May, 2007

Access to the Airwaves for Issue Ads: CBS v. Democratic National Committee Revisited

Gordon S. Jackson
ACCESS TO THE AIRWAVES FOR ISSUE ADS:
CBS V. DEMOCRATIC NATIONAL COMMITTEE REVISITED
ABSTRACT

This paper undertakes a First Amendment analysis of the discretion of federal broadcast licensees to exclude advertisers that they deem unsuitable for other than the standard reasons of indecency. The issues are crystallized by the case of Kalle Lasn and Adbusters Media Corp., who have tried unsuccessfully to get the networks to run their anti-ads, which attempt to de-glamorize consumption. The main business of the paper is to revisit the principal impediment to an action by Lasn – a 1973 U.S. Supreme Court holding, *CBS v. Democratic National Committee*. This case seems to stand for the proposition that decisions by licensees on who will use the public airwaves to advertise can never be characterized as state action, and therefore are beyond constitutional reach. It will be argued here that not only is this holding inconsistent with other relevant case law, it rests most uneasily upon internal logical contradictions and faulty, dated premises. Once unimpeded by *CBS*, Lasn’s constitutional action, or a similar proceeding, would be an excellent vehicle to clarify the law in this area, while establishing a narrowly tailored, manageable precedent.
In his 2000 book *Culture Jam: The Uncooling of America*, Kalle Lasn, editor of *Adbusters* magazine, issues a challenge to America’s lawyers. He has, he informs them, a splendid First Amendment issue dealing with the right of television networks to exercise total control over their time allotted to advertising, a cause for which he has heretofore been unable to find representation. His case stems from attempts to get the major television networks to run his anti-ads – thirty to sixty second TV spots that aim to de-glamorize consumption while advancing a cultural critique – an effort that, perhaps not surprisingly, met with no success, even though Lasn was prepared to pay the going rate for commercial time.¹ For the most part, representatives of the networks made no secret of the fact that they found the content of his spots objectionable, not for reasons relating to poor taste or production quality, but rather on pragmatic grounds. The position was summarized candidly by NBC network commercial clearance manager, Richard Gitter: “We don’t want to take any advertising that’s inimical to our legitimate business interests.”² CBS’s Robert L. Lowary elevated this pragmatism to a more philosophical plane: “This commercial (‘Buy Nothing Day’) ...is in opposition to the current economic policy in the United States.”³

² Id. at 32
³ Id. at 33
Indeed, and from Lasn’s standpoint that is precisely the idea. American culture has, he believes, sunk into a morass of mindless consumerism, a condition that is undermining the fundamental precondition of democracy – an informed citizenry alive to matters of public concern. The media, as prominent shapers of the public consciousness, are much implicated in this, in Lasn’s view. Increasingly, in this era of ownership by media conglomerates attentive above all other considerations to the bottom line, the public discourse is being turned over to the forces of commerce. It is being given over entirely to the project of making consumption “cool,” and Lasn’s project is to render uncool products he considers socially reprehensible, such as cigarettes, junk food, designer sneakers and heavily polluting private automobiles. It’s an old critique of American society, but one that Lasn is resurrecting in new and creative ways. Among the spots that have been featured on his website (www.adbusters.com) is a Calvin Klein model in his undershorts, holding the waistband out and peering at his genitals. The caption above, “obsession,” suggests the fundamental impulses of narcissism that Lasn believes drive the economy of superfluous consumption and superficial status. His arsenal of anti-iconography includes anorexic females, a dinosaur figure formed from automobiles lumbering toward the junk heap, the United States as bloated swine, and similar suppressants of commercial vigor. These spots are intended to compete with regular advertisements in a battle of dueling imagery for
the grail of cool, and also to provoke thought on matters of public concern. The opportunity to undertake this competition of ideas in the same highly pervasive forum utilized so effectively by the major advertisers is, Lasn intuitively believes, a matter of constitutional right (we’ll leave aside the fact that he is a Canadian citizen; his organization does most of its business in the United States).

But he has experienced difficulty finding a lawyer to take the case. The precedent standing in his way, he has been told, is *CBS v. Democratic National Committee*, a 1973 U.S. Supreme Court decision that seems to stand for the proposition that the television networks are free from constitutional scrutiny in making decisions about allocation of ad time. But if *CBS* is the principal impediment, dismissing Lasn’s case offhand may be a bit premature. The decision is ripe for re-visitation. It is premised on the deployment by the Federal Communications Commission of the Fairness Doctrine, which the FCC abandoned in 1987. It also makes much of the exercise of journalistic discretion, which is arguably a dated presumption as well in a journalistic era where the

---

4 Lasn’s company brought suit against the Canadian Broadcasting Corp. for reneging on an agreement to run one of these issue ads. The CBC does permit “advocacy ads,” but not during programming that conveys “news or information.” The trial court addressed the constitutional issue — which hinged on a state action question — and found for CBC. Adbusters Media Corp. v. C.B.C., [1996] 2 W.W.R. 698 (1996). The appellate court, however, declined to address the constitutional question, holding that the action was resolved entirely by a breach of contract finding. The court noted that the record was insufficient on the constitutional question for the trial court to have addressed it. Adbusters Media Corp. v. C.B.C., [1997] 154 D.L.R. 4th 404, 405. The Canadian Supreme Court declined to review the case. Adbusters Media Corp. v. C.B.C., [1998] 1 S.C.R. v (Can.).

bottom line rules over all. Furthermore, Justice Burger’s reasoning in finding no state action in any decision about selling advertising time is logically inconsistent, and in any case there is not a five-justice majority for that finding. In sum, this three-decades old holding, which gets aspirants to the public airwaves the bum’s rush from First Amendment lawyers, may well be vulnerable to challenge in 2005.

This paper sketches a possible First Amendment case for Lasn against the networks, taking up first the threshold questions of whether the type of expression he wishes to engage in is the type the First Amendment aims to protect and promote, and whether decisions of the privately-owned broadcasting networks can ever be brought under constitutional scrutiny. Next, the fundamental question of whether CBS disposes of the state action question will be addressed, before a closer look is taken at some of the holding’s underlying premises that can be seen as dated and no longer compelling. The final section of the paper will deal with practical consequences of any decision favorable to Lasn – questions that obviously loomed large in the thinking of both the Court and the FCC thirty years ago. Let us then take a closer look at the chief legal barrier to Lasn’s action and see how CBS bears up under the lens of our own time.

INTO THE FIRST AMENDMENT BALLPARK

Procedurally, Lasn’s first step in pursuing his legal remedies would be to file a fairness complaint with the Federal Communications
Commission, asking the agency to require the networks to run the anti-ads. Historically, this has been a rather fruitless venture, especially during those presidential administrations keenly sensitive to the interests of media ownership and armed with a libertarian rationale in support of those interests. In 1986, before the FCC had officially discarded the Fairness Doctrine (which we will come to), the agency forwarded to broadcasters six such complaints out of 5,509 filed.\(^6\) The chairman of the current commission, William Martin, like predecessor Michael Powell, apparently is unable to attach any meaning to the “public interest” standard to which the commission is obliged to hold the broadcasting industry, other than as protection against the occasional obscenity or indecently displayed nipple.\(^7\) The standard is too vague to be applied, Powell maintained,\(^8\) an ambiguity that continues to vex his successor Martin.

After what will undoubtedly be an unprofitable encounter with the regulators who don’t believe in regulating, Lasn’s next step will be into the federal courts with an action claiming that the networks that have refused to run his anti-ads are constraining his rights of free expression under the First Amendment, and that the FCC has taken insufficient account of both his rights and the public’s right to be informed. To get his case considered by the courts he must address two threshold

\(^8\) Janine Jackson, Their Man in Washington, EXTRA MAGAZINE, October, 2001 at 6-9.
questions, the first being: Is the substance of the expression he wants to get on the public airwaves the kind that the First Amendment aims to promote and protect? There can be no doubt that it is.

Though trading more in imagery than text, Lasn is clearly advancing a deep critique of American culture with substantial implications for public policy and public philosophy. It would seem to fall squarely within the kind of speech identified by the U.S. Supreme Court in 1982 as most worthy of First Amendment protection: “Expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values.”\(^9\) As a dissenter to the economic status quo, Lasn would also seem to come all the more clearly under First Amendment protection. Chief Justice Warren articulated a relevant standard in 1957 in a case that remains the law of the land: “...history has amply proved the virtue of political activity for minority, dissident groups, who innumerable times have been the vanguard of democratic thought. The absence of such voices would be a symptom of grave illness in our society.”\(^{10}\) A previous incarnation of the FCC has expressed a similar concern that a flaccid and unchallenged consensus should not dominate the public airwaves: “... it would clearly not be acceptable for the licensee to adopt a ‘policy of excluding partisan voices and always

---


itself presenting views in a bland, inoffensive manner.”11 All such considerations are by way of cultivating a vigorous forum of public debate, which the Court has often held up as the ideal incarnation of First Amendment values: “... it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”12 Or, one might add, by private entities such as advertisers, who can exercise control of the airwaves through their economic leverage.

Furthermore, First Amendment protection is aimed not only at those expressing diverse and dissenting views, but also at the public and its right to receive such views. In the Red Lion case Justice White makes this quite explicit: “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”13 Here White clearly addresses also the balancing within the First Amendment scheme that must be made among the sometimes competing values of individual expression, freedom of the press, and the implied right of the public to receive information relevant to the responsibilities of citizens in a democracy. The Red Lion formulation suggests that, when it comes to constitutional scrutiny of the public airwaves, the public’s right to receive the sort of expression Lasn wishes to put before it outweighs the

network’s right to exclusive determination of the content of its programming. White goes on: “… the people as a whole retain their interest in free speech by radio [and by implication under this train of logic, television] and their collective right to have the medium function consistent with the ends and purposes of the First Amendment.”

The second threshold question for Lasn is whether the broadcasting industry is subject to constitutional scrutiny to a degree that other mediums of mass communication would not be. Again, the answer is made quite clear in Red Lion: “… the broadcasting industry plainly operates under restraints not imposed on other media…” The rationale is rooted in the public interest standard to which the industry is held under the Federal Communications Act of 1934, and subsequent court decisions that have developed the concepts of the scarcity of radio frequencies, and in the ownership of the airwaves by the public, for which licensees act as a fiduciary. This fiduciary status was made explicit by the Court in 1984 – “… (the) Communications Act of 1934 has designated broadcasters as ‘fiduciaries for the public’” – as well as by Chief Justice Burger in the CBS decision, in which he refers to the broadcasting industry as a “public trustee.”

The rationale has also historically centered around the public’s right to receive information in forums that by their use of the public

---

14 Id.
15 Id. at 380.
airwaves are destined to be nationwide and highly pervasive: “It is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience, and that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”\textsuperscript{18} Here again, the Court seems to have precisely \textit{Adbusters} in mind in referring to “diverse and antagonistic sources.” The primary objective of federal regulation of the broadcast industry would seem from the case law to be the protection of voices such as this. Clearly, there is a chance to get the networks into court that would not be available with other media: “… although the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public’s First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. As a result of these restrictions, of course, the absolute freedom to advocate one’s own positions without also presenting opposing viewpoints – a freedom enjoyed, for example, by newspaper publishers and soapbox orators – is denied to broadcasters.”\textsuperscript{19}

As a creature of the federal government disposing of a public asset, the broadcasting industry clearly has been seen by the courts as falling within the First Amendment ambit, even by the lights of Burger in \textit{CBS}:

“... the public interest standard necessarily invites reference to First Amendment principles.” Lasn’s action easily gets by the threshold questions and brings him into the First Amendment ballpark, but then he will run squarely into CBS and a holding on state action that seems to coexist most awkwardly with the rest of the decision, and with the body of constitutional law heretofore discussed.

DOES CBS CLEARLY DISPOSE OF THE STATE ACTION QUESTION?

CBS involved an action brought by a group of businessmen opposed to the Vietnam War who were trying to get the network to run public service ads criticizing the war. The D.C Circuit found for the plaintiffs and remanded the case to the FCC for the agency to devise a regulatory scheme permitting access, but this holding was subsequently overruled by the Supreme Court. Writing for the majority, Chief Justice Burger is not ambiguous in finding that the decisions of networks to dispose of commercial time entirely as they see fit are within their editorial discretion and beyond the reach of constitutional scrutiny. He says that such decisions cannot constitute state action, so a constitutional analysis is not triggered: “...the policies complained of do not constitute governmental action violative of the First Amendment.”

But how strong is this holding as precedent? Does it clearly dispose of

---

the state action question and forever bar issue ads from the public airwaves if the networks choose not to run them?

The first and most obvious response to this question is that there was not a five-justice majority in support of the state action portion of Burger’s decision, as Justice Brennan points out in his dissent.22 Justices Rehnquist and Stewart join Burger in this part of the holding, and Justice Douglas takes the extreme libertarian position that the broadcasting industry should not be treated any differently under the Constitution than other forms of media. Brennan and Justice Marshall dissent from Burger’s state action finding, and Justices White, Powell and Blackmun pointedly refrain from joining that portion of the decision.

A close analysis of Burger’s reasoning in this part of the decision suggests the difficulties these five latter justices may have had in joining him. Brennan devotes a significant portion of his dissent to contesting this part of the decision, and arguably he has much the better of the exchange. Certainly, he has taken more pains than Burger to analyze the relevant state action doctrines and attempt to apply them to the questions at hand. He notes several interlocking aspects of the broadcasting industry’s relationship with government: public ownership of the airwaves;23 the dependence of broadcasters on the federal government for the right to operate the broadcast frequencies;24 the

---

22 Id. at 171.
23 Id. at 175.
24 Id.
initial government selection [and exclusion of others] of those privileged to make use of the public airwaves;\textsuperscript{25} and the extensive governmental control over the broadcast industry, as exercised by Congress through the administrative arm of the F.C.C.\textsuperscript{26} Brennan also argues that, in essence, Congress’s decision to exercise control over the industry must inevitably satisfy the state action requirement through the government imprimatur doctrine. Under this theory, any time the government is in a position to give its imprimatur to a decision where private parties are involved, state action must be found when the constitutionality of that decision is contested by one of the parties. So if, as was the case in CBS, the FCC endorses the right of the industry to dispose of commercial time as it pleases, that decision by the FCC is in effect government’s imprimatur upon a matter in controversy and creates the conditions necessary to find state action. This doctrine is well settled in the law, Brennan argues.\textsuperscript{27}

At least one lower court has interpreted CBS to imply that state action can be found only when the FCC looks favorably upon the fairness complaint and “put[s] its own weight” behind the challenge to the broadcast licensee’s conduct.\textsuperscript{28} But this holding begs the question raised by Brennan’s contention that whether the government says yea or nay to the challenged conduct, it is in either case giving its imprimatur. The

\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{24} Id. at 176.
\item \textsuperscript{27} Id. at 178.
\item \textsuperscript{28} Central New York Right to Life v. Radio Station WIBX 479 F. Supp. 8, 11 (N.D. N.Y. 1979).
\end{itemize}
holding also would put the FCC in the unlikely position of being the final arbiter of First Amendment questions concerning the broadcast industry, a role for which the agency is manifestly unsuited.

Burger’s grappling with state action doctrines in CBS is rather attenuated. While he does make a half-hearted effort to distinguish CBS from another state action case,29 his holding rests ultimately on a base of simple pragmatism. To open the decisions of broadcast licensees to constitutional challenges is, in Burger’s view, to open a very large can of worms: “... few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny.”30 Certainly these practical reservations are significant, and this paper attempts to address them in the final section, but they cannot be the decisive consideration when significant First Amendment values are at stake.

Burger’s disposition of the state action question seems also to be at odds with his own reasoning earlier in the decision. In discussing the Court’s traditional deference to Congress and administrative agencies in the performance of their regulatory duties, he reserves for the courts their own traditional bailiwick – the prerogative to decide constitutional questions: “That is not to say we ‘defer’ to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the

30 Id.
Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression.” This makes an obvious point that is clearly in line with all the other constitutional cases dealing with federal oversight of the broadcasting industry, but what can Burger possibly be talking about here other than a situation in which the networks are exercising their editorial discretion to keep a particular viewpoint off the airwaves? Yet this is a discretionary power that later in the decision he places beyond constitutional reach. If the courts are to apply the First Amendment to broadcast licensee decisions about content, they must find that those decisions constitute state action. There seems to be no way logically to reconcile Burger’s thinking in these two sections of CBS. If he’s going to reserve the courts’ prerogative to apply the First Amendment, he must be prepared to find state action in the editorial decisions of licensees.

The Court’s readiness to apply the First Amendment when a particular voice is excluded from the airwaves is suggested in the Red Lion decision, as Justice White discusses the circumstances under which the Court might overrule a decision of the FCC on a fairness complaint: “There is no question here of ....a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves. .... Such questions would raise more serious First Amendment

31 Id. at 103.
issues.” Burger simply reiterates White’s *Red Lion* position five years later in *CBS*, but then seems to contradict himself when he addresses the state action question.

That question has not been resolved in a clear, logical, and compelling way by the *CBS* holding. If it accomplishes nothing else, Lasn’s action, should he bring it, would most likely result in a clarification of this precedent that has a bit of age on it now. *CBS* stands in apparent opposition to a substantial body of First Amendment law, and it appears to rest uneasily upon internal contradictions and faulty premises, some of which the passage of time has brought into clearer relief.

**THE DATED PREMISES OF *CBS***

Chief Justice Burger’s holding in *CBS* is premised on the existence of the Fairness Doctrine, which is no longer operative. Adopted as policy by the FCC in the late ‘40s, this doctrine was held constitutional and articulated in *Red Lion* as a two-pronged approach to administration of the public interest standard: (1) coverage of issues of public importance must be adequate; and (2) such coverage must fairly reflect opposing viewpoints.

It is clear that Burger in *CBS* believes broadcasters will be held to Fairness Doctrine standards by the FCC, and consequently will have adequate sensitivity toward First Amendment considerations: “The

---

broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill the Fairness Doctrine obligations, although that discretion is bounded by rules designed to assure that the public interest in fairness is furthered....”34 Burger goes on to discuss the boundaries he expects will be imposed upon licensees, and quotes the agency’s rule of thumb in administering the Fairness Doctrine: “The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs.”35 Burger also indicates that he expects the Fairness Doctrine to remain in effect: “The Commission made it clear ... that it does not intend to discard the Fairness Doctrine.”36

Improbable though it might seem that Burger would turn over to a regulatory agency all review of First Amendment problems arising in the broadcasting industry, so he indeed appears to have done. He rests his decision on the existence of an “affirmative and independent statutory [emphasis mine] obligation to provide full and fair coverage of public issues...”37 He assumes that the First Amendment is adequately represented by the statutory public interest standard as administered through the Fairness Doctrine. But the task has been abandoned by the FCC, and this is yet one more reason – in addition to Burger’s questionable logic – that CBS needs revisiting. Can Burger’s holding

35 Id.
36 Id. at 136.
37 Id., 129.
carry any weight at all in the absence of the Fairness Doctrine, given his reliance on its function as a protector of constitutional values?

Arguably, a second faulty premise upon which Burger bases the CBS holding stems from his naivety about the priorities of the broadcasting industry. In balancing the individual’s right to expression, the public’s right to receive information, and the freedom of media ownership, he ultimately seems to conclude in CBS that the First Amendment is best served by giving greatest weight to the latter consideration, even though he affirms Red Lion’s assertion that the second is of paramount importance.38 Those who wish to advertise on the networks, Burger assumes, will be subject to the experienced, professional discretion of good journalists: “Obviously the licensee’s evaluation is based on its own journalistic judgment of priorities and newsworthiness.”39

But is that so obvious? If it bore some relation to reality in 1973 when individuals such as William Paley exercised near total control over network decisions, does anyone believe it to be even remotely true in 2007? Certainly, it is a commonplace of much of the commentariat, from William Safire on the right to Noam Chomsky on the left, that the networks have, in this era of ownership by corporate conglomerates, increasingly allowed journalistic priorities to be trumped by the bottom line. One of Paley’s successors to stewardship of CBS’s role as public

38 Id. at 112-113.
39 Id. at 118.
trustee made his priorities – and undoubtedly those of the industry – crystal clear in an interview with *Advertising Age* magazine. Michael Jordan, CEO of Westinghouse, which briefly owned CBS in the ‘90s before the network was swallowed up by media giant Viacom, left no doubt about what he saw as his business: “We’re here to serve advertisers. That’s our raison d’etre.”40 Indeed, and one need search no further for the reason that Kalle Lasn’s anti-ads are not welcome on the airwaves. This conception of the broadcast media’s function, however, rather loses sight of the public fiduciary role, which continues to be required by the law of the land.

Surely Burger, were he still on the Court, would grasp the realities of the industry today. In 1973, however, he was determined to hold aloft the ideal of journalistic purity. The journalists at the networks know best how to bring issue advocacy before the public, he maintains: “... the licensee’s policy against editorial spot ads is based on a journalistic judgment that 10- to 60- second spot announcements are ill-suited to intelligible treatment of public issues; the broadcaster has chosen to provide a balanced treatment of controversial questions in a more comprehensive form.”41 Burger’s assertion is, of course, laughable today if it wasn’t then. President Clinton floated a feeler in his 1998 state of the union address about getting the networks to free up a bit of airtime from

---

41 Id.
the discourse of commerce. In asking that they devote a small portion of prime time to free or low cost political announcements, Clinton reflected upon the principle that “the airwaves are a public trust and broadcasters also have to help us in this effort to strengthen our democracy.” Within 24 hours of the address, the firestorm from the broadcasting industry had its dutiful servants on Capitol Hill threatening the FCC with reduced funding if this proposal was not killed. And so indeed it was. Clinton never publicly mentioned the subject again.42

Burger’s CBS holding rests upon the presumption of a broadcast industry guided by journalistic priorities, overseen by a FCC imposing the public interest standard and administering it by light of the Fairness Doctrine. It cannot reasonably be argued that any of these conditions obtain today.

A final presumption in CBS will be notable for rich irony if the decision indeed is decisive in barring Lasn from access to the airwaves. Burger was concerned that if commercial time was made available to advertisers not approved by the networks that “the views of the affluent could well prevail over those of others…”43 Ironic it would be indeed if Lasn’s efforts to wrest the networks away from complete control by the moneyed interests should be stymied by a decision that aspires to the same ideal.

43 Id. at 123.
DRAWING LINES: PRACTICAL CONSIDERATIONS

Both Burger in CBS and the FCC a year later expressed concern about the practical consequences of not drawing a hard and fast line in favor of the networks’ discretion to allocate commercial time. Burger, it has already been noted, imagined the wide variety of constitutional grievances that might find their way into court. The FCC, after applying the Fairness Doctrine on behalf of anti-smoking and anti-automobile pollution ads, concluded that it was getting in over its head and no longer should engage in the “trivial task” of deciding what advertisements the networks should run. The commission reversed its thinking on these very issue-specific anti-ads in 1974 and decided that they would be permitted only if two sides of a public policy question are being ventilated. Cigarette and automobile ads, the commission now argued, did not make the case for smoking or driving, so only one side was presented – that of the anti-ads.

The logic here is perhaps as tortured as that which concludes determining the constitutional status of issue advocacy ads is a “trivial task.” And this 1974 policy statement is not binding on the current FCC, which in any case has shown no inclination to apply the Fairness Doctrine in questions of media access. But it may be useful to try to distinguish Lasn’s anti-ad campaign from these predecessors, and in

“Id. at 25.
doing so perhaps we will arrive at a proposed holding in his favor that is narrow enough to alleviate some of the concerns in both court and commission about an increased workload.

Lasn no doubt would argue that his anti-ad campaigns, while they are on the one hand clearly issue advocacy intended to be counterpoised against mindless commercialism, do constitute a second and competing voice in an ongoing theater of ideas playing out over the public airwaves. For the main business of these campaigns is not so much textual, which issue advocacy is commonly understood to be, as it is to compete in a contest of imagery. Their intent is to carry the battle on the field where the commercial advertisers compete vigorously, and attempt to counteract the imagery that attempts to establish what is to be deemed socially desirable.

In determining what sort of expressive weight to give such imagery, we need not go all the way with Marshall McLuhan and conclude that the medium of television and its bombarding images establish a whole new epistemology. A slightly more restrained assessment of the impact comes from former Library of Congress historian Daniel Boorstin: “The image of America overshadows the ideals of America.”47 Actually, we needn’t venture outside of federal court dicta, or indeed outside of CBS itself, to get a candid, insightful assessment of the role that televised commercial images have played in American life since the mid-twentieth century.

---

Burger approvingly quotes Judge Bazelon of the D.C. Circuit on the subject of commercial advertising: “It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if it is not listened to, but it may reasonably be thought greater than the impact of the written word.”

This incessant barrage of commercials over the public airwaves constitutes a point of view, one that can be summarized roughly as: The good life will be realized through consumption. Lasn presents a clear alternative to that point of view, making his case in the same subtle, sophisticated way that commercial advertisers make theirs. The fact that he is responding to and contradicting a viewpoint that is already on the public airwaves suggests a narrow basis for a holding in his favor that requires the networks to run his anti-ads.

As noted, much of the case law on the First Amendment as applied to the broadcasting industry, as well as the old Fairness Doctrine, focuses on the necessity to bring before the public antagonistic voices that are responding to an established viewpoint. A court decision favoring Lasn need not be any broader than an ad hoc conclusion that he is responding to the commercial world view that has established itself so pervasively in the public airwaves. His campaigns are a response to what’s already out there in the public discourse, and the First Amendment requires that his voice be heard. Finding for the plaintiff on

---

these grounds without articulating a rule of thumb such as “first come, first served” would meet the requirements of case law that the government’s restriction on licensees’ discretion be narrowly tailored so as to limit the editorial discretion of licensees as little as possible.49

Constitutional lawyers are an enterprising lot and they’re bound to discern a rule even from a holding narrowly tailored to Lasn’s circumstance. It would probably be something along the lines of this: Opportunity must be given to respond to points of view that have established themselves on the public airwaves. Obviously, that would leave some room for interpretation, and probably would create more work for the FCC and the courts. But it’s work that needs doing, unless we’re prepared to say that the Constitution no longer applies to the activities of federal broadcasting licensees. The courts have certainly not gone so far as to say that yet, but a de facto situation has arisen that has the effect of putting broadcasters beyond constitutional reach.

CONCLUSION

Perhaps we want to go all the way with Justice Douglas, and with those who say that the scarcity rationale no longer is relevant, and conclude that broadcasters should be treated no differently than other media. To do so would be to further abandon the public discourse to the forces of commerce ... but that is an argument for another day. As is the

question of whether the First Amendment implies an affirmative
responsibility of the courts to help create an information environment
adequate to the needs of a functional democracy. Such a viewpoint,
contra Douglas and the libertarians, would perhaps call into question the
constitutionally protected status of print and other media. For now, we
still have in place a scheme of federal regulation of the broadcasting
industry, with attendant constitutional implications, and the body of law
interpreting this arrangement could stand reexamination. CBS v.

Democratic National Committee stands out from a corpus of mostly
principled decision-making as an obvious capitulation to expediency and
vested interests. It rests on logical inconsistencies and flawed premises.
Reversing it would create a bit of work for regulators and judges, but this
is necessary work that our democracy has deferred for too long now.