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CASE COMMENTS

CONSTITUTIONAL LAW—FIRST AMENDMENT: *The Public's Right of Access to the Broadcast Media for the Airing of Editorial Advertisements*

INTRODUCTION

Columbia Broadcasting System, Inc. v. Democratic National Committee[1] had its origin in a hearing before the Federal Communications Commission (FCC).[2] In January of 1970, the Business Executives' Move for Vietnam Peace (BEM) filed a complaint with the FCC alleging that a Washington, D.C. radio station, WTOP, had refused to sell the organization broadcast time for the airing of a series of one-minute spot announcements urging "immediate withdrawal of American forces from Vietnam and from other overseas installations."[3] WTOP explained that it was a common policy of broadcasters to bar all editorial advertisements expounding views on controversial issues, and that since the station presented full and fair coverage of important public issues it was justified in refusing acceptance of editorial advertisements.[4]

A few months later, the Democratic National Committee (DNC) filed a request with the FCC for a declaratory ruling that a broadcaster may not as a general policy refuse to sell air time to responsible organizations for comment on public issues on the grounds that there is a limited constitutional right of access to the air waves.[5] The Commission considered the two cases together and rejected the arguments of BEM and DNC, holding that it was permissible for broadcasters to impose a ban on all editorial advertisements. The Commission argued that present statutory regulations already insure adequate coverage of controversial issues, and that a right of access would entail insoluble administrative problems.[6]

On appeal, a majority of the Court of Appeals for the District of Columbia reversed,[7] saying that "a flat ban on paid public issue

1. 412 U.S. 94 (1973).
2. Business Executives' Move for Vietnam Peace, 25 F.C.C.2d 242 (1970).
3. *Id.* at 243.
4. *Id.* at 247.
5. Democratic Nat'l Committee, 25 F.C.C.2d 216 (1970).
6. 25 F.C.C.2d at 242.
7. Business Executives' Move for Vietnam Peace v. F.C.C., 450 F.2d 642 (D.C. Cir. 1971).

announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted."[8] Recognizing that this was a new effort by members of the public to assert their first amendment rights in the operation of radio and television, the court concluded that the broadcasters' retention of total initiative and editorial control would be inimical to free speech protections, even in light of present statutory regulations on broadcasters.

On appeal to the Supreme Court,[9] the court of appeals was reversed: *held,* first amendment principles do not require broadcasters to accept editorial advertisements, and the FCC's ruling that the challenged ban need not be lifted was upheld. The majority opinion, delivered by Mr. Chief Justice Burger, examined the history of federal regulation of the broadcast media and underlying first amendment protections and concluded that neither assures the public a right of access for the airing of editorial advertisements during commercial broadcast time.[10] Mr. Justice Brennan, joined by Mr. Justice Marshall, filed a dissent basically reiterating the argument of the appeals court that the exclusionary policy of the broadcasters impinges upon the fundamental right of the public to engage in and to hear vigorous public debate on the broadcast media.[11]

The issue in this case quite clearly is whether a broadcaster can flatly refuse time for brief non-commercial editorial advertisements involving controversial issues. The proponents of the right of access for these "advertorials" (as one writer dubs them),[12] must affirmatively argue two points: (1) that the broadcasters' challenged ban constitutes sufficient "governmental action" to trigger the application of the first amendment; and (2) that the "free speech" portion of the first amendment assures a right of access for advertorials. The *CBS* Court met the two arguments head on and summarily rejected them both.

A comprehensive discussion of the merits and shortcomings of the above two arguments is beyond the scope of this comment and can be found elsewhere.[13] These arguments *will* be treated, however,

8. *Id.* at 646.
9. 412 U.S. 94 (1973).
10. *Id.* at 103-32.
11. *Id.* at 170-204.
12. Note, 85 HARV. L. REV. 689, 692 (1972).
13. For an excellent argument in favor of the right of access and a complete treatment of the governmental action and first amendment issues see Johnson & Westen, *A Twentieth*

to the limited extent of asking whether the *CBS* decision effectively disposes of these arguments in a persuasive and conclusive manner. This comment will attempt to show that the decision is deficient in that respect, and perhaps fundamentally so in that Chief Justice Burger decided both issues, when a disposition of only one was necessary. This comment will also suggest a solution to some of the problems envisioned by the *CBS* Court in implementing a right of access. But before turning to the decision and opinions as such, a bit of groundwork must be laid.

THE FAIRNESS DOCTRINE AND RED LION

The principle case was decided in the wake of the FCC's formulation of the so-called "fairness doctrine" and the subsequent Supreme Court decision in *Red Lion Broadcasting Co. v. FCC*.[14] The fairness doctrine evolved gradually over the years during the development of federal regulation of the broadcast media.[15] Basically, the doctrine can be shortened to two requirements or obligations upon broadcast licensees:[16] (1) coverage of issues of public importance must be adequate; and (2) such coverage must fairly reflect divergent views.[17] Moreover, this coverage must be provided at the broadcaster's own expense if necessary,[18] and if other sources are unavailable, the duty must be met by providing programming at the licensee's own initiative.[19]

In *Red Lion* the Court gave judicial approval to the FCC's

Century Soapbox: The Right to Purchase Radio and Television Time, 57 VA. L. REV. 547 (1971). *Contra*, Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972). Jaffe argues that the proponents of the right of access entertain an hysterical overestimation of the media, and that in fact the total influence of broadcasting on political attitudes is "at best marginal." He writes that to hold broadcasters subject to constitutional restraints would be stretching the concept of state action much too far, for by merely tolerating challenged conduct the state does not adopt it as its own. *See also* Canby, *The First Amendment Right to Persuade: Access to Radio and Television*, 19 U.C.L.A. L. REV. 723 (1972); Mallamund, *The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion*, 1973 DUKE L.J. 89.

14. 395 U.S. 367 (1965).

15. For a summary of the history of the fairness doctrine *see id.* at 375-86.

16. Congress gave statutory approval to the fairness doctrine by amending § 315 of the Communications Act of 1937. Act of September 14, 1959, § 1, 73 Stat. 557, *as amended*, 47 U.S.C. § 315(a) (1972).

17. *See generally* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 FED. REG. 10415 (1964).

18. Cullman Broadcasting Co., 25 P & F RADIO REG. 895 (1963).

19. John J. Dempsey, 6 P & F RADIO REG. 615 (1950).

expansion of the fairness doctrine—the "personal attack" and "political editorializing" rules.[20] The broadcasters alleged that such requirements imposed upon their rights of free speech, but the Supreme Court justified such interference by invoking the constitutional rights of the public which, it said, are at the foundation of the fairness doctrine rules.[21] The Court reasoned that the free speech rights of the broadcast licensees did not include a right to "snuff out" the free speech rights of the public. In fact, said the Court: "It is the right of the viewers and listeners, and not the rights of the broadcasters, which is paramount."[22] It should be noted here, however, that although the appeals court and the Supreme Court in *CBS* referred frequently to *Red Lion*, the issue raised by BEM and DNC is not completely analogous to the issue in *Red Lion*. Specifically, the right of access is somewhat different from the fairness doctrine. The "fairness" requirement is satisfied when the licensee airs programs reflecting a view in opposition to one previously aired, and the control of the program format along with the selection of the opposition speakers is retained by the broadcaster. The controversy reflected in *CBS* is whether the public has an *initial* right of access to purchase radio and television time for the airing of controversial issues.

THE CHALLENGED BAN—GOVERNMENTAL ACTION?

As pointed out above, in order for the appellees DNC and BEM to argue they are assured a right of access it must be shown that the challenged ban constitutes sufficient "governmental action" to activate the application of the first amendment. That "Congress shall make no law . . . abridging the freedom of speech, or of the press" is a prohibition of governmental action—not of activity of private persons. The court of appeals argued that the reach of the first amendment should not be dependent upon such technical distinc-

20. The editorial reply and personal attack rules appear at 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1972). The "political editorializing" rule provides that when a broadcaster endorses a political candidate in an editorial, he must give other candidates or their spokesmen an opportunity to respond. Similarly, the "personal attack" rule provides that if during a presentation of a view on a controversial issue of public importance the honesty, integrity or character of a person is attacked, the licensee must notify the person attacked and give him an opportunity for rebuttal.

21. 395 U.S. at 391.

22. *Id.* at 390.

tions as "public" or "private," but rather should be judged by "functional considerations."[23] Such considerations, they argued, show that the broadcast industry is intimately related with the federal government with the result that there is "joint participation" and "interdependence."[24]

The Supreme Court disagreed. There is not a symbiotic relationship, Chief Justice Burger contended, because the legislative history of governmental regulation of the broadcast media clearly shows that the licensee is merely a "public trustee" and the government's role is only that of an "overseer."[25] Since the activity of the licensees and the regulation of the media by the federal government are clearly distinguishable, the broadcasters' ban on advertorials is not governmental action.[26]

> Thus, it cannot be said that the Government is a "partner" to the action of broadcast licensee complained of here, nor is it engaged in a "symbiotic relationship" with the licensee, profiting from the invidious discrimination of its proxy. The First Amendment does not reach acts of private parties in every instance where Congress or the Commission has merely permitted or failed to prohibit such acts.[27]

Chief Justice Burger's argument here is not very lucid. His claim that the government is merely an "overseer" rather than a "partner" seems to be a rather fine distinction that is not too helpful in resolving the basic issue. The disagreement with the court of appeals' interpretation of the legislative history of the regulation of the media never goes further than tagging names on both the government's and licensee's roles. The battle appears to be one of terminology only, with the conclusion that the licensees are "private parties" free from first amendment constraints merely because that is what they ought to be called. The reader is left with the impression that the discussion should have been expanded beyond the scope of name-tagging and vague legislative interpretation.

But the *CBS* Court also faced the question of *specific* governmental involvement in that the Commission had previously

23. 450 F.2d at 642.
24. *Id.*
25. 412 U.S. at 117.
26. *Id.*
27. *Id.* at 119.

considered the challenged ban and had refused to invalidate it, and by doing so, became de facto involved. The court of appeals held that mere governmental approval of or acquiescence in the licensee's challenged activity (via the FCC) constituted governmental action.[28] Burger refuted this position noting that the "Commission has not fostered the licensee policy here; it has simply declined to command particular action. . . ." Again the impression given is that the Chief Justice attempted to dodge the real argument. The issue is not whether the FCC has "fostered" the challenged ban on airing advertorials, but whether its policy of *permitting* it and giving it federal approval has the effect of sufficiently coloring the activity as governmental action.

In *Public Utilities Commission of the District of Columbia v. Pollak,*[29] the Supreme Court held that a private bus company was subject to first amendment constraints.[30] Sufficient governmental action was found in that the Public Utilities Commission had examined and permitted the challenged refusal of the bus company to install radio receivers in its public buses.[31] Seemingly, the *Pollak* case established the doctrine that a federal regulatory agency's acquiesnce in challenged action by a private organization constitutes the requisite action to apply the protections of the first amendment. The *CBS* Court avoided this principle by attempting to distinguish *Pollak* on the grounds that *Pollak* was concerned with a transportation utility that itself derives no protection from the first amendment, whereas the broadcast media enjoys such protection in the form of journalistic independence.[32]

> Were we to read the First Amendment to spell out governmental action in the circumstances presented here, few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny.
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> . . . .
>
> [The] concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action.[33]

28. 450 F.2d at 652-54.
29. 343 U.S. 451 (1952).
30. *Id.* at 462-63.
31. *Id.* at 462.
32. 412 U.S. at 120.
33. *Id.*

This reasoning is anomalous for several reasons. First, the rationale for distinguishing *Pollak* is unclear, for it would seem to be more proper to apply the acquiescence principle of governmental action to the broadcast media than to a transportation utility for the very reason that the Court said it should not. That is, it would be less desirable to apply first amendment constraints to a bus company which itself derives no first amendment protections or reciprocal rights, than to the broadcast media which has its own "free press" interests to act as a buffer against the rights of the public. The transportation utility in *Pollak* is much more vulnerable to the sometimes rigid limitations that the first amendment imposes on the government than would be the broadcasters who could "reciprocate" with their own protected constitutional interests. In the latter situation an acceptable balance could be achieved, for there is no reason why a finding of governmental action to assure the free speech rights of the public would necessarily entail a complete dissolution of the journalistic independence of the broadcasters. It certainly puts the two in conflict in an area such as the right of access to commercial time, but it does not logically follow that the two cannot "co-exist." In fact, as pointed out above, *Red Lion* firmly asserted that the rights of the public, and not those of the broadcasters, are "paramount."

Second, there are other cases in addition to *Pollak* that the *CBS* Court did not consider in this context which also rely on the principle of acquiescence in finding requisite governmental action.[34] In *Burton v. Wilmington Parking Authority*,[35] the Court found "state action" in a private lessee's refusal to serve Blacks on premises leased from the state. The Court found the necessary connection between the private discriminatory conduct and the constraints of the Constitution by holding that because the State Parking Authority had failed to take affirmative steps to prohibit the discrimination, there existed sufficient state action.

> But no State may effectively abidicate its responsibilities by either ignoring them or by failing to discharge them whatever the motive. . . . By its inaction, the Authority, and through it the State, has not only made itself a party

34. Burton v. Wilmington Parking Authority, 395 U.S. 715 (1961); Marsh v. Alabama, 326 U.S. 501 (1949).

35. 395 U.S. 715 (1961).

> to the refusal of service, but has elected to place its power, property, and prestige behind the admitted discrimination.[36]

It has long been held that the airwaves are a "limited and valuable part of the public domain" leased out temporarily by the federal government which maintains ultimate control over them,[37] and thus there is a close analogy between *Burton* and the Commission's inaction here. Therefore, the *CBS* Court's rationale that the Commission is uninvolved is not at all convincing in light of the "acquiescence principle" set out in *Pollak* and *Burton*.

Third, there are presently many restrictions on the broadcasters embodied in the fairness doctrine, specifically the editorial reply and personal attack rules upheld in *Red Lion*.[38] These rules already are a form of right of access—the broadcaster must give access to a person opposing a view previously aired. In light of this it is difficult to see why a holding here that there is sufficient governmental action to trigger the application of the first amendment to assure an initial right of access would now suddenly ring the death knell for the concept of journalistic independence. Admittedly, the fairness doctrine is a statutory regulation rather than a bare constitutional imposition, but that distinction is somewhat illusory since *Red Lion* pointed out that there are specific constitutional rights of the public which underlie and support the fairness doctrine rules.[39] The Court in *Red Lion* stated that "the people as a whole retain their . . . collective right to have the medium function consistently with the ends and purposes of the First Amendment."[40] The contrast between statutory and constitutional restrictions has become blurred, and one wonders whether such a distinction is all that important in this context. Thus, in view of the fact that there are already many statutory-constitutional restrictions upon the broadcasters, it is unlikely that a holding that the challenged ban is within the perview of the first amendment would suddenly signify the apocalypse for journalistic discretion and independence. Moreover, in a primary respect the issue here is very narrow. The appellees sought only a

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36. *Id.* at 725.

37. Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994, 1003 (D.C. Cir. 1966).

38. *See* note 20 *supra*.

39. *See* note 21 *supra* and accompanying text.

40. 395 U.S. at 390.

ruling that the flat ban be deemed impermissible—not that *all* their advertorials be accepted and aired. It should also be pointed out that only commercial air time is at stake, and by far the greater portion of broadcast time would escape unmolested by such a ruling.

THE CHALLENGED BAN—DISCRIMINATION WITHIN A FORUM?

Having decided that the licensee's refusal and the Commission's subsequent acquiescence did not constitute governmental action, Chief Justice Burger then faced the second issue of "whether, assuming governmental action, broadcasters are required to [accept advertorials] by reason of the First Amendment."[41] The court of appeals stressed that acceptance of "commercials" and rejection of editorial advertisements is favoritism toward bland commercialism, and that such favoritism "flies in the face of the First Amendment, whose central purpose is to protect and promote controversy, 'uninhibited, robust, and wide-open,' on public issues."[42] The appeals court cited numerous cases which it said established the principle that discrimination within a forum is impermissible.[43] Once a forum has been opened up for commercial advertising, a ban on controversial editorial advertisements is unconstitutional. Also analogized were several Supreme Court cases which held that states may not ban certain protected speech while at the same time permitting other speech in public areas.[44] This reasoning was rejected by the *CBS* Court:

> In none of those cases did the forum sought for expression have affirmative and independent statutory obligations [*viz.*, the fairness doctrine]. . . . In short, there is no "discrimination" present in this case. The question here is not

41. 412 U.S. at 121.

42. 450 F.2d at 661.

43. *Id.* at 659-61. The *BEM* court cited numerous federal and state supreme court decisions which held that once a forum subject to first amendment constraints has been opened up for commercial (noncontroversial) advertising, a ban on controversial editorial advertising is unconstitutional. Access was granted to state-supported newspaper, Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969) *aff'd*, 441 F.2d 1257 (7th Cir. 1971); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969), and to display panels on public transportation vehicles, Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 P.2d 350 (1969); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

44. Cox v. Louisiana, 379 U.S. 536 (1965); Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951).

> whether there is to be discussion of controversial issues . . . but rather who shall determine what issues are to be discussed by whom, and when.[45]

But this attempt to distinguish the broadcast forum on the basis that this media already has "fairness" obligations is troublesome in that it leaves the serious question of whether the fairness doctrine is realistically effective in assuring the public's right to hear debate on controversial issues. Chief Justice Burger answered that question in the affirmative, but such a disposition of the "discrimination" issue places an unwarranted faith in the efficacy of the fairness doctrine. First, as Mr. Justice Brennan pointed out in his dissent, the broadcasters have wide discretion in carrying out their obligations.[46] They are required only to act "reasonably and in good faith" to determine what issues are to be discussed, which spokesman should be used with what format, and how much time should be allocated. Hence, the licensees still have virtually complete control, and it is hard to see how these loose requirements will result in the "uninhibited, robust, and wide-open" debate which the first amendment assures the public. Vigorous free expression characterized by a direct collision of issues is promoted only when individuals involved have at least some opportunity to take the initiative and some editorial control in their own hands.

Moreover, as one writer points out,[47] the fairness doctrine overestimates the broadcaster's willingness to initiate debate or discussion on controversial issues. His primary goal is to "sell" products—the soaps, beers, and perfumes—and a viewer who is angered by a certain controversial view is simply not a good customer. Thus, it serves the broadcaster's own financial interests to be as uncontroversial as possible, and "robust and wide-open" debate is ignored. In its place is the bland and edited treatment of some selected topic which the broadcaster himself chooses. Chief Justice Burger pointed out that the fairness doctrine was effective because a broadcaster who neglects his obligations "does so at the risk of losing his license."[48] This sanction is somewhat misleading as a practical matter, however, because the precise scope of adequate

45. 412 U.S. at 130.
46. *Id.* at 187.
47. Jaffe, *supra* note 13, at 773 n.26.
48. 412 U.S. at 131.

and fair coverage has escaped definition in the past, and a surprisingly small number of broadcasters have ever had licenses revoked for this reason.[49] In fact, the majority opinion did not cite any instances in which this did occur. In conclusion, then, the majority's reliance on the fairness doctrine as a viable substitute for the right of access, supposedly assuring the public's free speech rights in the broadcast media, appears to be rooted in an unrealistic faith in the efficacy of that doctrine and the FCC's power (or willingness) to enforce it.

THE RIGHT OF ACCESS—A BALANCING APPROACH

Mr. Chief Justice Burger's main difficulty with the right of access was that it would entail insurmountable administrative problems which would outweigh any benefits derived from such a right.[50] Burger felt that the FCC's fear that the financially affluent would monopolize the alloted time was justified, for the purchasing power of the rich could render meaningless the right of access of the poor who would be unable to purchase time.[51] In addition, claimed Burger, the fairness doctrine itself would be jeopardized if it was applied to advertorials, because the "broadcaster might be forced to make regular programming time available to those holding a view different from that expressed in an editorial advertisement . . . ."[52]

Although Burger's and the Commission's fears can be appreciated in this context, a disposition on these pragmatic grounds prostitutes the more fundamental doctrinal issue at stake. For example, one would be shocked if the Supreme Court refused to order desegregation on the grounds that it would involve certain practical difficulties in implementation. In other words, the basic doctrinal issue here—whether the first amendment assures a right of access—supercedes and overshadows the possible problems in carrying it out. Also, Chief Justice Burger's apprehensions are actually

49. Two FCC Commissioners, Kenneth A. Cox and Nicholas Johnson, conducted an extensive study to evaluate the condition of American radio and television. Cox & Johnson, *Broadcasting in America and the F.C.C.'s License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968). The results of the study were, in their own words, extremely disquieting. The Commissioners concluded that the license renewal process is presently a ritualistic sham, which has no real point. The Commission staff routinely grants all the renewal applications except for the few whose draftsmen were inexperienced and hence made technical mistakes in filling them out. Thus most programming obligations are never subjected to scrutiny, and the license revocation sanction is only an ignored formality.

50. 412 U.S. at 124.

51. *Id.* at 122-27.

52. *Id.* at 124.

only speculative, for as Mr. Justice Brennan pointed out in his dissent in *CBS*:

> We simply have no sure way of knowing whether, and to what extent, if any, these potential difficulties will actually materialize. The [majority's] bare assumption that these hypothetical problems are both inevitable and insurmountable indicates an utter lack of confidence in the ability of the . . . licensees to adjust to changing conditions of a dynamic medium.[53]

Numerous writers in support of the right of access have already proposed realistic solutions to the supposed difficulties that the FCC anticipated.[54] This writer submits that perhaps there is yet another answer or solution to the "insurmountable" administrative problems envisioned by Chief Justice Burger and the Commission. Very generally, this scheme would require the potential purchasers of commercial time for the airing of advertorials to come to the broadcasters "two by two"—similar to the mandate given to ancient Noah for the filling of the Ark. Suppose, for example, an organization wished to purchase commercial time to speak out against recent liberal abortion standards. Under this new scheme the broadcaster could deny the organization commercial time if it alone sought time to editorialize on the controversial topic. But the organization could acquire a right of access if it found persons or an organization willing to purchase a corresponding amount of time in opposition. Thus, the representatives of both views could accompany each other in presenting a request for the purchase of time.

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53. *Id.* at 202.

54. *See* Canby, *supra* note 13, at 754-57. Professor Canby suggests that advertising time could be divided into two categories. One portion or category could be allocated with priority for views which have not had access. Rates for this block of time could be adjusted to fit the fiscal ability of the advertisers. A second category should also be available to established groups with financial backing. The time alloted could be substantial and at the present commercial rates. Although this system favors well-financed causes, he argues that a bad system is better than one without a right of access. *See also* Malone, *Broadcasting, the Reluctant Dragon: Will the First Amendment Right of Access End Suppressing of Controversial Ideas?*, 5 U. MICH. J. L. REF. 193, 252-69 (1972); Note, HARV. L. REV. 689, 693-99 (1972). The last article cited above points out that the present commercial advertising market system would inevitably discriminate against the poor. The writer suggests that the system be adjusted to allow editorial advertisers with insufficient funds to purchase time at below-market rates. The scheme would require the FCC and the licensees to create a sub-market rate available to groups or persons whose potential resources were below a stated minimum. The rate would be set by striking some compromise between the goal of access to the media and the need to deter frivolous use.

The above "by two's" scheme would eliminate the dangers and problems enumerated in the *CBS* decision. The fairness doctrine would no longer be jeopardized, since its application would in large part be obviated by requiring the purchasers to come in pairs, representing both sides of a controversial issue. The danger of financial disaster of the broadcasters would also evaporate under this scheme for the same reason. Furthermore, this approach would reduce the danger that the views of the affluent or one political party might dominate, since the persons seeking initial access would be required to solicit their own opposition and perhaps even pay for some or all of the corresponding time if the opposition were unable to raise sufficient funds. This might lead to the problem of an organization buying up shoddy opposition, but perhaps this could be avoided by demanding that the parties act in "good faith," a requirement that is presently placed upon the broadcasters. Admittedly, this proposal does not contemplate an "absolute" right of access and it may foster other difficulties, but it illustrates that the number of possible solutions is limited only by the Commission's ingenuity.

THE CONCURRING OPINIONS—SOME DIFFICULTIES

Concurring opinions were filed by Justices Douglas,[55] Stewart,[56] White,[57] and Blackmun (joined by Powell).[58] Justice Douglas filed a maverick opinion arguing that the broadcast media should be treated no differently than newspapers and that the licensees should have *complete* discretion.[59] There should be no law that abridges the freedom of the press, and thus even the "Fairness Doctrine has no place in our First Amendment regime."[60] He disparaged the majority opinion for endorsing the fairness doctrine, claiming it "sanctions a federal saddle on broadcast licensees."[61] Douglas' opinion goes much further than the majority wanted to go, and if the fairness doctrine "has no place" in the first amendment realm then Burger's majority opinion is stripped of its fundamental rationale for leaving the ban unmolested.

The concurring opinions of Justices White, Blackmun and Pow-

55. 412 U.S. at 148.
56. *Id.* at 132.
57. *Id.* at 146.
58. *Id.* at 147.
59. *Id.* at 150.
60. *Id.* at 154.
61. *Id.* at 163.

ell, which concur in part, bring to light a more serious difficulty. As outlined above, Chief Justice Burger initially decided in his majority opinion that there was insufficient governmental action, and then proceeded to the merits, holding that the ban did not violate the substance of the first amendment. He was joined in the governmental action determination by only two others, Justices Stewart and Rehnquist. Justice White stated in his concurring opinion that he was "not ready" to decide the governmental action issue,[62] and Justices Blackmun and Powell indicated that the "governmental action issue does not affect the outcome of the case,"[63] and hence they did not concur in this part of Burger's opinion. Thus, it cannot be said that the *CBS* case is a *holding* that there is insufficient governmental action in the maintenance of the ban. Furthermore, since the Chief Justice (joined only by Rehnquist and Stewart) first decided on the governmental action issue, it could be argued that the later treatment of the first amendment right of access issue is only dicta. The result is a curious situation in which one is hard pressed to ferret out which issue is in fact determinative. It was clearly unnecessary for the Chief Justice to decide on both issues, for a negative disposition of either one would have been conclusive.

CONCLUSION

Taken as a whole, the *CBS* decision is disconcerting, especially because the legal implications of the case are unclear. Only three of the nine Justices decided that there was not governmental action, and hence the precedential value of that part of the decision is questionable. The decision is also not at all helpful in the area of discrimination within a public forum, because the majority opinion avoided that issue, looking instead to the fact that the broadcasters have statutory "fairness" obligations already. The Court also relied heavily on the belief that implementation of a right of access would entail countless administrative obstacles. But this comment has attempted to show that those fears are largely unfounded, and that perhaps a novel approach to implementing access would evaporate those supposed difficulties.

The *CBS* decision is troublesome when one considers that radio and television are now the primary source and forum for public news and debate. If the public is refused a limited right to purchase time

62. *Id.* at 146.
63. *Id.* at 148.

to voice its views, then it is true that the public's free speech interests are diminishing as the age of technology and mass communication moves onward. The era of the town meeting and street corner debates is forever gone, and in its place is television and radio, present in over sixty million homes across the nation.[64] And if members of the public are to be denied access to this vital outlet for speech, then the future of open debate on controversial issues is indeed bleak.

64. 25 F.C.C.2d at 235.