Freedom of Expression
In
Public Broadcasting

A Report and Analysis
Prepared for the Organization of
State Broadcasting Executives

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INTRODUCTION

Public radio and television are a vital component of the American system of broadcasting. Approximately 650 radio stations and 350 television stations are licensed by the Federal Communications Commission ("FCC") to provide educational programming to the American people. Noncommercial educational broadcasters are licensed by the FCC primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial broadcast service. In fulfilling this mandate, public stations provide high quality news, educational, cultural and entertainment programs that are not otherwise available from commercial broadcast and subscription television outlets.

But while the contribution of noncommercial broadcasting to public discourse is undeniable, the precise status of noncommercial licensees within America's system of free expression is not as well defined. Because of the "public" nature of public broadcasting, questions recur as to the rights of the licensees to engage in unfettered expression. Complex questions abound: To what extent are public broadcasters, many of which include state governmental entities, protected by the First Amendment to the Constitution, which provides that "Congress shall make no law . . . abridging freedom of speech, or of the press?" When a state agency acquires a license to transmit broadcast speech, does it create a "public forum" in which the station's editorial preferences are subordinated to constitutionally-required rights of public ac-

cess? In contrast, may the government dictate programming choices of a public licensee by virtue of its state affiliation or because it is funded in part by the legislature? There also are questions regarding special restrictions for public broadcasters under the federal system of regulation. Yet the federal licensing scheme may also be a source of rights to free expression vis-à-vis state governments.

Such questions go to the heart of public broadcasting's constitutional identity. Are public licensees nothing more than the mouthpiece of the government or do they provide an important independent editorial voice? And if it is the latter, how is journalistic independence to be preserved in the face of the competing demands of political influence and public access? What is the source of a public licensee's editorial independence in light of its obligations as a federal licensee and its dependence on governmental funding?

The elusive nature of these questions is a counterpoint to the rather concrete threats to free expression that perennially confront public broadcasters. In the early 1970s the White House and Congress adopted measures designed to restrict the editorial independence of public broadcasting by limiting "controversial" programming. In the 1980s, viewers of public stations and program producers demanded the right to override the editorial decisions made by public broadcasting executives. In the 1990s political candidates claimed a constitutional right of access to political debates sponsored by public broadcast licensees. And in the year 2000, states used their spend-

ing power to limit nationally-distributed programming on local stations. This partial list oversimplifies the various threats to free expression, in that particular efforts to limit programming are not necessarily confined to any one point in time. But it does provide a sampling of the various types of threats encountered by public broadcasters.

This Report addresses these complex issues and offers an approach for maximizing the editorial independence of public broadcast licensees. It defines editorial independence in the same way as the Statement of Principles of Editorial Integrity in Public Broadcasting: "the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." The goal of this Report is to bolster the "free and independent decision-making process" of public broadcasting and to provide legal analysis and support for the Statement of Principles of Editorial Integrity, the fourth principle of which states:

> Public broadcasting stations are subject to a variety of statutory and regulatory requirements and restrictions. These include the federal statute under which our licensees must operate, as well as other applicable federal and state laws. Public broadcasting is also cloaked with the mantle of First Amendment protection of a free press and freedom of speech.
>
> As trustees we must be sure that these principles are met. To do so requires us to understand the legal and constitutional framework within which our stations operate, and to inform and educate those whose position or influence may affect the operation of our licensees.

This Report updates a previous study of the First Amendment rights of public broadcasters, which is now almost twenty years old. *See* Preston, Thorgrimson, Ellis & Holman, ANALYSIS OF FIRST AMENDMENT RIGHTS OF PUBLIC BROADCASTERS (Nov. 4, 1983) ("1983 FIRST AMENDMENT ANALYSIS"). The current Report examines constitutional doctrine and case law to determine whether, and to what extent, public broadcasters are protected by First Amendment guarantees of free expression. It also analyzes the ways in which the federal licensing scheme imposes special programming requirements on public broadcasters, while simultaneously limiting content regulation at other levels of government. Finally, it offers recommendations for further steps to help solidify public broadcasters' rights to free expression.

EXECUTIVE SUMMARY

Public Broadcasting in the Scheme of Federal Regulation

Public broadcasters, like their commercial counterparts, are licensed by the Federal Communications Commission ("FCC") to provide radio and television service to the public. As part of the FCC's expansive powers over licensing, the Communications Act of 1934 confers certain authority to regulate broadcast programming by authorizing political broadcasting rules, requirements for children's programming, closed captioning rules, and restrictions on "indecent" broadcasts. As a general matter, broadcast licenses are conditioned on the licensee's ability and willingness to serve the "public interest, convenience and necessity."

Congress adopted the Public Broadcasting Act of 1967 to provide federal support for public broadcasting so as to "encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences." Within this framework, the overall federal policy toward public broadcasting is to promote freedom of expression. Federal policies underlying the promotion of public broadcasting include maximizing diversity by promoting "freedom, imagination and initiative on both local and national levels," serving as "a source of alternative telecommunications services for all the citizens of the Nation," and insulating programming decisions from political control.

To promote these goals, Congress created the Corporation for Public Broadcasting ("CPB"), a private, non-profit corporation that partially funds the activities of public broadcasting. Among other things, CPB was given a mandate of facilitating the production of "programs of high quality, diversity, creativity, excellence, and innovation, . . . with strict adherence to objectivity and balance in all programs . . . of a controversial nature." However, CPB may neither engage in broadcasting itself nor produce programming, and is required to remain a strictly non-political and non-profit organization. Instead, CPB created the Public Broadcasting Service ("PBS") and National Public Radio ("NPR") to distribute programming to member radio and television stations. Most CPB-funded television programs are distributed through PBS, and CPB-funded radio programs are distributed primarily through NPR and Public Radio International ("PRI").

Public broadcast stations are licensed to various types of private and governmental entities. Nonprofit community organizations or state government agencies operate a large proportion of public television stations, while many public radio stations are licensed to universities. State government stations are typically linked into multi-station networks that air a common program schedule statewide. Funding for public broadcasting also comes from a combination of public and private sources. Less than half of the funding for public broadcasting comes from tax-based sources such as federal, state, and local governments.

Programming Regulation. Because broadcasters are licensed by the federal government, they historically have been subject to certain content controls considered constitutionally impermissible if applied to unregulated media. The classic example illustrating this difference is the Supreme Court's approval of the broadcast "fairness doctrine," and its rejection for similar "right of reply" requirements for the print media. However, the FCC's authority in this area is somewhat paradoxical. Congress vested the FCC with the authority to regulate broadcasters "in the public interest," but it also decreed that the federal agency lacks any power to "interfere with the right of free speech by means of radio communication" or to impose any "regulation or condition" that interferes with free expression. The overall purpose of this regulatory balancing act is to "to maintain – no matter how difficult the task – essentially private broadcast journalism."

Generally, commercial and noncommercial licensees have the same public interest obligations. However, some differences between the two sectors exist because of the differing purposes of commercial and noncommercial service.

- **Educational Programming Requirements**. The Communications Act and FCC rules require that noncommercial broadcasting facilities "will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service."

- **Commercial Restrictions**. The Communications Act provides that "no public broadcast station may make its facilities available to any person for the broadcasting of

any advertisement." Despite this statutory proscription, the FCC decided that public broadcasters may use part of their digital frequencies for subscription services.

- **Political Broadcasting Restrictions**. The Communications Act prohibits noncommercial licensees from supporting or opposing candidates for elected office, broadcasting program material in exchange for remuneration intended to support or oppose any candidate for political office, and accepting any remuneration for the broadcast of programming expressing the views of any person on a matter of public importance or interest. However, Congress amended Section 312(a)(7) of the Act in 2001, freeing public broadcasters from the obligation to provide "reasonable access" to their facilities by federal candidates.

Free Expression Controversies. Public broadcasting has faced various threats to free expression over the years. Some examples of editorial interference are based on the nature of broadcasting as a regulated medium while others arise from the special nature of public broadcasting.

- **Federal Funding Crisis**. Shortly after passage of the Public Broadcasting Act, the Nixon Administration sought to eliminate news and public affairs programming from public broadcasting, and to redirect programming efforts toward local cultural and educational programming. It sought to accomplish these goals through its appointments to the CPB Board and through restricting funding for public broadcasting. These actions culminated in a presidential veto of public broadcasting appropriations in 1972. After this event, Congress moved toward a more stable system of multi-year funding for public broadcasting, although similar questions over funding recur from time to time.

- **FCC Review of Programming Decisions**. The FCC generally defers to the good faith editorial judgments of licensees, but in a series of decisions in the 1970s it subjected public broadcasters to significant scrutiny, and even denied some license renewals. The Commission stressed that public broadcasters have a statutory obliga-

tion to maintain control over programming on their stations. However, it subsequently eliminated formal ascertainment of community needs and significantly modified program logging requirements in order to reduced routine oversight of programming. The FCC has characterized its role as "appropriately limited" to "facilitating the development of the public broadcasting system rather than determining the content of its programming."

- **Federal Editorial Limits**. Congress and the FCC in the past have imposed restrictions on the editorial freedom of noncommercial broadcasters, but courts have carefully scrutinized such measures. Until the editorial ban was invalidated by the Supreme Court in 1984, Section 399 of the Public Broadcasting Act provided that "[n]o noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office." This provision had been limited in 1981 to cover only stations receiving CPB grants. Another rule requiring public stations to record "controversial programs" similarly was invalidated. The restriction on supporting or opposing candidates was not challenged in court and remains in effect.

- **Viewer and Programmer Access Demands**. In another series of cases the editorial discretion of public licensees has been challenged by access demands made by program producers and various segments of the public. These "public forum" cases ask whether the government's involvement as a licensee of noncommercial broadcast stations entitle viewers and program providers to a constitutional right of "access" to the governmentally-created forum. Generally, courts have denied such access demands, but have also ruled that, as "government speakers," public broadcasters lack First Amendment rights.

- **Political Debates**. A specialized class of public forum cases involve the sponsorship of political debates by public broadcasters. Courts have been asked to determine whether public broadcasters create a public forum when they sponsor debates between political candidates and thereby take on the obligation to include all candidates in the event. Public broadcasters have responded that they need to have editorial discretion to limit debates to newsworthy candidates. As the case law has developed in this

area, reviewing courts have concluded that public broadcasters do not necessarily create a public forum by sponsoring a political debate. However, under certain circumstances, public broadcasters may take on the obligations of the public forum if they do not exercise news judgment.

- **State Programming Restrictions**. State governments from time to time seek to impose restrictions on the programming transmitted by public broadcast stations. Such restrictions may take various forms. A state legislature may simply prohibit programming it considers to be controversial or it may impose less direct regulatory requirements on particular types of programming. Control may also be imposed by appropriations decisions, since state legislatures provide significant funding for public broadcasting. Such measures raise questions about possible federal preemption of state programming restrictions as well as First Amendment issues.

Constitutional and Statutory Approaches to Protecting Free Expression

One important challenge facing public broadcasters is the need to make consistent arguments in support of their rights to editorial discretion in the various situations in which free expression has been threatened. Courts have upheld the right of public broadcasters to air editorials, to control their programming schedules and to use journalistic judgment to select participants for political debates. Other challenges – notably restrictions on federal and state funding – have been resolved more by political solutions than by litigation. However, in light of the myriad situations in which threats to free expression arise, it is critically important that arguments supporting editorial discretion in response to a particular challenge be developed with an awareness of how the reasoning may affect the next case.

The Dichotomy Between Government Speech and the Public Forum. The root First Amendment question facing public broadcasters is their constitutional identity. Can they claim First Amendment protection from government "abridgement" of speech when the licensee is a government agency? Or is the government merely exercising dominion over "its own medium of expression" when it restricts speech in ways that would constitute a clear case of censorship if applied to private media? Also, what obligations does the government have to provide citizen access to station facilities under the public forum doctrine? Case law provides some answers to these questions, but it is episodic and its doctrinal underpinnings are not always clear. Based on recent developments, this Report explores the possibility of developing a separate doctrine under which constitutional protection may be extended to "state-sponsored speech enterprises," such as public broadcasters.

- **Public Broadcasters as Government Speakers**. When the government is the speaker and is delivering its own message, First Amendment protections do not apply to its speech. Although some lower courts have assumed that state-operated public broadcast licensees necessarily are government speakers and therefore lack First Amendment rights, this issue has never been resolved definitively. The Supreme Court declined to address it in *Arkansas Educational Television Commission v. Forbes*, thus preserving the possibility that the First Amendment may protect public broadcasters from some types of government action.

- **Public Broadcasters Under the Public Forum Doctrine**. Certain courts have held that public broadcasting stations are not public fora, and therefore no right of access exists for the public. Instead, licensees are consid-

ered government speakers. Under these decisions the public cannot dictate broadcasters' program schedules, but state officials *can* do so. The difficult question presented by these cases is how simultaneously to preserve the discretion of public broadcasters from both public demands and political manipulation. The Supreme Court in *Forbes* helped clarify this issue by holding that "broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." But the Court did not resolve the broader doctrinal question of the constitutional status of state-owned broadcast stations.

- **A Possible Third Way: Constitutional Protection for Government-Sponsored Speech Enterprises**. Developing case law suggests that it may be possible to craft a new First Amendment doctrine to provide protection for government-sponsored speech enterprises. Recent decisions suggests that the First Amendment may protect the journalistic integrity of government-sponsored institutions, like public broadcast stations, that are created for the purpose of exercising independent editorial judgment. A government-sponsored speech enterprise is distinguished from pure "government speech" in that it is established to exercise independent editorial judgment, not to disseminate the state's message. It also is distinguished from the designated public forum in that the purpose of the speech enterprise is not to create an open platform for all speakers. Certain types of state-sponsored institutions – libraries, universities, and the institutional press – have a First Amendment "aura" that has received judicial recognition and protection. Under this logic, state-owned public broadcast licensees could be the very paradigm of a government-sponsored speech enterprise.

Applying Legal Arguments to Particular Threats to Free Expression. Because free expression by public broadcasters may be threatened in various ways, different legal arguments may be necessary to combat such threats. The goal of this analysis is to fashion arguments that protect free expression while maintaining a consistent doctrinal approach.

- **Federal Programming Restrictions**. Because questions involving broadcast content have an undeniable political appeal, it is entirely possible that federal regulators may in the future enact content restrictions that are incompatible with the mission of public broadcasting. One potential example is the perennial attempt to ban the distribution of violent programs at time when children may be watching. Measures of this type would be subject to a straightforward First Amendment argument. The principal claim would be that such regulations disrupt the balance struck by the Communications Act and the First Amendment between public interest obligations and editorial discretion.

- **Access Demands and the Public Forum**. The Supreme Court's decision in *Forbes* should help resolve most claims that public broadcast stations are public fora. In the special case of candidate debates, however, public broadcasters must use good journalistic judgment in order to preserve their editorial discretion. Such practices are consistent with broadcast licensees' obligations under the Communications Act's political broadcasting requirements.

- **State Programming Restrictions, the First Amendment, and the Power of Federal Preemption**. The imposition of content controls on noncommercial licensees by state governments poses one of the thorniest issues in public broadcasting. A significant percentage of noncommercial licenses are held by state governments, thus raising the question whether any given content restriction is more properly characterized as "censorship" or as "editing." But programming decisions based on accepted professional standards are quite different from content prohibitions imposed through the political process. State-

imposed content restrictions may provide an occasion to test the theory that the First Amendment protects state-sponsored speech enterprises. Additionally, it would be plausible to argue that such restrictions are preempted by federal law. The Communications Act is predicated on serving the public interest by maximizing the editorial freedom of broadcast licensees. The Supreme Court has noted that "[p]ublic and private broadcasters alike are not only permitted, *but indeed required*, to exercise substantial editorial discretion in the selection and presentation of their programming." Accordingly, substantial case law supports the argument that programming restrictions imposed on public broadcasters by state governments are federally preempted.

- **Limits on Use of Funding to Restrict Free Expression**. Where funding decisions are made for the sole purpose of influencing editorial decisions, constitutional limits may come into play. The Supreme Court recently limited the government's ability to use funding restrictions to "prohibit[] speech necessary to the proper functioning" of the programs it creates. Although the government may not be required to fund public broadcasting in the first place, the Constitution limits its ability to withdraw financial support solely to restrict programming it disfavors.

Public Broadcasting, Free Expression, and Editorial Integrity

The Wingspread Conference on Editorial Integrity in Public Broadcasting was convened in 1984 to enable public broadcasting executives and representatives from state licensing boards and commissions to explore the First Amendment position of public broadcasting licensees. The resulting report found that "[t]he history of public broadcasting licensees, especially those which are also state government entities, shows that they have unclear First Amendment rights." Now, almost two decades later, while the legal

questions have not been fully resolved, there have been significant case law developments that point toward possible strategies to maximize the editorial independence of public broadcast licensees based on First Amendment and statutory principles.

As the analysis detailed in this Report suggests, a critical factor in preserving the editorial independence of public broadcast licensees is making sure that the entities are chartered to provide an independent editorial voice and that they behave as professional journalistic organizations. This requires attention to the obligations associated with the FCC license, the purposes of the authorizing legislation at the state level, the corporate bylaws, and professional guidelines such as the Principles of Editorial Integrity. By focusing on professional standards that advance established goals of journalistic excellence, public broadcasters can help create a self-fulfilling prophesy: They are more likely to be accorded a high degree of editorial independence by law where they exercise a high degree of editorial independence in fact.

Recommendations

This Report on freedom of expression in public broadcasting represents only the starting point, and not the end, of any focused effort to promote full constitutional protections for noncommercial licensees. The purpose of this analysis is to initiate a dialogue that will lead to a reexamination of the status of public broadcasting as a journalistic enterprise in the 21st century, and perhaps to the development of new Principles of Editorial Integrity. Accordingly, to move this project to its next phase, I recommend the following actions:

- There should be a comprehensive analysis of existing state statutes, corporate by-laws, and professional standards that govern the operations of noncommercial broadcast licensees.
- Public broadcasters should convene a second Wingspread Conference to examine issues of editorial integrity in public broadcasting in the contemporary media environment.
- Based on the Wingspread II findings, and in light of this analysis and a review of state laws, the public broadcasting community should consider developing new Principles of Editorial Integrity for the 21st century.

I. PUBLIC BROADCASTING AND FREE EXPRESSION

A. PUBLIC BROADCASTING IN THE SCHEME OF FEDERAL REGULATION

The Communications Act of 1934, as amended, confers broad powers on the FCC to regulate "interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 1/ Federal regulation of broadcasting is comprehensive. The Communications Act grants to the FCC the sole power to determine who should receive broadcast licenses,2/ a power that includes determining where a station may be located, what frequency it can use, when it can broadcast, and what area it can serve.3/ The FCC also exerts authority over broadcast programming through its political broadcasting regulations,4/ children's programming requirements,5/ programming accessibility rules,6/ and its restrictions against "indecent" broadcasts.7/ As a general matter,

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1/ 47 U.S.C. § 151.

2/ 47 U.S.C. §§ 307, 309. *See also* 47 U.S.C. § 301 ("It is the purpose of this chapter . . . to maintain the control of the United States over all the channels of radio transmission.").

3/ 47 U.S.C. § 303.

4/ 47 U.S.C. §§ 312, 315.

5/ 47 U.S.C. § 303a.

6/ 47 U.S.C. § 713.

7/ 18 U.S.C. § 1464.

broadcast licenses are conditioned on the licensee's ability and willingness to serve the "public interest, convenience and necessity." 8/ This includes the power to ensure that both commercial and noncommercial broadcast licensees operate in the public interest. 9/

Non-commercial broadcasting has been part of this scheme since the beginning of radio. Some of the first radio stations in the United States were established by physics and engineering departments of colleges and universities. As radio developed in the early 1920s, these same institutions maintained their stations and licensed them under the terms of the Radio Act of 1927. However, the Act made no distinction between commercial and non-commercial broadcasting.

The Communications Act of 1934 required the Commission to report to Congress on a proposal create a nationwide cultural or educational broadcast service and "to allocate fixed percentages of radio broadcasting facilities to particular kinds of non-profit radio programs, or persons identified with particular types of non-profit activities." 10/ In 1935, the Commission

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8/ 47 U.S.C. §§ 301, 303.

9/ 47 U.S.C. §§ 307, 309.

10/ The Communications Act of 1934, Pub. L. 416, § 307(c), 48 Stat. 1064 (1934).

reported that existing stations were producing programs with enough diversity and cultural content that the special allocation would be unnecessary. 11/

The FCC established a class of non-commercial educational radio stations in the late 1930s and in 1940 reserved five of the forty channels in the new high-frequency band for such stations. In 1952, the FCC reserved 250 television channels for noncommercial educational use. 12/ Congress ratified that decision in 1962, through passage of the Educational Television Facilities Act, which provided funding for educational stations. 13/ These set-asides have continued to exist for both television and FM services. 14/ Because the AM band was established and populated prior to these reservations, there are no special provisions for non-commercial broadcasters in that service. In addition to frequency set-asides, various institutions were established to facilitate public broadcasting. In 1967 the Carnegie Commission on Educational Television issued its initial report proposing federal aid and an

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11/ DWIGHT L. TEETER, JR. and DONALD LEDUC, MASS COMMUNICATIONS AND GOVERNMENT 415 n.94 (8th ed. 1995).

12/ *Sixth Report and Order on Television Allocation*, 41 F.C.C. 148, 158-167, 227-563, (1952).

13/ The Act created a capital grant program for non-profit broadcasters to expand and improve their facilities. Educational Television Facilities Act, Pub. L. 87-447, 76 Stat. 64 (1962).

14/ *See*, *e.g.*, 47 C.F.R. §§ 73.501, 73.606 (2000).

extension of educational TV to be known as "public television." 15/ This prompted Congress to pass the Public Broadcasting Act of 1967. 16/

The goal of the Public Broadcasting Act is to "encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences." 17/ Within this framework, the overall federal policy toward public broadcasting is to promote freedom of expression. Federal policies underlying the promotion of public broadcasting include maximizing diversity by promoting "freedom, imagination and initiative on both local and national levels," 18/ serving as "a source of alternative telecommunications services for all the citizens of the Nation," 19/ and insulating programming decisions from political control. 20/

To implement these goals the Public Broadcasting Act created the Corporation for Public Broadcasting. CPB is a private, non-profit corporation that partially funds the activities of public broadcasting through pro-

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15/ PUBLIC TELEVISION: A PROGRAM FOR ACTION (Carnegie Commission Report 1967); *See generally* Burke, THE PUBLIC BROADCASTING ACT OF 1967: PART I AND PART II 6 EDU. BROADCASTING REV. 105-119 and 178-192 (1972).

16/ Public Broadcasting Act of 1967 Pub. L. No. 90-129, 81 Stat. 365 (1967). The term "public" was chosen over "educational" to allow the corporation more flexibility in developing programming, TEETER and LEDUC, *supra* note 11 at 416 n.96 (8th ed. 1995).

17/ 47 U.S.C. § 396(a)(6).

18/ 47 U.S.C. § 396(a)(3).

19/ 47 U.S.C. § 396(a)(5).

20/ 47 U.S.C. § 398(c).

gramming grants and funding for station operations. 21/ To obtain CPB funding, non-commercial stations must establish a community advisory board, conduct open meetings of the governing body and maintain open financial records. 22/ The community advisory board reviews the programming goals of the station, the station's policy decisions, and whether the programming has met the "specialized educational and cultural needs" of the community. 23/ However, the role of the board is "advisory in nature" and does not include "control over the daily management of the station." 24/

Among other things, CPB was given a mandate of facilitating the production of "programs of high quality, diversity, creativity, excellence, and innovation, . . . with strict adherence to objectivity and balance in all programs . . . of a controversial nature." 25/ However, CPB may neither en-

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21/ 47 U.S.C. § 396(g).

22/ 47 U.S.C. § 396(k)(8)(A). Stations owned and operated by state governments, political or special subdivisions of a state, or public agencies are not required to establish separate advisory boards.

23/ *Id*. Meetings of the board must be open to the public, and CPB recipient stations must allow public inspection of annual financial reports, audit statements and other contracts, grants and agreements (which are also filed with CPB).

24/ 47 U.S.C. § 396(k)(8)(C).

25/ 47 U.S.C. § 396(g)(1)(A). The "objectivity and balance" requirement was bolstered by an amendment to the Public Telecommunication Act of 1992. The amendment required CPB to review its programming activities, establish procedures for public input, and to submit annual reports to the President and Congress regarding its efforts to ensure "objectivity and balance" in CPB-funded programming. Section 19, Public Telecommunication Act of 1992, Pub. L. 102-356.

gage in broadcasting itself nor produce programming, and is required to remain a strictly non-political and non-profit organization. 26/ Instead, CPB created the Public Broadcasting Service and National Public Radio to distribute programming to member radio and television stations. Most CPB-funded television programs are distributed through PBS, and CPB-funded radio programs are distributed primarily through NPR and Public Radio International ("PRI").

PBS is a private, nonprofit corporation established in 1969. It provides quality TV programming and related services to 171 noncommercial, educational licensees which operate the 356 member stations. 27/ Programs distributed to member stations are not produced by PBS, but are drawn from many sources, including public television stations, independent producers, and other distributors. NPR provides a similar programming service for noncommercial radio stations. NPR produces, acquires and distributes programming to member stations. Formed in 1972, NPR distributes programming to more than 620 public radio stations. PRI was founded in 1983 to develop distinctive radio programs and to diversify the public radio offerings. It distributes more than 400 hours of weekly programming to its 694 affiliate stations.

26/ 47 U.S.C. § 396(g)(3). CPB is the largest single source of funding for public radio and television programming.

27/ Of the 171 licensees, 89 are community organizations, 54 are colleges/universities, 20 are state authorities and 7 are local educational or municipal authorities.

Public broadcast stations are licensed to various types of private and governmental entities. Nonprofit community organizations or state government agencies operate a large proportion of public television stations, while many public radio stations are licensed to universities. State government stations are typically linked into multi-station networks that air a common program schedule statewide. Of the public television stations funded by CPB, approximately 38 percent are licensed to state and local governments, and another 24 percent are licensed to universities. The remaining 38 percent are licensed to nonprofit community organizations. Of public radio stations funded by CPB, approximately 15 percent are licensed to state and local governments, and another 55 percent are licensed to universities. The remaining stations are licensed to nonprofit community organizations. 28/

Funding for public broadcasting also comes from a combination of public and private sources. Less than half of the funding for public broadcasting comes from tax-based sources such as federal, state, and local governments. Sixty-one percent of the income is from private sources such as businesses and memberships. In 1999, the revenue breakdown of funding sources was as follows: membership (25.6%); business (14.7%); state governments (13.9%); CPB appropriation (11.6%); state colleges (8%); foundations (5.7%); local governments (2.7%); federal grants and contracts (2.4%); private

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28/ *See FAQ About Public Broadcasting*, www.cpb.org/pubcast (page visited on Nov. 6, 2001). *See also Public Broadcasting PolicyBase*, www.current.org/pbpb/statistics/licensees.html (page visited on Nov. 5, 2001).

colleges (1.5%); other public colleges (0.8%); auction (0.8%); all other sources (12.3%). 29/

B. REGULATION OF PUBLIC BROADCAST PROGRAMMING

Any analysis of free expression and public broadcasting must take into account the special status of broadcasting as a licensed medium. Content controls considered constitutionally impermissible in the case of unregulated media have been allowed when applied to broadcasting. The classic example illustrating this difference is the Supreme Court's approval of the broadcast "fairness doctrine," 30/ and its rejection for similar "right of reply" requirements for the print media. 31/ Similarly, the Court has upheld the regulation of broadcast "indecency" 32/ while striking down similar restrictions for cable television 33/ and the Internet. 34/ However, the federal government's ability to regulate broadcast content must be understood both in its historical context and in light of congressional intent.

29/ *See FAQ About Public Broadcasting*, http://www.cpb.org/pubcast/#who_pays (page visited on Nov. 6, 2001).

30/ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

31/ *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

32/ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

33/ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000); *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1116 (D. Utah 1985) (cable indecency law targeting premium movie services invalidated), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415, 1419 n.4 (11th Cir. 1985) (same).

Although seemingly paradoxical, the overall purpose of government content regulation is to promote First Amendment values. Congress vested the FCC with the authority to regulate broadcasters "in the public interest," but it also decreed that the federal agency lacks any power to "interfere with the right of free speech by means of radio communication" or to impose any "regulation or condition" that interferes with free expression. 35/ Accordingly, the Supreme Court has stressed that "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." 36/ Thus, despite the FCC's ability to regulate content, the Communications Act of 1934 was designed "to maintain – no matter how difficult the task – essentially private broadcast journalism." 37/

Whatever may be the current scope of FCC authority, as a general matter, the same public interest requirements apply to both commercial and noncommercial licensees. The FCC has noted that "[w]hen it comes to responsibility for adequate supervision and control over station operations, all licensees are treated alike, whether commercial or non-commercial, network 'O&Os' or educational stations. 38/ Although noncommercial broadcast-

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34/ *Reno v. ACLU*, 521 U.S. 844 (1997).

35/ 47 U.S.C. §§ 303, 326.

36/ *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984).

37/ *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120 (1973).

38/ *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d at 713, 720 (1981).

ers receive governmental financial assistance where commercial broadcasters do not, Congress acted to restrict the federal government's ability to use funding for public broadcasting as a means to exert political influence over programming.39/ Nevertheless, some differences in the content regulation of noncommercial licensees exist, particularly in the areas of educational programming obligations, political broadcasting, commercial speech and (at least potentially) enforcement of indecency rules. These particular areas are described below:

1. EDUCATIONAL PROGRAMMING REQUIREMENTS

The very purpose for the reservation of frequencies for noncommercial broadcasting was to provide an alternative to commercial programming and to increase the amount of educational and cultural programming in the marketplace. Accordingly, the Communications Act and FCC rules require that noncommercial broadcasting facilities "will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television

39/ In creating the Corporation for Public Broadcasting, for example, Congress specifically excluded any federal agency or officer from interfering with the "content or distribution of public telecommunications programs and services." 47 U.S.C. § 398(c). *See Community-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1108 (D.C. Cir. 1978) (*en banc*) (The Public Broadcasting Act was the "product of a congressional determination that strong safeguards were necessary to ensure that federal funding of programming did not carry with it any political influence on the contents of that programming.")

broadcast service."40/ The FCC's rules state that noncommercial educational broadcast stations "may transmit educational, cultural and entertainment programs, and programs designed for use by schools and school systems in connection with regular school courses, as well as routine and administrative material pertaining thereto." 41/

One issue that has led the FCC to clarify its requirement of "educational" broadcasting has been its licensing of reserved frequencies to religious broadcasters. The FCC has in the past, and continues now, to issue radio and television licenses to religious organizations to operate on frequencies reserved for noncommercial educational uses. 42/ Like all other licensees on the reserved frequencies, religious organizations must comply with the Commission's eligibility rules. That is, a noncommercial educational broadcasting station must "be used *primarily* to serve the educational needs of the community." 43/ In meeting this requirement, the Commission gives "primary weight to those programs which may properly be categorized as 'instructional'

40/ 47 U.S.C. § 396; 47 C.F.R. § 73.621(a).

41/ *Id.* § 73.621(c).

42/ *See In re Applications of WQED Pittsburgh (Assignor) and Cornerstone Television, Inc. (Assignee) for Consent to the Assignment of License of Station WPCB-TV, Channel 40*, 15 FCC Rcd. 202 (1999) ("*Applications of WQED*"); *Moody Bible Institute of Chicago*, 66 F.C.C.2d 162 (1977).

43/ 47 C.F.R. § 73.621(a) (emphasis added).

or 'general educational.'" 44/ With respect to religious broadcasters, the FCC has stated:

> We will not disqualify any program simply because the subject matter of the teaching or instruction is religious in nature. While not all religious programs are educational in nature, it is clear that those programs which involve the teaching of matters relating to religion would qualify. In this regard, some programs will properly be considered to be both instructional and religious or both general educational and religious. 45/

Although this approach requires the evaluation of program content, the Commission has stressed that "as in all matters relating to programming, we will defer to the judgment of the broadcaster unless his categorization appears to be arbitrary or unreasonable." 46/

In late 1999, the FCC attempted to provide "additional guidance" on the type of programming required to comply with its rules for reserved channels. It stated that more than half of the hours of the overall weekly program schedule of a noncommercial educational station "must primarily serve an educational, instructional or cultural purpose in the station's community of license." Additionally, qualifying programming "must have as its primary purpose service to the educational, instructional or cultural needs

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44/ *See Notice of Inquiry*, Docket No. 78-164, 43 Fed. Reg. 30847, 30844 (1978).

45/ *Id.* at 30845.

46/ *Id.*

of the community." 47/ While the Commission noted that programs which involve the teaching of matters related to religion would be considered to be educational, it indicated that programming "primarily devoted to religious exhortation, proselytizing, or statements of personally-held religious views and beliefs generally would not qualify as 'general educational' programming." 48/ As before, the Commission said it would defer to the judgment of the broadcaster in selecting qualifying programming unless its "categorization appears to be arbitrary or unreasonable." 49/ Under pressure from Congress, the Commission subsequently decided to vacate the "additional guidance" for what constitutes "educational, instructional or cultural" programming. 50/

2. COMMERCIAL RESTRICTIONS

A second principal distinction between public and commercial broadcasting is the noncommercial nature of the service. Section 399B of the Communications Act provides that "no public broadcast station may make its facilities available to any person for the broadcasting of any advertise-

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47/ *Applications of WQED*, 15 FCC Rcd. 202, 224 (1999).

48/ *Id.*

49/ *Id.* at 224-225.

50/ *See In re Applications of WQED Pittsburgh (Assignor) and Cornerstone Television, Inc. (Assignee) for Consent to the Assignment of License of Station WPCB-TV, Channel 40*, 15 FCC Rcd. 2534 (2000).

ment." 51/ Despite this statutory proscription, the FCC recently decided that public broadcasters may use part of their digital frequencies for subscription services so long as a "substantial majority" of their capacity is devoted to the provision of a nonprofit, noncommercial educational broadcasting service. The Commission also decided that its commercial advertising restrictions do not apply to nonbroadcast services, such as subscription services provided on DTV channels. 52/

As a general matter, public broadcasters are permitted to engage in "enhanced underwriting" as a source of funding for their broadcast services. Section 399a of the Communications Act permits noncommercial licensees to acknowledge underwriting contributions with brief acknowledgements that identify – but do not promote – underwriters and their products. 53/ For many years non-commercial stations were prohibited from announcing more than the name of the corporate sponsor of particular pro-

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51/ 47 U.S.C. § 399B. *See* 47 C.F.R. § 73.621(e). The Act defines "advertising" as "any message or other programming material which is broadcast or otherwise transmitted in exchange for remuneration, and which is intended (1) to promote any service, facility, or product offered by any person engaged in such offering for profit; (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for political office." 47 U.S.C. § 399B(a).

52/ *Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees*, 16 FCC Rcd. 19,042 (2001).

53/ 47 U.S.C. § 399A.

gramming. 54/ In 1984 the Commission relaxed its underwriting policy to allow public broadcasters to "enhance" their donor acknowledgements to include logograms or slogans, information on the location of the donor, neutral descriptions of the donor's product or service and brand or trade names. The enhanced announcements could not include promotional or comparative language like that typically found in advertisements, and the Commission chose to rely on the reasonable good faith judgments of licensees to tell the difference. 55/ The Commission reaffirmed and clarified its policy governing enhanced underwriting in 1986, stressing that such announcements cannot include qualitative or comparative product or service descriptions, price information, calls to action, or inducements to buy, sell or lease. 56/ The specific applications of this policy are determined case-by-case by the FCC.

3. POLITICAL BROADCASTING RESTRICTIONS

The rules affecting political broadcasting generally apply both to commercial and non-commercial licensees, but there are some differences. In 2001, Congress amended Section 312(a)(7) of the Communications Act, freeing public broadcasters from the obligation to provide "reasonable access" to

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54/ *See Commission Policy Concerning Noncommercial Nature of Educational Broadcast Stations, Second Report and Order*, 86 F.C.C.2d 141 (1981). The prior rule stated "no announcements promoting the sale of product or service shall be broadcast in connection with any program."

55/ *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 97 F.C.C.2d 255 (1984).

56/ *Noncommercial Nature of Educational Broadcasting*, 7 FCC Rcd. 827 (1986).

their facilities. 57/ However, some added restrictions apply to non-commercial licensees. The Communications Act prohibits non-commercial station licensees from supporting or opposing any candidate for elected office, broadcasting any program material in exchange for remuneration intended to support or oppose any candidate for political office, and accepting any remuneration for the broadcast of programming expressing the views of any person on a matter of public importance or interest. 58/ As explained later in this Report, public broadcasters successfully challenged other restrictions on editorializing and that required noncommercial licensees to record programs that touched on matters of public importance. 59/ However, the prohibition against making political endorsements has not been challenged. 60/

57/ Section 312(a)(7) was amended to provide for the revocation of a station license or construction permit "for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station, *other than a noncommercial educational broadcast station*, by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a)(7) (emphasis added), as amended by the Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, Section 1(a)(4) (December 21, 2000) (referencing Section 148 of HR 5666 as introduced on December 15, 2000 and set forth in Conference Report 106-1033, published in Congressional Record Vol. 146, No. 155, H12280).

58/ 47 U.S.C. §§ 399, 399B.

59/ *See infra* pp. 52-57.

60/ *See FCC v. League of Women Voters of California*, 468 U.S. 364, 371 (1984).

4. INDECENCY RESTRICTIONS

Both commercial and noncommercial broadcast stations are subject to the federal ban on transmitting "indecent" speech. Generally, federal law and FCC policy prohibit broadcasting language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience. While the same rules apply to commercial and noncommercial broadcasters as a matter of law, there may be some difference in application as a practical matter.

In *FCC v. Pacifica Foundation*, the Supreme Court upheld the FCC's legal definition of indecency against a First Amendment challenge. 61/ The *Pacifica* decision approved the Commission's "time channeling" approach to indecency enforcement, which prohibited indecent content during hours when children were likely to be in the audience. From the late 1980s until the mid-1990s, the FCC engaged in continuous litigation to clarify its application of a "time channeling" or "safe harbor" policy. 62/ After two unsuccess-

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61/ 438 U.S. 726, 731-32 (1978).

62/ *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) ("*ACT III*"). (approving uniform safe harbor requirements specified in 1992 Cable Act); *Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) ("*ACT IV*") (approving FCC forfeiture procedures); *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914

ful FCC attempts to establish a "safe harbor" period, Congress in 1992 decreed that indecency would be banned from the airwaves between 6 a.m. and midnight. 63/ However, the statute created a different "safe harbor" period for public broadcasters that went off the air on or before midnight. Such stations were prohibited from transmitting indecent programming between 6 a.m. and 10 p.m. In response, the D.C. Circuit narrowed the time period covered by the indecency ban to midnight to 6 a.m. for all stations, reasoning that Congress did not justify imposing different and inconsistent requirements for public and commercial broadcasters. 64/

For the most part, the FCC has enforced its indecency policy equally when it comes to commercial and noncommercial broadcasters. The *Pacifica* decision, for example, arose from a broadcast on noncommercial station WBAI. More recently, the FCC's Enforcement Bureau issued a forfeiture against noncommercial KBOO-FM for the broadcast of a rap song entitled "Your Revolution" 65/ within a couple of weeks of issuing a similar sanction

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(1996) ("*ACT II*") (striking down 24-hour indecency ban); *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*") (striking down FCC safe harbor ruling).

63/ Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992); *see* 47 U.S.C.A. § 303 note (1993).

64/ *ACT III*, 58 F.3d at 668-69.

65/ *In the Matter of The KBOO Foundation*, 16 FCC Rcd. 10,731 (Enforcement Bureau, 2001). This FCC decision resulted in a First Amendment lawsuit filed by the recording artist. *Jones v. FCC*, No. 02 Civ. 0693 (S.D.N.Y., filed Jan. 30, 2002).

against a commercial station. 66/ However, in another case the Commission exonerated an NPR broadcast despite the fact that, as former FCC Commissioner (and later PBS President) Ervin S. Duggan wrote in dissent, it transmitted "in the course of a few seconds ten repetitions of the dirtiest of 'the seven dirty words.'" 67/ Then-Commissioner Duggan ventured the opinion that his fellow Commissioners may have been persuaded not to issue a sanction in that case "because the broadcast in question was by National Public Radio." 68/ His dissent suggested that, at least for some types of programs on public broadcasting, some FCC Commissioners may be more willing to find sufficient "merit" to forestall an indecency finding. However, the FCC's more recent decision to issue a notice of apparent liability for the broadcast of "Your Revolution" casts doubt on this opinion. In a particular case, or in response to a particular program, the FCC may be more likely to find sufficient merit in the material to avoid an indecency finding. However, such assumptions are not amenable to generalization.

66/ *In the Matter of Citadel Broadcasting Co.*, DA 01-1334 (Enforcement Bureau, June 1, 2001). The Bureau subsequently rescinded this Notice of Apparent Liability. *In the Matter of Citadel Broadcasting Co.,* 17 FCC Rcd. 483 (Enforcement Bureau 2002).

67/ *Letter to Peter Branton*, 6 FCC Rcd. 610, 611 (1991) *petition for rev. dismissed*, 993 F.2d 906 (D.C. Cir. 1993). Former Commissioner Duggan described the word in question as "the one expletive that has traditionally been considered the most objectionable, the most forbidden, and the most patently offensive to civilized and cultivated people: the famous F-word." *Id.*

68/ *Id.*

C. FREE EXPRESSION CONTROVERSIES AFFECTING PUBLIC BROADCASTING

Public broadcasting has faced various threats to free expression over the years. Some examples of editorial interference are based on the nature of broadcasting as a regulated medium while others arise from the special nature of public broadcasting. This section summarizes some of the major free speech controversies that have affected public broadcasters.

1. FEDERAL FUNDING CRISIS

Shortly after passage of the Public Broadcasting Act, the future direction of noncommercial broadcasting became embroiled in political controversy. The Nixon Administration sought to shape the development of public broadcasting, and to forestall the creation of a federally funded national network. In particular, the Administration attempted to eliminate news and public affairs programming from public broadcasting, and to reorient its focus toward local cultural and educational programming. It sought to accomplish these goals through its appointments to the CPB Board and through restricting funding for public broadcasting. These actions culminated in a presidential veto of public broadcasting appropriations in 1972. 69/

69/ Current Magazine maintains an online archive of these events for the years 1969-1974 with references to White House correspondence and memoranda. *See Nixon Administration Public Broadcasting Papers, Summary of 1969*, http://www.current.org/pbpb/nixon/nixon69.html; *Summary of 1970*, http://www.current.org/pbpb/nixon/nixon70.html; *Summary of 1971*, http://www.current.org/pbpb/nixon/nixon71.html; *Summary of 1972*, http://www.current.org/pbpb/nixon/nixon72.html; *Summary of 1973*, http://www.current.org/pbpb/nixon/nixon73.html; *Summary of 1974*, http://www.current.org/pbpb/nixon/nixon74.html. *See generally, The Future*

The Administration's stated position was that the federal government should not be involved in the distribution of national public affairs programming. Dr. Clay T. Whitehead, the director of the White House Office of Telecommunications Policy explained in a memo to support President Nixon's 1972 veto message:

> It was never intended that there should be a monolithic publicly-funded national network with [CPB] as its headquarters, nor that its principal purpose should be programming for narrow audiences. It was not intended to be a journalistic medium. Its purpose was to encourage local and private initiatives in educational programming and experimental program development. 70/

In fact, however, the opposition to public affairs programming on public broadcasting was linked directly to the Administration's concern that national news and public affairs programming was tainted with a liberal bias. Patrick Buchanan, then an advisor to the President, classified liberal commentators on PBS variously as "definitely anti-administration," "definitely not pro-administration," and "unbalanced against us," and conservative commentators as "a fig leaf." 71/

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of Public Broadcasting, 3 COMINT 1-32 (Fall 1992); *Public Broadcasting*, THE CQ RESEARCHER, at 812-814, 820-824 (Sept. 18, 1992).

70/ *Summary of 1972*, http://www.current.org/pbpb/nixon/nixon72.html.

71/ THE CQ RESEARCHER, *supra* at 822. Buchanan, by all accounts, was characteristically blunt about the Administration's intent. He reportedly told a public broadcasting executive at a cocktail party, "if you don't do the kind of programming we want, you won't get a fucking dime." *See* Lucas A. Powe, Jr., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 129 (1987).

The White House monitored particular programs, and was especially concerned about the announced selection of Robert MacNeil and Sander Vanocur as anchors of a weekly political program in 1972. The Administration was troubled by their outspoken positions against the Vietnam War. One confidential memo at the time noted: "[t]he above report greatly disturbed the President who considered this the last straw. It was requested that all funds for Public Broadcasting be cut immediately." 72/ One staff memo suggested that "no one participating in this exercise has ever been unclear as to the President's basic objective: to get the left-wing commentators who are cutting us up off public television at once, indeed yesterday if possible . . . ." 73/ Options that were considered included abolishing CPB, prohibiting the broadcast of public affairs programming, taking greater control of the CPB board, and exerting pressure on federal funding. 74/

A key part of the White House strategy involved structuring public broadcast funding to place greater emphasis on programming by local stations. A June 1971 memo written by Office of Telecommunications Policy ("OTP") General Counsel (and later Supreme Court Justice) Antonin Scalia outlined this approach:

72/ *Summary of 1971*, http://www.current.org/pbpb/nixon/nixon71.html.

73/ *Id.* The Administration had also expressed concern about the way domestic issues were presented on public affairs shows like *The Advocates*. *Summary of 1970*, http://www.current.org/pbpb/nixon/nixon70.html.

74/ *Summary of 1971*, http://www.current.org/pbpb/nixon/nixon71.html.

> Probably no amount of restructuring will entirely eliminate the tendency of the Corporation to support liberal causes. On the other hand, this Administration does have an opportunity to establish, by legislation and otherwise, structures and counterbalances which will restrain this tendency in future years and which, as a political matter, it will be difficult for other administrations to alter. It is in this direction that we have thus far been proceeding. 75/

A subsequent OTP staff memo stated that the "principal objective of our policy toward public broadcasting should be to modify the structure of the system so as to eliminate the dominant position of CPB." 76/ Accordingly, in February 1972, Whitehead informed Congress that the Nixon Administration opposed any permanent financing for CPB unless local public stations were given greater power to control programming. 77/ This culminated in President Nixon's veto, in June 1972, of a two-year CPB authorization bill. 78/ Con-

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75/ *Id*.

76/ *Id*.

77/ Erwin G. Krasnow, Lawrence D. Longley and Herbert A. Terry, THE POLITICS OF BROADCAST REGULATION 71 (3d ed. 1982). Local public stations also were concerned that insufficient funds were being allocated for local initiative and control, and they advocated allocations for direct station grants. *See* Editorial Integrity Project, PUBLIC BROADCASTING GOVERNANCE AND MANAGEMENT HANDBOOK 4 (1986) ("EDITORIAL INTEGRITY HANDBOOK").

78/ *Summary of 1972*, http://www.current.org/pbpb/nixon/nixon72.html. The bill provided for 30 percent of CPB's appropriation to be earmarked for local public broadcast stations.

gress ultimately adopted a one-year continuing authorization for CPB at a level thirty percent below the vetoed proposal. 79/

In the year following these budget actions, CPB and PBS negotiated an agreement redefining the relationship between the two organizations with respect to program control, operation of the public television interconnection, and support of local stations. 80/ The White House viewed the agreement as a compromise that gave CPB a direct voice in determining the scheduling and funding of programs rather than leaving the choice entirely to PBS, and that called on both CPB and PBS to review the balance and objectivity of programming. 81/ It was seen as a way to establish a system of checks and balances between the boards of local stations, PBS and CPB. President Nixon subsequently signed a two-year budget authorization for

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79/ *Summary of 1973*, http://www.current.org/pbpb/nixon/nixon73.html. After President Nixon's veto, CPB Chairman Tom Curtis resigned, charging that the Administration had sought to influence the Corporation to preclude funding of news and public affairs programs. *Id*. *See also* EDITORIAL INTEGRITY HANDBOOK at 4.

80/ By this time, the Nixon Administration had appointed 11 of the 15 CPB board members, and the board modified its approach to public affairs programming. It reduced its commitment to public affairs and took over most of the programming functions previously performed by PBS. In particular, CPB advised PBS that it intended to decide which programs would or would not be scheduled for broadcast on the national public TV interconnection system. *See* EDITORIAL INTEGRITY HANDBOOK at 4-5.

81/ The agreement provided that PBS would continue to operate the interconnection for its member stations and CPB would provide financial support for technical operations. The agreement also resulted in a substantial increase in Community Service Grants to local stations. Finally, it altered the program funding process in a way that allowed CPB to make final decisions about funding but required specific consultation with PBS. *Id*. at 5.

CPB, 82/ and Congress moved toward a more stable system of long-term funding for public broadcasting.

The various efforts to limit public affairs programs were challenged as a violation of the Public Broadcasting Act and the First Amendment. In a suit filed by a number of public television viewers and independent producers it was alleged that that CBP and PBS had eliminated funding for "controversial programs" and that remaining programs were subject to various forms of prescreening and censorship. 83/ The District Court dismissed the complaint, holding that the plaintiffs had failed to state a claim under the Public Broadcasting Act and that it lacked jurisdiction over the First Amendment claims. 84/ Claims against former presidential aides Clay Whitehead and Patrick Buchanan were dismissed as moot. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed dismissal of the statutory claims. In its analysis of the history and structure of the Public Broadcasting Act, including various provisions of Section 396, the court concluded that "private rights of action are not part of the machin-

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82/ *Id.*

83/ Among other things, plaintiffs alleged that CPB and PBS prescreened programs, required changes prior to distribution, and issued warnings about programs designated as "controversial."

84/ *Network Project v. CPB*, 398 F. Supp. 1332 (D.D.C. 1975).

ery devised by Congress for control of CPB's activities." 85/ Instead, the statutory mandates "are to be enforced exclusively by Congress." 86/

Although the controversy over federal funding of public broadcasting is associated primarily with the Nixon Administration, it is not entirely a thing of the past. The Bush Administration has indicated that public broadcasting should not receive multi-year funding commitments, but instead should be subject to an annual appropriations process like other federal programs. Public broadcasters, on the other hand, have responded that advance funding is essential to insulate public broadcasting from undue political influence. At the end of 2001, Congress voted to support advance funding, approving a $380 million appropriation for CPB for fiscal year 2004. 87/

2. FCC Review of Programming Decisions

Although the FCC generally defers to the good faith editorial judgments of licensees, there have been a few cases in which it has subjected public broadcasters to significant scrutiny and denied license renewal. The decisions did not reflect any special obligations for public broadcasters, but demonstrated the significance of federal oversight under the public interest

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85/ *Network Project v. Corporation for Public Broadcasting*, 561 F.2d 963, 976 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1068 (1978).

86/ *Id.* at 975. The D.C. Circuit also held that the District Court erred in dismissing the First Amendment claims on jurisdictional grounds. *Id.* at 77-79. However, there were no subsequent proceedings on the constitutional issues.

87/ COMMUNICATIONS DAILY, Dec. 21, 2001 at 10.

standard. Most of these programming reviews occurred during the 1970s, when FCC oversight of programming was more regulatory than the current practice.

The most significant of the FCC decisions resulted in denial of the Alabama Educational Television Commission's ("AETC's") applications to renew the licenses of eight television stations and to grant a license to cover the construction permit of a ninth station. 88/ The main thrust of the complaint against AETC was that it followed a racially discriminatory policy in its overall programming practices and did not adequately serve the public interest. In particular, a leading complaint charged that AETC had censored a number of black oriented programs, including *Black Journal*, *Soul* and *On Being Black*. 89/ In response AETC argued that selection of programming was within the licensee's discretion, and that the few programs it chose not to carry contained offensive material.

The FCC initially granted AETC's applications, but on rehearing designated the matter for a hearing. 90/ Although the Administrative Law Judge subsequently granted the applications upon finding that "no licensee is to be faulted for refusing to broadcast programming which it believes to be

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88/ *Alabama Educational Television Commission*, 50 F.C.C.2d 461 (1975).

89/ *Alabama Educational Television Commission*, 33 F.C.C.2d 495, 496 (1972).

90/ *Id.* at 513.

offensive and in poor taste," 91/ the full Commission overruled the decision. The FCC did not conclude that AETC rejected programs because of racial considerations but instead found "a total lack of evidence that AETC formulated any policy or issued any order designed to block the presentation of programs of special interest to negroes." 92/ However, it denied AETC's applications upon the finding that AETC had failed to ascertain the "special needs" of blacks within the state and that its programming was not responsive to those needs. 93/ Despite the application denial, the FCC decision did not cause AETC to forfeit its stations. Because AETC is a public agency and had taken steps to improve its performance, the FCC granted it interim authority to operate the stations and allowed it to file new applications for the stations. 94/

The decision spawned a number of other challenges to the renewal of public broadcast licenses. However, many of the challenges were based on generalized assertions of programming failures that the FCC found insufficient to warrant a full hearing. For example, the Commission rejected a challenge to the renewal of eight television licenses held by the Mississippi Authority for Educational Television ("MAET") that was very similar to the

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91/ *Alabama Educational Television Commission*, 50 F.C.C.2d 484, 496(ALJ Naumowicz 1973).

92/ *Alabama Educational Television Commission*, 50 F.C.C.2d at 495.

93/ *Id.* at 498.

94/ *Id.* at 477-478.

allegations leveled against AETC. Various citizens' groups alleged that MAET had failed to fulfill its programming obligations by ignoring the interests of Mississippi's black population, by censoring programming involving women and minority groups, and by generally excluding controversial material. 95/ The state licensee defended its decision not to air programming that it believed represented a "racist-separatist" point of view or that were too sexually explicit, and the Commission found that "petitioners' allegations appear to be little more than a disagreement over which programs the Authority should broadcast." It concluded that "the mere allegation that the licensee 'will not air the particular programs petitioner would like to have aired does not warrant further administrative inquiry." 96/

Other Commission decisions at about the same time helped reduce the potential for confusion arising from the AETC and MAET decisions. For example, the FCC rejected a license renewal challenge filed against the

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95/ *Mississippi Authority for Educational Television*, 71 F.C.C.2d 1296 (1979). The complaints also pointed out that the state legislature had adopted a statute forbidding the network from airing any programming produced by the Sex Education and Information Council of the United States ("SEICUS"). The provision, which is still on the books in Mississippi, states that: "No SEICUS (or any of its subsidiaries or connections known by other name whatsoever) programming whatsoever shall be carried by any educational television station in the State of Mississippi." Miss. Code § 37-63-15 (2001).

96/ *Mississippi Authority for Educational Television*, 71 F.C.C.2d at 1308. The FCC issued no opinion on the legality of the statutory ban on certain programming, describing the issue as an "inchoate conflict." *Id.* at 1308-09. *See also KQED, Inc.*, 57 F.C.C.2d 264, 266 (1975) ("Petitioner has failed to demonstrate with any degree of specificity that KQED has in fact ignored Blacks or females.").

Georgia State Board of Education based on allegations that the licensee failed to ascertain local needs, did not air locally-produced programming, and lacked sufficient amounts of minority-oriented programming. 97/ The Commission decided that the obligation to meet local programming needs did not imply a requirement that a station that was part of a state educational network must produce responsive programs locally. It also clarified that a licensee is not required to divide coverage of local issues "according to the racial, ethnic or religious composition of his community." 98/ The Commission noted that public affairs programming cannot always be "broken down into 'black points of view' versus 'other points of view.'" 99/

Shortly after these decisions were issued, the Commission examined its programming review and ascertainment policies. It noted that the provisions of the Public Broadcasting Act reinforce the idea that "the programming decisions of public broadcasters should be the product of diverse and creative influences, and should be free from government domination." 100/ With respect to the FCC oversight of licensees, the Commission stressed that its "role in the programming decisions of all broadcasters has

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97/ *Georgia State Board of Education*, 70 F.C.C.2d 948 (1979).

98/ *Id.* at 962.

99/ *Id.*, quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320 (D.C. Cir. 1974).

100/ *See Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 87 F.C.C.2d 716, 731 (1981).

always been profoundly affected by its sensitivity to the First Amendment rights of the public and of broadcasters and the specific noncensorship provision of Section 326 of the [Communications] Act." 101/ Within this statutory framework, the Commission characterized its role as "appropriately limited" to "facilitating the development of the public broadcasting system rather than determining the content of its programming." 102/

Accordingly, it proposed to eliminate or modify the formal ascertainment and logging requirements imposed on public broadcasters "and to state as specifically as possible the minimum programming responsibility of each public broadcast licensee." 103/ At the conclusion of the proceeding, the Commission eliminated formal ascertainment requirements and significantly modified program logging requirements. 104/ It took these steps as part of an

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101/ *Id*. The Commission more recently reemphasized its "limited role" in determining public broadcasting content. *Letter to Henry Goldberg*, 12 FCC Rcd. 15,242 (1997) (rejecting objections regarding transfer of a noncommercial radio license to C-SPAN).

102/ *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 87 F.C.C.2d at 732.

103/ *Id*. at 734. The Commission proposed eliminating regulatory policies "not specifically traced to substantive provisions of the Communications Act" or that are "an integral part of national public policy." *Id*. It suggested that "[f]reedom from government regulation may provide a tremendous liberating force. On the one hand it may free the service from the conforming and confining oversight of a central authority; on the other it may allow the system to be more directly responsible and responsive to the people and institutions that constitute it." *Id*. at 735.

104/ Report and Order, *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 98 F.C.C.2d 746 (1984). Detailed logging requirements were replaced by a quarterly is-

overall implementation of "reduced routine Commission oversight of programming." 105/

More recently, the FCC, at the end of the Clinton Administration, proposed the use of a standardized form to replace the issues/program lists, a move that suggests a renewed interest in routine oversight of programming. Noting that "a television broadcaster's fundamental public interest obligations" include airing "programming responsive to the needs and interests of its community," the Commission suggested revising the current reporting rules to enhance "the public's ability to access information on the extent to which broadcasters are serving the public interest." 106/ Among other things, the proposal would set forth defined categories of programming and require licensees to provide a narrative description in each category, "including a list of the program titles aired, as well as the time, date, and duration of the programs." 107/ The proposal appears to portend a return of more intensive content regulation, but its prospects for adoption appear dim. As then

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sues/programs list which described the five to ten issues licensees addressed with responsive programming during the preceding three months. *Id.* at 755-756.

105/ *Id.* at 755.

106/ *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 15 FCC Rcd. 19,816, 19,817 (2000).

107/ *Id.* at 19,824 (2000). Licensees also would be required to make the standardized information available both in their public files and on the Internet. *Id.* at 19,825.

Commissioner (and now Chairman) Michael Powell observed, "the recommendation that certain categories of programming be identified on the form raises serious First Amendment concerns . . . . I am also troubled by what appears to be a slow step backwards to a subjective review of a broadcaster's public interest obligations." 108/

Although the substance of broadcasters' public interest obligations has changed over time along with FCC procedures to ensure accountability, one requirement has remained constant: licensees' fundamental duty to exercise independent discretion with respect to programming. 109/ Thus, the Commission has denied a renewal of a noncommercial broadcast license where the licensee failed to maintain adequate supervision over station operations and programming. In 1978 the FCC denied renewal of WXPN(FM), licensed to the University of Pennsylvania, where a maze of delegations and sub-delegations to various employees and student organizations extinguished the station's ability to investigate and respond to continuing complaints and

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108/ *Id.* at 19842 (Separate Statement of Commissioner Powell). Commissioner Furchtgott-Roth wrote to highlight "the clear and present First Amendment problems posed by the concept of breaking out categories of programming on broadcasters' FCC forms." *Id.* at 19,840 (Separate Statement of Commissioner Furtchgott-Roth, concurring in part and dissenting in part).

109/ Section 310(d) of the Communications Act prohibits the transfer of control of a broadcast station license, or any rights thereunder, without prior Commission consent. 47 U.S.C. § 310(d).

take corrective action where necessary. 110/ Most of the complaints concerned the content of WXPN's programming, although the Commission stressed that it was not "pass[ing] judgment on the content of the material broadcast by WXPN(FM)." Rather, it was the licensee's failure to maintain control that led to the nonrenewal of the license. 111/

The Commission considers maintenance of control over programming as "a most fundamental obligation of the licensee." 112/ In this regard, "[t]he right to determine, select, supervise, and control programs is inherently incident to the privilege of holding a station license." 113/ This duty to exert control programming selection "is personal and may not be delegated." 114/ As the Commission has explained:

> The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station . . . . The licensee is obligated to reserve to himself the final decision as to what programs will best serve the public interest. 115/

110/ *The Trustees of the University of Pennsylvania Radio Station WXPN(FM), Philadelphia, Pennsylvania*, 69 F.C.C.2d 1394 (1978), *recon. denied*, 71 F.C.C.2d 416 (1979).

111/ *WXPN(FM)*, 69 F.C.C.2d at 1409.

112/ *Id*. at 1397, quoting *WCHS-AM-TV Corp*.,8 F.C.C.2d 608, 609 (1967).

113/ *Id*. at 1398.

114/ *Id*., quoting *1960 En Banc Programming Policy Statement*, 44 F.C.C. 2303, 2313-14 (1960).

115/ *Id*., quoting *NBC, Inc. v. United States*, 319 U.S. 190, 206-207 (1943).

This duty to exercise independent editorial discretion arises from "the legislative design for broadcasting set out in the Communications Act, [that] licensees alone must assume and bear ultimate responsibility for the planning, execution, and supervision of programming and station operation." 116/ As the Commission stressed in denying WXPN's petition for reconsideration, "supervision and control is . . . one of the most fundamental and obvious obligations of a licensee 'entrusted with the use of a precious public resource'" that touches on "the very fabric of our regulatory authority." 117/

In other decisions the Commission has made clear that noncommercial licensees may delegate programming decisions so long as the licensee maintains ultimate control. The Commission defines control as "every form of control, actual or legal, direct or indirect, negative or affirmative, over basic station policies," including finances, personnel matters and programming. 118/ Thus, in *Alabama Educational Television Commission*, the FCC found that AETC's delegation of certain program functions to a Program Board or program production centers was not an abdication of responsibility

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116/ *Id.*, quoting *Broadcast Licenses and Public Agreement*, 57 F.C.C.2d 42, 47-48 (1975).

117/ *WXPN(FM) Reconsideration Order*, 71 F.C.C.2d at ¶ 5. The Commission has stressed that the obligation to maintain editorial control is the same for both commercial and noncommercial licensees. *WXPN(FM)*, 69 F.C.C.2d at 1399-1400.

118/ *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981), quoting *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

because the licensee maintained ultimate control over every aspect of its broadcast operations. 119/ Accordingly, a state noncommercial licensee may accept free use of a university's broadcast facilities and personnel so long as it does not "surrender control of the stations' basic policies." 120/ When a licensee makes programming changes after it becomes aware of FCC complaints, such editorial decisions are within the licensee's permissible exercise of discretion so long as there are "no impermissible pressures exerted on the licensee to comply." 121/ On the other hand, a transfer of control has occurred where a state governmental unit issues an edict that divests a licensee of its authority to make programming decisions. 122/

3. FEDERAL EDITORIAL LIMITS

In addition to FCC oversight of public licensees' programming, Congress also has adopted particular restrictions on the speech of noncommercial broadcasters. Until it was invalidated by the Supreme Court, Section

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119/ *Alabama Educational Television Commission*, 33 F.C.C.2d at 508.

120/ *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d at 716. The Commission noted that it would represent an unauthorized transfer of control if it had been demonstrated that the university, rather than the licensee, exercised control over the broadcast stations.

121/ In renewing the license of WGTB-FM, licensed to Georgetown University, the FCC affirmed the right of a public broadcast licensee to make format decisions after becoming aware of indecency complaints and to assert their "personal and religious views when making program decisions." *Georgetown University*, 66 F.C.C.2d 944, 951 (1977).

122/ *See Citicasters Co.*, 16 FCC Rcd. 3415 (Enforcement Bureau 2001) (state court injunction enforcing provisions of time brokerage agreement is an unauthorized transfer of control).

399 of the Public Broadcasting Act of 1967 provided that "[n]o noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office." 123/ This provision was amended in 1981 by confining the ban on editorializing to stations that receive CPB grants and separately prohibiting all public stations from "support[ing] or oppos[ing] any candidate for political office." 124/ The provision relating to candidates was not challenged in court.

The limited discussion of these provisions in the legislative history indicated that a principal reason for establishing CPB was to "remove programming activity from governmental supervision." Accordingly, educational stations were prohibited from becoming "vehicles for the promotion of one or another political cause, party, or candidate." 125/ Editorializing was prohibited "out of an abundance of caution" and because testimony indicated that "no noncommercial educational station editorializes." However, the restriction was not intended to preclude public stations from airing "balanced, fair and objective presentations of controversial issues." 126/

Congress supplemented these restrictions in 1973 by requiring all noncommercial stations that receive federal funding to "retain an audio

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123/ Pub.L. 90-129, Title II, § 201(8), 81 Stat. 368.

124/ Section 1229, Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 730. 97th Cong, 1st Sess. (1981).

125/ House Rpt. No. 572, 1967 U.S. CODE CONG. & ADMIN. NEWS 1772,1810.

126/ *Id.*

recording of each of its broadcasts of any program in which any issue of public importance is discussed." 127/ In implementing this provision, the FCC required recording and retention of all programs "which consist of talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, roundtables, and similar programs primarily concerning local, national, and international public affairs." 128/ The taping requirement was proposed as a means of increasing congressional oversight over programs presented on public broadcast stations. 129/

The provisions prohibiting editorializing by public stations and requiring taping of certain programs were both successfully challenged in court. The restriction on political endorsements was not challenged. 130/ Both the United States Court of Appeals for the District of Columbia Circuit and the United States Supreme Court invoked the First Amendment in strik-

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127/ Section 399(b) provided that "Each licensee which receives assistance under sections 390 to 399 of this title after August 6, 1973, shall retain an audio recording of each of its broadcasts of any program in which any issue of public importance is discussed." Pub. L. 93-84, § 2, 87 Stat. 219.

128/ *Report and Order, Docket No. 19861*, 57 F.C.C.2d 19, 21 & n.11 (1975).

129/ *See* Public Broadcasting Hearings on S. 1090 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 93d Cong., 1st Sess. 113-114 (1973) (Comments of Senator Griffin) ("To avoid any kind of Government censorship, you should make programs broadcast over-the-air available to the public as is the case with material that is printed in the newspaper.").

130/ *See FCC v. League of Women Voters of California*, 468 U.S. 364, 371 (1984).

ing down the respective federal limits on public broadcasters' editorial discretion.

Noncommercial licensees challenged the program taping requirement in *Community-Service Broadcasting of Mid-America v. FCC*. 131/ A plurality of the court, sitting *en banc*, found that the statute and implementing regulations provided "a 'ready mechanism' not previously available for members of Congress and other governmental officials to involve themselves in disputes over the contents of individual programs and to influence programming decisions in the future." 132/ Accordingly, a majority held that the provisions placed substantial burdens on noncommercial broadcasters and "present[ed] the risk of direct governmental interference in program content." 133/

Judge Skelly Wright, who wrote the plurality opinion, said that the requirement "provide[d] a mechanism, for those who would wish to do so, to review systematically the content of public affairs programming." 134/ He noted that "[t]he vulnerability of noncommercial licensees to official pressures is increased by Section 399(b), for the operation of the taping requirement

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131/ 593 F.2d 1102, 1116 (D.C. Cir. 1978) (*en banc*).

132/ *Id*. at 1110 (plurality op.).

133/ *Id*. at 1105.

134/ *Id*. at 1116 (plurality op.).

serves to facilitate the exercise of 'raised eyebrow' regulation." 135/ Although Judge Wright (joined by Judge Wilkey) found that "noncommercial broadcasters, no less than their commercial counterparts, are entitled to invoke the protection of the First Amendment," the court's majority invalidated the taping requirement on equal protection grounds. 136/ Notwithstanding the Fifth Amendment rationale of the decision, it appeared that the majority agreed that the First Amendment applies in the public broadcasting context. 137/

In striking down the Section 399 ban on editorializing several years later, a majority of the Supreme Court was more definite about applying the First Amendment. The Court in *FCC v. League of Women Voters of*

135/ *Id.* A panel of the D.C. Circuit recently cited *Community-Service Broadcasting of Mid-America* for the proposition that "raised eyebrow" regulation can impose impermissible burdens on broadcasters. *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001), *cert. denied sub nom. Minority Media and Telecom. Council v. MD/DC/DE Broadcasters Ass'n*, 122 S.Ct. (2002).

136/ *Community-Service Broadcasting of Mid-America*, 593 F.2d at 1110 (Plurality op.); *see id.* at 1122 (applying stricter Equal Protection analysis because "fundamental rights are involved").

137/ Noting that the case involved a statute "involving First Amendment rights," the majority applied an "equal protection standard . . . closely related to the *O'Brien* First Amendment tests." *Id.* In subsequent cases, the Supreme Court noted the connection between First and Fifth Amendment issues in the public broadcasting context. In *Turner Broadcasting System v. FCC*, 512 U.S. 662 (1994), the Court confirmed that noncommercial stations "are subject to no more intrusive content regulation than their commercial counterparts." *Id.* at 650. "'The FCC itself has recognized that 'a more rigorous standard for public stations would come unnecessarily close to impinging on First Amendment rights and would run the collateral risk of stifling the creativity and innovative potential of these stations.'" *Id.* at 651 (quoting *Public Broadcasting.*, 98 F.C.C.2d 746, 751 (1984)).

California noted that "Section 399 plainly operates to restrict the expression of editorial opinion on matters of public importance, and, as we have repeatedly explained, communication of this kind is entitled to the most exacting degree of First Amendment protection." 138/ However, reviewing the less rigorous constitutional test historically applied broadcasters, the Court held only that the editorial ban was not sufficiently tailored to the harms it sought to prevent and that its scope far exceeded the government's stated interest. 139/ The Court indicated that it was not yet willing to reevaluate the First Amendment standard that applies to broadcasters "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." 140/ The Court also acknowledged that many public licensees were state entities, but found it unnecessary to address that fact in resolving the First Amendment issues presented. 141/

138/ 468 U.S. at 375-376.

139/ *Id.* at 376-381, 392-399.

140/ *Id.* at 376 n.11.

141/ Although noting that at least two thirds of the public television stations in operation were licensed to state broadcasting authorities, state universities or educational commissions, or local school boards or municipal authorities, the Court found that Section 399 prohibited a wide range of speech by wholly private stations. As a consequence, it reserved for another day the question whether a restriction focusing only on state and local governmental licensees would survive constitutional scrutiny. *Id.* at 394-395.

4. VIEWER AND PROGRAMMER ACCESS DEMANDS

In another class of cases, threats to the free expression of public broadcasters came not from government edicts but from demands made by program producers and the public. These "public forum" cases ask whether the government's status as a licensee of noncommercial broadcast stations entitles viewers and program providers to demand "access" to the governmentally-created forum. That is, can programmers assert a constitutional right to gain a platform for expressing their views, and can audience members object to scheduling changes implemented by governmentally-employed editors as "censorship?" The workings of the public forum doctrine in First Amendment law are addressed later in this Report. This section briefly describes major controversies involving public forum claims and their outcomes. 142/

The most prominent public forum controversy arose from the decisions of public broadcasters in two states to cancel a presentation of the docudrama *Death of a Princess* in 1980. The program explored the motivations and circumstances that reportedly led to the 1977 execution of a Saudi Arabian princess on charges of adultery. The program, produced jointly by the WGBH Educational Foundation and ATV Network of London, England, was one installment in a thirteen-part series distributed to member stations by PBS. Litigation ensued after the Alabama Educational Television Com-

142/ The more narrow category of public forum claims involving political debates sponsored by noncommercial broadcasters is covered in the next section.

mission and University of Houston station KUHT-TV each decided to pull the program from their respective broadcast schedules.

AETC had received numerous complaints from Alabama residents about the scheduled presentation of *Death of a Princess* in the week prior to the broadcast date. Many of the protests expressed fear for the personal safety of Alabama citizens working in the Middle East if the program was shown. In response, AETC cancelled the program two days before its scheduled showing. The decision of KUHT-TV to pull *Death of a Princess* from its schedule was made by a university vice president in charge of public relations. The school issued a press release explaining the "strong and understandable objections by the government of Saudi Arabia at a time when the mounting crisis in the Middle East, our long friendship with the Saudi government and U.S. national interests all point to the need to avoid exacerbating the situation." 143/

Various parties filed suit over the cancellations. In response to the decision by KUHT-TV to drop *Death of a Princess*, two viewers asserted that their First and Fourteenth Amendment rights were violated by the scheduling decision. They sought an injunction ordering the station to air the

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143/ *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1037 (5th Cir. 1982) (*en banc*), *cert. denied*, 460 U.S. 1023 (1983). It was also suggested that the university cancelled the program because it was believed to be "in bad taste," because of concerns about the "docudrama" format, because the school had a previous contract with the Saudi royal family to tutor a particular princess, and – perhaps most tellingly – because a significant percentage

program. Similarly, various Alabama residents challenged AETC's decision to cancel *Death of a Princess* on constitutional grounds, and they sought an injunction against AETC's making "political" decisions on programming.

The two district courts in which the cases were filed reached opposite conclusions. The United States District Court for the Southern District of Texas held that KUHT-TV's decision to cancel the program was a prior restraint of speech in a public forum, and it ordered the station to air *Death of a Princess* within 30 days. The court found that KUHT-TV was a public forum, thus entitling viewers to challenge adverse scheduling decisions. 144/ By contrast, the United States District Court for the Northern District of Alabama denied the request for a preliminary injunction and granted summary judgment in favor of AETC. The court noted that the Communications Act gives the licensee the absolute right and nondelegable responsibility to select the programs to be broadcast. Accordingly, AETC's decision to cancel *Death of a Princess* was merely the licensee's exercise of its obligation to make programming decisions. Finally, it concluded that the

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of the university's private funding came from oil companies and related individuals. *Id*. at n.5.

144/ *Barnstone v. University of Houston*, 514 F. Supp. 670, 688-689 (S.D. Tex. 1980). On emergency appeal, the United States Court of Appeals for the Fifth Circuit vacated the mandate to air *Death of a Princess* on KUHT-TV, and the Supreme Court denied a request to vacate the Fifth Circuit order. *Barnstone v. University of Houston*, 446 U.S. 1318 (1980).

functioning of a broadcast station is fundamentally inconsistent with the concept of a public forum. 145/

Separate panels of the United States Court of Appeals for the Fifth Circuit reached the conclusion that public broadcast stations were not public forums, thus affirming the district court decision in Alabama 146/ and reversing the Texas decision. 147/ Reviewing the two panel decisions *en banc*, the entire Fifth Circuit reaffirmed the holding that public broadcast stations are not public fora, and that private parties have no right of access to compel the broadcast of any particular program. 148/ The court noted that "[t]he pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority." 149/ Accordingly, because the public is not given general access to the station, the court concluded that the facility "by definition is not a 'public forum'" and an excluded speaker "is without grounds for challenge under the public forum doctrine." 150/

145/ *See Muir v. Alabama Educ. Television Comm'n*, 656 F.2d 1012, 1014-15, 1017, 1021 (5th Cir. 1981) (describing district court ruling).

146/ *Id*. at 1026.

147/ *Barnstone v. University of Houston*, 660 F.2d 137 (5th Cir. 1981).

148/ *Muir*, 688 F.2d at 1041-42.

149/ *Id*. at 1042.

150/ *Id*. at 1043.

One point of disagreement between the *Muir* panel and *en banc* rulings involved the extent to which public broadcasters are protected by the First Amendment. The Fifth Circuit panel found that noncommercial public licensees do not forfeit their First Amendment rights "merely because they are publicly supported." Accordingly, it held that "AETC's refusal to broadcast 'Death of a Princess' was a legitimate exercise of its statutory authority as a broadcast licensee to make its own programming decisions and is protected by the First Amendment guarantee of freedom of the press." 151/ The *en banc* court, on the other hand, while finding that the First Amendment "does not preclude the government from exercising editorial control over its own medium of expression," was loathe to find that a public licensee has constitutional rights. It found that "as state instrumentalities, these public licensees are without the protection of the First Amendment." 152/

In a more recent controversy, the United States Court of Appeals for the Eighth Circuit held that noncommercial licensees did not create a public forum by allowing sponsors to make enhanced underwriting announcements. 153/ The case involved a demand by the Ku Klux Klan to sponsor segments of *All Things Considered* and to air underwriting an-

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151/ *Muir*, 656 F.2d at 1020, 1026 (panel).

152/ *Muir*, 688 F.2d 1041, 1044 (*en banc*).

153/ *See Knights of the Ku Klux Klan v. Curators of the University of Missouri*, 203 F.3d 1085, 1093-94 (8th Cir.), *cert. denied*, 531 U.S. 814 (2000) (enhanced underwriting announcements on a public broadcast station are not a public forum).

nouncements on public radio station KWMU, licensed to the University of Missouri. 154/ When the station refused, the KKK filed suit, claiming that the enhanced underwriting program is a public forum. The United States District Court for the Eastern District of Missouri rejected this claim and granted the station's motion for summary judgment. The Court of Appeals affirmed, holding that the underwriting announcements constituted "government speech," and, quoting *Muir*, finding that "the First Amendment does not preclude the government from exercising editorial discretion over its own medium of expression." 155/

5. POLITICAL DEBATES

A specialized class of public forum cases involve the sponsorship of political debates by public broadcasters. From time to time courts have been asked to determine whether public broadcasters create a public forum when they sponsor debates between political candidates. The consequence of such a finding would be to limit the public station's editorial control over the debate participants – it would be obligated under the First Amendment to accept all candidates who wanted to participate. Such a finding would curtail a public station's ability to act in a journalistic capacity to present only those

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154/ The following announcement was submitted to the station: "The Knights of the Ku Klux Klan, a White Christian organization, standing up for rights and values of White Christian America since 1865. For more information[,] please contact the Knights of the Ku Klux Klan, at P.O. Box 525[,] Imperial, Missouri[,] 63052. Let your voice be heard!" *Id*. at 1089.

155/ *Id*. at 1093-94.

candidates it deems to be newsworthy. As the case law has developed in this area, reviewing courts have concluded that public broadcasters do not create a public forum by sponsoring political debates, at least in most cases. However, under certain circumstances, public broadcasters may take on the obligations of the public forum. The relevant case law is discussed below.

In *Chandler* v. *Georgia Public Telecommunications Commission*, the United States Court of Appeals for the Eleventh Circuit decided in 1990 that the Georgia Public Telecommunications Commission did not intend to open a forum for all candidates when it sponsored debates between the Republican and Democratic candidates for the offices of Governor and Lieutenant Governor. 156/ Rather, the court held that the public broadcasting commission was performing its function of "'providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia.'" 157/ The Eleventh Circuit emphasized that public broadcast stations must be free to decide whether to air debates, and which candidates to include. 158/ Noting the ways in which public forum status would hobble journalistic judgment, the court found that "[t]he values sought to be fostered by the First

156/ 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991).

157/ *Id.* at 488 (quoting Ga. Code Ann. § 20-13-5(a)).

158/ *Id.* at 489.

Amendment would be frustrated, not furthered, by the fitting of such harnesses on public television." 159/

The decision in *Chandler* was consistent with a ruling issued by the United States Court of Appeals Eighth Circuit that same year. In *DeYoung* v. *Patten*, the court held that a debate on Iowa Public Television was not a public forum and that a third party candidate could not raise a constitutional objection where the debate included only the two major party candidates. 160/ The court reasoned that the nature and purpose of a public broadcaster-sponsored debate simply is "'not compatible with unrestricted public access, or even with unrestricted access by a particular class of speakers.'" 161/ However, *DeYoung* subsequently was overruled by the Eighth Circuit sitting *en banc* in *Forbes* v. *Arkansas Educational Television Communication Network Foundation* ("*Forbes I*"). 162/

In *Forbes*, the state-owned public broadcasting network had invited only the major party candidates to participate in a debate, excluding independent candidate Ralph Forbes. The United States Court of Appeals for the Eighth Circuit had held that the debates were a designated public forum and that Forbes had a First Amendment right of access as a legally qualified

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159/ *Id.* at 490.

160/ 898 F.2d 628 (8th Cir. 1990).

161/ *Id.* at 633 (quoting *Estiverne* v. *Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989)).

162/ 22 F.3d 1423 (8th Cir.) (*en banc*), *cert. denied*, 513 U.S. 995 (1994).

candidate for Congress. The court noted that "[a]s a state actor, AETN is faced with constraints not shared by other television stations," and concluded that "a state agency does not have an absolute right to determine which of the legally qualified candidates for a public office it will put on the air." 163/ Because the District Court initially had dismissed the case, the court of appeals sent the matter back for a trial on the merits.

On remand, the District Court once again decided the case in AETN's favor. However, the Eighth Circuit again reversed the District Court and held that a candidate debate on a state-owned television station is a limited public forum because such events are "staged in order for the candidates to express their views on campaign issues." 164/ The court noted that "AETN, by staging the debate, opened its facilities to a particular group – candidates running for the Third District Congressional seat." 165/ Because there was no suggestion that AETN had exerted any type of political favoritism, the decision underscored the difference between state-owned broadcasters and private licensees in their ability to make editorial choices. The court declared:

163/ *Id*. at 1428-29.

164/ *Forbes* v. *Arkansas Educational Television Comm'n*, 93 F.3d 497, 504 (8th Cir. 1996) (*en banc*) ("*Forbes II*").

165/ *Id*. The court later modified its ruling to exclude access by write-in candidates, and clarified that access need not be provided to debates "organized by people or groups other than [the public licensee]."

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. . . . But . . . the people making this judgment were not ordinary journalists: they were employees of government. . . . A journalist employed by the government is still a government employee. 166/

The Supreme Court reversed the Eighth Circuit's *Forbes II* decision and held that a third-party congressional candidate does not necessarily have a First Amendment right to participate in a public television-sponsored candidate debate. 167/ The Court held that public broadcast stations generally should not be considered to be public fora, noting that "broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." 168/ At the same time, the Court concluded that "[t]he special characteristics of candidate debates support the conclusion that the . . . debate [at issue in that case] was a forum of some type." 169/

The Court described candidate debates as a "narrow exception to the rule" that programming on public stations is not subject to public forum analysis because "the debate was by design a forum for political speech by the

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166/ *Id*. at 505.

167/ *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

168/ *Id*. at 673.

169/ *Id*. at 676.

candidates," the views expressed were those of the candidates, and the purpose of the debate was "to allow the candidates to express their views with minimal intrusion by the broadcaster." 170/ On the particular facts of the case, the Court found that the AETN debate was a non-public forum rather than a designated public forum because the Arkansas network did not create an open-microphone format available to all candidates; it expressly restricted debate access to "newsworthy" candidates based on its independent news judgment; and it did not invite or exclude candidates based on their political viewpoints. 171/

The Supreme Court's holding in *Forbes* does not require state-licensed public broadcasters to employ pre-established, objective criteria by which to determine candidate eligibility for debates. However, the Court's analysis of the debate at issue, and its conclusion that debates sponsored by state-licensed entities are "a forum of some type," places great significance on the policies employed by public broadcasters when they sponsor candidate forums. It focused on the fact that the candidate debate in question was a news program and the participants were selected on the basis of their newsworthiness.

Ultimately, the Court found AETN's selection of candidates to be reasonable to the extent it was based on such factors as voters' assessments

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170/ *Id.* at 675.

171/ *Id.* at 680.

of the candidates (*e.g.*, public opinion polls), the extent of news media coverage of the various candidates, their inclusion in election reports, their level of financial support, the extent to which candidates had formal campaign organizations, headquarters and/or volunteers, and the overall extent of public interest in the candidacies. The Court suggested additional indicia of reasonableness for selecting participants, such as the amount of time available for the debate compared to the total number of candidates. 172/

In another case, the United States Court of Appeals for the Eighth Circuit treated a news interview program as if it were a debate. *Marcus v. Iowa Public Television*, 97 F.3d 1137 (8th Cir. 1996). Although the court analyzed the news interview as a limited public forum (under the yet-to-be reversed holding in *Forbes II*), it upheld the broadcaster's decision to invite only the major party candidates to participate. Following the Supreme Court's decision in *Forbes*, the full Eighth Circuit reaffirmed the decision in *Marcus*. 173/

6. STATE PROGRAMMING RESTRICTIONS

State governments from time to time seek to impose restrictions on the programming transmitted by public broadcast stations. Such restrictions may take various forms. A state legislature may simply prohibit programming it considers to be controversial, such as programming relating

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172/ *Id.* at 681.

173/ *Marcus v. Iowa Public Television*, 150 F.3d 924 (8th Cir. 1998) (*en banc*).

to sex education. 174/ In other instances, states may seek to impose certain regulatory requirements on particular types of programming, such as political broadcasts. Maine, for example, tried to prohibit public television stations from carrying interviews with political candidates. 175/ New Jersey, on the other hand, requires that state-owned public television stations provide balanced and fair coverage of all state elections. 176/ Control may also be imposed by appropriations decisions, since state legislatures provide significant funding for public broadcasting.

In 2000, the Idaho legislature adopted content restrictions and programming monitoring requirements for Idaho public television as a reaction to the presentation of programming that the legislators considered too sympathetic to the homosexual lifestyle. 177/ The movement to impose content restrictions began after Idaho Educational Public Broadcasting System

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174/ A Mississippi statute adopted in the 1970s and which is still on the books provides that: "No [Sex Education and Information Council of the United States ('SEICUS')] (or any of its subsidiaries or connections known by other name whatsoever) programming whatsoever shall be carried by any educational television station in the State of Mississippi." Miss. Code § 37-63-15. *See Mississippi Authority for Educational Television*, 71 F.C.C.2d 1296 (1979).

175/ The restriction was invalidated in *State v. University of Maine*, 266 A.2d 863 (Me. 1970).

176/ The New Jersey requirement was upheld by a divided vote in *McGlynn v. New Jersey Public Broadcasting Authority*, 439 A.2d 54 (N.J. 1981).

177/ For a detailed account of this controversy, *see* Bornstein & Associates, GOVERNANCE OPTIONS FOR IDAHO PUBLIC TELEVISION (January 2001) ("IDAHO PUBLIC TELEVISION REPORT").

("IEPBS") broadcast the documentary *It's Elementary: Talking About Gay Issues in School*. Supporters of the legislation also complained about other public television programs, including a dramatization of *Madame Bovary*, a documentary that "brutally attacked" the use of public lands for grazing, and a PBS documentary *Culture Shock* that depicted controversies caused by French impressionist art. 178/

In response, the legislature adopted restrictions as part of the appropriations bill for Idaho Public Television for fiscal year 2001. In brief, Idaho House Bill 768 restricted IEPBS by prohibiting the broadcast of any program "which promotes, supports or encourages violation of Idaho criminal statutes." The law also provided that "[a]ny decision to broadcast programs expected to be of a controversial nature, including programming format," must be monitored by the State Board of Education, which is required to report to the Joint Finance-Appropriations Committee of the legislature. 179/

Under the procedures adopted to implement these restrictions, IEPBS was required to follow written procedures for selecting programming, subject to prior approval of the State Board of Education. It also was directed to submit its monthly programming decisions to the Board for advance review. In addition, IEPBS was required to broadcast daily warnings that some programming may show acts that violate Idaho criminal law and other

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178/ *See* Steve Behrens, *Idaho Likely to Ban Programs That "Support" Lawbreaking*, CURRENT, April 3, 2000.

179/ 2000 Idaho Sessions Laws Ch. 475 (H.B. 768).

daily warnings suggesting that, due to the potentially controversial nature of some programs, families should exercise discretion as to what to view. Finally, IEPBS was required to keep records and provide quarterly reports detailing what programs have been broadcast in content categories covered by the law. The Idaho restrictions generated a great deal of controversy and national media attention, but were not challenged in court. However, the funding limits were not renewed by the legislature and expired in mid-2001.

Such problems tend to recur in a variety of settings. In April 2002, the Missouri House of Representatives voted to withhold $720,000 in state funding from the University of Missouri to show its displeasure with the School of Journalism and the university-owned commercial television station. The budgetary action was prompted by a policy of the station's news director forbidding reporters from wearing red, white and blue ribbons or flags when they work in the newsroom. 180/ Although this controversy did not arise in the public broadcasting context per se, it illustrates the type of political retaliation that can accompany disfavored editorial or news policies.

180/ Tiffany Ellis and Brian Connolly, *UM Faces Further Budget Cuts*, DIGITAL MISSOURIAN (http://www.digmo.com/news/local/premium/0404local11638.html), April 4, 2002.

II. CONSTITUTIONAL AND STATUTORY APPROACHES TO PROTECTING FREE EXPRESSION IN PUBLIC BROADCASTING

A. FREE EXPRESSION AND THE UNIQUE STATUS OF PUBLIC BROADCASTERS

This Report is entitled "Freedom of Expression in Public Broadcasting" and not "The First Amendment and Public Broadcasting" because application of the First Amendment in this area is not necessarily a straightforward proposition. Where the licensee is the state, it is not obvious that the First Amendment applies at all. The 1983 analysis explored various First Amendment theories to support First Amendment protections for public broadcasters, but cautioned that such arguments were "untested" in court and suffered from a number of weaknesses. *See* 1983 FIRST AMENDMENT ANALYSIS at 77-86. A follow-up analysis described the First Amendment protection for public broadcasters as "uncertain," noting that "it is not clear when public broadcasters will be considered as acting on behalf of the state." 181/ The 1983 report also concluded that First Amendment arguments would not protect public broadcasters from funding cuts and changes in personnel. *Id*. at 81-82, 87.

Many of the questions that were untested in 1983 about the First Amendment's application to public broadcasting to a certain degree remain unresolved today. However, there have been significant developments

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181/ Nicholas P. Miller, Legal Summary of Cases and Opinions, PUBLIC BROADCASTING GOVERNANCE AND MANAGEMENT HANDBOOK, Appendix 1B (1986).

in First Amendment doctrine generally in the past two decades (including public forum law) as well as the law governing broadcast regulation and public funding. Some First Amendment arguments that lacked support two decades ago may be stronger today. In addition, case law suggests other arguments to protect free expression and editorial discretion without reliance on First Amendment theories. Accordingly, this Report explores ways to preserve free expression and editorial discretion whether or not a First Amendment argument may be made.

The type of argument that may best preserve freedom of expression will depend largely on the nature of the threat presented. As described so far in this Report, public broadcasters' editorial discretion may be influenced or restricted in various ways – federal funding controls and content regulations, private litigation by viewers and would-be speakers, and state programming restrictions. As a consequence, in meeting the various challenges to free expression in this history of public broadcasting no single theory or approach has prevailed. And, for the same reason, no coherent or consistent strategy for preserving the editorial independence of public broadcasters has emerged.

One reason for the lack of coherence is that the arguments used to protect public broadcasters from particular threats to a certain extent conflict with one another. For example, the court in *Muir* held that public broadcasters are not a public forum and that viewers cannot compel the air-

ing of a particular program because "public licensees are without the protection of the First Amendment." It stressed that the government may exercise editorial control over "its own medium of expression." 182/ While this finding effectively protected the broadcasters' editorial control against audience demands in that case, it would not help a public broadcaster fight a state's effort to censor broadcast programming. Indeed, a state government logically could use the *Muir* language to support content restrictions. One argument against state government control of public broadcasting programming is the supremacy of the federal licensing scheme. However, an argument that FCC licensing requirements should preempt state content controls appears to concede significant federal authority to regulate programming content. Finally, an argument that the First Amendment extends to state-licensed media may lend credence to the argument that public broadcasters should be treated as public fora.

The challenge facing public broadcasters is not so much the need to make arguments that preserve their editorial discretion, so much as to develop successful arguments that maximize their rights consistently in all of the situations in which free expression has been threatened. Public broadcasters have had a good track record in preserving their editorial independence thus far, although doing so has required significant effort. Courts have upheld public broadcasters' right to air editorials, to control their program-

182/ *Muir*, 688 F.2d at 1041, 1044 (*en banc*).

ming schedules and to use journalistic judgment to select participants for political debates. Other challenges – notably restrictions on federal and state funding – have been resolved more by political solutions than by litigation. Whether addressed politically or through the judicial process, each incident has required a reasoned response, and the arguments made in each case have drawn from the analysis and case law that has gone before.

While the first priority in the face of a particular challenge must be to devise a strong argument to protect the broadcaster's editorial choices in the case in which the threat arises, it also is important to consider what form the next challenge to free expression may take. It could emerge from federal content regulations or funding restrictions; it might result from a private lawsuit challenging a public broadcaster's editorial choices; or it could be generated by state or local programming restrictions. While public broadcasters must respond to the particular problem presented the them, an effective response must take into account the effect a *positive* ruling might have on other aspects of broadcasters' editorial discretion. The decision in *Muir* provides a telling example: a state-licensed public television network successfully defended its ability to control its programming schedule against the demands of viewers, but the court also held that state-owned public broadcasters lack any protection of the First Amendment. As this example attests, it is critically important that arguments supporting editorial discretion in response to a particular challenge be developed with an awareness of how the

reasoning may affect the next case, which may arise in an entirely different context.

B. THE DICHOTOMY BETWEEN GOVERNMENT SPEECH AND THE PUBLIC FORUM

The root First Amendment question facing public broadcasters is their constitutional identity. Can they claim First Amendment protection from government "abridgement" of speech when the licensee is a government agency? Or is the government merely exercising dominion over "its own medium of expression" when it restricts speech in ways that would constitute a clear case of censorship if applied to private media? Also, what obligations does the government have to provide access to citizens under the public forum doctrine? Precedent clearly establishes the fact that the government is constrained by the First Amendment when it creates a public forum. But from the public broadcaster's perspective, is the price of First Amendment "protection" the loss of editorial control vis-à-vis the audience?

Case law provides some answers to these questions, as discussed previously in this Report. However, the case law is episodic and its doctrinal underpinnings are not always clear. This analysis examines whether public broadcasting is properly characterized as government speech or whether it is governed by the public forum doctrine. Neither of these choices is entirely helpful from the perspective of maximizing free expression. If public broadcasters are considered "government speakers," they do not have independent editorial rights from government interference at all, but if they are consid-

ered to be a public forum, they must provide some type of public access. One recent analysis described this dichotomy as "an endless circle, at the edge of a chasm between government speech and the public forum." 183/ Accordingly, this Report explores the possibility of developing a separate doctrine under which constitutional protection may be extended to "state-sponsored speech enterprises," such as public broadcasters.

1. PUBLIC BROADCASTERS AS GOVERNMENT SPEAKERS

Government "speech" takes many forms. Government may speak directly, by conveying factual information, taking a position on a matter of public policy, or criticizing the ideas of others. As Judge (now Justice) Antonin Scalia has written, "[w]e know of no case . . . which . . . suggest[s] that 'uninhibited, robust, and wide-open debate' consists of debate from which the government is excluded." 184/ Accordingly, the government speaks on behalf of its citizens "when it airs advertisements warning of the dangers of cigarette smoking or drug use, praising a career in the armed services, or

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183/ Randall P. Bezanson and William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381 (2001) ("Bezanson & Buss").

184/ *See, e.g.*, *Block* v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir.) (quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964)), *cert. denied*, 478 U.S. 1021 (1986). *See also Meese* v. *Keene*, 481 U.S. 465, 480-482 (1987) (Congress may label foreign films as "political propaganda"); *Penthouse Int'l, Ltd.* v. *Meese*, 939 F.2d 1011, 1015-16 (D.C. Cir. 1991) ("We do not see why government officials may not vigorously criticize a publication for any reason they wish"), *cert. denied,* 503 U.S. 950 (1992).

offering methods for AIDS prevention." 185/ The government at all levels "publishes 'journals, magazines, periodicals, and similar publications' that are 'necessary in the transaction of the public business.'" 186/

In other circumstances, government participates in the marketplace of ideas by subsidizing speech, or by selecting from among various voices or messages. For example, local school boards have "a substantial legitimate role to play in the determination of school library content," and education officials must make choices between subjects to be offered and competing areas of academic emphasis. 187/ Universities may provide funding for various student activities that involve speech. 188/ The government may distribute grants to promote speech or artistic excellence. 189/ And it may impose certain conditions on the speech of those who accept government assistance. For example, in *Rust* v. *Sullivan*, the Supreme Court upheld regulations prohibiting the use of funds under Title X of the Public Health Service Act from

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185/ *United States* v. *Frame*, 885 F.2d 1119, 1131 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

186/ *Muir*, 688 F.2d at 1050 (Rubin, J., concurring) (citation omitted).

187/ *Board of Educ., Island Trees Union Free Sch. Dist.* v. *Pico*, 457 U.S. 853, 869 (1982) (plurality opinion). *See id.* at 878 n.1 (Blackmun, J., concurring).

188/ *Board of Regents v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995).

189/ *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

supporting counseling concerning the use of abortion as a method of family planning. 190/

When it is clear that the government is the speaker and is delivering its own message, it is doubtful that the First Amendment applies at all. To do so presents a conceptual problem: How can the government be constitutionally protected from itself? As former Justice Potter Stewart wrote in *CBS, Inc. v. Democratic National Committee*, "[t]he First Amendment protects the press from governmental interference[;] it confers no analogous protection on the Government." 191/ Professor Mark Yudof agreed in his seminal work WHEN GOVERNMENT SPEAKS that "[t]he First Amendment has been viewed historically as involving limitations on government, not as a source of government rights." 192/ Accordingly, the United States Court of Appeals pointed out in *Muir* that public television stations are "state instrumentalities" and, as such, "are without the protection of the First Amendment." 193/ Similarly, in *Knights of the Ku Klux Klan*, the United States Court of Appeals for the Eighth Circuit held that "the First Amendment does not preclude the

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190/ 500 U.S. 173 (1991).

191/ 412 U.S. at 139 (Stewart, J., concurring).

192/ Mark Yudof, WHEN GOVERNMENT SPEAKS 44 (University of California Press: Berkeley 1983).

193/ *Muir*, 688 F.2d 1041, 1044 (*en banc*).

government from exercising editorial discretion over its own medium of expression." 194/

However, even where the government provides substantial assistance for expressive activities, it is not always clear when it should be considered the "speaker" for purposes of such a constitutional analysis. Where government programs support or facilitate speech, but do not necessarily deliver the government's message, courts in some cases have applied the First Amendment to limit or overturn restrictions on speech. In this regard, various courts have struck down government censorship of state-sponsored publications. 195/ For similar reasons, in *FCC v. League of Women Voters of California*, the Supreme Court invalidated funding conditions that prohibited editorializing by noncommercial broadcasters. 196/ Courts have also made clear that the government cannot engage in invidious discrimination or impose partisan preferences when it subsidizes or sponsors speech activities. 197/

194/ 203 F.3d at 1093-94.

195/ *E.g.*, *Kincaid v. Gibson*, 236 F.3d 342, 355 (6th Cir. 2001) (*en banc*) (confiscation of student yearbook violated the First Amendment); *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983) (cutting student newspaper's funding because of disfavored content violates the First Amendment); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975) (college newspaper is protected by the First Amendment); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (publication of college newspaper cannot be suppressed because college officials dislike its content); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D.Mass. 1970) (prior review requirement for college newspaper violates the First Amendment).

196/ 468 U.S. at 375-376.

197/ *See Rosenberger*, 515 U.S. at 835.

For example, "if a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books." 198/

Although the courts in *Muir* and *Knights of the Ku Klux Klan* assumed that state-operated public broadcast licensees necessarily are government speakers, an assumption shared by a number of academic commentators, 199/ the status of public broadcasters has never been resolved definitively. 200/ This issue was presented squarely in *Forbes*, where the federal government took the position that the Arkansas Educational Television

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198/ *Pico*, 457 U.S. at 870-871.

199/ *E.g.*, Bezanson & Buss, *supra* note 183 at 1385 ("To the extent a government agency is delegated authority over a medium of communication with full editorial control, which the Supreme Court has approved and even required, the resulting communications are plainly government speech."); Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 963 (1997-98) ("editorial judgment is but a single manifestation of a broader range of speech selection judgments that government makes in its capacity as a speaker"); Schauer, *Principles, Institutions and the First Amendment*, 112 HARVARD L. REV. 84, 101 (1998) ("the claim that these actions are not the speech of the state is simply false"). *But see* Yudof, *supra* note 192 at 125-135 ("Whatever else may be said about the content of noncommercial programming, the charge that public broadcasting is a propaganda arm of the federal government is simply ill-founded").

200/ In *Muir*, the court distinguished public broadcasting stations from other situations in which "the government sponsors and financially supports certain facilities through the use of which others are allowed to communicate and exercise their own right of expression." 688 F.2d at 1044. It described such things as university literary magazines and speaker's bureaus as "public access facilities-public forums" and public television stations as the government's "own medium of expression." *Id*. at 1044-45 & n.27.

Commission was a government speaker. 201/ However, the Supreme Court declined to provide a clear answer on this issue, although it upheld the public broadcaster's ability to exercise editorial discretion.

The Court in *Forbes* compared AETC's editorial choice to that of "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum," but nevertheless held that some types of candidate debates may be public forums when sponsored by public licensees. 202/ For example, a station that simply opened its facilities to transmit the unmoderated views of all candidates for a particular race would be considered to have designated a public forum. In most other respects, the Court concluded that public broadcasting "does not lend itself to scrutiny under the forum doctrine." 203/ Ultimately, however, its decision to uphold AETC's use of journalistic judgment did not turn on the assumption that the state network was a government speaker, but on the premise that all broadcast licensees, both public and

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201/ *See* Brief for the Federal Communications Commission and the United States as *Amici Curiae* Supporting Petitioner, *Arkansas Educational Television Commission v. Forbes*, at 16 n.6 ("Petitioner 'is an agency of the State of Arkansas' . . . and is therefore 'part of the Government for purposes of the First Amendment.'") (citations omitted). *See id.* at 17 ("'when the State is the speaker, it may make content-based choices'") (quoting *Rosenberger*, 515 U.S. at 833).

202/ *Forbes*, 523 U.S. at 674-676.

203/ *Id.* at 675.

commercial, are statutorily required "to exercise substantial editorial discretion in the selection and presentation of their programming." 204/

By avoiding choosing sides in the debate over the government speech-public forum dichotomy, the Supreme Court in *Forbes* preserved the possibility that the First Amendment may protect public broadcasters from some types of government action. Although the Court's analysis of the extent to which broadcasters are entitled to exercise editorial discretion was based on the Communications Act and not the Constitution, the underlying logic may have implications for the First Amendment. Just as the First Amendment may protect a government-sponsored publication, it also may cover a state entity that is created (and licensed by the federal government) for the purpose of exercising independent editorial judgment. Such institutions, it may be presumed, were not created for the purpose of delivering the government's message, and therefore should not be considered government speakers.

Professor Yudof illustrated this point by noting the very different experience with public broadcasting abroad. There is little question that public broadcasters are "government speakers" in nations such as France, where the state broadcasting monopoly was long tightly controlled by various central government officials, leading to persistent allegations of "propaganda

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204/ *Id*. at 673. *See* Lilli Levy, *Professionalism, Oversight, and Institution Balancing: The Supreme Court's "Second Best" Plan for Political Debate on*

and bias in favor of the government in charge." 205/ By contrast, in the United States there have been few claims that public television "is a propaganda arm of the executive or legislative branches." If anything, "controversy has centered on the possibility that an overly independent public television network would become dominated by biased elites, unfettered by congressional scrutiny of the expenditure of tax dollars." 206/ Control over public broadcast licensees in the United States is decentralized and delegated to various agencies "which, despite their quasi-public nature operate more as private fraternities or foundations than as government bodies." A condition of the license is that editorial control must reside in the individual licensees. Consequently, there is no valid analogy between public broadcasting stations and classic examples of government speech such as "Voice of America, *Stars and Stripes*, or a university administration's campus newsletter." 207/

2. PUBLIC BROADCASTERS UNDER THE PUBLIC FORUM DOCTRINE

The public forum doctrine emerged from Supreme Court cases as the primary analytic tool for applying the First Amendment to government property dedicated for expressive purposes. Although the doctrine originated

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Television, 18 YALE J. ON REG. 315, 342 n. 102 (Summer 2001) ("The Court [in *Forbes*] thus rejected the full-fledged 'government as speaker' position.").

205/ Yudof, *supra* note 192 at 125.

206/ *Id.*

207/ *Id.* at 126.

with cases involving meetings on public thoroughfares, 208/ it evolved over the years to encompass any form of government property that can be used as a "channel of communication." Courts have devised three categories in which public property may be considered public fora: (1) the traditional public forum, such as streets, sidewalks and public parks, in which members of the public generally have a right to engage in speech activities; (2) the designated public forum, such as university meeting rooms, which have been intentionally opened for expressive purposes for identified groups (*e.g.*, student organizations); and (3) the non-public forum, such as an intra-school mail system, which has not been generally opened to the public for communicative purposes. 209/

In some ways, a broadcast station licensed to the government for purposes of public communication seems like a natural example of a public forum. However, the government's mere creation of a channel of communication is not alone sufficient to designate a public forum. "Not every instrumentality used for communication . . . is a traditional public forum or a public forum by designation." 210/ Indeed, even where the property involved has no

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208/ *Hague v. CIO*, 307 U.S. 496, 515 (1939); *Jamison v. Texas*, 318 U.S. 413 (1943). The term "public forum" was coined by Professor Harry Kalven, Jr. in the 1960s. *See* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUPREME COURT REVIEW 1.

209/ *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

210/ *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985).

function other than communication, a public forum may not have been created. Consequently, the Supreme Court has declined to accord forum status to advertising space on buses, 211/ mail boxes, 212/ billboards, 213/ high school student newspapers, 214/ charitable campaign drives in federal offices, 215/ and internal school mail systems, 216/ although all are avenues of communication controlled by the government. In the context of electronic media, the Court declined to hold that leased and public access channels on cable television systems are governed by the public forum doctrine, even though such channels clearly involve expressive activity. 217/

211/ *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 301-302 (1974) (plurality opinion).

212/ *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128-129 (1981).

213/ *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995). In Lebron, which involved a demand for access to a prominent billboard in New York's Grand Central Station, the Court compared Amtrak to the Corporation for Public Broadcasting, noting that the boards of directors of both entities are "controlled by Government appointees." *Id.* at 391. Nevertheless, control of the enterprise by government appointees was not crucial. *Id.* at 403. On remand, the United States Court of Appeals for the Second Circuit held that the particular billboard at issue was a non-forum. *Lebron* v. *National R.R. Passenger Corp.*, 69 F.3d 650, *amended*, 89 F.3d 39 (2d Cir. 1995), *cert. denied*, 517 U.S. 1188 (1996).

214/ *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 267-270 (1988).

215/ *Cornelius*, 473 U.S. at 803.

216/ *Perry*, 460 U.S. at 49 n.9.

217/ *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 742, 749-50 (1996) (plurality opinion).

The relevant question in identifying a limited public forum is whether the government has shown a "'clear intent to create a public forum.'" 218/ The government does not create a limited public forum "by inaction or by permitting limited discourse." 219/ That selective groups or individuals are permitted to use public property, moreover, "does not transform [it] into a public forum." 220/ Instead, the government must have, "'by policy or by practice,'" intentionally opened the forum "'for indiscriminate use by the general public, or by some segment of the public.'" 221/ The Supreme Court has identified a variety of factors that reflect the government's intention to create a public forum, including its practice or policy of allowing or disallowing unrestricted speech in the forum, the characteristics of the property, and, importantly, the government's stated purpose. 222/ Analysis of the government's intent also depends on the role it is performing in a particular case. Where the government acts "as a proprietor, managing its internal operations," rather than "as [a] lawmaker with the power to regulate or license," its

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218/ *Hazelwood*, 484 U.S. at 270 (quoting *Cornelius*, 473 U.S. at 802).

219/ *Cornelius*, 473 U.S. at 802. *Accord Perry*, 460 U.S. at 46-47.

220/ *Id.* at 47. *Accord Cornelius*, 473 U.S. at 805.

221/ *Hazelwood*, 484 U.S. at 267 (quoting *Perry*, 460 U.S. at 47).

222/ *Cornelius*, 473 U.S. at 802-806.

actions are subject to lesser scrutiny. 223/ In such cases, the Supreme Court repeatedly has found that a limited public forum was not created. 224/

Understanding this background on the public forum doctrine is necessary to analyze ways to maximize the editorial discretion of public broadcasters. In cases such as *Muir* and *Knights of the Ku Klux Klan*, the respective courts held that public broadcasting stations are not a public forum, but also held that the licensees were government speakers. The upshot of those decisions was that viewers or would-be underwriters could not dictate broadcasters' program schedules, but that state officials could do so. On the other hand, a decision limiting the authority of state officials to control their own program schedules – *i.e.*, applying the First Amendment to public broadcasting via the public forum doctrine – would have drastically limited the editorial independence of station managers. The difficult question is how best to preserve the discretion of public broadcasters from both public demands and political manipulation.

Fortunately, the decision in *Forbes* provides some direction about application of the public forum doctrine to state-licensed noncommercial broadcasters. Noting that the public forum doctrine arose "in the context of streets and parks" the Supreme Court cautioned that it "should not be ex-

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223/ *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992).

224/ *See, e.g.*, *Lehman*, 418 U.S. at 303-304; *Perry*, 460 U.S. at 47. *See also Lebron*, 69 F.3d at 657.

tended in a mechanical way to the very different context of public television broadcasting." It further observed that "broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." 225/ Nevertheless, the Court found that public broadcasters may create a public forum when they transmit particular programs designed for open access, but that such programming is a "narrow exception to the rule." A candidate debate may qualify as a public forum where "the debate was by design a forum for political speech by the candidates," the views expressed were those of the candidates, and the purpose of the debate was "to allow the candidates to express their views with minimal intrusion by the broadcaster." 226/

On the facts of *Forbes*, the Supreme Court found that the AETN debate was a non-public forum because the public licensee did not create an open-microphone format available to all candidates but instead exercised its news judgment and editorial discretion. AETN expressly restricted debate access to "newsworthy" candidates based on its independent news judgment; and it did not invite or exclude candidates based on their political viewpoints. 227/ In other words, the Court accorded the noncommercial licensee

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225/ 523 U.S. at 672-673.

226/ *Id*. at 675.

227/ *Id*. at 680.

the rights of a journalistic organization essentially because it acted like one. By the same token, if AETN had demonstrated its intent to designate the debate as an open candidate forum, it would have been so treated.

Although the Supreme Court's decision in *Forbes* reflected a pragmatic approach to deciding the immediate case before the Court, it did not resolve the broader doctrinal question of the constitutional status of state-owned broadcast stations. 228/ By straddling the public forum and government speech analyses, the Court "clung to the wreckage of doctrines designed for the demonstrably different situations of earlier First Amendment controversies." 229/ The decision was couched within the rubric of the public forum and government speech doctrines (without fully committing to either), but the Court's reasoning suggested that the most important factor was that it was willing to view AETN more as a journalistic enterprise than as a government institution. 230/

228/ *See*, *e.g.*, Bezanson & Buss, *supra* note 183 at 1383 ("Does government speak when it acts as a journalist, a broadcaster, or as an owner or controller of the channels of distribution of speech? . . . The Supreme Court's opinions hint at the answers to some of these questions, self-consciously evade others, and simply ignore most.").

229/ Schauer, *supra* note 199 at 86.

230/ *Id.* at 89 ("the opinion is about state journalism as *journalism*, as opposed to state journalism as an enterprise of the *state*") (emphasis in original); *id.* at 90 ("the journalistic character of Arkansas Educational Television may have been more determinative than is indicated by the structure of the majority opinion"); *id.* at 91 ("it is the institutional character of public broadcasting as broadcasting, heightened here by the involvement of broadcasting professionals in the very decision under attack, that appears to have

3. A POSSIBLE THIRD WAY: CONSTITUTIONAL PROTECTION FOR GOVERNMENT-SPONSORED SPEECH ENTERPRISES

Developing case law suggests that it may be possible to craft a new First Amendment doctrine to provide protection for government-sponsored speech enterprises. No such analysis for public broadcasting stations has yet been articulated by the courts, but the trend of recent decisions suggests that an argument for constitutional protection of certain institutions may be plausible. In short, it could be argued that the First Amendment protects the journalistic integrity of government-sponsored institutions, like public broadcast stations, that are created for the purpose of exercising independent editorial judgment.

This argument would borrow elements from both the public forum and government speech cases but would not strictly fall under either doctrine. It would recognize, for example, that the government's relationship with speech falls along a "complex spectrum, not a bipolar one." 231/ That is, when it comes to speech the government acts in various roles including censor, regulator, manager, employer, policymaker, patron and speaker or publisher. 232/ A government-sponsored speech enterprise would be distinguished from pure "government speech" in that it would be established for

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determined the outcome of the case"); *id.* at 115 ("the involvement of the institutions of journalism appears to have been the saving factor in *Forbes*").

231/ *See* Bezanson, *supra* note 183 at 964.

232/ *Id. See generally* Bezanson & Buss, supra note 183.

the purpose of exercising independent editorial judgment, not to disseminate the state's message. It would also be distinguished from the designated public forum in that the purpose of the speech enterprise would not be to create an open platform for all speakers. Like a designated public forum, however, the speech enterprise would come into being only by deliberate action and could be eliminated at the government's option. No constitutional principle would require the government to create a speech enterprise, but once it does so it would be obligated to adhere to First Amendment principles.

The Supreme Court has begun to address this issue, although in *Forbes* it stopped short of establishing a constitutional basis for its support for editorial discretion. However, in *Legal Services Corp. v. Velazquez*, the Court applied the First Amendment to invalidate funding restrictions that limited the speech of government-funded attorneys. 233/ In an opinion written by Justice Kennedy (who also wrote the majority opinion in *Forbes*), the Justices voted 5-4 to strike down a funding condition that prohibited legal aid lawyers from engaging in representations attempting to amend or otherwise challenge the validity of existing welfare laws. The Court analyzed prior cases involving government speech and the public forum and held that the government cannot constitutionally fund a particular speech activity and then impose conditions "which distort its usual functioning." 234/

233/ 531 U.S. 533 (2000).

234/ *Id.* at 543.

The case dealt with funding restrictions imposed on the Legal Services Corporation, but the majority opinion applied the same reasoning to other speech enterprises including universities and public broadcast stations. In the case of legal aid lawyers, the Court held that providing legal assistance to indigent individuals and, at the same time, "[r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys." 235/ It also cited *Forbes* and *Rosenberger* to suggest that the government "could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems." 236/ In a particularly important passage, the Court explained:

> Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations. In *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), the Court was instructed by its understanding of the dynamics of the broadcast industry in holding that prohibitions against editorializing by public radio networks were an impermissible restriction, even though the Government enacted the restriction to control the use of public funds. The First Amendment forbade the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium. *See id.*, at 396-397, 104 S.Ct. 3106. In

235/ *Id.* at 544.

236/ *Id.*

> *Arkansas Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 676, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998), the dynamics of the broadcasting system gave station programmers the right to use editorial judgment to exclude certain speech so that the broadcast message could be more effective. 237/

The Court's reasoning in *Velazquez* strongly suggests that the government must adhere to the First Amendment principles that are appropriate to the nature of the activity in question when it creates or sponsors a speech enterprise. The majority stressed that the public forum cases were not "controlling in a strict sense" but that they provided "some instruction" in how to apply this theory. 238/ It distinguished *Rust v. Sullivan*, where the Court upheld restriction on doctors' speech about abortion, as a case involving "government speech." 239/ The Court characterized the legal services program as being designed "to facilitate private speech, not to promote a governmental message," and to function within the institutions of the "legal pro-

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237/ *Id*. at 543.

238/ *Id*. at 543-544. For example, just as the government is not required to designate a public forum in the first place and may "define the limits and purposes" of the forum, *id*, the Court noted that Congress "was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or relationships." *Id*. at 548. But it cannot "define the scope of the litigation it funds to exclude certain vital theories and ideas" without running afoul of the First Amendment. *Id*. at 1052.

239/ *Id*. at 541. The Court used the term "government speech" to include "instances in which the government is itself the speaker" and instances in which the government "used private speakers to transmit information pertaining to its own program." *Id*. (citations omitted).

fession and the established Judiciary of the States and Federal Government." 240/

Finding cognizable First Amendment interests in cases of this type will require courts "to inquire much more deeply into the specific character of the institution, and the functions it serves" 241/ than they have in the past, and the Court in *Velazquez* did just that. It examined the purposes for which the LSC was created (assisting indigent clients in litigation over welfare benefits), the traditional purposes of litigation ("the expression of theories and postulates on both, or multiple, sides of an issue"), and the primary mission of the judiciary ("[i]nterpretation of the law and the Constitution"), and concluded that the statute imposed a "serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary." 242/ As confirmed by the dictum citing *Forbes* and *Rosenberger*, the logic of *Velazquez* is not limited to the government's decision to fund legal services. Professor Frederick Schauer has written that if a jurisprudence extending First Amendment protection to entities sponsored by government is to develop, "institutions that have a certain First Amendment aura – the arts, libraries,

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240/ *Id*. at 542.

241/ Schauer *supra* note 199 at 116.

242/ *Velazquez*, 531 U.S. at 544-549

universities, and the institutional press, for example – would serve as leading candidates." 243/

Various cases have already identified such a "First Amendment aura" as an inherent aspect of certain state-sponsored institutions. For example, the Supreme Court has recognized universities as the quintessential "marketplace of ideas" with a "tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." 244/ Even when it upheld funding restrictions on abortion-related speech by doctors in *Rust v. Sullivan*, the Court emphasized that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." 245/ Similarly, courts have routinely rejected claims that government editors have no right to select which articles and advertisements they will choose to publish. 246/

243/ Schauer *supra* note 199 at 116.

244/ *Rosenberger*, 515 U.S. at 835-836; *Healy v. James*, 408 U.S. 169, 180 (1972) ("vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"). *See also Kincaid*, 236 F.3d at 352 (the university environment "merits full, or indeed heightened, First Amendment protection").

245/ 500 U.S. at 200.

246/ *See, e.g., Barnard* v. *Chamberlain*, 897 F.2d 1059 (10th Cir. 1990) (state bar newsletter); *Estiverne v. Louisiana State Bar Ass'n.*, 863 F.2d 371 (same); *Sinn* v. *The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987) (refusal to publish advertisement in university newspaper is not state action); *Avins* v.

Although these cases often are analyzed under the public forum doctrine, they also recognize the inherent function of editorial discretion in state-sponsored publications. 247/

The same reasoning suggests that state-owned public broadcast licensees should be the very paradigm of the government-sponsored speech enterprise. They are chartered under state laws that, for the most part, support editorial autonomy, 248/ and are licensed pursuant to a federal law that

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Rutgers, 385 F.2d 151 (3d Cir. 1967) (law review at state university may exercise editorial discretion), *cert. denied*, 390 U.S. 930 (1968); *Leeds* v. *Meltz*, 898 F. Supp. 146 (E.D.N.Y. 1995), *aff'd*, 85 F.3d 51 (2d Cir. 1996) (refusal to publish advertisement in school newspaper is not state action); *Allston* v. *Lewis*, 480 F. Supp. 328 (D.S.C. 1979), *aff'd*, 688 F.2d 829 (4th Cir. 1982) (bar association newspaper is not a public forum).

247/ *See*, *e.g.*, *Estiverne*, 863 F.2d at 381 ("[T]he Louisiana State Bar Journal, as the trade publication of the Louisiana Bar, . . . serves a narrow, instrumental role. It was not established as an open forum for the expressive activities of the public, or of all members of the Bar. Rather, the invitation is to *submit* articles and advertisements for consideration by the editorial board, within the framework of editorial discretion necessary to fulfill the magazine's purposes.") (emphasis in original).

248/ *See*, *e.g.*, 70 Okla. Stat. § 23-102 ("the influence, direction or attempt to influence or direct the program content or programs shown on public television by an elected official or his representative for personal gain or political benefit, direct or indirect, shall be unlawful"); N. Carolina Gen. Stat. § 116-37.1 (Board of Governors is authorized to establish the North Carolina Center for Public Television to provide "production of noncommercial educational television programming and program materials; to provide distribution of noncommercial television programming through the broadcast facilities licensed to the University of North Carolina; and otherwise to enhance the uses of television for public purposes"); Miss. Stat. § 37-63-1 (purpose of Mississippi educational television and radio system is to "provide educational and instructional, professional growth, and public service programs for the students and citizens of Mississippi"); Fla. Stat. § 229.805 (It is the public policy of the state "to provide through educational television and radio the powers of teaching, raising living and educational standards of the citizens and resi-

requires them to exercise independent editorial judgment. State noncommercial licensees generally are staffed by broadcast professionals who provide a journalistic service, further distancing their operations from political decisionmaking. 249/ Such an institution should be constitutionally protected against restrictions that would preclude it from fulfilling its intended function. As the Supreme Court noted in *Velazquez*, "the dynamics of the broadcasting system gave station programmers the right to use editorial judgment." 250/

Such protections would not be unlimited. Just as the government may designate a public forum for particular types of speech, it should be able to sponsor a speech enterprise for specified purposes. 251/ Consequently, this theory of constitutional protection would be unlikely to support a challenge (if one were ever made) to Communications Act and FCC requirements that public stations be "educational" and "noncommercial." Nor

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dents of the state, and protecting and promoting public interest in educational television and radio in accordance with existing state and federal laws."). *See* EDITORIAL INTEGRITY HANDBOOK AT 13-14, 40-41.

249/ *See* Bezanson & Buss, *supra* note 183 at 1497 ("The professional discipline involved in selecting participants in a televised debate for elected office differentiates the government speech involved from the same process of selection by a government actor closer to the political level of government.").

250/ *Id*. at 543. *See also Estiverne,* 863 F.2d at 380 n.12 (comparing bar journal to the public broadcast stations in *Muir* and concluding that the purpose of the publication "could not be accomplished without the exercise of editorial discretion").

251/ *Velazquez*, 531 U.S. at 543-544.

would this theory preclude a finding that a public broadcasting station has created a public forum for certain types of programs where it has exhibited the requisite intent to provide open access. As the Supreme Court explained in *Forbes*, candidate debates generally are considered to be "a forum of some type" and may be considered a designated public forum where the broadcaster uses an "open microphone" format for all candidates. 252/

Finally, a word of caution is warranted. Although an argument to extend First Amendment protection to state-owned public broadcast stations appears to be promising, such a theory has not been definitively articulated by the Supreme Court. The Court in *Velazquez* stressed that the funding restrictions on LSC affected "private speech," and it may not be willing to extend its holding to a case where the speaker is a state licensee. The references in dictum to *Forbes* and *League of Women Voters* in *Velazquez* suggest that the Court may be ready to apply the same reasoning to state-licensed broadcasters. But *Velazquez* was narrowly decided by a 5-4 vote; a different set of facts could lead to a different result. In this regard, it is important to note that extending First Amendment protection to certain "institutions" would represent a significant expansion of constitutional doctrine. 253/

252/ *Forbes*, 523 U.S. at 676, 680.

253/ *See* Schauer *supra* note 199 at 107-108 ("the Court's refusal to make institution-specific decisions is supported not only by most of existing First Amendment doctrine, but also, and more importantly, by a battery of extraordinarily well-entrenched views about the nature and function of law itself, views that are especially concentrated in the First Amendment context"); Bezanson & Buss, *supra* note 183 at 1509 (The Supreme Court has been re-

Finding such a right would be one thing, and applying it in a coherent manner might be quite another. For example, where the public broadcaster has a recognizable First Amendment right to editorial discretion and the license is held by the state, who are the proper parties when content restrictions are imposed by state government? It is an easier case where the licensee's rights are asserted against an outsider, as in the *Forbes* case, but more difficult where different political subdivisions of the state are on both sides. Problematic questions such as this will be resolved case by case, if such controversies result in litigation. Public forum cases may provide guidance by analogy, as the *Velazquez* majority noted, but the public forum doctrine has never been considered a model of judicial clarity. For purposes of this Report, however, it is sufficient to say that, in an appropriate case, an argument may be made to support First Amendment protection for a state licensee's editorial judgments.

C. APPLICATION OF LEGAL ARGUMENTS TO PARTICULAR THREATS TO FREE EXPRESSION

Free expression by public broadcasters may be threatened in various ways. Restrictions may be imposed on editorial decisions by federal regulation or by funding mandates. State governments may seek to regulate broadcast speech either by direct regulation or through the power of the

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luctant "to forge a full-bodied new idea of government as a First Amendment right-holder" in part because of "the theoretical problems with such a right, its unknowable implications, and the difficulties confronted in defining and restraining a government speech right.").

purse. Individuals may demand access to the licensee's station or otherwise seek to control broadcast content. This section of the Report reviews legal arguments that may be used to combat such threats to editorial independence, bearing in mind the need to maintain a consistent approach.

1. FEDERAL PROGRAMMING RESTRICTIONS AND THE FIRST AMENDMENT

By their nature, noncommercial licensees do not have the same editorial flexibility as commercial station owners. Public broadcasters are charged with the mission of providing programming for "instructional, educational, and cultural purposes;" 254/ cannot endorse or oppose political candidates; 255/ and are prohibited from broadcasting advertisements. 256/ Public broadcasters have not challenged these mission-defining limits, 257/ and potential First Amendment arguments about such requirements do not seem promising. 258/ Other restrictions on free expression, such as the ban on editorializing and the requirement that noncommercial stations retain record-

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254/ 47 U.S.C. § 396(a).

255/ 47 U.S.C. § 399.

256/ 47 U.S.C. § 399B. This restriction does not apply to subscription services on noncommercial DTV channels. *Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees*, 16 FCC Rcd. 19,042 (2001).

257/ *See League of Women Voters*, 468 U.S. at 371.

258/ This is not intended to suggest that public broadcasters have any interest in challenging such requirements. It is only to illustrate the fact that some limits on the editorial prerogatives of public broadcasters are more troublesome constitutionally than others.

ings of "controversial" programming, are inconsistent with the mission of public broadcasting and have led to successful constitutional challenges. 259/ It is quite likely that additional content restrictions that are incompatible with the mission of public broadcasting may arise in the future, since questions that involve broadcast content seem to be endlessly fascinating to policymakers.

One example of potential federal content restrictions is S. 341, The Children's Protection From Violent Programming Act, introduced by Senator Ernest Hollings last year. 260/ An identical House bill, H.R. 1005, was introduced in March by Rep. Ronnie Shows. If enacted into law, S. 341 would make the V-chip ratings system mandatory and would require that programs be specifically rated for "violent" content. In addition, the FCC would be required to ban any distribution of violent programs before late night hours if it finds that the use of V-chips is "insufficiently effective" to protect children. If enacted, the legislation would most likely impose a far-reaching ban for significant periods of the broadcast day on a broad range of constitutionally-protected programs, from war documentaries to acclaimed dramas such as *I, Claudius*.

259/ *League of Women Voters*, 468 U.S. at 375-381, 392-399; *Community-Service Broadcasting of Mid-America*, 593 F.2d at 1122.

260/ S. 341, 107th Cong., 1st Sess. (Feb. 15, 2001). The bill is a rewrite of S. 876, which passed the Senate Commerce Committee by a 16-2 vote in 2000.

The challenge to public broadcasters posed by measures such as S. 341 is to find arguments to preserve editorial freedom without undermining legal theories that might be used to combat other types of content controls. In this example, it would be necessary to devise an argument that could effectively limit federal content restrictions without extinguishing elements of federal jurisdiction that might help combat state content controls. As explained below, the federal statutory scheme that includes licensing requirements and FCC oversight over programming has preemptive authority over inconsistent state requirements. Thus, a First Amendment argument challenging new FCC content controls would need to be reconciled with the basic statutory scheme of the Communications Act.

In the case of a measure such as S. 341, or an action such as increased enforcement of the FCC's indecency policy, the burden on free expression would rest on commercial and noncommercial broadcasters alike. One strategy for combating such intensive content regulation is to argue that the Communications Act seeks to preserve First Amendment values by maximizing licensees' editorial discretion. In this regard, reviewing courts have long recognized the "delicate balance" between FCC oversight and editorial independence and have noted that the Commission must "walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its

successor, the Communications Act." 261/ As a consequence, under the Communications Act, licensees are to be held "only broadly accountable to public interest standards." 262/ As the Supreme Court put it, "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." 263/ In light of these concerns, the FCC has tended to avoid imposing specific programming requirements because doing so would create a "high risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest," and "must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship." 264/

The Commission has performed this constitutional balancing act by relying primarily on the editorial discretion of individual broadcast licensees as the best measure of the public interest. Accordingly, "television broadcasters enjoy the 'widest journalistic freedom' consistent with their pub-

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261/ *Democratic Nat'l Comm.*, 412 U.S. at 117. *See also Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied. sub. nom. Tobacco Institute, Inc. v. FCC*, 396 U.S. 842 (1969).

262/ *Democratic Nat'l Comm.*, 412 U.S. at 120.

263/ *Id.* at 124.

264/ *Banzhaf*, 405 F.2d at 1096. *See also Pub. Interest Research Group v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) ("we have doubts as to the wisdom of mandating . . . government intervention in the programming and advertising decisions of private broadcasters"); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1967) ("the First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress . . . limited the Commission's powers in this area").

lic responsibilities." 265/ One of a licensee's fundamental obligations under the Communications Act is to maintain editorial control over its station. 266/ In this regard, the Supreme Court has noted that "[p]ublic and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming." 267/ "Among the broadcaster's responsibilities is the duty to schedule programming that serves the 'public interest, convenience, and necessity.'" 268/

In reviewing this statutory framework, the Supreme Court has in the past upheld some federal requirements designed to promote "more speech" 269/ while rejecting rules that restrict speech. 270/ The Court has

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265/ *Forbes*, 523 U.S. at 673, quoting *Democratic Nat'l. Comm.*, 412 U.S. at 110. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (recognizing the "policy of the Act to preserve editorial control of programming in the licensee"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596-597 (1981) (FCC relies on the editorial discretion of licensees to serve the public interest).

266/ Section 310(d) of the Communications Act prohibits the transfer of control of a broadcast station license, or any rights thereunder, without prior FCC consent. 47 U.S.C. § 310(d). In particular, a licensee is obligated to exercise its own authority over whether to accept or reject programming to be aired over its station. *E.g.*, *WGPR, Inc.*, 10 FCC Rcd. 8140, 8142 (1995). *See Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981); *Alabama Educational Television Commission*, 33 F.C.C.2d 495, 508 (1972).

267/ *Forbes*, 523 U.S. at 673.

268/ *Id.*, quoting 47 U.S.C.§ 309(a).

269/ *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (upholding reasonable access requirements for federal candidates); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding fairness doctrine). *But see CBS, Inc.* v. *Democrat-*

emphasized that "the unifying theme of these various statutory provisions is that they substantially reduce the risk of governmental interference with the editorial judgments of local stations without restricting those stations' ability to speak on matters of public concern." 271/

Putting FCC content regulations in historical context, the Commission generally has exhibited an increasing reluctance in the past two decades to exert direct authority over broadcast content, 272/ and appears to have less constitutional latitude to engage in such regulation even if it wanted to do so. The Supreme Court's 1984 decision in *League of Women Voters* invalidating the ban on editorializing by public broadcast stations is a notable example, although the Court stopped short of limiting the FCC's general

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ic Nat'l. Comm., 412 U.S. 94 (holding that broadcasters cannot be required to accept public issue advertising).

270/ *League of Women Voters of Cal.*, 468 U.S. at 397 (invalidating ban on editorializing by noncommercial educational licensees). *See id.* at 398 ("Rather than requiring noncommercial broadcasters who express editorial opinions on controversial subjects to permit more speech on such subjects to ensure that the public's First Amendment interest in receiving a balanced account of the issue is met, § 399 simply silences all editorial speech by such broadcasters.").

271/ *Id.* at 388-90. Further, the D.C. Circuit has found that Congress sought to minimize the risks to "state-owned systems" regarding the seemingly inevitable pressures to self-censor which face such programmers reliant on state funding by providing the interference-free funding of the CPB. *Community-Service Broad., Inc. v. FCC*, 593 F.2d at 1114-15.

272/ There are some notable exceptions to this trend. In 1996 the FCC adopted children's television requirements that included quantitative programming guidelines.

public interest authority. 273/ Three years later, however, the FCC eliminated the "fairness doctrine" because it interfered with the editorial prerogatives of broadcasters. 274/ More recently, the Commission (under pressure from the United States Court of Appeals for the District of Columbia Circuit) abandoned two remaining vestiges of the fairness doctrine – the personal attack and political editorial rules. 275/ During this time the Supreme Court also restricted the FCC's ability to regulate certain types of commercial speech. 276/ Other specific First Amendment arguments could be made against attempts to regulate "violent" television programming. 277/

273/ *League of Women Voters of Cal.*, 468 U.S. at 364-373.

274/ *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 659 (1989), *cert. denied*, 493 U.S. 1019 (1990) (it is important to avoid "having government officials second-guess editorial judgments"). *See also Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (*en banc*) (Arnold, C.J., concurring) ("There is something about a government order compelling someone to utter or repeat speech that rings legal alarm bells.").

275/ *See Radio-Television News Directors' Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

276/ *Greater New Orleans Broadcasters Ass'n v. United States*, 527 U.S. 173 (1999).

277/ *See*, *e.g.*, *American Amusement Machine Ass'n. v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 462 (2002) (invalidating municipal ordinance restricting minors' access to "violent" arcade games); *Video Software Dealer's Association v. Webster*, 968 F.2d 684 (8th Cir. 1992) (invalidating restriction on renting "violent" movies to minors). *See generally* Harry T. Edwards and Mitchell N. Berman, *Regulating Violence on Television*, 89 NORTHWESTERN U. L. REV. 1487 (1995). *See also* Patricia M. Wald, *Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence*, 23 U. BALT. L. REV. 397 (Spring 1994).

In short, it is possible to fashion arguments to combat overly intrusive federal content controls without simultaneously attacking the statutory framework that relies heavily on the editorial discretion of broadcast licensees. The principal claim would be that new regulations would disrupt the balance struck by the Communications Act and the First Amendment between public interest obligations and editorial discretion. As explained in more detail below, framing an argument against increased federal content regulation in this way should preserve the ability of public broadcasters to rely on federal preemption to oppose state content controls imposed by state governments.

2. ACCESS DEMANDS, THE PUBLIC FORUM DOCTRINE AND THE COMMUNICATIONS ACT

The Supreme Court's decision in *Forbes* should help resolve most claims about public broadcast stations being considered public fora. The Court noted that "broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." 278/ However, it also concluded that "[t]he special characteristics of candidate debates support the conclusion that the . . . debate [at issue in that case] was a forum of some type." 279/ The Court found that the AETN debate was a non-public forum rather than a designated public forum because the

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278/ *Forbes*, 523 U.S. at 673.

279/ *Id.* at 676.

Arkansas network did not create an open-microphone format available to all candidates; it expressly restricted debate access to "newsworthy" candidates based on its independent news judgment; and it did not invite or exclude candidates based on their political viewpoints. 280/

In short, the key to being able to have editorial discretion is to *use* editorial judgment. In reaching this conclusion the Court focused on public broadcasters' statutory obligations, a fact that is important for several reasons. Couching the public forum analysis in terms of broadcasters' public interest duties enables licensees to satisfy the constitutional standard for establishing a non-forum using essentially the same practices and procedures necessary to show compliance with the political broadcasting requirements of the Communications Act. Reliance on this traditional analysis should help stations avoid designating a sponsored debate as a public forum inadvertently. Focusing the inquiry on the licensee's bona fide journalistic judgment also minimizes the possibility of making conflicting statutory and constitutional arguments to support the exercise of editorial freedom.

As noted above, a primary factor in determining that a candidate debate is a nonforum is the same thing that determines a licensee's compliance with the political broadcasting requirements of the Communications Act – good faith news judgment. For more than twenty years the FCC has held, with judicial approval, that candidate debates are "news events" ex-

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280/ *Id.* at 680.

empt from the equal opportunities requirement. In 1983, the Commission specifically extended the exemption to broadcaster-sponsored debates. 281/ The FCC reasoned that the identity of a debate's sponsor does not affect the program's news value and that, because "a broadcaster may be the ideal, and perhaps the only, entity interested in promoting a debate between candidates for a particular office, especially at the state or local level," exempting broadcaster-sponsored debates "should serve to increase the number of such events, which would ultimately benefit the public." 282/

The Commission will not interfere with a broadcaster's decision to invite only some legally qualified candidates to participate in a candidate debate, so long as the decision is based on the broadcaster's "'good-faith news judgment.'" 283/ The Commission, moreover, "places considerable reliance on the exercise of a broadcaster's journalistic discretion to determine [a program's] 'newsworthiness.'" 284/ "'[A]bsent evidence of broadcaster intent to advance a particular candidacy, the judgment of the newsworthiness of an

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281/ *Henry Geller*, 95 F.C.C.2d 1236, *aff'd sub nom. League of Women Voters* v. *FCC*, 731 F.2d 995 (D.C. Cir. 1983).

282/ *Id.* at 1244-45.

283/ *King Broad. Co.*, 6 FCC Rcd. 4998, 4999 (1991) (quoting *Kennedy for President Comm.*, 77 F.C.C.2d 964, 969, *aff'd*, *Kennedy for President Comm.* v. *FCC*, 636 F.2d 417 (D.C. Cir. 1980)).

284/ *Id.*

event is left to the reasonable news judgment of professionals.'" 285/ Applying these principles, the Commission repeatedly has sustained both public and private broadcasters' decisions to limit debate participation to the major candidates in a campaign when candidates were selected based on the broadcasters' good faith judgment as to their newsworthiness. 286/

285/ *Kennedy for President Comm.*, 636 F.2d at 427 (quoting *Chisholm*, 538 F.2d at 359).

286/ *See, e.g., Jim Trinity*, 7 FCC Rcd. 3199 (1992) (upholding public television station decision to exclude candidate from Republican senatorial debate where candidate was behind in polls and failed to "demonstrate that the participating candidates were not chosen on the basis of their newsworthiness"). *Accord John W. Spring*, 1 FCC Rcd. 589, 590 (1986) (upholding commercial radio station decision to air debate on talk radio show among Republican senatorial candidates although six qualified candidates were excluded); *Cyril E. Sagan*, 1 FCC Rcd. 10 (1986) (upholding noncommercial television station decision to exclude candidate from Democratic senatorial debate based on candidate's low standing in public opinion poll). *See also Ross Perot*, 11 FCC Rcd. at 13,116 (Reform Party candidate's exclusion from debate sponsored by Commission on Presidential Debates to be broadcast by commercial television networks did not trigger equal opportunity requirement); *Arthur R. Block, Esq.*, 7 FCC Rcd. 1784, 1785 (1992) (equal opportunity requirement not triggered by exclusion of legally qualified presidential candidate from debate produced by MacNeil/Lehrer Productions to be aired on PBS stations because candidate failed to present "objective evidence," such as polling data, "sufficient to demonstrate that she [wa]s a major presidential candidate"); *Mitchell Rogovin, Esq.,* 7 FCC Rcd. 1780, 1781 (1992) (presidential debate sponsored by Democratic National Committee and aired on commercial television station did not trigger equal opportunities for candidate who did "not present[] objective criteria sufficient to demonstrate that he [wa]s a major presidential candidate"); *Carl E. Person, Esq.*, 6 FCC Rcd. 7477 (1991) (upholding exclusion of legally qualified presidential candidate from debates to be aired on commercial stations and PBS); *Lenora B. Fulani*, 3 FCC Rcd. 6245, 6246 (1988) (commercial networks' coverage of presidential debate between major-party presidential candidates did not trigger equal opportunities provision where excluded candidate failed to show that broadcasters' decision "was motivated by bad faith rather than the requisite good faith intent to air what was perceived as a bona fide news event").

Over two decades of Commission and judicial precedent interpreting the Communications Act confirm that the "common denominator" of broadcasters' decisions to sponsor debates, to determine their format, and to limit participation to selected candidates is "bona fide news value." 287/ The FCC similarly has interpreted the news exemption to allow public broadcasters to make blocks of time available to selected candidates for office. For example, the Commission approved a PBS proposal to telecast unmoderated statements by certain presidential candidates selected by such criteria as national polling data. The FCC concluded that such presentations would not trigger the equal opportunities requirement because there was no "basis to question the good faith news judgment of PBS with respect to its decision to broadcast the event." 288/

So long as noncommercial licensees consciously exercise journalistic judgment when sponsoring candidate debates (and have a way of documenting their choices), there should be no difficulty in complying with FCC political broadcasting rules and no danger of being considered a designated forum, which would trigger a constitutional right of access. If a licensee is required to defend its choice, either in court or before the Commission, the

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287/ *Henry Geller*, 95 F.C.C.2d at 1244.

288/ *Fox Broadcasting Co.*, 11 FCC Rcd. 11,101, 11,113 (1996). The Commission has also approved programming produced in cooperation with local PBS affiliates that makes free air time available to major candidates in senatorial, congressional, and gubernatorial races. *A.H. Belo Corp.*, 11 FCC Rcd. 12,306, 12,309-10 (1996).

same argument should prevail in either setting: Selection of debate participants is a matter of news judgment, which is protected by both the First Amendment and the Communications Act.

3. STATE PROGRAMMING RESTRICTIONS, THE FIRST AMENDMENT, AND THE POWER OF FEDERAL PREEMPTION

The imposition of content controls on noncommercial licensees by state governments poses one of the thorniest issues in public broadcasting. A significant percentage of noncommercial licenses are held by state governments, thus raising the question whether any given content restriction is properly characterized as "censorship" or merely as "editing." This dilemma was brought home in both *Muir v. Alabama Educational Television Commission* and *Knights of the Ku Klux Klan v. Curators of the University of Missouri*, where the respective courts of appeals held that the state licensees could cancel the program *Death of a Princess* and deny underwriting announcements to the KKK because the broadcasters were engaged in government speech.

The court decisions in these two cases were welcome because they enabled the licensees to defeat attempts from the outside to control their programming schedules. But what about attempts to control programming from the inside? This issue was squarely presented by the funding conditions imposed by the Idaho legislature that required the state Board of Education (the licensee) to ban programming that "promotes, supports or encourages violation of Idaho criminal statutes" and to monitor "programs expected to be of

a controversial nature." The legality of the Idaho programming restrictions was never litigated, but the state took the position that its actions were fully defensible as an exercise of government speech. Since the state was the licensee, the state said it could decide what would – or would not – be presented on Idaho public broadcasting.

The superficial reasonableness of Idaho's position tends to obscure the fact that programming decisions that are based on accepted professional standards are quite different from content prohibitions imposed through the political process. The Supreme Court addressed a similar question in *Board of Education v. Pico*, where it invalidated a school district's decision to remove books from the school library that the board believed "'contain[ed] obscenities, blasphemies, brutality, and perversion beyond description.'" 289/ The removal decision was made against the advice of teachers and librarians in the school system, and the school board ignored its existing library policies. 290/ A divided Court held that the removal decision was invalid and that the board could not exert control over the library in "a narrowly partisan or political manner" or impose "a political orthodoxy to which pe-

289/ 457 U.S. 853, 858, 866, 873 (1982) (quoting *Pico v. Board of Educ.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)). Several school board members implemented this decision after attending a conference sponsored by "a politically conservative organization." *Id.* at 856.

290/ *Id.* at 874-875.

titioners and their constituents adhered." 291/ Lower courts have reached similar decisions regarding censorship in public libraries. 292/

State-imposed content restrictions, like those adopted in Idaho, may provide an occasion to test the theory that the First Amendment protects state-sponsored speech enterprises. 293/ The history of programming restrictions in that state provides a particularly compelling example. In 1981 the Idaho legislature drastically cut state funding for public television in response to two locally-produced documentaries. The programs included a critical examination of the timber industry in northern Idaho and a critical look at the communities of Kellogg and Bunker Hill for downplaying the significance of lead poisoning in children of the Silver Valley. 294/ One year later, in response to adverse reactions to the funding cuts, the legislature restored the funds and created the Idaho Educational Public Broadcasting Service

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291/ *Id*. at 870, 875.

292/ *Sund v. City of Wichita Falls*, 121 F. Supp.2d 530, 547-548 (N.D. Texas 2000); *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp.2d 552, 563 (E.D. Va. 1998); *Pratt v. Independent School Dist.*, 670 F.2d 771 (8th Cir. 1982); *Case v. Unified School Dist. No. 233*, 908 F. Supp. 864 (D. Kan. 1995); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

293/ The Idaho legislature in 2001 rescinded the programming restrictions, rendering a potential court challenge moot. However, this is not likely to be the last time a state legislature adopts restrictions on public television programming. As noted earlier in this Report, some state content restrictions are imposed as direct mandates, while others take the form of funding restrictions. The next subsection examines in greater detail legal constraints on funding restrictions.

294/ *See* IDAHO PUBLIC TELEVISION REPORT, *supra* note 177 at 6.

("IEPBS") as a separate agency under the State Board of Education. A new general manager was charged with the duty to "manage, coordinate, and supervise" IEPBS. 295/

Given this history, a strong argument might be made that the state created a speech enterprise that should be accorded First Amendment protections, like a university or library. IEPBS was created as a separate entity for the express purpose of exercising editorial judgment. However, since this theory of constitutional law is untested, a safer course would be to argue that state programming restrictions are preempted by the Communications Act.

Under the Supremacy Clause of the Constitution, enforcement of a state regulation may be preempted by federal law in three circumstances: (1) where Congress, in enacting a federal statute, expresses its clear intent to pre-empt a state law; 296/ (2) where Congress, by legislating comprehensively, has "occupied the field," enacting a system of regulations so comprehensive as to leave no room for state action; 297/ and (3) by enacting a law with which the state regulation conflicts, making compliance with both state and federal law impossible. 298/ A conflict between the state and federal schemes

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295/ *Id.*

296/ *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

297/ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

298/ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

occurs when it is impossible to comply with both the federal and state regulation, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 299/

As explained above in Section I, federal broadcasting law is predicated on serving the public interest by maximizing the editorial freedom of broadcast licensees. The "thrust" of public interest requirements has been "to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern." 300/ Accordingly, "television broadcasters enjoy the 'widest journalistic freedom' consistent with their public responsibilities." 301/ In this regard, the Supreme Court has noted that "[p]ublic and private broadcasters alike are not only permitted, *but indeed required*, to exercise substantial editorial discretion in the selection and presentation of their programming." 302/

Among the broadcaster's responsibilities "is the duty to schedule programming that serves the 'public interest, convenience, and necessity.'" 303/ Indeed, the FCC has stressed that the duty to exercise independent

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299/ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

300/ *League of Women Voters*, 468 U.S. at 380. *See id*. at 378 ("the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area").

301/ *Forbes*, 523 U.S. at 673, quoting *Democratic Nat'l. Comm*., 412 U.S. at 110.

302/ *Forbes*, 523 U.S. at 673 (emphasis added).

303/ *Id*., quoting 47 U.S.C. § 309(a).

editorial discretion arises from "the legislative design for broadcasting set out in the Communications Act, [that] licensees alone must assume and bear ultimate responsibility for the planning, execution, and supervision of programming and station operation." 304/ The Supreme Court has emphasized that "the unifying theme of these various statutory provisions [of the Communications Act] is that they substantially reduce the risk of governmental interference with the editorial judgments of local stations without restricting those stations' ability to speak on matters of public concern." 305/ In addition, federal policies underlying the promotion of public broadcasting include maximizing diversity by promoting "freedom, imagination and initiative on both local and national levels," encouraging the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, and insulating programming decisions from political control. 306/

Reviewing courts in various cases have found broad preemptive authority in the Communications Act. In *Capital Cities Cable, Inc. v. Crisp*,

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304/ *WXPN(FM)*, 69 F.C.C.2d at 1398, quoting *Broadcast Licenses and Public Agreement*, 57 F.C.C.2d 42, 47-48 (1975).

305/ *League of Women Voters*, 468 U.S. at 388-90. Further, the D.C. Circuit has found that Congress sought to minimize the risks to "state-owned systems" regarding the seemingly inevitable pressures to self-censor which face such programmers reliant on state funding by providing the interference-free funding of the CPB. *Community-Service Broad*, 593 F.2d at 1114-15 (plurality op.).

306/ 47 U.S.C. §§ 396(a)(3), 396(a)(6), and 398(c).

for example, the Supreme Court held that an Oklahoma prohibition against broadcasting advertisements for alcoholic beverages was preempted by federal law and regulation. 307/ The Court in *Crisp* held that the state advertising prohibition conflicted with various FCC regulations. In particular, the Court found that enforcement of local law would deprive the public "of the wide variety of programming options that cable systems make possible" – a result it concluded was "wholly at odds with the regulatory goals contemplated by the FCC." 308/ Consistent with this decision, the Supreme Court had held earlier that Section 315 of the Communications Act preempted local defamation law to the extent such tort claims might dampen broadcasters' willingness to air political speeches. 309/

Lower courts similarly have applied the law of preemption and have found that some, but not all, state regulation of broadcasting to be superceded by federal law. As a general proposition, courts are more likely to

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307/ 467 U.S. 691 (1984).

308/ *Id.* at 708. *See also id.* at 704 (By "shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television services that should increase program diversity. . . . Clearly, the full accomplishment of such objectives would be jeopardized if state and local authorities were now permitted to restrict substantially the ability of cable operators to provide these diverse services to their subscribers.") (citation omitted).

309/ *Farmers Educational and Cooperative Union of America, North Dakota Division v. WDAY*, 360 U.S. 525, 535 (1959) ("we have not hesitated to abrogate state law where satisfied that its enforcement would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (citation omitted).

find local law to be preempted if it has the effect of restricting broadcast programming. Accordingly, the Third Circuit in *Allen B. Dumont Labs, Inc., v. Carroll* held that the Communications Act barred a Pennsylvania law requiring all television programs be pre-approved by a state board of censors. 310/ It found that while Section 326 "declares it to be a national policy that nothing in the Act shall be understood to give the Federal Commission 'power of censorship' over radio communications and that no regulation or condition shall be promulgated or fixed by the Commission which shall interfere 'with the right of free speech by means of radio communication,' this does not mean that the States may exercise a censorship specifically denied to the Federal agency." 311/

The Supreme Court of Maine followed *Carroll* in striking down a Maine statute that barred public television stations from carrying interviews with political candidates. 312/ Unlike *Carroll*, the court in *State v. University of Maine* did not conclude that Congress had preempted the entire field of television regulation. Rather, the court cited the Supreme Court's decision in *WDAY*, and found that "the states are ousted generally in the area of censorship," which it defined as "any examination of thought or expression in order

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310/ 184 F.2d 153 (3d Cir. 1950). The *Carroll* court held that the federal government had occupied the field of television regulation.

311/ *Id*. at 156.

312/ *State v. University of Maine*, 266 A.2d 863 (Me. 1970).

to prevent publication of 'objectionable material.'" 313/ It noted that "[t]he power to license in the 'public interest' remains federally located," and concluded that "it would be impossible for [the public broadcasting licensee] to obey the rigid censoring requirements of the Maine statute and at the same time satisfy the 'public interest' standard requisite for FCC licensing." 314/

By contrast, the Supreme Court of New Jersey, by a divided vote, declined to hold that a state regulation of election coverage was preempted. 315/ The court upheld a New Jersey statute that required that state-owned public television stations provide balanced and fair coverage of all state elections. The court reasoned that the statute was essentially an exercise of the state licensee's discretion, ignoring the fact that the license holder was the state public television authority and not the legislature. 316/ The court ultimately concluded that there was no conflict between the state regulatory scheme and the Communications Act, and that the effect of the New Jersey scheme was to promote more election coverage, not less. 317/ Other

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313/ *Id*. at 866-867.

314/ *Id*. at 868-869. In finding this preemptive effect of federal law, the court cited Sections 326 and 398 of the Act. It also rejected the state's argument that public funding enlarged state authority over programming, finding "no authority in support of this novel position." *Id*. at 868.

315/ *McGlynn v. New Jersey Public Broadcasting Authority*, 439 A.2d 54 (N.J. 1981).

316/ *Id*. at 137-139.

317/ *Id*. at 141-142.

courts, however, including the United States Court of Appeals for the Fifth Circuit (in a decision summarily upheld by the U.S. Supreme Court), have been more willing to find conflicts, and to preempt state regulation of political broadcasting. 318/

These cases suggest that programming restrictions imposed on public broadcasting by state governments may well be preempted by federal law. Where a state adopts content limits via the political process, such action should not be viewed as the mere exercise of editorial discretion by a state licensee. Indeed, in *Muir*, the leading case supporting the "sole programming discretion" of state licensees for purposes of public forum analysis, the court suggested that programming restrictions imposed by a state may not be consistent with a licensee's obligations under the Communications Act. 319/ Where a state legislature takes action to reduce the level of editorial freedom previously exercised by the licensee, such action is difficult to reconcile with the purposes of the Communications Act and the Public Broadcasting Act. As the Supreme Court of Maine put it, "[a] state law which effectively prevents

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318/ *E.g.*, *KVUE, Inc. v. Austin Broadcasting Corp.*, 709 F.2d 922 (5th Cir. 1983), *aff'd. mem. sub nom. Texas v. KVUE-TV, Inc.*, 465 U.S. 1092 (1984) (Communications Act held to preempt state statute setting rates for political advertising and sponsorship identification requirements for federal candidates or committees); *Sagan v. Pennsylvania Public Television Network*, 544 A.2d 1309, 1312-13 (Pa. Sup. Ct. 1988) (Communications Act preempts local law governing political broadcasting).

319/ *Muir*, 688 F.2d at 1047-1048. *See also id.* at 1041 ("the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest").

the licensee from discharging this 'public interest' obligation and thereby satisfying the license requirement cannot stand." 320/

Whether an argument against state programming restrictions is based on the constitutional rights of state-sponsored speech enterprises or on principles of federal preemption, the focus of the claim would be that public broadcasters require a significant measure of editorial independence. The constitutional argument would emphasize the fact that the state created the enterprise for the purpose of transmitting independent views, while the preemption claim would stress the idea that state content controls necessarily interfere with the editorial autonomy required of federal licensees. Either way, the thrust of the argument is that state-licensed public broadcast licensees should be able to assert an enforceable claim in support of their editorial discretion.

4. LIMITS ON USE OF FUNDING TO RESTRICT FREE EXPRESSION

Funding is one of the perennial problems facing noncommercial broadcasters, and the problem is at least two-fold: (1) Obtaining adequate funding, and (2) avoiding the political influence on programming that can ac-

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320/ *State v. University of Maine*, 266 A.2d at 868. Such a purpose may be considered diametrically opposed to the Communications Act's public interest requirements which are based on First Amendment values. *See*, *e.g.*, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring) ("A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'").

company the power of the purse. The CPB budget battles during the Nixon Administration illustrate both problems, and the Public Broadcasting Act was written to help minimize the danger of political control at the federal level. Such restrictions on programming may be imposed directly, by denying funds to air particular types of shows, or indirectly, by slashing funding in response to airing disfavored programming. Where the funding decision is made for the sole purpose of influencing editorial decisions, constitutional limits may come into play.

It is well-established that government – state or federal – is under no obligation to provide various benefits, including funding for public television. At the same time, government cannot deny benefits by requiring a choice between exercising First Amendment rights or suffering the loss of the benefit. 321/ As the Supreme Court noted in *Velazquez*, "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." 322/ Using public broadcasting as an example, the Court held that the government could not create a "regime which prohibits speech necessary to the proper functioning of those systems." 323/ That is, in cases where the gov-

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321/ *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983); *Perry v. Sindermann*, 408 U.S.. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

322/ 531 U.S. at 547.

323/ *Id.* at 544.

ernment "uses or attempts to regulate a particular medium," the Court bases its analysis on the medium's "accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations." 324/ Where, as in the case of public broadcasting, "the dynamics of the broadcasting system [give] station programmers the right to use editorial judgment," funding conditions that restrict programming discretion should be unconstitutional. 325/

Other cases in which courts struck down funding limits to restrict speech may prove to be helpful to this analysis. For example, in *Brooklyn Institute of Arts & Sciences v. City of New York*, 326/ the district court held that the city could not withhold appropriated funding from a museum displaying an exhibit offensive to the Mayor and many others. The core holding was that "denial of a benefit, subsidy or contract [that] is motivated by a desire to suppress speech" violated the First Amendment. 327/ Similarly, in *Cuban Museum of Arts & Culture, Inc. v. City of Miami*, the district court held that the city could not refuse to renew a lease – even in the absence of a contractual right for the museum to a renewal – based on disagreements

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324/ *Id*. at 543.

325/ *Id*.

326/ 64 F. Supp.2d 184 (E.D.N.Y 1999).

327/ *Id*. at 200. The court did not rely on the public forum doctrine.

about what artists to include in the exhibit. 328/ And in *American Council of the Blind v. Boorstin*, 329/ the district court ordered the Librarian of Congress to resume translating *Playboy* magazine into Braille. The Librarian had halted such translation when Congress had withheld the exact amount needed for the translation from the annual appropriations bill. Again, the only reason given for the censorship by Congress was disagreement with the content of the speech. 330/ Thus, the First Amendment may limit legislative actions even when they restrict only the speech of government instrumentalities.

This area of the law is undergoing significant development. Although the Supreme Court held in 1991 that the federal government could use funding restrictions to limit abortion-related speech in a government medical program, 331/ and in 1998 that grants issued by the National Endowment for the Arts could be based on certain limited conditions, 332/ it has since sug-

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328/ 766 F. Supp. 1121, 1126-27 (S.D.Fla. 1991).

329/ 644 F. Supp. 811 (D.D.C. 1986).

330/ *Id*. at 816. Although the court described the Library of Congress as a non-public forum, it principally relied on the unconstitutional conditions doctrine to invalidate the government's actions. *See id*. (describing constitutional infirmity as a "viewpoint-based denial of a subsidy"); *id*. at 815 ("Although individuals have no right to a government subsidy or benefit, once one is conferred, as it is here through the allocation of funds for the program, the government cannot deny it on a basis that impinges on freedom of speech.").

331/ *Rust*, 500 U.S. at 200.

332/ *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

gested that the government cannot use funding decisions to subvert the essential purpose of a speech-related program. 333/

Recent legal developments and current litigation already are leading to further developments in this area. Requirements that federally funded and subsidized libraries use Internet content filters were added as an amendment to the 2001 Labor-Health and Human Services Appropriations Bill, H.R. 4577. Labeled the "Children's Internet Protection Act" ("CIPA"), the amendments condition e-rate subsidies, funding via the Elementary and Secondary Education Act and funding through the Museum and Library Services Act on the use of content filters on Internet access terminals. The passage of CIPA resulted in judicial challenges led by the American Library Association and the ACLU. 334/ The Justice Department moved to dismiss the suits, arguing that the government could impose conditions on the programs it chooses to fund, but the district court rejected the motion without issuing an opinion. Cases such as this suggest that public broadcasters would have a strong constitutional argument for preserving their editorial integrity in the face of content-based funding restrictions.

333/ *Velazquez*, 531 U.S. at 544-549.

334/ *American Library Ass'n. v. United States*, No. 01-CV-1303 (E.D. Pa. filed March 20, 2001); *Multnomah County Public Library v. United States*, No. 01-CV-1322 (E.D. Pa. filed March 20, 2001).

III. PUBLIC BROADCASTING, FREE EXPRESSION, AND PRINCIPLES OF EDITORIAL INTEGRITY

The Wingspread Conference on Editorial Integrity in Public Broadcasting was convened in 1984 to enable public broadcasting executives and representatives from state licensing boards and commissions to explore the First Amendment position of public broadcasting licensees. The resulting report opened on this uncertain note: "The history of public broadcasting licensees, especially those which are also state government entities, shows that they have unclear First Amendment rights." 335/ To help provide greater clarity and to provide a sense of mission, the conference proposed Principles of Editorial Integrity to be adopted by the governing boards of public broadcast organizations. 336/ Editorial integrity in public broadcasting was defined as "the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." 337/ The following five principles emerged from this process:

- We are Trustees of a Public Service
- Our Service is Programming
- Credibility is the Currency of our Programming

335/ Proceedings of the Wingspread Conference, EDITORIAL INTEGRITY IN PUBLIC BROADCASTING 11 (November 1984).

336/ *Id.* at 71.

337/ *See Statement of Principles of Editorial Integrity in Public Broadcasting* at 3.

- Many of our Responsibilities Are Grounded in Constitutional or Statutory Law
- We have a Fiduciary Responsibility for Public Funds

Now, almost two decades after the Wingspread Conference explored these issues, the legal questions have not yet been resolved, although there have been significant case law developments. The critical question remains: What is the constitutional status of state-licensed public broadcast stations? Although that question cannot yet be answered definitively, it is possible to develop strategies to maximize the editorial independence of public broadcast licensees based on First Amendment and statutory principles.

As the legal analysis in Section II suggests, a critical factor in preserving the editorial independence of public broadcast licensees is to ensure that the entities are chartered to provide an independent editorial voice and that they behave as professional journalistic organizations. This requires attention to the obligations associated with the FCC license, the purposes of the authorizing legislation at the state level, the by-laws and professional guidelines such as the Principles of Editorial Integrity. Where this is done, strong statutory and constitutional arguments can be made to support public broadcasters' editorial discretion.

More importantly, such arguments can be fashioned with a degree of consistency so as to avoid conflicting rationales in response to different threats to free expression. By focusing on professional standards that advance established goals of journalistic excellence, public broadcasters can

help create a self-fulfilling prophesy: They are likely to be accorded a high degree of editorial independence by law where they exercise a high degree of editorial independence in fact.

A. FEDERAL STATUTORY POLICIES

Federal broadcasting law is predicated on serving the public interest by maximizing the editorial freedom of broadcast licensees. In addition, federal policies underlying the promotion of public broadcasting include maximizing diversity by promoting "freedom, imagination and initiative on both local and national levels," encouraging the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, and insulating programming decisions from political control. 338/

Although the FCC imposes somewhat greater restrictions on the content of public broadcast stations than on their commercial counterparts, the programming limits (no commercials, no political endorsements, requirements for educational and cultural fare) are consistent with – and limited by – the purposes for which public broadcasting was created. If viewed by analogy in terms of the public forum doctrine, it would be fair to say that the government "designated" a broadcasting service to provide noncommercial cultural programming, and can condition the licenses accordingly. But it cannot impose greater restrictions. It cannot ban editorials by public stations, for

338/ 47 U.S.C. §§ 396(a)(3), 396(a)(6), and § 398(c).

example, because the Communications Act envisions public broadcasters as journalistic enterprises that exercise editorial discretion. 339/ Indeed, public broadcasters, like all broadcast licensees, *must* exercise editorial discretion as an essential condition of being licensed. For that reason, under the doctrine of federal preemption, state government restrictions that impair a licensee's ability to fulfill its statutory duties should be invalid.

B. STATE GOVERNANCE OF PUBLIC BROADCASTING

Forty-eight states have passed laws regarding public broadcasting, either to direct the activities of state agencies engaged in public broadcasting or to authorize contributions to public television stations. 340/ These laws are fairly similar throughout the country and serve to define the mission for state broadcasting agencies. They also shape the bylaws and governance of state broadcasting organizations. Accordingly, the state laws are an important factor in any argument to support public broadcasters' constitutional status. They help determine whether a state-owned public licensee should be considered a government speaker or as a state-sponsored speech enterprise with independent rights.

The Kentucky statute on educational television provides a useful example in this regard. It provides for the creation of an "independent agency and instrumentality of the commonwealth" to "prescribe and enforce regu-

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339/ *League of Women Voters*, 468 U.S. at 378; *Forbes*, 523 U.S. at 673.

340/ *See* EDITORIAL INTEGRITY HANDBOOK at 40.

lations governing the use of educational television." The agency was given an independent corporate identity. 341/ Such an agency may fairly be characterized as a separate enterprise and not as a "state speaker" even though it is a public agency. In *Forbes*, for example, the Supreme Court noted that the Arkansas Educational Television Commission operated as an independent agency that was insulated from political pressure whose professional staff exercised "broad editorial discretion in planning the network's programming." 342/ Thus, where an agency is created for the purpose of providing a journalistic service rather than to be a government press office, reviewing courts may be willing to accord that agency with enforceable First Amendment rights.

Whether or not courts are prepared to expand constitutional doctrine to encompass certain state agencies, it is important to recognize that all state licensees must adhere to the terms of their federal licenses. As noted above, the Communications Act requires its licensees to exercise unfettered editorial judgment. Accordingly, the First Amendment values embedded in the Communications Act may be enforced in situations where state law burdens editorial freedom. In most instances, however, state law will reinforce the notion that the state is an independent speaker.

341/ Ky. Rev. Stat. § 168.030.

342/ *Forbes*, 523 U.S. at 669-670.

C. PRINCIPLES OF EDITORIAL INTEGRITY

In addition to state and federal laws, adherence to professional standards, such as the Principles of Editorial Integrity, may affect significantly the extent to which courts are willing to recognize legally enforceable rights to editorial discretion for public broadcasters. In *Forbes*, the Supreme Court was greatly influenced by the fact that the licensee's choice of debate participants was governed by professional journalistic standards. It noted that specifically that AETC had adopted the Principles of Editorial Integrity which counsel adherence to "generally accepted broadcast industry standards, so that the programming service is free from pressure from political or financial supporters." 343/ Professor Schauer has even suggested that "the journalistic character of Arkansas Educational Television may have been more determinative than is indicated by the structure of the majority opinion" in *Forbes*. 344/

The journalistic nature of the enterprise, as supported by adherence to professional standards, also is instrumental in avoiding the conclusion that the licensee has created a public forum of some type. In short, the exercise of journalistic judgment helps preserve editorial discretion in law, and well-articulated professional standards can provide the necessary documentation of the principles underlying such judgment. The Supreme Court

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343/ *Id*. at 670.

344/ Schauer, *supra* note 199 at 90.

in *Forbes* agreed that when a public broadcaster "exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity." 345/ Such journalistic behavior is diametrically opposed to the "open platform" notion of the public forum. Consequently, the Court came down on the side of licensees' editorial discretion because a right of access "could obstruct the legitimate purposes of television broadcasters." 346/

To conclude that professional standards are important to the preservation of the right of editorial discretion is not the same thing as determining what those standards should be. The original Principles of Editorial Integrity in Public Broadcasting were adopted in the mid-1980s as a way to help clarify the rights and obligations of public broadcasters, at a time when the legal environment was more uncertain. With the passage of time and the development of legal doctrine, the time may be right to review the Principles of Editorial Integrity to determine whether they should be revised to reflect new conditions and understandings. It is beyond the scope of this Report to suggest potential changes, but the legal analysis contained herein should provide a background to inform any such review.

D. RECOMMENDATIONS

This report on freedom of expression in public broadcasting represents only the starting point, and not the end, of any focused effort to pro-

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345/ *Forbes*, 523 U.S. at 674.

346/ *Id.*

mote full constitutional protections for noncommercial licensees. This has been an effort to spot the relevant issues and to update the discussion of case law in the nearly two decades since the 1983 FIRST AMENDMENT ANALYSIS was issued and the Wingspread Conference was held. The purpose of this analysis is to initiate a dialogue that will lead to a reexamination of the status of public broadcasting as a journalistic enterprise in the 21st century, and perhaps to the development of new Principles of Editorial Integrity. Accordingly, to move this project to its next phase, I recommend the following actions:

- There should be a comprehensive analysis of existing state statutes and corporate by-laws that govern the operations of noncommercial broadcast licensees. Such an analysis should illuminate the extent to which public broadcasting organizations may be characterized as state-sponsored journalistic enterprises.

- Public broadcasters should convene a second Wingspread Conference to examine issues of editorial integrity in public broadcasting in the contemporary media environment. The purpose of Wingspread II would be to assess the current state of journalism in noncommercial broadcasting and to work toward developing professional standards and strategies to maximize editorial freedom.

- Based on the Wingspread II findings, and in light of this analysis and a review of state laws, the public broadcasting community should consider developing new Principles of Editorial Integrity for the 21st century.

Any recommendations about protecting freedom of expression for public broadcasting must be based on the real world experiences of noncommercial licensees in this changing media environment. They also must be

analyzed against the backdrop of existing state laws and developing case law. It is the hope that this Report, along with an examination of state charters and with the input of noncommercial broadcasters, will provide the basic building blocks for new Principles of Editorial Integrity.