Restrictions on Public Broadcasters' Rights to Editorialize

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Recommended Citation
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speech as the basis of the freedom of association, but considered that freedom, once derived, without referring back to the underlying guarantee. In those cases, the Court measured the infringement of the right in terms of the impact on the membership itself. In Jaycees, the Court indicated that it is the interference with speech, not with membership, that must be justified. In the future, therefore, organizations seeking protection under the freedom of expressive association must argue that challenged regulations interfere with their expression, not simply with their association.

Jaycees announces a test for associational rights that is responsive to the states' interest in promoting equality. The Court recognized that in order to eradicate discrimination, the states must have the authority to ensure equal access to a broad range of tangible and intangible goods and services. Although the Court's analysis limits the freedom of association by casting it solely in instrumental terms, the test should facilitate protection of that freedom as it is now defined. Jaycees thus embodies a satisfactory compromise between preventing the harms of discrimination and protecting both intimate and expressive association.

2. Restrictions on Public Broadcasters' Rights To Editorialize. — Broadcasting occupies a special status under the first amendment: the Supreme Court has often approved regulation of broadcasting that would summarily be deemed unconstitutional if applied to other modes of expression. The Court has approved such regulation on the ground that the physical scarcity of broadcasting frequencies limits access to them and that only by regulating that access can government ensure that broadcasting will function as a forum for the vigorous discussion of public issues. Last Term, the Court considered a first amendment challenge to a broadcasting regulation in FCC v. League of Women Voters. The Court's analysis provides some insight into how far the Justices are prepared to go in adapting constitutional doctrine not just to physical realities, but to the realities of the modern regulatory state as well. The Court acknowledged that the first amendment sometimes requires both government regulation of communications media and restrictions on how Congress may distribute its funds. League of Women Voters suggests, however, that the Court may choose to avoid


deciding whether economic limitations on access to the means of expression — like physical and political limitations — may justify modifying constitutional doctrine.

The plaintiffs in this case were Pacifica Foundation, a nonprofit, educational broadcasting corporation, the League of Women Voters, and Henry Waxman, a congressman and “regular listener and viewer of public broadcasting.”4 They asserted that section 399 of the Public Broadcasting Act of 1967,5 which prohibited editorializing by any public broadcasting station6 that received a grant from the Corporation for Public Broadcasting (CPB),7 violated their freedoms of speech and press under the first amendment.8 The District Court for the Central District of California, declaring that section 399 violated the first amendment, granted the plaintiffs’ motion for summary judgment and enjoined section 399’s enforcement.9 The government appealed directly to the Supreme Court.10

4 Id. at 3112 n.6. The district court found that Pacifica had standing to challenge the regulation. See League of Women Voters v. FCC, 547 F. Supp. 379, 383 (C.D. Cal. 1982). The court therefore declined to discuss the standing of the League of Women Voters or of Rep. Waxman.


6 The FCC has interpreted this restriction to prevent only “the use of noncommercial educational broadcast facilities by licensees, their management or those speaking on their behalf for the propagation of the licensees’ own views on public issues [and not] any other presentations on controversial issues of public importance.” In re Accuracy in Media, Inc., 45 F.C.C.2d 297, 302 (1973).

7 The Corporation for Public Broadcasting is a private, nonprofit corporation created by Congress that distributes funds for the construction and operation of local public broadcasting facilities as well as for the production of educational programming for national distribution. See 47 U.S.C. § 396 (Supp. V 1981).

8 The plaintiffs also claimed that § 399 violated their fifth amendment right to equal protection. Because both the district court and the Supreme Court found the provision unconstitutional under the first amendment, neither court decided the equal protection issue.


10 The most interesting aspect of the district court’s opinion, and the only one rejected by the Supreme Court, was its insistence that a balancing approach should not automatically be substituted for the strict scrutiny traditional in first amendment cases simply because broadcasting regulation was at issue. The district court found that the unique character of broadcasting justifies a less stringent first amendment standard only if that special character is related to the reason for the particular regulation of speech at issue. See id. at 384; see also League of Women Voters, 104 S. Ct. at 3115 (rejecting the district court’s approach). The district court cited FCC v. Pacifica Found., 438 U.S. 726 (1978), as an example of a case in which the special character of broadcasting justified a restriction on speech. In that case, the Supreme Court upheld the FCC’s restrictions on the broadcast of “indecent” speech. It reasoned that the unique accessibility of broadcasting to children and the uselessness of prior warnings in a medium in which listeners continually tune in and out made it particularly difficult for the state to achieve in any less restrictive way the admittedly legitimate state interest in protecting children from such speech. See id. at 748–50. The district court in League of Women Voters found no comparable connection between the scarce character of broadcasting frequencies and the regulation of speech at issue in this case. See 547 F. Supp. at 384; Brief for Appellees League of Women Voters at 20 n.28, FCC v. League of Women Voters, 104 S. Ct. 3106 (1984) (No. 82-912).

10 The appeal was made pursuant to 28 U.S.C. § 1252 (1982), which allows direct review
A closely divided Court affirmed. Justice Brennan, writing for the majority, acknowledged that a special first amendment standard applies to broadcasting. "Because broadcast regulation involves unique considerations," he wrote, "our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve 'compelling' governmental interests." The Court based its more lenient approach to the regulation of broadcasting on the "fundamental distinguishing characteristic of the new medium... [which] is that 'broadcasting frequencies are a scarce resource [that] must be portioned out among applicants.'" Because not everyone who wishes to broadcast can do so, the Court observed, broadcasters act, in part, as public trustees. As trustees, they are charged with fostering the first amendment's ideal of "an uninhibited marketplace of ideas" by ensuring that the audience has access to a wide range of viewpoints and voices.

The role of broadcasters as trustees does not, however, deprive them completely of the protection of the first amendment. The League of Women Voters opinion emphasized that broadcasters are "entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their public [duties]." Accordingly, the Court articulated a standard designed to balance the public's first amendment interest in robust debate against the broadcasters' first amendment right to journalistic discretion: any restriction on broadcasters' speech must be "narrowly tailored to further a substantial governmental interest." by the Supreme Court of any final district court judgment declaring an act of Congress unconstitutional. See League of Women Voters, 104 S. Ct. at 3114 & n.10.

11 Justices Marshall, Blackmun, Powell, and O'Connor joined the majority opinion.


13 104 S. Ct. at 3116 (quoting Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973)). In the Red Lion case, the Court explained why this scarcity requires different treatment: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S. at 388.


15 104 S. Ct. at 3116 (quoting Red Lion, 395 U.S. at 390).

16 See id.

17 Id. at 3116–17 (quoting Columbia Broadcasting Sys. v. FCC, 453 U.S. 367, 395 (1981) (quoting Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973))). For suggestions about the source of a first amendment right to journalistic discretion, see Bazelon, FCC Regulation of the Telecommunications Press, 1975 DUKE L.J. 213, 235 & n.67 (finding such a right implied by the framers' inclusion of a press as well as speech clause), and Blasi, "Journalistic Autonomy" as a First Amendment Concept, in IN HONOR OF JUSTICE DOUGLAS 55, 68 (R. Keller, Jr., ed. 1977) (deriving such a right from the function of the press as a check on government).

18 104 S. Ct. at 3118.
In applying this standard to section 399's ban on editorializing, the majority began with a discussion of the seriousness of the ban's interference with broadcasters' first amendment rights. The Court found the interference significant in two respects. First, the "expression of editorial opinion," which the statute proscribed, "lies at the heart of First Amendment protection" because of the important role such expression plays in the democratic process. Second, the regulation at issue limited speech on the basis of its "content" and was therefore particularly suspect.

The Court next considered whether the two interests asserted by the government could justify section 399. First, the FCC had argued, the restriction prevented the stations from using their editorials to air pro-government propaganda in order to protect their federal funding. Second, section 399 prevented licensees from editorializing in favor of private, partisan views. The Court did not find either of these purposes persuasive. The majority saw the threat of undue government influence over editorial policy as speculative and insubstantial. And, even assuming the danger to be real, the Court believed section 399 to be a poorly designed remedy, one that was both over- and underinclusive.

The second asserted danger — that public broadcasters' editorials would become a tool of private, partisan

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19 Id.
20 See id. at 3118–19; see also Mills v. Alabama, 384 U.S. 214, 218–20 (1966) (striking down law prohibiting newspapers from publishing election-day editorials telling people how to vote). The FCC has itself acknowledged the public interest in editorials by defining editorializing as one of the major elements of programming necessary for a station to serve the public interest. See 104 S. Ct. at 3119 n.14 (citing FCC Programming Statement, 25 Fed. Reg. 7295 (1960)).
21 Not all speech by a broadcaster was considered editorializing; only an expression of opinion on "controversial issues of public importance" fell within the ban. See 104 S. Ct. at 3119 (quoting In re Accuracy in Media, Inc., 45 F.C.C.2d 297, 302 (1973)). The challenged statute prohibited a particular group of people — public broadcasters receiving CPB funds — from speaking on a particular subject — their own opinions on public issues. It therefore constituted a regulation of content.
23 The provision's legislative history indicated that one of Congress's motives may have been the illegitimate desire to limit criticism of political officials by public broadcasters. See 104 S. Ct. at 3121 n.18; Lindsey, Public Broadcasting: Editorial Restraints and the First Amendment, 28 FED. COMM. B.J. 63, 94–95 (1975).
24 See Brief for the United States at 22–28, 35–39, League of Women Voters (No. 82-912).
25 Such partisan advocacy, the government had contended, would destroy the unbiased presentation that was the goal of the funding and would put taxpayers in the position of supporting private speech with which they disagreed. See id. at 25–28, 33–35, 39.
26 The Court pointed out that CPB funds represent a relatively small percentage of the total funding for public broadcasting, see 104 S. Ct. at 3123 n.19, and that the Public Broadcasting Act contains many more effective and less restrictive measures to ensure that the funding mechanism would not become a means of government control over editorial policy, see id. at 3122–23. Moreover, the Court believed local stations' editorials to be one of the least likely targets of government control. See id. at 3123–24.
27 The provision was overinclusive in that it banned many editorials unrelated to subjects in which the government would take a serious interest. It was underinclusive in that government
interests — fared no better. The Court found that section 399 was ill-suited to prevent this harm as compared with other available means. Thus, the government failed to meet its burden of showing that section 399 was narrowly drafted to serve a substantial state interest.

Finally, the Court considered and rejected the government's argument that the challenged regulation fell within Congress's spending power. In *Regan v. Taxation With Representation*, the Court had allowed Congress to deny preferred tax-exempt status to organizations that engage in substantial lobbying so that Congress could prevent those organizations from using the funds to subsidize the exercise of the protected right to lobby. In *League of Women Voters*, the FCC argued that the Court should, likewise, uphold section 399 as the expression of Congress's intention not to subsidize editorializing by public broadcasters. But the Court rejected this argument. Relying primarily on the reasoning of the concurrence in *Taxation With Representation*, the Court pointed out that the government in that case had allowed the subsidized organizations to lobby without forfeiting their tax exemption: they could continue to receive federal aid as long as they segregated their public and private funds to ensure that the subsidy did not support the lobbying. In *League of Women Voters*, however, section 399 prohibited a station from editorializing even if none of the funds obtained from CPB were used to support that activity. As a result, the broadcasters were unconstitutionally forced to choose between their federal funding and their first amendment right to speak.

Justice Rehnquist, in a dissent joined by Chief Justice Burger and Justice White, took issue with the majority's dismissal of the argu-

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28 Section 399 is too limited to prevent an insidious bias from coloring all of a station's programming. The fairness doctrine, which requires all broadcasters to present public issues in a balanced manner and applies to all forms of programming, is a better means of preventing this harm. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 357, 369, 377 (1969); *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249–51 (1949). The fairness doctrine is preferable because it prevents a partisan presentation of public issues without silencing the broadcaster. See *League of Women Voters*, 104 S. Ct. at 3126–27.

29 See 104 S. Ct. at 3127.
31 See id. at 2003.
33 See 104 S. Ct. at 3128 (citing *Taxation With Representation*, 103 S. Ct. at 2004–05 (Blackmun, J., concurring); id. at 3131 (Rehnquist, J., dissenting) (noting majority's reliance on the *Taxation With Representation* concurrence).
34 See 104 S. Ct. at 3128.
35 See id. at 3129–32 (Rehnquist, J., dissenting). Justice White also filed a separate one-sentence dissent based on considerations unrelated to the majority's analysis. See id. at 3132 (White, J., dissenting).
ment that section 399 was a legitimate exercise of the government's spending power. He contended that the majority was economically naive in assuming that it was possible to segregate the funds for public broadcasting so that federal money would not subsidize editorializing. Because "CPB's unrestricted grants are used for salaries, training, equipment, promotion, etc. — financial expenditures which benefit all aspects of a station's programming, including management's editorials"\(^3\)\(^6\) — the government could avoid subsidizing editorials only by prohibiting them or by abandoning general funding.\(^3\)\(^7\) The first option — prohibition — met Justice Rehnquist's standard for a constitutional condition on the use of federal funds:\(^3\)\(^8\) it was a neutral ban\(^3\)\(^9\) that operated to prevent a subsidy of the protected activity rather than to penalize it by withdrawing some unrelated benefit.\(^4\)\(^0\) As such a condition, section 399 implicated no constitutional rights and was subject only to the weak requirement that it be rationally related to a legitimate state end. Justice Rehnquist, finding this standard met,\(^4\)\(^1\) concluded that the section was constitutional.\(^4\)\(^2\)

A third dissent, by Justice Stevens, argued that the Court gave too little credence to the FCC's asserted interest in protecting broadcasters from government influence over their editorial policies. Believing that Congress was a better judge of this political danger than the Court was, and that Congress's assessment was valid, Justice Stevens found that the restriction served a government purpose of "overriding importance." \(\text{id. at 3136-37 (Stevens, J., dissenting).}\) In Justice Stevens's opinion, moreover, § 399 did not significantly interfere with free speech: the ban left broadcasters free to express their opinions through avenues other than their subsidized stations, allowed other commentators to express their opinions on the stations, and was completely neutral with respect to the subject matter addressed and the viewpoint presented. See \(\text{id. at 3134-35.}\)

\(^3\)\(^6\) Id. at 3131 (Rehnquist, J., dissenting).
\(^3\)\(^7\) Cf. Reply Brief for the FCC at 20, League of Women Voters (No. 82-912) (if government may not prohibit editorializing, it will be forced "to choose between abandoning assistance for public broadcasting and subsidizing editorializing by those groups or persons who happen to have control of public stations"). The majority rejected this argument on the ground that Congress could have enabled a station to segregate its funds so that no federal aid subsidized editorializing. See 104 S. Ct. at 3128. Thus, the holding in League of Women Voters is limited to situations in which funding can be effectively segregated. The Court leaves open the question whether Congress could force a recipient to choose between retaining its funding and exercising its rights in a case — if there is one — in which that was the only way to prevent the subsidy short of abandoning funding.

\(^3\)\(^8\) A long line of cases restricts the government's ability to condition receipt of a government benefit on the surrender of a constitutional right. See, e.g., Speiser v. Randall, 357 U.S. 513 (1958) (holding that requirement that veterans take a loyalty oath in order to qualify for a property tax exemption unconstitutionally restricts their freedom of speech). See generally Note, Unconstitutional Conditions, 73 HARV. L. REV. 1595 (1960) (discussing the arguments that justify this restriction on the government's ability to put conditions on its benefits).

\(^3\)\(^9\) See 104 S. Ct. at 3132 (Rehnquist, J., dissenting). Like Justice Stevens, see supra note 35, Justice Rehnquist found the ban neutral with respect to both the viewpoint presented and the content or subject matter addressed. See 104 S. Ct. at 3132 (Rehnquist, J., dissenting). As the majority pointed out, however, editorializing is a particular type of speech identifiable by its content: the expression of opinion on an issue of public interest. See supra note 21.

\(^4\)\(^0\) See 104 S. Ct. at 3132 (Rehnquist, J., dissenting).

\(^4\)\(^1\) See id.

\(^4\)\(^2\) See id.
The League of Women Voters opinions illuminate the Court's assumptions about the nature of the society in which the first amendment operates, and indicate how far the Court will modify first amendment doctrine in light of those assumptions. First amendment jurisprudence was founded on a conception of American society as a "marketplace of ideas" — a society characterized by its members' relative equality of access to the means of speech, by freedom from government regulation, and by the vigorous exchange of diverse viewpoints resulting from this combination of unimpeached access and unrestricted expression. But in the broadcasting context, the Court has asserted, the physical scarcity of frequencies makes it impossible to achieve equal access and diversified debate without abandoning the laissez-faire approach. Therefore, the Court has upheld government regulation of broadcasting as long as it serves the goals of broader access and more balanced presentation without unnecessarily restricting expression.

The regulation at issue in League of Women Voters did not serve those goals. As the appellees pointed out: "[T]o silence the broadcaster in order to eliminate the theoretical possibility of government interference with the content of its programming stands the First Amendment on its head. The remedy for any feared imbalance in the marketplace of ideas is more speech, not less speech." The Court recognized that the regulation seriously intruded on broadcasters' freedom of expression. Moreover, the regulation did not further the public's interests in diversified debate and equality of access; in the name of "a balanced presentation," it deprived listeners of broadcasters' knowledgeable and articulate opinions on public issues rather

44 See League of Women Voters, 104 S. Ct. at 3116; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388–89 (1969); Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 902 (1963) ("The situation is indeed paradoxical. Freedom of expression is by its very nature laissez-faire; it implies absence of government control. Yet the conditions under which freedom of expression can successfully operate in modern society require more and more governmental regulation.").
45 See, e.g., Columbia Broadcasting Sys. v. FCC, 453 U.S. 367 (1981) (upholding statutory right of access for federal candidates); cf. League of Women Voters, 104 S. Ct. at 3118 (stating that broadcast regulation must be "narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues").
47 See 104 S. Ct. at 3118–20. This was a particularly invidious "content" regulation because it singled out the dimension of broadcasters' speech that is most clearly connected to the role of speech as an outlet for self-expression: their opinions.
48 See Lindsey, supra note 23, at 96.
than simply ensuring access, within the limits of spectrum scarcity, to those with different points of view.\textsuperscript{49}

Although the result in \textit{League of Women Voters} is thus unsurprising, the analysis warrants closer examination. The Court's approach indicates the extent to which it is willing to adapt constitutional doctrine to the technological and economic conditions that distinguish the modern regulatory state from the proverbial marketplace of ideas. The Court's dismissal of the argument that section 399 is within Congress's spending power, as that power was interpreted in \textit{Taxation With Representation}, demonstrates the Court's willingness to prohibit the government from using its extensive regulatory apparatus to restrict access to the means of speech. In a modern economy characterized by widespread reliance on government benefits and subsidies, statutory conditions on those benefits that silence a large number of people may significantly limit the scope and diversity of public debate. The Court accommodated this widespread reliance on government funds by denying government the power to distribute those funds in a way that interferes with recipients' exercise of constitutional rights. The Court's desire to cabin the growth of the regulatory state may also shed light on its curious refusal to reconsider whether broadcasting outlets remain truly scarce. The Court has clung to the notion that access to broadcasting is chiefly impeded by a physical barrier, the finite spectrum of broadcasting frequencies, and has refrained from acknowledging the fundamental economic barriers to access. Perhaps the Court fears that such an acknowledgment — a recognition that economic concentration in the broadcasting industry, caused by underlying market forces, is what limits many people's opportunities to speak — could constitutionally justify, or even require, extensive governmental regulation of communications media in the interest of revitalizing the marketplace of ideas.

Justice Brennan's discussion of \textit{Taxation With Representation} seems to indicate that a majority of the Court has adopted the reasoning of the concurrence in that case\textsuperscript{50} and embraced the view that the distinguishing characteristic of an unconstitutional scheme is its implicit demand that the would-be recipient choose between his funding and his rights. By affirming this view, the majority implies that the holding in \textit{Taxation With Representation} — that Congress may condition federal aid to avoid subsidizing the exercise of a constitut-

\textsuperscript{49} See 104 S. Ct. at 3121 (distinguishing § 399 from regulations increasing access); supra note 28.

\textsuperscript{50} Compare \textit{League of Women Voters}, 104 S. Ct at 3128 (arguing that Congress may prohibit the use of public funds for protected activity only if it allows the recipient to continue to engage in protected activity using his own funds), \textit{and} \textit{Regan v. Taxation With Representation}, 103 S. Ct. 1997, 2004-05 (1983) (Blackmun, J., concurring) (same) \textit{with} \textit{Taxation With Representation}, 103 S. Ct. at 2001 (arguing that Congress may prohibit the use of public funds for protected activity because it is not required to subsidize constitutional rights).
tional right — applies only to statutes that allow the recipient of aid to continue exercising that right as long as he does not use Congress's funds for that purpose.

The majority opinion in *Taxation With Representation*, which Justice Rehnquist wrote, did not rely primarily on the recipient's opportunity to keep both his funding and his rights. Instead, the opinion focused on the government's power to tailor its spending program to further only its chosen objectives and on the plaintiff's legal inability to demand that those objectives include subsidization of constitutional rights. This focus might be consistent with robust public debate if we lived in the society envisioned by early first amendment jurisprudence: if government subsidies were insubstantial — in terms of both the number of people who receive them and the degree to which any individual relies upon them — then an attempt by Congress to silence the recipients through withdrawal of funds would have a negligible impact on the range of voices and viewpoints available to the public.

In a society, however, in which government funding is often a prerequisite to private activity, the majority's position may be essential to ensuring each citizen a meaningful opportunity to exercise his rights and contribute to public debate. Although Congress could have constitutionally chosen not to fund private activity at all, it has chosen instead to create an extensive web of federal aid, thereby inviting widespread reliance on public funds. If the Court now allowed Congress to condition its subsidies on the recipients' relinquishing their first amendment rights, there would remain few people who could afford to speak. In requiring that government allow the recipients of its aid to retain their rights, the Court implicitly modifies its traditional first amendment vision by acknowledging that government intervention is a fact of modern life. Yet the Court's modified position remains true to one of the hallmarks of the traditional vision: the judiciary's limitation of government interference with expressive activity.

An examination of the Court's staunch refusal to recognize the demise of spectrum scarcity underscores the conflict between the Court's continuing desire to limit government and its responsibility to

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51 See *League of Women Voters*, 104 S. Ct. at 3131 (Rehnquist, J., dissenting).
53 See Brief for Appellees League of Women Voters at 27, *League of Women Voters* (No. 82-912) (“Congress today funds everything from education to elections, from parks to playhouses. If the existence of such support were deemed sufficient to justify restricting the recipients' freedom of speech, the First Amendment would soon become meaningless.”).
54 Most people would be unable to bear the loss of the subsidy and also unable, once denied the funding, to compete with those more willing to forgo the exercise of their constitutional rights.
protect freedom of expression. In *League of Women Voters*, the Court explicitly refused to determine whether, as a factual matter, spectrum scarcity still exists; it thrust that task upon Congress and the FCC. This abdication of its constitutional responsibility may result, at least in part, from the Court's desire to avoid the choice it would then face. If it finally accepts its responsibility, and acknowledges the end of spectrum scarcity — a fact generally recognized by commentators — the Court could choose to release broadcasting from its second-class first amendment status in either of two ways. On the one hand, the Court could simply welcome broadcasting into the fold of traditional first amendment protection and initiate the dismantling of the regulatory system. Yet, having disavowed spectrum scarcity, the Court would still have to contend with the uncomfortable fact that limitations on access persist. These limitations are caused not by the physical restriction of spectrum scarcity or by political restrictions imposed by Congress, but by economic constraints that perpetuate the concentration of control in the broadcasting industry. If it recog-

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56 *League of Women Voters* takes the Court's refusal to address the issue of spectrum scarcity one step further: it attempts to thrust the responsibility for the evaluation of spectrum scarcity upon the political branches. The Court explicitly declined to "reconsider [its] long-standing approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 104 S. Ct. at 3116 n.11. If spectrum scarcity has disappeared, broadcasting is now constitutionally indistinguishable from the more traditional forms of the press. See Bazelon, *supra* note 17, at 220–26; Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich. L. Rev. 1, 14–16 (1976). The existing regulatory scheme, which has never been acceptable in other first amendment contexts, see *League of Women Voters*, 104 S. Ct. at 3115–16, might then appear to be a massive invasion of broadcasters' rights. The Court may not rely upon Congress or an agency to notify it that circumstances have changed in such a way that a constitutional violation has arisen. It must itself make any factual judgments necessary to determine the constitutional validity of a regulatory scheme.

This is not to say that the Court must make an independent assessment of every factual judgment; clearly some judgments are within the discretion of the political branches. But the only judgments that are within the legislature's or executive's sole discretion are those that will not result in the violation of anyone's rights regardless of the decision. In cases in which a factual matter is itself the condition precedent of a constitutional right, the Court fails to fulfill its duty to uphold the Constitution if it simply accepts the legislature's or executive's determination and refuses to assess the situation independently. See id. at 3122 n.18 ("[D]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." (quoting Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843–44 (1978))).


59 See Bazelon, *supra* note 17, at 238; Note, *supra* note 58, at 105 n.105. The vast
nized these economic limitations, the Court might then choose the second alternative: to acknowledge that economic barriers, like physical and political ones, may justify adapting constitutional doctrine to serve the goal of broader access.

Perhaps because its opposition to political barriers was motivated, at least in part, by a distrust of government, the Court has been unwilling to extend its arguments to oppose economic barriers to access. This unwillingness exalts the means over the end: it transforms the special wariness of government encroachment—which should act merely as an aid in identifying and eliminating politically created barriers to speech—into a justification for ignoring economically created barriers. If the Court would recall that a diverse and robust marketplace of ideas is the goal of the first amendment, it might recognize that limited access, whatever its cause, justifies the government's efforts to create an opportunity for other voices and points of view to be heard.

The Court may also be reluctant to follow this approach because of the possibility of its application to other media. As the Court itself recognized a decade ago, inaccessibility is a problem in the print media as well:

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.60

Once the Court recognizes that the concentration of power allows, or perhaps even requires,61 the government to take affirmative steps to provide access to those outside the communications industry, it is difficult to see how the print media could escape access regulation as well.62

60 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249-50 (1974) (footnote omitted). In Miami Herald, the Court rejected a statutory guarantee of access despite its recognition of the concentration problem. See id. at 254. It has, however, upheld the FCC's efforts to reduce, through broadcasting regulation, the concentration of media control. See, e.g., FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (holding that FCC may refuse broadcasting licenses to those with significant control over other local mass media).

61 If the public truly has a first amendment right to a broad-based forum, the regulation necessary to achieve such a forum may be constitutionally required.

62 For suggestions on how to limit the reach of the access principle, see Bollinger, supra note 56, at 26-37, and Note, supra note 58, at 106-09. For a collection of sources on the access theory, see Lange, supra note 43, at 2 n.5 (supporting the theory), and id. at 5 n.21 (criticizing the theory).
In its treatment of broadcasting, the Court faces the difficult task of interpreting constitutional values in light of a modern society permeated by government regulation and subsidization. *League of Women Voters*, by rejecting the suggestion of unbridled congressional discretion implicit in Justice Rehnquist's dissent, reaffirms the Court's commitment to that project. The Court's refusal to recognize the disappearance of spectrum scarcity is, however, an abdication of its duty of constitutional interpretation. If it chooses to recognize that physical scarcity is now no more than a myth, the Court will find itself in possession of a valuable opportunity to adapt constitutional law to economic reality. The special status of broadcasting might then be seen not as an aberration, but as the foundation of a first amendment theory that addresses the economic phenomenon of a modern communications industry that excludes most Americans from the public debate on which democracy depends.

3. *Symbolic Speech.* — For decades, the Supreme Court has struggled to reconcile "the right to disseminate ideas in public places" with "claims of an effective power in government to keep the peace and to protect other interests of a civilized community."¹ In resolving this tension in individual cases, the Court has largely managed to accommodate first amendment interests while giving due deference to the regulatory judgments of government. The particular needs and values associated with the form of expression at stake have been carefully weighed against the governmental purpose in restricting the expression, discounted by the availability of effective alternatives for furthering that purpose. Last Term, however, in *Clark v. Community for Creative Non-Violence*,² the Court abandoned this sensitive balancing of interests and mechanically upheld the application of a government regulation that impaired expressive activity in a traditional public forum, yet advanced a governmental purpose only roughly.

In 1982, the Community for Creative Nonviolence (CCNV), a religious association formed to work on behalf of homeless people, received from the National Park Service a renewable seven-day permit to conduct a round-the-clock demonstration in Washington, D.C.³ The demonstration, scheduled to begin on the first day of winter, was to consist of the occupation by 150 homeless persons of two "symbolic tent cities" — one in Lafayette Park across from the White House, and the other on the Mall abutting the Washington Monument.⁴ The

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¹ Niemotko v. Maryland, 340 U.S. 268, 273–74 (1951) (Frankfurter, J., concurring in the result).
⁴ CCNV, 104 S. Ct. at 3068. Demonstrations are quite common in these parks, but are ordinarily subject to permits issued by the National Park Service. See 36 C.F.R. § 50.19 (1983).