* Court also recognized that the "public interest, convenience, or necessity" standard implemented in granting broadcast licenses did not abridge or deny free speech. *Id.* at 226-27; see FRIENDLY, *supra* note 139, at 195 (noting that focal point of difference between *Tornillo* and *Red Lion* cases is scarcity argument).

¹⁵⁶ 395 U.S. 367 (1969).

Amendment standards applied to them.”¹⁵⁷ The Court also recognized that although there were two sets of First Amendment rights involved, those of the viewer and listener and those of the broadcaster, it was the right of “the people as a whole . . . to have the medium function consistently with the ends and purposes of the First Amendment” that was most important.¹⁵⁸

In *Red Lion*, the Court was called upon to determine the constitutionality of the FCC’s fairness doctrine.¹⁵⁹ The fairness doctrine had become a part of statutory law after evolving over years of broadcast regulation.¹⁶⁰ The fairness doctrine imposed

¹⁵⁷ *Id.* at 386. The Court stated, “Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.” *Id.* at 388. The impact of the *Red Lion* Court’s pronouncements make it a landmark case in the history of broadcasting law. See FRIENDLY, *supra* note 139, at xiv. For a comprehensive tracing of the effect of *Red Lion*, see generally FRIENDLY, *supra* note 139.

¹⁵⁸ *Red Lion*, 395 U.S. at 390. The Court stated: “It is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount.” *Id.*

¹⁵⁹ In *United States v. Radio Television News Directors Association* (“RTNDA”), a case consolidated with *Red Lion*, the Court was also asked to review the FCC’s promulgation of the personal attack and political editorializing regulations which were put in place by the FCC after the *Red Lion* litigation had begun. *Id.* at 371. Briefly, the personal attack regulations provided for licensee notification, within a reasonable time, of a person or group whose “honesty, character, integrity or like personal qualities” were attacked during the presentation of views on a controversial issue of public importance. *Id.* at 373. The licensee was also required to offer the attacked group or individual a reasonable opportunity to respond over the licensee’s facilities. *Id.* at 374. The regulation did not apply to “bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event.” *Id.* The political editorializing regulation provided that after endorsing or opposing a legally qualified candidate in an editorial, a licensee had to transmit to either the other qualified candidate or the candidate opposed in the editorial notification of the date and time of the editorial, a script or tape of the editorial, and an offer of a reasonable opportunity for the candidate or a spokesman for the candidate to respond over the licensee’s facilities within 24 hours after the editorial. *Id.* at 374-75.

¹⁶⁰ See Dixon, *supra* note 154, at 326. The fairness doctrine was first articulated in *In re Editorializing By Broadcast Licensees*, 13 F.C.C. 1246, 1257-58 (1949). It was later codified into law by the 1959 amendments to the Communications Act. 47 U.S.C. § 315(a). See HENRY GELLER, THE FAIRNESS

two affirmative duties on broadcasters. The first, known as the "Part One requirement," compelled broadcast licensees to devote a "reasonable amount" of their programming to controversial issues of public importance; the second part required that when such issues are aired, contrasting viewpoints must be presented in order to provide a reasonable opportunity for the discussion of conflicting views on issues relevant to the public.¹⁶¹ It is the latter requirement that is more often thought of when the "fairness doctrine" is discussed.¹⁶²

Those who opposed the doctrine argued that it had a chilling effect on the decisions made by broadcast programmers.¹⁶³ A broadcaster who wished to avoid later controversy and the need to justify a broadcast's "fairness" would be inhibited from airing especially strong presentations.¹⁶⁴ A broadcaster with minimal

DOCTRINE IN BROADCASTING: PROBLEMS AND SUGGESTED COURSES OF ACTION 2 (1973). For a history of the fairness doctrine, see FRIENDLY, *supra* note 139, at 12-31. In 1987, the FCC concluded that continued enforcement of the fairness doctrine was contrary to the First Amendment. GINSBURG ET AL., *supra* note 60, at 324; MARVIN R. BENSMAN, BROADCAST/CABLE REGULATION 99 (1990). The doctrine was declared to have a chilling effect on the First Amendment rights of broadcasters. See GUNTHER, *supra* note 147, at 1352 n.2.

¹⁶¹ See RICHARD E. LABUNSKI, THE FIRST AMENDMENT UNDER SIEGE: THE POLITICS OF BROADCAST REGULATION 15 (1981); see also FRIENDLY, *supra* note 139, at 13; GELLER, *supra* note 160, at v, 2.

In the words of the *Red Lion* Court, under the doctrine a broadcaster was required to "give adequate coverage to public issues" and coverage had to be "fair in that it accurately reflects the opposing views." *Red Lion*, 395 U.S. at 377. As articulated in later opinions, the doctrine applied whenever a broadcaster presented one side "of a controversial issue of public importance." *In re Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 299 (1973).

¹⁶² LABUNSKI, *supra* note 161, at 15-16, 17; GELLER, *supra* note 160, at 2 n.† (calling second requirement "essence of the fairness doctrine"). For a further discussion of the fairness doctrine, see R. TERRY ELLMORE, BROADCASTING LAW AND REGULATION 207-17 (1982).

¹⁶³ See GELLER, *supra* note 160, at 5. Geller quotes newsman Walter Cronkite with regard to the impact of fairness complaints: "It is only natural that station management should become timid, and newsmen should sidestep controversial subjects rather than face the annoyance of such harassment." See GELLER, *supra* note 160, at 5 n.*.

¹⁶⁴ See GELLER, *supra* note 160, at 4. This argument was presented by the broadcaster in *Red Lion*. Roger Robb, who argued the case for the broadcaster

resources could be forced to either cut down on or completely avoid airing controversial programming because any resulting fairness conflict could drain limited financial resources.¹⁶⁵ Many broadcasters argued that, in essence, the fairness doctrine inevitably made a government agency akin to a "super editor" with the power to inhibit the sort of vigorous debate that the First Amendment intended to promote.¹⁶⁶

The FCC's position on the matter is easily stated: a responsible broadcaster could present truly controversial programming without fear of reprisal by the government, and have wide discretion to present whatever programming he deemed to be controversial in a vigorous manner with no need for balance in any specific program.¹⁶⁷ Additionally, a broadcaster who acted in good faith would neither be fined nor endanger his license; he would simply be required to present additional speech to rectify the imbalance in programming.¹⁶⁸ Therefore, the fairness doctrine was not antithetical to the goals of the First Amendment, but rather promoted and furthered those goals.¹⁶⁹

The *Red Lion* Court found the FCC's reasoning more persuasive than the argument that the doctrine had a chilling effect on

cautioned that if the Court gave approval to the doctrine, the broadcaster would "in the future . . . tread more cautiously." See FRIENDLY, *supra* note 139, at 62 (quoting Robb's oral argument). The end result of this, argued Robb, would amount to censorship "nonetheless virulent for being self-imposed." FRIENDLY, *supra* note 139, at 62.

¹⁶⁵ See GELLER, *supra* note 160, at 4-5. The petitioner in *Red Lion* made this argument as well, stating that it was a station of modest circumstances and for a small station in a competitive market "any donation of free time . . . is not a trivial concern, and might very well drive the station out of existence." See FRIENDLY, *supra* note 139, at 62 (quoting *Red Lion* attorney Roger Robb) (omission in original). Robb noted that the threat of a fine could have "a chilling and deterrent effect upon . . . Red Lion's First Amendment right." *Id.* (omission in original).

¹⁶⁶ GELLER, *supra* note 160, at 4.

¹⁶⁷ See GELLER, *supra* note 160, at 5.

¹⁶⁸ GELLER, *supra* note 160, at 5.

¹⁶⁹ See GELLER, *supra* note 160, at 5 (stating FCC's position that doctrine never prevents any speech, but only adds more voices or views to the robust debate).

broadcasters' speech.¹⁷⁰ In a unanimous opinion authored by Justice Byron White,¹⁷¹ the Court held that the specific application of the fairness doctrine in *Red Lion* and the promulgation of the regulations in *Radio Television News Directors Association* were valid and constitutional.¹⁷² The Court, echoing the arguments in favor of the fairness doctrine, stated that the doctrine and the regulations "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment."¹⁷³

In making its pronouncement, the Court supported a First Amendment standard for broadcasting that was different from that applied to other media. This standard, although not specifically articulated,¹⁷⁴ clearly offered broadcasters a lesser degree of protection than that offered newspapers in the *Tornillo* decision.¹⁷⁵ According to the Court, this lesser standard of First Amendment protection was justified by the limited nature of the broadcasting resource.¹⁷⁶

First noting that broadcasting was "clearly a medium affected by a First Amendment interest,"¹⁷⁷ the opinion went on to state that "differences in the characteristics of new media justify

¹⁷⁰ The Court noted that it would certainly be "a serious matter" if the FCC requirements induced self-censorship on the part of licensees and had the effect of making their coverage of controversial public issues "ineffective," yet dismissed these results as only a speculative possibility. *Red Lion v. FCC*, 395 U.S. 367, 393 (1969).

¹⁷¹ The opinion in *Red Lion* was unanimous by a 7-0 vote due to Justice Abe Fortas's departure from the Court and to Justice William O. Douglas's absence during the oral argument of the case. One commentator noted that Douglas, a strong opponent of the fairness doctrine on First Amendment grounds, "never quite [forgave] himself" for missing *Red Lion*. See FRIENDLY, *supra* note 139, at 138.

¹⁷² *Red Lion*, 395 U.S. at 375.

¹⁷³ *Id.*

¹⁷⁴ One group of commentators notes that the Court's different standard of First Amendment protection for broadcasting is not clearly stated. See GINSBURG ET AL., *supra* note 60, at 350.

¹⁷⁵ See *supra* note 151 and accompanying text; see also GINSBURG ET AL., *supra* note 60, at 350.

¹⁷⁶ See *infra* notes 177-180 and accompanying text.

¹⁷⁷ *Red Lion*, 395 U.S. at 386.

differences in the First Amendment standards applied to them.”¹⁷⁸ Justice White wrote: “[T]he First Amendment confers . . . no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.”¹⁷⁹ He continued, “There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.”¹⁸⁰ In perhaps the most startling statement in the opinion with regard to the First Amendment protections offered broadcasters, Justice White stated:

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 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 abridgement of freedom of speech and freedom of the press.¹⁸¹

Therefore, based on the assertion that the scarcity of the broadcast spectrum made the broadcast medium fundamentally different from other media, the U.S. Supreme Court upheld restrictions on broadcasters that would be impermissible if imposed on those who sought to communicate either through the print medium or through the simple spoken word not broadcast on the air.¹⁸² Whereas in the 1950s “the fairness doctrine” was a little-thought-of FCC guideline that could be dismissed as mere “lawyer’s language,”¹⁸³ the *Red Lion* case brought the doctrine to the forefront of the communications industry and allowed the Supreme Court to cement the less-protected nature of the broadcast medium. As one commentator notes, *Red Lion* became “a code word for government interference with freedom of the press.”¹⁸⁴

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 391.

¹⁸⁰ *Id.* at 392.

¹⁸¹ *Id.* at 394.

¹⁸² See GUNTHER, *supra* note 147, at 1500.

¹⁸³ FRIENDLY, *supra* note 139, at 13.

¹⁸⁴ FRIENDLY, *supra* note 139, at 5.

Five years later, in *CBS, Inc. v. Democratic National Committee* (“DNC”),¹⁸⁵ the curtailed First Amendment protection afforded the broadcasting medium was reiterated. Again, the limited nature of the medium’s protection was based on the scarcity of the broadcasting resource, and therefore, found its support in *Red Lion* as precedent. Although the Supreme Court’s decision in *DNC* began and ended with *Red Lion*,¹⁸⁶ as one commentator noted, the Court’s decision in *Red Lion* was as distinct from its decision in *DNC* as two cases involving the fairness doctrine could be.¹⁸⁷ Where *Red Lion* dealt with one individual’s right to airtime to answer a personal attack against him and with the right of a station to deny the federal government’s order to grant the individual the time to respond, *DNC* concerned an entire organization’s right of access to the airwaves and the right of a broadcaster to reject the purchase of time for such an organization.¹⁸⁸

The issue presented in *DNC* was “whether a broadcast

¹⁸⁵ 412 U.S. 94 (1973). As in *Red Lion*, two cases were consolidated under one heading in *Columbia Broadcast System* (“CBS”) v. *Democratic National Committee*. In one instance, the Business Executives’ Move for Peace (“BEM”), an anti-Vietnam War group brought suit against a single station for its refusal to air the group’s messages against the war. *Id.* at 98; see FRIENDLY, *supra* note 139, at 121-22. In the other case, brought by the Democratic National Committee (“DNC”) against the entire broadcasting industry, the committee protested the industry’s refusal to allow it either free airtime or purchased airtime to counter President Richard Nixon’s effective use of the broadcast media to further his and the Republican Party’s agenda. See *DNC*, 412 U.S. at 127 n.21.

Depending on the nature of their involvement, those who played a part in the case refer to it by different names. The *Washington Post-Newsweek* stations and the Business Executives’ Move for Peace call it *BEM*; the Democrats and the lawyers who argued the case for the Democratic National Committee refer to the case as *DNC*; the CBS lawyers remember the case as *CBS*. FRIENDLY, *supra* note 139, at 134 n.1. Because the Supreme Court joined the cases under the Democratic National Committee’s name, the case shall be referred to in this Article as *DNC*.

¹⁸⁶ See FRIENDLY, *supra* note 139, at 135 (noting that opinion quoted *Red Lion* in first paragraph and referred to *Red Lion* in last paragraph). Additionally, notes Friendly, in between these opening and closing mentions there were 38 other mentions of *Red Lion*. FRIENDLY, *supra* note 139, at 135.

¹⁸⁷ FRIENDLY, *supra* note 139, at 135.

¹⁸⁸ FRIENDLY, *supra* note 139, at 135.

licensee's general policy of not selling advertising time to individuals or groups wishing to speak out on issues they consider important" violated the First Amendment.¹⁸⁹ Writing for the Court of Appeals for the D.C. Circuit, Judge Skelly Wright had reversed a prior FCC decision, stating that "a flat ban on paid public issue announcements is in violation of the First Amendment" and holding that an arbitrary ban on the sale of time for discussion of public issues offended First Amendment principles.¹⁹⁰ Amid a flurry of opinions, the U.S. Supreme Court reversed the lower court's decision with the Court's majority position on most issues stated by Chief Justice Warren Burger.¹⁹¹

Burger wrote an opinion that served as a "mixed blessing to the broadcaster" because it not only recognized that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations,"¹⁹² it also, in effect, repositioned the much-disparaged fairness doctrine as a protector of the broadcast industry, rather than as a threat to the industry's freedom.¹⁹³ Burger's opinion "used the [f]airness [d]octrine as a shield to protect radio and television from access by political advertisers" and "as a sword to prevent broadcasters from engaging in one-sided presentations on public issues."¹⁹⁴

The chief justice noted that the FCC had made admirable attempts to stay out of the editorial process and that a constitutional right of access would inevitably lead the FCC to review the

¹⁸⁹ *DNC*, 412 U.S. at 97. The Court was also asked to consider whether such action violated the Federal Communications Act of 1934. *Id.*

¹⁹⁰ *BEM v. FCC*; *DNC v. Federal Communications Commission*, 450 F.2d 642, 646 (D.C. Cir. 1971), *quoted in* *CBS v. DNC*, 412 U.S. 94 (1973); *see also* *FRIENDLY*, *supra* note 139, at 134.

¹⁹¹ The Court's reversal of the lower court's decision raised so many questions that it required five different opinions—four of them simply to explain the reasoning of the main opinion. *FRIENDLY*, *supra* note 139, at 135 (in addition to the opinion penned by Burger, Justices Douglas, Stewart, White and Blackmun wrote concurrences and Justice Brennan wrote a dissenting opinion).

¹⁹² *DNC*, 412 U.S. at 110.

¹⁹³ *See* *FRIENDLY*, *supra* note 139, at 137 (noting that CBS's president relied on fairness doctrine in arguing against BEM's right to access, yet would later attack doctrine as unconstitutional).

¹⁹⁴ *FRIENDLY*, *supra* note 139, at 141.

day-to-day editorial decisions made by broadcasters.¹⁹⁵ Instead of this undesirable result, Burger stated, it should be up to the broadcaster to use his "significant journalistic discretion in deciding how to best fulfill the [f]airness [d]octrine obligations."¹⁹⁶ In other words, the fairness doctrine did not grant across-the-board access, but instead placed the principal responsibility on broadcasters to ensure fair coverage.¹⁹⁷ The Burger opinion appeared to reject First Amendment-based arguments in favor of the fairness doctrine. In fact, some commentators have questioned whether the Burger opinion ever truly reached the constitutional question presented.¹⁹⁸

Although the stance on the constitutional issue is murky with regard to exactly how much support the Court intended to offer broadcasters, what is clear is that Burger based his opinion on the status of broadcasting as different from other media. At the beginning of his opinion, Burger noted—citing *Red Lion*—that because "the broadcast media pose unique and special problems not present in the traditional free speech case," the Court was required to "afford great weight to the decisions of Congress and the experience of the [FCC]" in evaluating the First Amendment claim presented in the case.¹⁹⁹ Later in his opinion, he discussed the inherent differences between privately owned newspapers and publicly regulated broadcast stations: "A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.'"²⁰⁰

Justice Douglas, in his concurring opinion, articulated a far

¹⁹⁵ *DNC*, 412 U.S. at 127 ("Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.").

¹⁹⁶ *Id.* at 111.

¹⁹⁷ See *THE MEDIA AND THE LAW* 32 (Howard Simons & Joseph A. Califano, Jr. eds., 1976).

¹⁹⁸ See, e.g., GINSBURG ET AL., *supra* note 60, at 342 (asking whether there is any majority holding on constitutional issue and noting Justice Brennan's suggestion that there was no majority holding on constitutional issue).

¹⁹⁹ *DNC*, 412 U.S. at 102.

²⁰⁰ *Id.* at 117-18.

clearer and firmer constitutional position in favor of broadcasting. Although in agreement on the Court's decision to reverse the lower court, Douglas denounced Burger's contention that newspapers enjoyed protections not available to the electronic media and concluded that "TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines."²⁰¹ He then went even further and offered an attack on the fairness doctrine stating, "The [f]airness [d]octrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends."²⁰²

The *DNC* opinion is confusing because with all of its differing conclusions, it is difficult to tell exactly what sort of First Amendment protections the Court is offering broadcasters. What one does take away from the Court's opinion is that broadcasting, due to the scarce nature of the broadcast spectrum, is subject to a different level of constitutional scrutiny than other forms of media.²⁰³ This different level of scrutiny left the door open for the Court to revert to the First Amendment analysis of *Red Lion*.²⁰⁴

²⁰¹ *Id.* at 148; see also FRIENDLY, *supra* note 139, at 138.

²⁰² *DNC*, 412 U.S. at 154.

²⁰³ Professor Tribe notes that *DNC* remained "firmly in the *Red Lion* tradition" through its refusal to consider that scarce channels could be allocated in the same manner as newspapers as opposed to a manner incorporating government involvement and broadcaster autonomy. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-25 (2d ed. 1988) (footnote omitted).

²⁰⁴ In fact, this is arguably what the Court did in its 1981 decision, *CBS, Inc. v. FCC*, 453 U.S. 367 (1981). In *CBS*, the Court faced the issue of whether broadcasters could be required to grant access to third parties, an issue strikingly similar to the issue explored eight years earlier in *DNC*. Yet, in allowing a right of access in *CBS*, the Court distinguished the *DNC* decision by stating that it was not approving "a general right of access to the media" but was instead supporting "a limited right to 'reasonable' access that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced." *Id.* at 396 (*CBS* dealt with the legitimacy of § 312(a)(7) of the Communications Act of 1934, which allowed the FCC to revoke any station license for the "willful or repeated failure to allow reasonable access" to legally qualified candidates on behalf of their candidacies for elective office). By upholding the statute in question in *CBS* and disagreeing with the petitioners' argument that the statute violated the First

The Court's standard of First Amendment protection for broadcasting is not explicitly set forth in any of its fairness doctrine decisions. Yet, although the Court's messages in *Red Lion*, *DNC*, and *CBS* appear to be mixed, one thing is clear: the U.S. Supreme Court supported a different application of the First Amendment to the broadcast medium than to other media, and this difference stemmed from the nature of the broadcast medium as a scarce resource which was not available to all. Due to the limited nature of the broadcast resource, the award of a license by the FCC was seen as the granting of a public trust, thereby making the broadcaster a public trustee; this role as a public trustee necessitated that the government regulate the broadcasting industry in some manner.²⁰⁵

This view of broadcasting leads to the question of whether public broadcasting should be treated any differently than other forms of broadcasting in light of its even more evident role as "a public trust." In 1984, the Supreme Court explored this issue.

2. Public Broadcasting

In *FCC v. League of Women Voters*,²⁰⁶ the Supreme Court addressed the constitutionality of section 399 of the Public Broadcasting Act.²⁰⁷ This section restricted the ability of noncommercial broadcasting stations which received grants from the CPB

Amendment rights of broadcasters by "unduly circumscribing their editorial discretion," *Id.* at 394, the Court again sanctioned government interference with broadcasting based on the scarcity of broadcast resources. The Court relied on *Red Lion*, stating that the broadcasters' rights under the First Amendment were not violated because "[i]t is the right of the viewers and listeners, not the right of the broadcaster, which is paramount." *Id.* at 395, quoting, 395 U.S. at 390. Interestingly, after stating in *DNC* that *Red Lion* did not confer a First Amendment right of access for editorial advertisements, Chief Justice Burger wrote the majority opinion in *CBS*.

²⁰⁵ See *supra* note 200 and accompanying text; see also KEN AULETTA, THREE BLIND MICE 19-20 (1992) (noting that nature of television as public trust was illustrated by fact that frequencies were relatively scarce and had to be rationed, therefore necessitating government-imposed regulations).

²⁰⁶ 468 U.S. 364 (1984).

²⁰⁷ 47 U.S.C. § 399 (1988).

to engage in editorializing.²⁰⁸ Additionally, no such noncommercial broadcasting station could support or oppose any candidate for public office.²⁰⁹ The reasoning behind Congress's enactment of this statute was that as a part of the broadcasting medium that received funds from the federal government, noncommercial broadcasters had to be prevented from becoming "propaganda organs for the government."²¹⁰

Justice Brennan, writing for the Court,²¹¹ reviewed the standard the Court had developed for the broadcasting medium in previous cases. He recognized that "because broadcast regulation involves unique considerations," the Court had not followed exactly the same approach that it had with other media and had never gone so far as to demand that regulation of the broadcast medium serve a compelling governmental interest.²¹² The Court noted three

²⁰⁸ *Id.* The term "editorializing" was not defined in the statute which merely stated that stations could not "engage in editorializing." See *FCC v. League of Women Voters*, 468 U.S. 364, 366 (1984). Yet the FCC construed the statute to apply to "the use of noncommercial educational broadcast facilities by licensees, their management, or those speaking on their behalf for the propagation of the licensee's own views on public issues" *Id.* at 381 (citing *Accuracy in Media, Inc.*, 45 F.C.C. 2d 297, 302 (1973)). Apparently, the term was not meant to include the presentation of opinions by those persons not mentioned by the FCC. See *League of Women Voters*, 468 U.S. at 381 (citing *Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973) ("Such prohibition should not be construed to inhibit any *other* presentations on controversial issues of public importance.")).

²⁰⁹ 47 U.S.C. § 399.

²¹⁰ *League of Women Voters*, 468 U.S. at 372.

²¹¹ Justice Brennan had penned the dissent in *DNC*.

²¹² *League of Women Voters*, 468 U.S. at 376. In making this determination, Brennan corrected the standard that had been applied by the lower court. See *League of Women Voters*, 547 F. Supp. 379, 384 (C.D. Cal. 1982). The lower court applied the compelling interest standard, the standard traditionally applied to statutes that restrict the discussion of public issues *outside* of the broadcasting context. See *id.* The lower court's application of this standard could have resulted from confusion over the Supreme Court's prior broadcasting decisions regarding the standard to be applied. In fact, this is just what the government contended when the case reached the Supreme Court. In arguing that a less demanding standard of review than the compelling interest standard was required, the government asserted that the lower court "drew the wrong lessons" from the Supreme Court's prior decisions concerning broadcast regulation. *League of Women Voters*, 468 U.S. at 375.

"fundamental principles that [had guided its] evaluation of broadcast regulation."²¹³ First, the Court had long recognized that Congress, acting under the authority of the Commerce Clause, has the power to regulate "the use of this scarce and valuable national resource."²¹⁴ Second, the Court noted, citing its decisions in *Red Lion*²¹⁵ and *DNC*,²¹⁶ that because of the scarce nature of the broadcasting resource, Congress could, in the exercise of its power, "seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations."²¹⁷ Third, the Court stated that while it had in prior decisions taken note of the fact that the government's interest in ensuring balanced coverage of public issues was both an "important and substantial" interest, it had also previously made clear that "broadcasters are engaged in a vital and independent form of communicative activity."²¹⁸ Hence, the First Amendment "must inform and give shape" to the ways in which Congress flexed its

The lower court's opinion had taken notice of the fact that the Supreme Court's prior decisions regarding the First Amendment and broadcasting had noted that the "special characteristics" of the broadcast medium justified the application of a less stringent standard of review. *League of Women Voters*, 547 F. Supp. at 384. Apparently, however, the lower court misinterpreted this pronouncement, as evidenced by its recognition that the FCC had not specifically brought any special characteristics of the broadcast media to the court's attention that would warrant the application of a lesser standard of review. *Id.* Because the Supreme Court's jurisprudence takes the "special characteristics" of the broadcast medium as a given, a specific articulation of the special characteristics of the broadcast medium is not necessary. See discussion *supra* notes 177-181, 199-200 and accompanying text.

²¹³ *League of Women Voters*, 468 U.S. at 376.

²¹⁴ *Id.*

²¹⁵ 395 U.S. 367 (1969).

²¹⁶ 412 U.S. 94 (1973).

²¹⁷ *League of Women Voters*, 468 U.S. at 377. The Court reiterated its previously articulated view that differences in the broadcast medium, namely spectrum scarcity, justified differences in the First Amendment standard applied to the medium versus other media. *Id.* (quoting *Red Lion v. FCC*, 395 U.S. 367, 368 (1969)).

²¹⁸ *League of Women Voters*, 468 U.S. at 378.

regulatory muscle in the broadcasting area.²¹⁹ In sum, the *League of Women Voters* Court recognized that “although the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public’s First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern.”²²⁰ In articulating the fundamental principles applicable to broadcasting, the Court rejected the lower court’s “compelling” interest test in favor of an examination of whether the restriction proposed by section 399 was “narrowly tailored to further a substantial government interest.”²²¹

The Court found section 399 to be unconstitutional in two respects. First, Justice Brennan’s opinion noted that the restriction imposed by section 399 was specifically directed at a form of speech—expression of editorial opinion—“that lies at the heart of First Amendment protection.”²²² Brennan’s next quarrel with section 399 was based on the statute’s scope. The scope of section 399’s ban, stated Brennan, was delimited solely by the content of the speech to be suppressed.²²³ Brennan based this finding on the fact that “a wide variety of non-editorial speech” was plainly not prohibited by the statute.²²⁴ Consequently, in order to ascertain whether a particular statement constituted an editorial proscribed by

²¹⁹ *Id.* The Court, citing to *CBS* and its quotation of language from *DNC*, recognized that broadcasters are “entitled under the First Amendment to exercise ‘the widest journalistic freedom consistent with their public [duties].’” *Id.* at 378 (alteration in original).

²²⁰ *Id.* at 380.

²²¹ *Id.* The Court, citing *Red Lion*, *CBS* and *DNC*, recognized that “ensur[ing] adequate and balanced coverage of public issues” was a substantial government interest. *Id.*

²²² *Id.* at 381 (“Expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values”) (citation omitted). Brennan recognized that § 399 restricted “precisely that form of speech which the Framers of the Bill of Rights were most anxious to protect—speech that is ‘indispensable to the discovery and spread of political truth.’” *Id.* at 383.

²²³ *Id.* at 383.

²²⁴ *Id.* Brennan cited daily announcements of a station’s program schedule and over-the-air appeals for listener contributions as examples of speech permissible under § 399. *Id.*

section 399, it would be necessary to examine the content of the message to determine whether it involved "controversial issues of public importance."²²⁵ This clearly amounted to "[a] regulation of speech . . . motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest" and was thereby "the purest example of a 'law . . . abridging the freedom of speech, or of the press.'"²²⁶

The Court was careful to note that it was not holding that Congress or the FCC were without power to regulate "the content, timing, or character of speech" by noncommercial broadcasters.²²⁷ What the Court did hold in *League of Women Voters* was only that "the specific interests sought to be advanced by section 399's ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgement of important journalistic freedoms which the First Amendment jealously protects."²²⁸

In most respects, the public broadcasting medium was not distinguished from the broadcast medium in general. The Court reasserted the broadcast medium's different nature as compared to other media and restated the existence of a different standard of First Amendment protection based on the nature of the broadcast medium.²²⁹ However, public broadcasting *is* different from

²²⁵ *Id.* The Court analogized the editorializing ban to the actions of the New York Public Service Commission that were declared unconstitutional in *Consolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980) (holding that an order prohibiting inclusion in monthly bills of inserts discussing controversial public policy issues directly infringed freedom of speech under First and Fourteenth Amendments).

²²⁶ *League of Women Voters*, 468 U.S. at 383-84 (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 546 (1980)).

²²⁷ *League of Women Voters*, 468 U.S. at 402.

²²⁸ *Id.* The Court left the ban against supporting or opposing candidates for public office intact. This ban exists today at 47 U.S.C. § 399.

²²⁹ It is important to note, however, that Justice Brennan's opinion, although continuing to recognize the spectrum scarcity doctrine, left the door open to jettisoning it. *League of Women Voters*, 468 U.S. at 376 n.11 ("The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics . . . 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."). Yet, Brennan

general broadcasting because unlike general broadcasting, public broadcasting is subsidized by the federal government. The Court took notice of this fundamental difference in addressing the government's arguments in support of section 399. The government advanced three arguments in defense of the statute. It first argued that section 399 ensured that the federal government, through its supply of funding, would not be able to undermine the autonomy of broadcasters and thereby turn them into "vehicles for Government propagandizing."²³⁰ The government claimed that the power of the purse could lead noncommercial broadcasters to either say what the government instructed them to say, or more likely, to say what they thought would please the government.²³¹ The government next argued that section 399 was necessary to prevent noncommercial broadcasting stations from becoming outlets for the "partisan viewpoints" of private interest groups or for the "political and ideological opinions of station owners."²³² The government argued that "the hazards posed in the 'special' circumstances of noncommercial educational broadcasting are so great that section 399 is an indispensable means of preserving the public's First Amendment interests."²³³

The Court rejected the government's first two arguments out of hand. It countered the government's first argument by stating that other provisions of the Public Broadcasting Act—for example the creation of the CPB—already protected the noncommercial broadcasting medium from governmental interference.²³⁴ The Court then disposed of the government's second contention finding that section 399 was both underinclusive and overinclusive with

noted that it was not up to the Court to take such action, but rather such a decision was best left to either Congress or the FCC. *Id.* ("We are not prepared . . . to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.").

²³⁰ *League of Women Voters*, 468 U.S. at 384; see also Marcus, *supra* note 154, at 463.

²³¹ See Marcus, *supra* note 154, at 463.

²³² *League of Women Voters*, 468 U.S. at 385; Marcus, *supra* note 154, at 463.

²³³ *League of Women Voters*, 468 U.S. at 385.

²³⁴ *Id.* at 386-90.

respect to the government's concern that stations could become an outlet for the views of a privileged few.²³⁵ With regard to the statute being underinclusive, the Court found that to the extent the statute failed to prevent biased programming and to the extent that little was done to preclude a broadcaster from distorting his programming to communicate his own personal views, section 399 was underinclusive.²³⁶ Section 399 was found to be overinclusive based on the fact that other regulations existed—for example, the fairness doctrine—which offered protection against the actions Congress sought to restrict through its enactment of section 399.²³⁷ Unlike the fairness doctrine, which the *League of Women Voters* Court asserted added “more speech” to the public forum, section 399 “simply silence[d] all editorial speech” by noncommercial broadcasters.²³⁸ Therefore, “the breadth of [section] 399 extend[ed] so far beyond what is necessary to accomplish the goals intended by the Government, it fail[ed] to satisfy the First Amendment standards” that had previously been applied in the area of broadcasting.²³⁹

The government's third contention, although also rejected by the Court, proves to be the most potentially troubling for an argument that a decision on the part of Congress to defund Public Television would violate the First Amendment. The government's third argument was that by prohibiting CPB-funded stations from editorializing, Congress was merely choosing not to subsidize noncommercial broadcasters' editorials.²⁴⁰ The government based this assertion on the Supreme Court's prior ruling in *Regan v. Taxation With Representation of Washington* (“*TWR*”),²⁴¹ where the Court had held that Congress in the exercise of its spending power could reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to fund their

²³⁵ *Id.* at 396.

²³⁶ *Id.* at 396-97; Marcus, *supra* note 154, at 464.

²³⁷ *League of Women Voters*, 468 U.S. at 397-99.

²³⁸ *Id.* at 398.

²³⁹ *Id.* at 398.

²⁴⁰ *Id.* at 399; Marcus, *supra* note 154, at 463.

²⁴¹ 461 U.S. 540 (1983).

activities.²⁴² Although the majority opinion in *League of Women Voters* distinguished *TWR* by noting that in that case the Internal Revenue Code sections provided for the creation of two distinct tax-exempt entities,²⁴³ while section 399 provided no such choice and a noncommercial broadcaster was unable to segregate its editorializing activities from its other activities,²⁴⁴ in his dissent, Justice Rehnquist accepted the logic of *TWR* as applied to noncommercial broadcasting.²⁴⁵

Justice Rehnquist, who had authored the Court's unanimous opinion in *TWR*, relied on the case to argue that the connection between federal funding and the restrictions of section 399 made the restrictions permissible. He asserted that in enacting section 399, Congress had simply made a determination that public funds would not be used to subsidize noncommercial broadcasting stations that engaged in editorializing.²⁴⁶ In support of his assertion, Rehnquist stated, "I do not believe that anything in the First Amendment to the United States Constitution prevents Congress from choosing to spend public moneys in [this] manner."²⁴⁷

Rehnquist based his opinion on the Congress' authority as the

²⁴² *Id.* at 548-51.

²⁴³ The two entities were divided into one entity that does not lobby and thereby can receive tax-deductible contributions, and one that does lobby and is ineligible to receive such contributions. *League of Women Voters*, 468 U.S. at 400.

²⁴⁴ *Id.* (noting that station that receives as little as one percent of its overall income from CPB would be barred absolutely from all editorializing and would have no way of limiting use of its federal funds to all noneditorializing activities and would be barred from using wholly private funds to finance editorial activity). In rejecting the government's proposition, the Court prevented Congress from using its spending power to limit free expression. See Marcus, *supra* note 154, at 453. The First Amendment rights of public broadcasters trumped the exercise of the congressional spending power.

The Court noted, however, that if § 399 were revised to provide for the creation by noncommercial broadcasters of affiliate organizations which could use station facilities to editorialize with nonfederal funds, such a statute would be valid under the reasoning of *TWR*. *League of Women Voters*, 468 U.S. at 400.

²⁴⁵ Justice Rehnquist was joined in his dissent by Justice White and Chief Justice Burger.

²⁴⁶ *League of Women Voters*, 468 U.S. at 403.

²⁴⁷ *Id.*

governmental voice of the people. He found that Congress had rationally determined that the bulk of taxpayers whose moneys provide the funds for CPB grants would prefer not to see the management of local noncommercial broadcast stations promulgate its own private views on the air at taxpayer expense.²⁴⁸

Discussing the Court's decision in *TWR*, Rehnquist noted that the Court had "squarely rejected the contention that Congress' decision not to subsidize lobbying violates the First Amendment" even though the Court had recognized that the right to lobby is constitutionally protected.²⁴⁹ For Rehnquist, *TWR* stands for the proposition that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."²⁵⁰ Yet, he noted:

This is not to say that the Government may attach *any* condition to its largesse; it is only to say 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 subsidy²⁵¹

In the case of section 399, Congress' prohibition was directly related to its purpose for subsidizing public broadcasting, stated Rehnquist.²⁵² Additionally, Congress' prohibition was neutral in

²⁴⁸ *Id.* at 405. Justice Brennan rejected this reasoning in the Court's majority opinion, noting that it was readily disposed of by *Buckley v. Valeo*, 424 U.S. 1 (1976). As the Court explained in that case, "[V]irtually every congressional appropriation will to some extent involve a use of public money as to which some taxpayers will object." *League of Women Voters*, 468 U.S. at 385 n.16. (citing *Buckley*, 424 U.S. at 91-92). Yet this does not mean that disgruntled taxpayers have "a constitutionally protected right to enjoin such expenditures. Nor can this interest be invoked to justify a congressional decision to suppress speech." *League of Women Voters*, 468 U.S. at 385 n.16.

²⁴⁹ *League of Women Voters*, 468 U.S. at 405.

²⁵⁰ *Id.* See *Regan v. TWR*, 461 U.S. 540, 545 ("This Court has never held that Congress must grant a benefit such as *TWR* claims here to a person who wishes to exercise a constitutional right.")

²⁵¹ *League of Women Voters*, 468 U.S. at 407 (emphasis added).

²⁵² *Id.* at 407. Additionally, in *TWR*, Rehnquist cited to *Commissioner v. Sullivan*, 356 U.S. 27, 28 (1958) for the proposition that appropriations are like the tax exemptions and deductions at issue in *TWR* in that they were "a matter

that it did not affect editorials of only one ideological bent, but all editorials.²⁵³

Because *TWR* represents the decision of a unanimous Court that the government does not have to fund what it does not wish to fund and that the First Amendment does not protect against such decisions, Rehnquist's support of *TWR* in *League of Women Voters*, and the *TWR* case standing on its own, are potentially troubling for an argument that a congressional decision to defund Public Television would violate the First Amendment. Yet, the Court's reasoning in *TWR* leaves open a door to making a successful argument in favor of the maintenance of Public Television.

The Court's decision in *TWR* was premised on its earlier decision in *Cammarano v. United States*,²⁵⁴ where the Court had upheld a U.S. Treasury Regulation that denied business expense deductions for lobbying activities.²⁵⁵ Yet, in *Cammarano*, Justice Douglas, in a concurring opinion, clarified the difference between a decision not to subsidize protected activity and the levying of a penalty based on the exercise of constitutional rights.²⁵⁶ For example, if a decision were made simply not to subsidize lobbying activities, such a decision would be constitutionally sound; yet, if a tax deduction were denied based on the taxpayer spending money to influence legislation, this would be a penalty levelled on First Amendment activity and therefore unconstitutional.²⁵⁷

Although there appears to be a fine line between the two actions noted by Justice Douglas, an argument could be made that, at this point, and based on the history of the public broadcasting medium, particularly the most recent debates over reauthorization, a decision to defund Public Television would amount to a penalty

of grace [that] Congress can, of course, disallow . . . as it chooses." *TWR*, 461 U.S. at 549.

²⁵³ *League of Women Voters*, 468 U.S. at 407. The neutral prohibition would allow the Court to apply the rational relationship test to § 399, as opposed to the more stringent test that would be necessary if the prohibition were determined to be content-based.

²⁵⁴ 358 U.S. 498 (1959).

²⁵⁵ *TWR*, 461 U.S. at 546; see also *Cammarano*, 358 U.S. at 513.

²⁵⁶ *Cammarano*, 358 U.S. at 515.

²⁵⁷ *Id.*; see also Marcus, *supra* note 154, at 468.

imposed on action protected by the First Amendment. That is, any such decision to defund would most likely be grounded in the belief that Public Television is too ideologically liberal.²⁵⁸ Public broadcasters fear for their survival based on the tone of the most recent reauthorization debates,²⁵⁹ and this fear could force a choice on the part of the noncommercial broadcast licensee to choose between federal support and the exercise of a fundamental right. While the Constitution does not compel the government to subsidize the exercise of all fundamental rights (as the Court recognized in *TWR*), it must prevent the government from penalizing the exercise of a fundamental right through a denial of funding.

Particular language in *TWR* leaves open the possibility that a statute repealing the Public Broadcasting Act would violate the First Amendment. Relying on *Cammarano*, the Court noted that *TWR*'s case would be different "if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'"²⁶⁰ Arguably, a repeal of the Public Broadcasting Act based on the content of Public Television programming viewed as liberally-biased could have the goal of suppressing ideas which a particular political party finds "dangerous."

Based on the Court's decision in *League of Women Voters*, it appears that although Public Television is subject to the same lesser standard of First Amendment protection as other forms of broadcasting, at the same time, due to its nature as a federally subsidized part of the broadcast media, it could arguably receive a different kind of First Amendment protection from governmental interference. Whether this different First Amendment standard would be that articulated by Justice Brennan in the majority opinion in *League of Women Voters*—that is, a rejection of the proposition that Congress needs only a rational basis and an apparently

²⁵⁸ See *supra* notes 103-114 and accompanying text.

²⁵⁹ See *supra* note 131 and accompanying text.

²⁶⁰ *TWR*, 461 U.S. at 548 (quoting, *Cammarano*, 358 U.S. at 513 (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958))). Additionally, the Court quotes from its opinion in *Maher v. Roe*: "Constitutional concerns are greatest when the State attempts to impose its will by force of law . . ." *TWR*, 432 U.S. 464, 476 (1977) (considering legislative decisions not to subsidize abortions).

innocuous purpose for placing conditions that inhibit free expression on the receipt of federal funding—or the standard offered by Justice Rehnquist—that “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right”²⁶¹—is unclear. Yet, a case recently decided by a California federal district court may offer additional support to the argument that a congressional decision to defund Public Television may be subject to reversal based on First Amendment principles.

In *Finley v. National Endowment for the Arts*,²⁶² the district court examined the constitutionality of the National Endowment for the Arts’ (“NEA”)²⁶³ decision to defund the work of several performance artists. The case arose from the artists’ application for grants under the NEA’s Performance Arts Program during a period

²⁶¹ *FCC v. League of Women Voters*, 468 U.S. 364, 405 (1984) (Rehnquist, J., dissenting).

²⁶² 795 F. Supp. 1457 (C.D. Cal. 1992). The Justice Department appealed this decision to the Ninth Circuit. See Martin Booe, *What Does the NEA Mean by ‘Decency’? Justice Department Challenges Agency’s Standard for Arts Funding*, WASH. POST, Feb. 3, 1994, at C2. As of this writing, the court’s decision is pending.

²⁶³ The NEA was created by Congress in 1965 as part of the National Foundation on the Arts and the Humanities. Pub. L. No. 89-209 (codified as amended at 20 U.S.C. § 954 (1988 & Supp. V 1993)). See *Finley*, 795 F. Supp. at 1460. It was the intent of Congress to encourage “free inquiry and expression” and to insure that “conformity for its own sake” was not encouraged and that “no undue preference should be given to any particular style or school of thought or expression.” *Id.* at 1460 (citation omitted). The NEA is authorized to administer a grants-in-aid program for individuals of “exceptional talent” engaged in or concerned with the arts. 20 U.S.C. § 954(c). The NEA administers grants through its chairperson and a 26 member council, all of whom are appointed by the president with the advice and consent of the Senate. 20 U.S.C. §§ 954(b)(1), 955(b). Although the chairperson is the ultimate decision maker, she is prohibited from either approving or disapproving any grant application until she has received the recommendation of the council on the application. 20 U.S.C. § 955(f). Jane Alexander is the current chairperson of the NEA; at the time period relevant to the *Finley* case, John Frohnmayer was the chairperson of the NEA.

For a history of the NEA, see Craig Alford Masback, Note, *Independence vs. Accountability: Correcting the Structural Defects in the National Endowment for the Arts*, 10 YALE L. & POL’Y REV. 177 (1992) [hereinafter *Structural Defects*].

when the NEA was under political fire.

From 1989 through the time period when *Finley* was decided, the NEA had been the target of both congressional critics and private interest groups who excoriated the organization for providing funding for works that depicted, among other things, sexual acts and expressions of women's anger over male dominance in the area of sexuality.²⁶⁴

Despite the turbulent atmosphere at the NEA, the applications of the plaintiffs in *Finley* were reviewed by the Performance Artists Program Peer Review Panel (the "Panel") along with those of over eighty other applicants.²⁶⁵ The Panel unanimously recommended that the plaintiffs' applications be funded, which as a matter of practice and custom was tantamount to the granting of an application by the council and the NEA chairperson.²⁶⁶

After the Panel had recommended that the plaintiffs' applications be funded, the NEA chairperson asked the panel to reconsider its recommendations regarding three of the plaintiffs; he decided that reconsideration of the fourth plaintiff's (Karen Finley) application was unnecessary since "two of his close friends had attended a Finley show and had reported to him that it was not obscene."²⁶⁷ After reconsideration, the Panel again recommended that the three artists' applications be funded.²⁶⁸ Before the council

²⁶⁴ See *Finley*, 795 F. Supp. at 1461; DE GRAZIA, *supra* note 129, at 622-688; Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2089-97 (1991) [hereinafter *State Activism*]. Two especially prominent attacks were levelled in the Spring of 1989 upon the discovery that NEA funding had been provided for a photography exhibit by Robert Mapplethorpe which included homoerotic imagery, and an exhibit by Andres Serrano entitled *Piss Christ*, which depicted a crucifix emerged in a container of the artist's urine. See *Finley*, 795 F. Supp. at 1461; *State Activism*, *supra*, at 208 (noting that Senator Jesse Helms described one of Mapplethorpe's photographs as a picture of "a naked man with a bullwhip protruding from his posterior"); DE GRAZIA, *supra* note 129, at 630 (noting that Helms called Serrano "not an artist" but "a jerk"; Senator Alphonse D'Amato "vilified the NEA's action in supporting Serrano's work, which he described as 'garbage'"); *Structural Defects*, *supra* note 263, at 178 (noting extensive debate provoked by Mapplethorpe's and Serrano's works).

²⁶⁵ *Finley*, 795 F. Supp. at 1462.

²⁶⁶ *Id.* at 1462 n.9.

²⁶⁷ *Id.* at 1462.

²⁶⁸ *Id.*

met to review the recommended NEA grants, a Washington, D.C. newspaper reported that Frohnmayer had been "advised" by "friends of the NEA" to veto several grants, including Finley's, in order to "ease President Bush's deepening troubles with conservatives on his suspect cultural agenda."²⁶⁹ Subsequently, the NEA advised the plaintiffs that their applications had been denied.²⁷⁰ The plaintiffs in *Finley* brought suit on the basis that the NEA and Frohnmayer injured their First Amendment interests by denying their applications because of the content of their past artistic expression.²⁷¹ They sought declaratory and injunctive relief on the basis of the NEA's denial of their applications for funding.²⁷²

The issue in *Finley* was whether the plaintiffs could even *allege* that the defendants had injured their First Amendment rights through their denial of the plaintiffs' applications based on the plaintiffs' past artistic expression.²⁷³ Asserting that the plaintiffs could *not* make such an allegation, the defendants sought judgment on the pleadings.²⁷⁴

The defendants offered an argument strikingly similar to that supported by Justice Rehnquist in *TWR* and *League of Women Voters*, contending that the denial of the plaintiffs' grant applications did not amount to an injury of their First Amendment rights because the denial was merely a refusal to subsidize the plaintiffs' expressive activities and not a barrier to that exercise.²⁷⁵ The

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 1463. The individual plaintiffs, as well as the National Association of Artists' Organizations, asserted an alternative First Amendment claim regarding whether the First Amendment protects artistic expression funded by the federal government. *Id.* at 1472-73. This claim is not addressed here because in light of Supreme Court precedent regarding broadcasting, a right of First Amendment protection for broadcasting does not have to be established. See *supra* note 177 and accompanying text. Additionally, this section of this Article is concerned more with arguments that could be made with regard to the denial of funding for Public Television. The First Amendment claim based on the denial of funding to the NEA applicants is therefore more relevant.

²⁷² *Finley*, 795 F. Supp. at 1460.

²⁷³ *Id.* at 1463.

²⁷⁴ *Id.* at 1460.

²⁷⁵ *Id.* at 1463.

district court rejected this argument, relying on *Speiser v. Randall*:

[E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech²⁷⁶

The court noted that the defendants correctly argued that the denial of a benefit imposes an unconstitutional condition only when the benefit is imposed as a penalty for constitutionally protected speech, yet that they were incorrect in claiming that this standard did not apply to the case at bar.²⁷⁷ The fact that the plaintiffs alleged that their applications were denied based on the content of their past performances, indicated a penalty imposed for past speech.²⁷⁸ Therefore, the plaintiffs stated a sufficient claim under the First Amendment and the defendants were not entitled to judgment on the pleadings.²⁷⁹

By analogy, the decision in *Finley* lends further support to an argument that a content-based congressional decision to defund Public Television could be attacked under the First Amendment. Yet, the ultimate result of such an attack is by no means certain. A court could find that such a claim would be governed by *TWR* and that because Public Television receives funding from sources other than Congress, there is no First Amendment danger involved in Congress' decision to withdraw funding for Public Television. The better solution is, therefore, to derive an alternative means of funding the medium.

IV. AN ALTERNATIVE MEANS OF FUNDING PUBLIC TELEVISION

Although *League of Women Voters* in conjunction with precedent stemming from the NEA controversy indicates that the

²⁷⁶ *Id.* at 1463 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

²⁷⁷ *Id.* at 1463.

²⁷⁸ *Id.* at 1464.

²⁷⁹ *Id.*

First Amendment could protect against the termination of Public Television's funding stemming from a congressional, content-based attack, such a result is by no means certain.²⁸⁰ For this reason, prophylactic measures designed to ensure the continued existence of Public Television are necessary. As the discussion above illustrates,²⁸¹ the wisest course is to examine alternative means of funding the medium.

Although various alternative funding schemes for Public Television have been presented throughout the span of its existence,²⁸² including the Carnegie Commission's original proposal

²⁸⁰ See discussion *supra* notes 240-261 and accompanying text.

²⁸¹ As the 1991-92 authorization process confirms, President Ford's belief that multiyear funding was "a constructive approach to the sensitive relationship between federal funding and freedom of expression" and would "assure the independence of noncommercial . . . television programming for our nation" was ill-founded. See GIBSON, *supra* note 3, at 215 (quoting President Ford).

²⁸² For example, before deciding on the multiyear funding scheme in 1975, several alternatives were contemplated by Congress. Among these alternatives were: setting aside a portion of income tax paid by commercial radio and television stations and cable operations; a tax on commercial advertising and cable advertising revenues; a dedicated excise tax on residential electric and telephone bills; proceeds from the profits of operating a domestic satellite system; a "user charge" paid by families owning radio and television sets; a Public Broadcasting Development Board financed by the sale of bonds; and federal loan guarantees. See GIBSON, *supra* note 3, at 215.

Another suggestion is that a spectrum-use fee be imposed on all commercial broadcasters; such a fee would go directly to CPB thereby eliminating the government control inherent in the appropriations process, providing "a steady, nonfederal source of funding for public broadcasting." See *Freeing Public Broadcasting*, *supra* note 80, at 746-47. The justification for imposing this fee is that the users of the spectrum—a public resource—should pay for the use of the spectrum. *Freeing Public Broadcasting*, *supra* note 80, at 746. A similar proposal was recently offered by Henry Morgenthau who based his suggestion on the Clinton administration's proposal to open up a large segment of the airwaves now largely reserved for the military. See Morgenthau, *supra* note 4. A major aspect of the Clinton administration's plan is that for the first time frequencies usually "given away" by the FCC would be auctioned off to the highest bidder. Morgenthau, *supra* note 4. In light of this shift, Morgenthau suggests that some of the yield from such an auction could be put toward financing public broadcasting. Morgenthau, *supra* note 4. Morgenthau predicts that the profit from such an auction would be in the billions of dollars. Morgenthau, *supra* note 4.

that the system be funded through an excise tax on television sets,²⁸³ this section shall offer a different proposal. This section offers a proposal for providing funding for Public Television through a direct federal matching grant program based on direct taxpayer contributions. This matching grant program would be supplemented by direct taxpayer contributions at the state level.

A. Giving the Public Its Say, Part I: Current Actions

Any arguments made in favor of preserving Public Television naturally presume that Public Television is worth saving. How best to assess the correctness of this presumption? The Republicans who added the amendments to the Act reauthorizing funding for Public Television believed that the determination should be made by those for whom the medium was created—the public. To this end, they amended the Public Broadcasting Act to provide for CPB's solicitation of the views of the public and for the provision of "reasonable opportunity" for members of the public to present comments to the CPB Board regarding "the quality, diversity, creativity, excellence, innovation, objectivity, and balance" of the programming offered by Public Television.²⁸⁴

Public Television, prodded by a congressional mandate and realizing that it would be unwise to bite the hand that feeds it, implemented various mechanisms for determining the public's views on Public Television programming. In addition to an "open to the public" project, town meetings, and planned workshops on editorial integrity,²⁸⁵ the CPB Board, in an attempt to hear and heed the voices of the viewing public, initiated a toll-free number for viewers who wished to respond to programming.²⁸⁶ Yet these

²⁸³ See *supra* note 33 and accompanying text.

²⁸⁴ Pub. L. No. 102-356, § 19, 106 Stat. 955 (1992) (amending 47 U.S.C. § 396).

²⁸⁵ See Richard W. Carlson, Letter to the Editor, *How Broadcast Agency Continues to Guard the Public Interest*, N.Y. TIMES, May 22, 1993, at 18 (author is president and chief executive officer of CPB in Washington, D.C.); Sandy Tolan, *Dial 1-800-Censor*, N.Y. TIMES, May 7, 1993, at 31.

²⁸⁶ See Tolan, *supra* note 285, at 31. Public Television viewers who call what is referred to as the *Comment Line* (1-800-356-2626), are asked if they

proposals have led some observers to worry about "town meeting" audiences packed with members of special interest groups, and the use of the toll-free number as a censorship tool.²⁸⁷

How, then, can the level of interest in Public Television and the desire to continue funding it through the federal government be assessed without fear of content regulation on the part of special interest groups who might attempt to impose their own sense of morality on others? This Article suggests that Congress enact a statute similar to the one that created the Presidential Election Campaign Fund.

B. Giving the Public Its Say, Part II: Use of the Tax Form and Matching Grants

In 1966, Congress amended the Internal Revenue Code ("IRC") through its enactment of the Presidential Election Campaign Fund Act of 1966 ("PECFA").²⁸⁸ The PECFA provided that every individual, other than a nonresident alien, whose income tax liability for any taxable year exceeded one dollar could designate that one dollar be paid over to the Presidential Campaign Fund (the "Fund") for the account of candidates running for the offices of president and vice president of the United States.²⁸⁹ Taxpayers

have comments about a specific program or about Public Television programming in general. The operator then takes the caller's name, address, and telephone number and asks how the caller came to hear about the *Comment Line*. Telephone call to the *Comment Line* (Feb. 28, 1994).

²⁸⁷ See, e.g., Tolan, *supra* note 285, at 31 (noting CPB's statement that "[n]egative comments might vindicate a station's decision not to carry controversial programming."). But see Carlson, *supra* note 285, at 18 (stating that solicitation of public comments is not "censorious" but "democratic").

²⁸⁸ The Presidential Election Campaign Fund Act ("PECFA") is now codified, as amended, at 26 U.S.C. § 6096 (1988 & Supp. V 1993).

²⁸⁹ 26 U.S.C. § 6096(a). In the case of a joint return of a husband and wife with a tax liability of two dollars or more, each spouse could designate that one dollar be contributed to the fund. *Id.* The PECFA was amended in 1993, raising the level of the contribution individual and joint return filers could make to the fund. The PECFA now states that individuals whose income tax liability is three dollars or more, and spouses filing joint returns with a tax liability of six dollars or more, can designate three dollars (in the case of spouses, three dollars each) for the Presidential Election Campaign Fund. 26 U.S.C. § 6096(a).

indicate their desire to designate moneys for the Fund by checking a box on their federal income tax return.²⁹⁰

The means for setting aside the funds designated for candidates is set forth in another provision of the IRC.²⁹¹ The statute establishes on the books of the U.S. Treasury a "special fund to be known as the 'Presidential Election Campaign Fund.'"²⁹² In this provision, the Secretary of the Treasury is mandated to, "from time to time," transfer to the fund an amount "not in excess of the sum of the amounts designated (subsequent to the previous presidential election) to the fund" under section 6096.²⁹³ The statute provides for the appropriation to the fund for each fiscal year, out of amounts in the general fund of the Treasury not otherwise appropriated, an amount equal to the amounts designated under section 6096 during each fiscal year.²⁹⁴

In 1991, over 29 million Americans (17.7% of taxpayers) contributed through the tax dollar check-off. Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A key to restoring the Health of our Democracy*, 94 COLUM. L. REV 1126, 1151 (1994). In 1992, approximately 19% of taxpayers used the check-off to contribute. John W. Mashek, *1996 Election Fund May Run Short as Only 19% of Taxpayers Check off*, BOSTON GLOBE, Dec. 15, 1992, at 10.

²⁹⁰ 26 U.S.C. § 6096(c)(2). The taxpayer is asked either on the first page of her return or on the page bearing her signature: "Do you want \$3 to go to this fund?," and "If a joint return, does your spouse want \$3 to go to this fund?" Income Tax Return for Single and Joint Filers With No Dependents (Form 1040EZ) (1993).

²⁹¹ 26 U.S.C. § 9006(a) (1988).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* The constitutionality of the designation of the Fund was challenged on First and Fifth Amendment grounds, yet the U.S. Supreme Court, in *Buckley v. Valeo*, 424 U.S. 1 (1976), upheld the constitutionality of the funding scheme. Both the dollar check-off provision and the appropriation provision were attacked. The Court found that the check-off provision was not unconstitutional for failing to permit taxpayers to designate particular candidates or parties as recipients of their money, and that the appropriations provision was not rendered any less an appropriation by Congress merely because the amount of the appropriation was determined by reference to aggregates of one- and two-dollar authorizations on taxpayers' income tax returns. *Buckley v. Valeo*, 424 U.S. 1, 91 (1976). See Lisa Babish Forbes, Note, *Federal Election Regulation and the States: An Analysis of the Minnesota and New Hampshire Attempts to Regulate*

Although there is a projected shortfall in the system,²⁹⁵ this shortfall developed primarily because the dollar tax check-off was not indexed to inflation.²⁹⁶ If the dollar tax check-off had been indexed, there would not have been a funding shortfall, and in fact, the fund might have maintained a surplus.²⁹⁷

While opponents of the use of a dollar tax check-off scheme to fund Public Television could point to the Fund's projected shortfall as an indication of the potential failure of the scheme on the basis of a lack of taxpayer support, the fact is that there would be no funding problem with regard to the Fund that was created by the PECFA if the check-off had been indexed to inflation.²⁹⁸ Therefore, a similar scheme created for the purpose of funding Public Television should be indexed to inflation to counter any potential shortfall problems.

At the local level, states have enacted legislation creating taxpayer contribution-based funds that provide monies for various projects. For example, the State of Connecticut enacted legislation in 1993 which provided for the creation of three separate accounts within a general fund to be supported by taxpayer contributions in amounts designated on state tax return forms.²⁹⁹

Unlike PECFA, the Connecticut legislation did not create a separate matching fund from which monies would be collected. Instead, the amount designated by each taxpayer on her tax form is deducted from the taxpayer's state tax refund.³⁰⁰ Additionally,

Congressional Elections, 42 CASE WESTERN RES. L. REV 509, 539-41 (1992).

²⁹⁵ See Mashek, *supra* note 289 (noting shortfall in funding program).

²⁹⁶ See Wertheimer & Manes, *supra* note 289, at 1142 n.89.

²⁹⁷ Wertheimer & Manes, *supra* note 289, at 1142 n.89.

²⁹⁸ Wertheimer & Manes, *supra* note 289, at 1142 n.89 (cause of shortfall is failure to index to inflation as opposed to a decrease in percentage of taxpayers who check off).

²⁹⁹ Public Act No. 93-233 (1993). The legislation created an organ transplant fund account, an endangered species, natural area preserves and watchable wildlife account, and an AIDS research education fund account. See Public Act No. 93-233, §§ 2(a), 4(a), 6(a). These accounts were established as separate, nonlapsing accounts within the general fund. *Id.*

³⁰⁰ See Public Act No. 93-233, §§ 1(b), 1(c) (creating space on tax return form where taxpayer can indicate intention to contribute and stating that contributed amount shall be deducted from tax refund).

under the Connecticut legislation, the separate accounts are authorized to receive additional monies from public and private sources, as well as from the federal government.³⁰¹

Similar legislation could be enacted in all fifty states to provide a source of funding for Public Television at the local level, supplementing the funds received from the federal government.

The tax form could therefore be used to fund Public Television at two levels. First, at the federal level, Congress could pass an act similar to PECFA which would create a Public Television Matching Fund. Each federal taxpayer who wished to do so could then contribute a statutorily designated amount toward funding Public Television by checking off the appropriate box on her tax form. Second, at the local level, states could create accounts funded by designated portions of taxpayers' state tax refunds as indicated by the appropriately checked box on the state tax form. As with the Connecticut scheme, these accounts would be authorized to receive supplemental monies from public and private sources as well.

The use of general tax revenues for funding Public Television in this manner would afford members of the public the opportunity to express their desire to maintain the public broadcasting medium, but would not allow them the opportunity to dictate its content.³⁰² Although the federal government would remain a source of funding, there would be a check on Congress' ability to affect the status of Public Television on the basis of congressmembers' discontent with the content of Public Television programming. The taxpayers, through the use of the check-off on the tax form, would be visibly expressing their desire to see the medium continue. With a significant public expression of the wish to preserve Public Television, Congress would have a difficult time arguing that the people should not pay for something they do not want. The people will have spoken.

³⁰¹ See Public Act No. 93-233, §2(a).

³⁰² Cf. *Question: Should the Government Fund the Corporation for Public Broadcasting?*, U.S.A. TODAY, Mar, 5, 1992, at 8A ("person on the street" opinion poll of six members of the public, all stating that government should continue funding; one interviewee stated view that only programs with a non-political message should be funded).

CONCLUSION

When the Act creating Public Television was originally proposed, Congress recognized that federal financial 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.”³⁰³ The current funding scheme allows Congress to frustrate both the mandate of CPB and the goals of Public Television. Any failure on the part of Public Television to offer “programs of high quality, diversity, creativity, excellence, and innovation”³⁰⁴ stems in large part from the method by which it is funded.³⁰⁵

The tenor of the 1991-92 congressional reauthorization debates for Public Television disturbingly mirrors the Nixon administration’s attempts to destroy the public broadcasting system in its early years. The same argument made during the Nixon era, namely that Public Television programming is too liberal in content, found its way to the Senate floor and infected the Public Broadcasting Act in the guise of compromise amendments passed in order to get the reauthorization bill through Congress.

As the history of Public Television and the recent furor illustrate, despite attempts to insulate Public Television from control by the federal government, the current funding system still does not fully protect Public Television from governmental influence of the worst kind—defunding of the medium on the basis of the content of its programming. Arguably, a statute enacted by Congress which repealed the Public Broadcasting Act could be attacked on First Amendment grounds, yet any such attack would have to overcome at least two obstacles. First, it would be necessary to prove that Congress took action based on the content

³⁰³ S. REP. NO. 222, *reprinted* in 1967 U.S.C.C.A.N. 1775 (emphasis added).

³⁰⁴ 47 U.S.C. § 396(g)(1)(A).

³⁰⁵ The insecure nature of federal funding leads public broadcasting stations to seek funds from other various sources, many of whom affect the tone of Public Television programming. *See, e.g.*, KELLNER, *supra* note 38, at 184-85 (noting effect of contributions from oil companies on Public Television programming).

of the programming on Public Television. Second, and perhaps a more difficult hindrance to surmount, existing precedent supporting the view that the government does not have to provide funding for particular activities if it does not choose to do so would have to be convincingly defused.

Based on the difficulty of clearing these hurdles, the most viable means of ensuring the future of Public Television is to devise a new means of funding the medium. A direct federal matching grant program based on direct taxpayer contributions, similar in nature to the statutorily created Presidential Campaign Fund, is one alternative means of providing funding for Public Television substantially free from congressional interference. Although the possibility would still exist that Congress could repeal a statute creating such a program, just as it could repeal the Public Broadcasting Act, such an action would be more difficult to justify since the funding apparatus involved in the proposed scheme would take account of the public's desire to maintain the Public Television system. If, through its use of the tax form, the public expressed a desire to see Public Television continue, it would be difficult for Congress as the governmental representative of the people to act against the populace's clearly-expressed wishes.

Perhaps this proposal would prove unworkable, yet an exploration of its feasibility would at least open the floor to debate on the perilous nature of the current funding system and to further suggestions as to how Public Television can be safely preserved through a new funding scheme. Until such an inquiry is seriously undertaken, the fate of Public Television shall remain shamefully uncertain.