BROADCASTING IN THE PUBLIC INTEREST: THE LEGACY OF FEDERAL COMMUNICATIONS COMMISSIONER NICHOLAS JOHNSON†

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> Manifestly, the government cannot prescribe that all material offered shall be printed or broadcast, since that would lead to absurdities. It cannot prescribe that the material shall conform to any particular standard, such as "fairness," "impartiality," or "public interest, convenience, or necessity," without setting up a bureau to supervise compliance with the standard; and once such a bureau is established, there is censorship. In a word, the alternative is between so-called private censorship and actual government censorship, and the latter is the evil against which the First Amendment is directed.
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> *Louis G. Caldwell*
> *Freedom of Speech and Radio Broadcasting*[1]

I

The Federal Communications Act of 1934[2] established the FCC and charged that agency with responsibility for regulating the youthful broadcasting industry by granting licenses which entitle holders to use the electromagnetic spectrum according to rules laid down by Con-

†Prepared for delivery at the 1977 Annual Meeting of the American Political Science Association.

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The research project on which this essay is based was supported by a grant from the National Endowment for the Humanities. The author also wishes to acknowledge the American Political Science Association, which supported his participation in the "Public Interest and Common Good" seminar series that was conducted during the summer of 1976 under the auspices of the Association's Ethical Issues in Political Life Project.

[1]177 ANNALS 182 (1935).

[2]Communications Act of 1934, 48 Stat. 1064 (1934).

gress and by the Commission. It was alleged that "chaos" had reigned during the early days of broadcasting and that the spectrum, a scarce natural resource, could never be "developed" without government intervention. While the idea that the public "owns" the airwaves and, so to speak, leases space to private parties who are to act as trustees has never been universally accepted, there is much that lends support to such an interpretation, not least of which is the stipulation in the Act that broadcaster performance be in the service of the "public interest, convenience, and necessity."[3]

The FCC immediately became the subject of considerable controversy and has remained so ever since. In the beginning it was laissez-faire conservatives who cried censorship and who charged that such an agency would impose fetters on the free enterprise system, moving us yet another step down the road that leads inexorably to "Big Brother." Since most Americans have come to be resigned to Big Brother even if not enamored of him, the original objections levelled against the FCC have given way to more specific complaints about *how* the broadcasting industry is to be regulated. Some individuals, especially those in the industry, are still inclined to blame all of the ills of American broadcasting on either the heavy hand of government regulation or the threat of it. Others, especially at the Commission, are quick to conclude that the pursuit of private gain, at least in broadcasting, does not redound to the public benefit; former FCC Chairman Newton Minow's charge that television is a "vast wasteland" being the classic example.

Minow's charge was hard to refute at the time; indeed, his characterization of "televisionland" may still be apt, even more than fifteen years after the fact (an aeon for such a youthful industry. Thirty years

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[3]Communications Act of 1934, 48 Stat. 1085 (1934). Nicholas Johnson's view of the status of the airwaves is contained in the following passage:

> The airwaves are public property. A frequency assignment is not "owned"—it is licensed from the public, like public lands. A broadcasting license is a trusteeship, equivalent to the position held by an elected official. His "election" occurs every 3 years, when the FCC hears from his local "constituency" whether they wish to continue him "in office" for another 3 years.

Renewal of Standard Broadcast and Television Licenses, 11 F.C.C. 2d 809, 810 (1968) (Comm'r Johnson, dissenting).

One of those who resists the public ownership theory is Senator William Proxmire. "Lawyers," he has written, "are very careful to avoid the claim that the public owns the electromagnetic spectrum because nowhere in the law books is there such a declaration." *Abandon the Fairness Doctrine*, in THE CLASH OF ISSUES: READINGS AND PROBLEMS IN AMERICAN GOVERNMENT 197 (J. Burkhart, S. Krislov, and R. Lee eds. 1976).

Recently, the question of the legal status of the airwaves has become embroiled in the debate over the public's "right of access" to broadcasting facilities, Barron, *infra* note 66.

ago practically no one in the United States owned a television receiver). Yet there *have* been changes in both television and radio—important changes. Technological developments have made color television generally available to the American consumer; CATV (cable) and the perfection of videotape have added immensely to TV's appeal and to its ubiquity. Changes in FCC policy have enlivened FM radio, invigorated local programming, and contributed to the more explicit treatment of controversial themes on radio and television. Most important, though, was the passage of the Public Broadcasting Act of 1967,[4] which, while not exactly creating an American BBC, nevertheless did give birth to the Corporation for Public Broadcasting, which some view as a significant first step toward the eventual de-commercialization of American broadcasting. These policy changes, especially those aimed at de-commercialization, are in no small measure attributable to an increasingly widespread notion that FCC licensees have been using the public's airwaves irresponsibly. They also reflect the considerable political clout now wielded by the "public interest" lobbies.

No man has played a more conspicuous role in this reform movement than Nicholas Johnson, former FCC Commissioner and relentless critic of both the industry and the agency. Appointed to the Commission by President Johnson in 1966, he served for seven tempestuous years before President Nixon resolutely watched his term expire. In "table-pounding"[5] dissents, newspaper and magazine articles, law re-

[4] 47 U.S.C. §§ 390 *et. seq.* (1970).

[5] This characterization of Comm'r Johnson's performance was pronounced by Chairman Dean Burch in A.T.&T., 20 F.C.C. 2d 886, 890 (1969) (Chairman Burch concurring). Chairman Burch went on to cite the "old saw among lawyers that 'if you're weak on facts, argue the law; if you're weak on the law, argue the facts; if you're weak on both the law and the facts, pound the table'" (*id.*). Comm'r Johnson replied that "most of us stopped using it [the "threadbare debater's canard"] after the first year in law school" (*id.* at 895) (Comm'r Johnson, dissenting).

This is one of many public exchanges between Comm'r Johnson and his colleagues. Among the more interesting are those featuring Chairman Hyde in Forum Communications, Inc., 17 F.C.C. 2d 959 (1969); Chairman Burch and Comm'r Cox in A.T.&T., 20 F.C.C. 2d 886 (1969), and 21 F.C.C. 2d 153 (1969); Chairman Burch in Committee for the Fair Broadcasting of Controversial Issues 25 F.C.C. 2d 283 (1970); Chairman Burch in The Selling of the Pentagon, 30 F.C.C. 2d 150 (1971); Comm'r Reid in National Industry Advisory Comm., 35 F.C.C. 2d 921 (1972); Comm'r Wiley in The Handling of Public Issues under the Fairness Doctrine, 40 (1972); and Chairman Burch in Cable Television Report and Order, 36 F.C.C. 2d 143 (1972).

The remarks of Comm'r Cox are especially interesting because Mr. Cox and Mr. Johnson were old comrades-in-arms (*see* Comm'r Johnson's extravagant tribute to his colleague in KCMC, Inc., 25 F.C.C. 2d 603, 617–18 (1970) (Comm'r Johnson dissenting)). In his statement in A.T.&T., 21 F.C.C. 2d 153 (1969) (Comm'r Cox, concurring) Mr. Cox defends Chairman Burch's characterization of Mr. Johnson's "table-pounding" dissent in the A.T.&T. case, and claims that Mr. Johnson "continues to . . . misstate

view articles, public speeches, two books,[6] and countless television and radio appearances, Mr. Johnson has assailed American broadcasting in no uncertain terms. Today, as head of the National Citizens Committee for Broadcasting, he remains the country's most visible and articulate broadcasting critic. In an era when "public interest" lobbies and consumers' unions have wrought profound changes in all aspects of American life, it would be appropriate to examine with some care the reformers' view of what ails American broadcasting and scrutinize their proposed solutions. Toward that end I propose in this essay to submit Mr. Johnson's thought, as it might be distilled from his written work—and especially that which constitutes his legacy as FCC Commissioner —to just such an examination.

II

Mr. Johnson's case against the FCC is a specific instance of a complaint frequently levelled against regulatory agencies; they have failed

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the facts and ignore the applicable law" (*id.* at 154), and describes certain passages in Mr. Johnson's opinion as being "in extremely bad taste." *Id.* at 160. Whether in bad taste or not, Mr. Johnson's prose is certainly colorful, and he was not in the habit of pulling his punches. A representative sample of Mr. Johnson at his table-pounding best would include his frequent references to the poetry of Bob Dylan, Mason Williams, and the Rolling Stones, and his penchant for entering Herblock cartoons into the record. Other highlights include his reference to the FCC's comparative hearing rules as an "amorphous glob" in Farragut Television Corporation, 8 F.C.C. 2d 279, 291 (1967) (Comm'r Johnson, dissenting); "This is the stuff of oppression" in KRAB-FM, 24 F.C.C. 2d 266, 270 (1970) (Comm'r Johnson, dissenting); his reference to an FCC decision as "truly shocking . . . an astonishing opinion" in Star Stations of Indiana, Inc., 19 F.C.C. 2d 991, 996 (1969) (Comm'r Johnson, dissenting); his reference to Chairman Burch as "Pentagon lawyer Lt. Colonel Burch" in The Selling of the Pentagon, 30 F.C.C. 2d 150, 163 (1971) (Comm'r Johnson, separate statement); "This is a lawless decision" in Moline Television Corporation, 31 F.C.C. 2d 263, 277 (1971) (Comm'r Johnson, dissenting); his reference to an FCC decision as a "punt on first down," a "cop-out," and "a blatantly partisan gift to an incumbent President seeking re-election" in Handling of Political Broadcast, 36 F.C.C. 2d 40, 55, 57 (1972) (Comm'r Johnson, dissenting); his characterization of the FCC decision-making process as "political blackmail" in Cable Television Report and Order, 36 F.C.C. 2d 143, 314 (1972) (Comm'r Johnson, concurring in part, dissenting in part); his reference to one FCC decision as a "Thanksgiving Day" present from the FCC to "Ma" Bell in A.T.&T., 38 F.C.C. 2d 213, 269 (1972) (Comm'r Johnson, dissenting); his reference to an FCC policy as being "chicken-hearted" in Diocesan Union of Holy Name Societies, 43 F.C.C. 2d 548, 550 (1973) (Comm'r Johnson, dissenting); and his description of a decision as "by all odds one of its [the FCC's] most outrageous decisions to date" in Chronicle Broadcasting Co., 40 F.C.C. 2d 775, 828 (1973) (Comm'r Johnson, dissenting).

[6]N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET (1970); TEST PATTERN FOR LIVING (N. Johnson ed. 1972); Johnson, *A Day in the Life; The Federal Communications Commission*, 82 YALE L.J. 1575 (1973).

to regulate their respective industries because they have been "captured" by those industries, or, to put it another way, they have adopted their respective industries as "clients." Thus, like the Veterans Administration or the Agriculture Department, the FCC has been characterized as a "clientele agency."[7]

It is not hard to understand how an incestuous relationship might develop between agency and industry. For one thing, service on the Commission is thought to require some expertise. Where better to recruit experts to man the agency than from the industry? On the other side of the coin, who could be better qualified for top management posts with the networks than former members of the Commission (an arrangement described by Ralph Nader as "the deferred bribe")? In any event this incestuous (or at least cozy) relationship has contributed much to the suspicion that the agency is inclined to stand idly by while private broadcasters line their pockets at the public's expense.[8]

Starting from this "industry capture" theory, Nicholas Johnson contends that the Commission has not only failed to enforce the public interest injunction imposed on licensees by the Federal Communications Act, but that it has not even been able to define that concept. The failure of the agency to formulate a public interest standard has meant that the agency has had to automatically approve anything and everything proposed by its corporate clients. This state of affairs results in corporate practices that cannot be regarded as consonant with the public interest and which brazenly flout the purposes of the Act.

For example, few would deny that monopoly is not in the public interest. Yet with the acquiescence of the agency the industry has come to be dominated by a few "conglomerate corporate broadcasters,"[9] the most prominent of which are the vast commercial networks. Because the development of nationwide networks was not anticipated by the Commission, the FCC attempts to impose the public interest injunction against individual stations, not networks. This is simply unrealistic.

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[7]Classic discussions of this problem appear in E. HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST (1936); R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS (1941); and M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955). A good recent discussion of clientele agencies may be found in Chapter 12 of T. LOWI, AMERICAN GOVERNMENT: INCOMPLETE CONQUEST (1976).

For a persuasive argument to the effect that this view of the relationship between the FCC and the broadcasting industry is far too simplistic *see* Williams, *The Politics of American Broadcasting: Public Purposes and Private Interests*, 10 JOURNAL OF AMERICAN STUDIES 329 (1976).

[8]No better example of this can be found than Kohlmeier's account of how Lyndon Johnson and his wife were able to parlay an FCC broadcasting license into a considerable private fortune. *See* L. KOHLMEIER, THE REGULATORS (1969).

[9]RKO General, Inc., 16 F.C.C. 2d 989, 993 (1969) (Comm'r Johnson, dissenting).

Thus, although it put up a fight for a time during the 1940s,[10] the truth is that the FCC has never really come to grips with the reality of nationwide network dominance of American broadcasting.

Networks are not the only problem. Although the FCC does have "multiple ownership" rules[11] that attempt to prevent undue concentration of media control, the Commission has found it difficult to keep the licenses of individual stations from passing into the hands of the "Media Barons."[12] Sometimes this occurs through the merger of parent corporations. Thus, when the license for station KFWB, Los Angeles, came up for renewal in 1969, Commissioner Johnson urged his colleagues to take the opportunity provided by the renewal proceeding to review the likely effect on the communications industry of the merger of Westinghouse Electric (parent of Westinghouse Broadcasting, the original licensee of KFWB and a Media Baron in its own right) with MCA, Inc. "It is simply irresponsible to suggest that the Commission's review function under its 'public interest' standard can be delegated to the U.S. Department of Justice and its more limited concerns under the antitrust laws."[13] But the renewal process is largely *pro forma*, and Mr. Johnson's plea fell on deaf ears.

The licenses of stations can usually be sold for a considerable profit as a matter of course without much in the way of Commission scrutiny. Sometimes this can result in the problem known as "cross-ownership," which occurs, for example, when the owner of the local newspaper is

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[10]The authority of the FCC to regulate "chain broadcasting" was upheld by the Supreme Court in National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Writing for the Court, Mr. Justice Frankfurter, in a passage reminiscent of Gibbons v. Ogden (9 Wheat. 1 (1824)) held that ". . . the Act does not restrict the Commission merely to supervision of the traffic [over the airwaves]. It puts upon the Commission the burden of determining the composition of that traffic." *Id.* at 215–16. Two years later the Commission set an important precedent by declaring that local stations were to be held responsible for network programming. United Broadcasting Co., 19 F.C.C. 515 (1945).

[11]The "duopoly" rule prohibits ownership of stations (AM, FM, or TV) with overlapping signals, *i.e.*, stations in the same service area. This does not, however, prevent ownership of AM-FM-TV combinations within the same service area. 47 C.F.R. §§ 73.35(a), 73.240(a)(1), 73.636(a)(1) (1976).

"Maximum ownership" rules are aimed at preventing undue "concentration of control" by an individual owner. These rules, however, are rather vague. 47 C.F.R. §§ 73.35(b), 73.240(a)(2), 73.636(a)(2) (1976).

The FCC also tries to encourage the decentralization of TV programming through the "prime time access" rule, which requires that local broadcasters schedule no more than three hours per evening with programming supplied by the networks. 47 C.F.R. § 73.658(k) (1976).

[12]*The Media Barons and the Public Interest* is the title of Chapter 2 of N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET (1970).

[13]Westinghouse Broadcasting Co., 16 F.C.C. 2d 1041, 1045–46 (1969) (Comm'r Johnson, dissenting).

awarded some combination of AM-FM-TV licenses in the same service area. An illustrative case is described by Commissioner Johnson:

> When all is said and done, the Commission has permitted the applicants to transfer *four* of the most powerful media voices in the Dallas–Ft. Worth market into the hands of *two* business entities. . . .
>
> The majority has made no pretense that it has guarded the public interest in this transfer. The majority does not hide the fact that it has no standards or guidelines for transfers of TV-newspaper combinations—other than automatic approval of whatever is asked. Although the transfer, on its face, violates *all* the important Commission and Congressional policies against cross-ownership of important media, the Commission has not asked the parties even to explain what purported benefits of the transaction will accrue to the public.[14]

According to Mr. Johnson, the FCC is so beholden to the industry that it has even sanctioned corporate fraud. In one such case the Commission renewed the license of an Indianapolis radio station that "bilked its advertisers of more than $6,000 in advertising revenues (all during a 1-year probationary license renewal period)."[15] Another case involved over-billing advertisers to the tune of $41,000.[16] In yet another,[17] the Commission renewed the license of a station whose facilities had allegedly been used by the Rev. James Lofton, Jr. to sell tips on the numbers game to members of his audience. Commissioner Johnson's exasperation in the face of this type of FCC non-regulation was reflected in the following passage from his dissent in the *WKKO* case:

> Not content just to ignore statutory programming standards which compel operation in "the *public* interest," this Commission is even prepared to ignore ethical and professional standards essential to "the industry interest". . . .
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> I regret the necessity to write an opinion of this length to explain, once again, why I believe fraud to be inconsistent with the public interest. But if

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[14]Times Herald Printing Company, 25 F.C.C. 2d 984, 1010 (1970) (Comm'r Johnson, dissenting) (emphasis in original). In a similar case Mr. Johnson wrote:

> Bonneville International Corp. receives approval today from this Commission to add to its stable of industrial and mass media properties an AM radio station, and an FM radio station, in the second largest market in the United States: Los Angeles—a city in which it already has a $20 million interest in the prestigious and dominant *Los Angeles Times*.
>
> This action is taken without a public discussion of the principal issues raised by this case: the conflicts with the public interest in granting ever-increasing mass media power—with all its economic, political, and social implications—to large industrial conglomerate corporations in the United States, in this case an industrial conglomerate that is inexorably intertwined with a religious sect, the Mormon Church.

John Poole Broadcasting Co., 16 F.C.C. 2d 458, 460 (1969) (Comm'r Johnson, dissenting).

[15]Star Stations of Indiana, Inc., 19 F.C.C. 2d 991, 996 (1969) (Comm'r Johnson, dissenting).

[16]WKKO, Inc., 24 F.C.C. 2d 889 (1970).

[17]Sonderling Broadcasting Corp., 29 F.C.C. 2d 866 (1971).

> one does not occasionally take the time to restate the truth of the self evident, it is possible to lose one's sensibilities in this weird Orwellian wonderland known as the United States Federal Communications Commission.[18]

When it is said that the FCC has adopted the broadcasting industry as its clients, what is really meant is that the Commission is in cahoots with the Media Barons. One of the victims of this arrangement, according to Mr. Johnson, is the small, independent broadcaster. Consider the case of a licensee named Esther Blodgett.[19] This independent-minded septuagenarian ran a small radio station in rural Wisconsin (WMCW—standing for "Milk Capital of the World"), and the only complaint against her stemmed from her inattention to bureaucratic detail. She regularly neglected, though not out of malice, to file forms required by the Commission and to answer their letters. For repeated offenses she was fined $500 by the FCC when her license was renewed in 1968. Mr. Johnson complained that $500 seemed rather harsh considering that the licensee ran an unprofitable radio station that indisputably served the needs of the local community. In a similar case Mr. Johnson lamented the injustice inherent in the Commission's double standard:

> Our most severe penalties continue to be reserved for *people*—the shrimp boat captain caught uttering a profanity over his radio telephone, the small town AM radio station operator who fails to paint his antenna tower, the radio amateur who strays off frequency. But the corporations are superhuman, above and beyond the law. If, perchance, one of their *employees* gets caught, that's the end of the matter. So long as he's disposed of, the corporation goes merrily on.[20]

In yet another case, the Commissioner wrote that he regretfully had to conclude that "politically weak, financially precarious Commission licensees feel the full force of Commission wrath while the rich and powerful remain immune."[21]

Mr. Johnson's indictment of the incestuous relationship between the FCC and the Media Barons begins with the fact that the latter use the former to obtain what amounts to a "license to print money," but it does not end there. For Mr. Johnson "broadcasting is programing,"[22] and, in America, broadcast programming is corrupted by corporate

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[18]WKKO, Inc., 24 F.C.C. 2d 889, 890, 892 (1970) (Comm'r Johnson, dissenting).

[19]Esther Blodgett, 14 F.C.C. 2d 342 (1968).

[20]Teleprompter, 40 F.C.C. 2d 1027, 1039 (1973) (Comm'r Johnson, dissenting) (emphasis in original).

[21]National Broadcasting Co., 16 F.C.C. 2d 698, 703 (1969) (Comm'r Johnson, dissenting).

[22]Renewal of Standard Broadcast Station Licenses, 7 F.C.C. 2d 122, 130 (1967) (Comm'r Johnson, dissenting).

greed and by the broadcasters' contempt for the public interest. This explains the reluctance of licensees to offer any manner of programming that does not promise to make them rich, news and public affairs programming, for example.

While he was on the Commission, Mr. Johnson, with Commissioner Kenneth A. Cox, proposed that every broadcaster be required to devote a stipulated number of hours each week to news, public affairs, and "other non-entertainment" programming. Specifically, they would have required every station to allocate five percent of its programming time to the news, one percent to public affairs, and five percent to other non-entertainment. The Commissioners proposed this "5-1-5 Rule" with the thought that although "it is impossible to 'quantify' the public starvation in the area of responsible public interest programming, some standards, any standards, would be refreshing and welcome."[23] The rule was never adopted. The Commission, bereft of any quantitative standards in this area, continues to pay lip service to the public interest, but according to Mr. Johnson it is incapacitated. Thus, when the FCC in 1972 approved the sale of a 50,000 watt, clear-channel AM station in Cleveland to a firm that made a non-binding proposal to devote only 3.5% of its air time to other non-entertainment programming, Mr. Johnson branded it "a classic illustration of the anything-for-business stance that has come to characterize this 'regulatory' agency."[24]

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[23]Pennsylvania/Delaware Renewals, 36 F.C.C. 2d 515, 549 (1972) (Comm'r Johnson, dissenting). Mr. Johnson's most complete statement on the subject of license renewal proceedings may be found in his essay, issued jointly with Comm'r Cox, entitled Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 F.C.C. 2d 1 (1968). Mr. Johnson could not conceal his indignation when the Commission renewed the licenses of stations with poor news and public affairs programming records. In one table-pounding dissent he wrote: " 'No news is good news' has today become the motto of the FCC for 120,000 citizens of Greensboro, N.C. For no news is precisely what citizens tuning into WMDE-FM are going to be hearing in the near future, as a result of today's decision." Herman C. Hall, 11 F.C.C. 2d 344, 344 (1968) (Comm'rs Cox and Johnson, dissenting).

[24]National Broadcasting Co., 37 F.C.C. 2d 657, 661 (1972) (Comm'r Johnson, dissenting). Other indignant references to the Commission's failure to formulate a workable public interest standard include his reference to the FCC's "complacent and comfortable hear-no-evil, see-no-evil slouch in front of the radio and television sets of America" in Renewal of Standard Broadcast Station Licenses, 7 F.C.C. 2d 122, 131 (1967) (Comm'r Johnson, dissenting); his charge of "all-out indifference [to the public interest]" in Lamar Life Broadcasting Company, 14 F.C.C. 2d 431, 443 (1968) (Comm'rs Cox and Johnson, dissenting); his characterization of the FCC as "the regulatory Commission least likely to succeed in serving the public interest" in Forum Communications, Inc., 17 F.C.C. 2d 959, 961 (1969) (Comm'r Johnson, dissenting); his observation that "It was the bright hope of the Congress, in an era when this Commission was born, that the Federal regulatory agencies would come to be

News and public affairs programming can also be "tailored" to suit a broadcaster's economic interest, a practice that may not serve the public interest. Of course it is easy to imagine how a conflict of interest could arise between a licensee's desire to maximize his advertising revenues and his responsibility to inform his audience in an impartial way. One such case involved newscaster Chet Huntley, who had invested in the cattle and meat business, and who on several occasions editorialized against bills pending in Congress that presumably would have had a detrimental effect on his investments. In his dissenting opinion in that case,[25] Commissioner Johnson explained that the public interest is disserved when the media are used "for the propagation of information and opinion selected (or omitted) not on the basis of its inherent truth, relevance or usefulness, but because of its impact upon the economic interests of the licensee."[26] Further, the Commissioner urged the FCC to adopt a policy stipulating that "any licensee that fails to insure the presentation of economically disinterested views will be called upon to justify why the retention of its broadcasting license is in the public interest."[27] The Commission, of course, did no such thing. An even more disturbing case was prompted by the proposed merger between ABC and ITT. In dissent, Mr. Johnson pointed out that the merger:

> will place one of the largest purveyors of news and opinion in America under the control of one of the largest conglomerate corporations in the world, a company that derives 60 percent of its earnings from foreign sources and 40 percent of its domestic income from defense and space contracts. The possibility that the integrity of the news judgment of ABC would be affected by the economic interests of ITT is a real threat. . . .[28]

Corporate greed does not merely threaten to corrupt newscasts, public affairs, and other non-entertainment programming. It extends well beyond these areas. Although the FCC declared on one occasion that "the Commission would be concerned if a licensee chose to broadcast material based on its private commercial interest rather than on the

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watchdogs of the public interest. In the Commission's action today I do not see a watchdog at work. I see a lap dog asleep." in Midwest Radio-Television, Inc., 24 F.C.C. 2d 625, 637 (1970) (Comm'r Johnson, dissenting); and his characterization of the FCC as an agency "whose standards are no standards, whose administrative policies are the non-policies of avoidance and deference, and whose members are quite simply frozen into public interest timidity by their long years of see-no-evil, hear-no-evil, speak-no-evil decision-making" in Black Caucus of the U.S. House of Rep., 40 F.C.C. 2d 249, 267 (1973) (Comm'r Johnson, dissenting).

[25]National Broadcasting Co., 14 F.C.C. 2d 713, 724 (1968) (Comm'r Johnson, dissenting). The majority decided simply to send a "nasty letter" to NBC.

[26]*Id.*

[27]*Id.*

[28]ABC-ITT Merger, 7 F.C.C. 2d 245, 287 (1966) (Comm'r Johnson, dissenting).

public interest,"[29] the truth is that it has seldom acted on this professed concern. Thus, Mr. Johnson explains that:

> The great mass of television programming consists of format entertainment series, carefully designed as supportive and palatable packaging for the commercial content supplied by the merchandisers of our land. To the extent a network seeks to provide programming which is "offensive" to some corporate interest, then pressures for censorship are brought to bear. . . .[30]

Mr. Johnson concludes that broadcasters, motivated by an insatiable lust for profits:

> have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. As the system now operates, any person wishing to sell products—toothpaste or "feminine deodorant spray," for example—has direct, personal and instant access to television. . . .[31]

Since the FCC is controlled by its corporate clients, the Commission's Rules of Order are "fantastically skewed" in favor of the "hucksters of industrial garbage."[32]

The hucksters of industrial garbage insist that broadcasters program only "bland"[33] material. Instead of informing, uplifting, or otherwise serving its audience, broadcasters give the public only "what the vast majority will 'accept' without widespread revolution."[34] Elaborating on this theme, Mr. Johnson explains that:

> Advertisers tend to support only that programming which is devoid of controversy on the contemptuous theory that the vast majority of Americans will not tolerate programming which stimulates thought processes, which inspires, which educates or which does more than lull viewers into a dull state of witlessness.[35]

These cynics, evidently taking to heart Mencken's observation that no one has ever gone broke by underestimating the taste of the American public, ensure that what is broadcast over the nation's airwaves will be that which attracts the largest audience "regardless of good taste."[36]

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[29]Student Ass'n of the State Univ. of N.Y., at Buffalo, 40 F.C.C. 2d 510, 518 (1973).

[30]Democratic Nat'l Comm., 25 F.C.C. 2d 216, 238 (1970) (Comm'r Johnson, dissenting).

[31]*Id.* at 233.

[32]*Id.*

[33]*Supra* note 12, at 45. Actually, Mr. Johnson says that network programming is "bland at best."

[34]*Id.* at 22.

[35]Student Ass'n of the State Univ. of N.Y., at Buffalo, 40 F.C.C. 2d 510, 520–21 (1973) (Comm'r Johnson, dissenting).

[36]*Supra* note 12, at 21.

The programming that will attract the largest audience regardless of good taste will be that which reflects the attitudes and tastes of "Middle America":

> The ideas and life-styles endorsed by and purveyed by American television are truly "popular" only with those Americans fortunate enough to be native-born-white-Anglo Saxon-Protestant-suburban-dwelling-middle class-and-over-thirty. Of course this is censorship pure and simple. Some ideas are permitted to reach the American people but not others.[37]

The media, in other words, are monolithic and reflect the middle-of-the-road witlessness of mainstream America (Amerika?). The American public is denied the programming that it really wants in its heart of hearts; programming that it would, for instance, be willing to pay for.[38] This problem of "private censorship," a problem with deep roots that are inextricably bound up in the imperatives of the profit motive, is for Nicholas Johnson, *the* problem of American broadcasting.

III

How, then, to deal with this problem? Since the broadcasting industry is dominated by media monopolies and nationwide networks whose interests lie in imposing the values of mainstream America on all Americans, it might be suggested that the cure for private censorship is to be found in a policy of enforced decentralization. The values

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[37]United Federation of Teachers, 17 F.C.C. 2d 204, 211 (1969) (Comm'r Johnson, concurring).

[38]N. JOHNSON, *supra* note 12, at 20. Such a conception of the public interest—that it is served by whatever the public is willing to pay for—would seem to argue for turning the electromagnetic spectrum over to private enterprise.

There *are* times when Mr. Johnson seems to want to characterize himself as a rugged individualist of the old school (*see*, for instance, an address delivered on October 19, 1970 in Chicago entitled "Why I am a Conservative *or* For Whom Does Bell Toil?"). He concedes that it is at least "conceivable that rational analysis might lead a reasonable man to conclude that the public interest in programming would be best served by encouraging broadcasters to select those program formats that will create the greatest possible advertising revenue." Renewal of Standard Broadcast Licenses, 7 F.C.C. 2d 122, 131 (1967) (Comm'r Johnson, dissenting). He is also on occasion moved to eloquence on the subject of competition: "[T]his country has long believed that the public will be better served over the long run by free and open competition. After lengthy consideration it is still my belief that, on balance, the principle is equally valid in the broadcasting industry." (Comparative Hearings on Renewal Applicants, 22 F.C.C. 2d 424, 431 (1970) (Comm'r Johnson, dissenting).

As we shall see below, however, Mr. Johnson does not really think that it would serve the public interest to give the public whatever it is willing to pay for. For this and other reasons the term "conservative" does not very accurately convey the essence of Mr. Johnson's thought.

of mainstream America take on a less ubiquitous aspect when the nation is broken down into its constituent parts. In fact, the FCC has long been committed, at least officially, to the idea it calls "localness." FCC rules, for instance, stipulate that "each standard broadcast station will be licensed to serve *primarily* a particular city, town, political subdivision, or community. . . ."[39]

Commissioner Johnson endorses the principle of localness. In one illustrative case the Commissioner joined with his colleagues (which would in itself make the case memorable) in denying the application of the City of Camden, New Jersey, for transference of the license of radio station WCAM to the McLendon Corporation. Writing for the Commission, Commissioner Johnson explained that the McLendons were proposing to alter the programming of the station by adopting a "good music" format. This would have meant substantial reductions in the categories of local news, public affairs, other non-entertainment, and ethnic-oriented programming. Because of these considerations, and citing the proximity of the lucrative metropolitan Philadelphia market, Mr. Johnson wrote:

> The burden was on the McLendons to show that their programing is, to some significant extent, tailored for Camden, and the case they have presented in this regard is decidedly unpersuasive. . . . [T]he steps taken by the McLendons to ascertain Camden's needs and interests were inadequate; their proposed programing cannot be regarded as responsive to properly determined needs. . . .[40]

But local service is a very ambiguous concept. In the case of station KOFY (AM), San Mateo, California, Mr. Johnson's dissenting opinion objects to the majority's decision to renew KOFY's license on the grounds that the station failed to serve, not the needs of San Mateo, but those of the 364,000 Spanish-speaking residents of the Bay Area.[41] Specifically, the station failed to meet the Johnson-Cox 5-1-5 Rule. In another Bay Area case Commissioner Johnson also questioned whether radio station KSOL, *San Francisco,* was serving the needs of

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[39]47 C.F.R. § 73.30(a)(1) (emphasis added). Certain exceptions are provided in paragraph (b).

[40]City of Camden, 18 F.C.C. 2d 412, 418 (1969). The general position of Mr. Johnson on the issue of "localness" can be summarized as a belief that "local service is a value of high import, and that the local station is an appropriate mode for its realization." Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 F.C.C. 2d 1, 10 (1968). He takes an equally unequivocal position on the issue of "community ascertainment." *See, e.g.,* his opinion in Primer on Ascertainment of Community Problems, 33 F.C.C. 2d 394 (1972) (Comm'r Johnson, dissenting).

[41]California La Raza Media Coalition, 38 F.C.C. 2d 22 (1972) (Comm'r Johnson, dissenting).

Bay Area blacks. In dissent he indicated that his suspicions were based in part on certain charges levelled against the station by the *Oakland* Black Caucus.[42]

One certainly is entitled to wonder why Mr. Johnson is willing to recognize black and Spanish-speaking residents of the Bay Area as constituting legitimate communities while denying that status to the "good music" lovers of Philadelphia-Camden. However, the fact that the Commissioner seems to be inconsistent in this set of cases is not really the issue here for, as anyone would be willing to concede, there are some communities and issues that do transcend jurisdictional boundaries that must inevitably be arbitrary. Issues can spill over such boundaries either literally (e.g., air pollution), or formally (e.g., the equal protection of the laws), and to the extent that the standard of localness fails to recognize this, it is bound to be an unrealistic and arbitrary strait-jacket.

In truth there is a more important reason for Mr. Johnson's reluctance to adopt localness as the standard for judging service to the public interest. The problem with the localness standard, from Mr. Johnson's point of view, is that it is premised on a false conception of public interest broadcasting. To wit: it regards any programming that is demanded by the public as necessarily serving the public interest. As his term on the Commission was nearing an end, he wearily announced that he was "tired of quibbling over definitions like 'the public interest is what interests the public' at this stage of my tenure."[43] In other words, public interest broadcasting is not simply a function of scale; the solution to the problem of "bland at best" programming produced by the commercial networks is not to be found in simply putting the producers into closer contact with the consumers. Destroying the monopolies and dismantling the networks may be a condition necessary to the production of public interest broadcasting, for it would more accurately reflect the heterogeneity of the country. But it is not a sufficient condition. Ultimately, Mr. Johnson's rejection of the marketplace as the arbiter of what constitutes public interest programming requires him to advocate a "positive, aggressive"[44] FCC that would vigilantly hold the performance of broadcast licensees up against a well-calibrated public interest standard.

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[42]KSAN, Inc., 35 F.C.C. 2d 402 (1971) (Comm'r Johnson, dissenting).

[43]Black Caucus of the U.S. House of Rep., 40 F.C.C. 2d 249, 265 (1973) (Comm'r Johnson, dissenting).

[44]*Id.*

IV

If we are to have a positive, aggressive FCC to regulate the broadcasting industry and if "broadcasting is programming," then how is the spectre of government censorship to be laid to rest? The traditional answer to this question, and it is Mr. Johnson's answer, is that the FCC will act only to promote "fairness" and certain related ideas.[45] Thus, FCC regulation is aimed at ensuring that a diversity of viewpoints is represented on the public's airwaves whenever controversial issues of public importance are raised.[46] Or, to use Mr. Justice Holmes' words, the aim is to promote "free trade in ideas."[47] Since Mr. Johnson believes that the main barrier to free trade in ideas is "private censorship," he joins many other individuals who believe that the Fairness Doctrine should be employed to ensure that promoters of unpopular, provocative ideas are allowed access to the media.

Consider a case that stemmed from a complaint filed by a California resident against "Romper Room," an otherwise innocuous children's television show that ordinarily began with the short prayer, "God is great. God is good. Let us thank him for our food. Amen."[48] In the opinion of Commissioner Johnson, whose dissent in this case is reminis-

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[45]The Fairness Doctrine evolved gradually from the injunctions of section 315 of the Communications Act. The affirmative obligation of licensees to broadcast controversial issue programming was enunciated first in the so-called "Blue Network" hearings, and then formalized in 1945 by the FCC's ruling in United Broadcasting Co., 10 F.C.C. 515 (1945). In that case the Commission stated that the grant of a broadcast license was contingent upon the willingness of the licensee to forego the extreme idea "that no time may be sold for the discussion of controversial issues." *Id.* at 518.

It was not until 1949 that the Commission completely lifted its ban on editorializing. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The Commission understood that this action would result in some licensees abusing their privileges by using their broadcast facilities to churn out overt propaganda. Therefore, when it lifted the ban on editorials, the FCC felt it had to enunciate a "fairness" policy. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[46]*See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The thrust of that decision is contained in the following passage:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. 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.

Id. at 390. This landmark decision recognized the constitutionality of the Fairness Doctrine.

[47]Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[48]Robert H. Scott, 25 F.C.C. 2d 239, 240 (1970). (Comm'r Johnson, dissenting).

cent of Mr. Justice Douglas' concern that nonbelievers not be made to feel like "oddballs" in the public schools,[49] the "Romper Room" prayer:

> clearly presents—presumably to pre-school or primary school children, not adults—the view both that a God exists, and that he is "good." The majority rules that presentation of this prayer, five times a week, to children at an impressionable age, does not involve the fairness doctrine, and does not require access by opposing views. I dissent to this ruling on two grounds.
>
> First, the position that God exists and that he is "good" has been a view of controversy and public importance since the Founding Fathers adopted the First Amendment. . . .
>
> Second, by barring the expression of opposing views, I fear we are "establishing" the religious viewpoints contained in the prayer. . . .[50]

"Private censorship" can be, as in this case, quite insidious; or it can be blatant.[51] The Fairness Doctrine can be triggered by very specific controversial statements or by the overall thrust of a station's programming.[52] It can be triggered by entertainment programming, as in *Robert H. Scott*,[53] or by non-entertainment programming. It can even be triggered by "public service" announcements.[54]

Perhaps the most provocative aspect of the Fairness Doctrine is seen in its application to commercial advertising. It is a revolutionary idea that would, if taken to its logical conclusion, undermine the commercial basis of American broadcasting. Thus, one of the most controversial acts in the history of the FCC was its decision to extend the Fairness Doctrine to cigarette advertising,[55] an action that required broadcasters to "balance" cigarette commercials with anti-smoking "spots." After

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[49]Abington School Dist. v. Schempp, 374 U.S. 203, 228 (1963) (Douglas, J., concurring).

[50]Robert H. Scott, 25 F.C.C. 2d 239, 240 (1970) (Comm'r Johnson, dissenting).

[51]One classic example of blatant "private censorship" stemmed from the editing by KTLA-TV, Los Angeles, of certain controversial remarks uttered by author/lawyer Mark Lane on the "Virginia Graham Show." The station cut off the sound portion of their broadcast and flashed a message on the screen: "We are having technical difficulty with the audio portion of our program. Please bear with us." *In re* Complaint by Mark Lane, 36 F.C.C. 2d 551 (1972).

[52]*See* text accompanying notes 94 and 95, *infra*.

[53]25 F.C.C. 2d 239 (1970).

[54]*See, e.g.*, San Francisco Women for Peace, 24 F.C.C. 2d 156 (1970). Here the issue was whether military recruitment messages constituted a controversial issue of public importance, given our involvement at the time in an unpopular war. The Commission's action denying controversial issue status was affirmed in Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971).

[55]The *Banzhaf* case began as *In re* Complaint Directed to Station WCBS-TV, 8 F.C.C. 2d 381 (1967), where the Commission ruled that the Fairness Doctrine was triggered by cigarette advertisements. The Commission denied reconsideration in Applicability of Fairness Doctrine to Cigarette Commercials, 9 F.C.C. 2d 921 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

the *Banzhaf* decision the Commission seemed to recoil from the implications of the "anti-commercial commercial" and refused to extend it to other similar controversial issues of public importance that might be implicit in radio and television advertising. In *Friends of the Earth*,[56] the FCC refused, over Commissioner Johnson's vehement dissent, to apply the Fairness Doctrine to automobile advertising. Mr. Johnson argued that the two cases were indistinguishable. He maintained that if fairness requires announcing that cigarettes are hazardous to one's health, then it requires that the same be said of the internal combustion engine:

> This question today is a crucial one for American commercial television. Will we allow the little glass screen in our living rooms to go merrily on its way merchandising the machines and mechanisms that pour thousands of pounds of pure poison in our sky every day? Or will American television for once put fantasies aside, pull its head out of the smog, and put the most potent merchandising tool yet developed by man—the spot advertisement—to work in curing instead of creating, in addressing rather than avoiding, one of America's greatest social ills: Pollution. . . . Friends of the Earth seek only to use the public airwaves to help the people get their sky back.[57]

In similar cases Mr. Johnson urged his colleagues to require broadcasters to provide rebuttal time to the opponents of Chevron ads which argued for construction of the Alaska Pipeline,[58] conservationists who wanted to reply to utility company ads which urged increased energy usage,[59] and a labor union which wanted to urge citizens to boycott a department store being struck.[60] So long as access is denied those who wish to respond to paid advertising, broadcasters, according to Mr. Johnson, will continue to regard the FCC license as a permit "to lie as much as desired until the license expires."[61] Mr. Johnson elaborates:

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[56]24 F.C.C. 2d 743 (1970). The Commission here denied that automobile advertising raised any controversial issue of public importance, but that ruling was overturned by Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971). The court, noting the association between the internal combustion engine and air pollution, and following the logic of *Banzhaf*, was unable to perceive a distinction between cigarette and automobile advertising.

[57]Friends of the Earth, 24 F.C.C. 2d 743, 752, 755 (1970) (Comm'r Johnson, dissenting).

[58]*In re* Complaint by Alan F. Neckritz, 29 F.C.C. 2d 807 (1971) (Comm'r Johnson, dissenting); Wilderness Society and Friends of the Earth, 30 F.C.C. 2d 643 (1971); *In re* Complaint by Alan F. Neckritz, 37 F.C.C. 2d 528 (1972) (Comm'r Johnson, dissenting).

[59]*In re* Complaint of Anthony R. Martin-Trigona, 40 F.C.C. 2d 327 (1973) (Comm'r Johnson, dissenting).

[60]WFMJ Broadcasting Co., 14 F.C.C. 2d 423 (1968) (Comm'r Johnson, concurring in part, dissenting in part).

[61]Friends of the Earth, 24 F.C.C. 2d 743, 757 (1970) (Comm'r Johnson, dissenting).

> We must not lose sight of what is fundamentally at issue here: whether our citizens should be told the *whole* truth about the products they use and consume. Is this not the bedrock of American competitive enterprise and consumer choice in the marketplace? How can such an un-American position be urged by an agency of our government? For an intelligent contemporary consumer to be free and independent (so the magic of the free enterprise marketplace can play its supposed role), the consumer must be fully informed on all aspects of his purchases.
>
> American television's "copout" is apparent. Working hand in glove with the industrial machine it supports and by which it is supported, it shows us only half the commercial picture, and always the glamorous half. Where are the warts, the wrinkles? They, too, are an important part of reality. What the majority really says today is that our present system of commercial television depends for its livelihood on duping the American consumer into buying faulty products he may not need, for reasons unrelated to their merits, that may indeed be literally killing him.[62]

The reader must take care not to be distracted by the rhetorical flourishes about the evils of smoking, the motorcar, gasoline engines, etc., for they are incidental to Mr. Johnson's position in this series of cases. His colleagues in *Banzhaf*, for instance, may have thought they were serving the public interest by promoting public health, but this is not Mr. Johnson's position. He believes the public interest is served by *Banzhaf* because the decision promotes an "uninhibited, robust, and wide-open"[63] debate on the issue of cigarette smoking. Broadcasting that serves the public interest is fair broadcasting, not broadcasting that promotes public health. His only professed concern is to make sure that all sides are heard, and while he may express his own private opinions on the matter, they are offered gratuitously as *obiter dicta*, not as *ratio decidendi*.[64]

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[62]*Id.* at 756–57 (emphasis in original).

[63]New York Times v. Sullivan, 376 U.S. 254 (1964). Writing for the Court Mr. Justice Harlan referred to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." This debate, he went on to say, "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

[64]Professor Louis L. Jaffe has observed that such an extreme commitment to the notion of fairness is not lacking in irony:

> [W]hen the broadcasters challenged the constitutionality of the total ban on cigarette advertising [Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1970)], Judge Wright, one of the most zealous judicial proponents of the fairness doctrine, dissented from a three-judge court's holding that the statute was constitutional on the grounds that it infringed the public's right to hear pro-cigarette commercials. Judge Wright argued that if pro-cigarette advertising raised an issue of public importance requiring a fairness reply it was inconsistent to now hold the making of such statements could be constitutionally forbidden.

Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 776 (1972).

It must also be emphasized that Mr. Johnson does not think that the uninhibited, robust, and wide-open debate is best promoted through the strictures of the Fairness Doctrine. On the contrary, he believes that the Fairness Doctrine is nothing more than a stop-gap measure[65] that will serve well enough until the federal courts are willing to recognize a "right of access" inherent in the first amendment.[66] The pillar on which this right of access rests is the idea that broadcasting constitutes state action, a notion that can be advanced in several ways.[67] However

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[65]Mr. Johnson believes that broadcasting may ultimately be liberated from the regulatory thicket. Diversity of ownership and "fairness" are for him only temporary problems:

> It is conceivable that, someday, a "common carrier" concept will be applied to a national cable television system. If so, anyone could obtain access to a channel in every major community to "televise" his programs to anyone who wished to watch. Such a system might easily alter our concerns about the potential threats from "concentration of control" of the mass media. We are not concerned, for example, about the telephone company's potential power to grant or withhold access to personal communication because the tradition, law, and supply of telephones, have made it possible for anyone to have a telephone who can pay for it. A comparable common carrier cable television system might have a similar impact upon our concerns about media monopolies. . . .

KCMC, Inc., 19 F.C.C. 2d 109, 111 (1969) (Comm'r Johnson, concurring).

[66]*See* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV L. REV. 1641 (1967). Professor Barron wants "some recognition of a right to be heard as a constitutional principle" (*id.* at 1678), and he wants that right to apply to all communications media. *See also* Johnson & Westen, *A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971). An even-handed analysis of the constitutional status of the principle of access may be found in Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

[67]Professor Jaffee shows that Mr. Johnson bases his state action theory on the idea that broadcasters exercise an essentially public authority (*see, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946), or Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968)), while Judge Wright, in Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), bases his state action theory on the fact of government regulation and licensing of broadcasters.

The state action theory is, of course, related to the notion that the public owns the airwaves and that broadcasters are public officials, *see supra* note 3. That this notion may be rooted more in sentiment than in legal precedent is the upshot of an interesting essay attributed to "J.A.R." in the *Virginia Law Review*:

> [I]t is misleading to characterize the broadcast frequencies as "public property." Modern commentators define ownership in terms of the owner's power to elicit the aid of the state in excluding others from the use or enjoyment of the property in question. But this right to exclude is rarely absolute. The seventeenth century notion of absolute dominion has given way, and today we freely recognize the diverse public obligations attendent upon ownership. Thus the owner of real estate is subject to zoning regulations, the automobile owner is subject to licensing and safety regulations, and the farmer is subject to certain health and output regulations. But it does not follow from the fact of regulation that real estate, automobiles, and farms are "public property." Likewise, it does not follow, as Judge Burger [*infra* note 97] and Commissioner Johnson appear to argue, that the public

firm the foundation on which this pillar rests, it should be clear that the pillar, once in place, converts "private censorship" into the type of censorship that the framers had in mind when they wrote the first amendment—state censorship. It is precisely this theory, promulgated by Mr. Johnson, that was later endorsed in the precedent-setting *BEM* case.[68] The issues raised by the notion of access are difficult, but however one might justify the view that broadcasting constitutes state action, one nonetheless ends up denying the broadcast licensee the right to exercise ordinary editorial discretion over his programming.

This is why some would suggest that Mr. Johnson, and those who share his beliefs, propose to turn the American broadcasting industry—and the printed press as well[69]—into an arm of the state. Mr. Johnson proposes to avoid the "parade of horribles" that accompanies this policy in so many parts of the world by turning Big Brother into a eunuch. He believes the FCC has an affirmative obligation to combat "private censorship" by fighting monopolies, ensuring fairness, and, above all, promoting access. Beyond that, the Commission is obliged only to "scrupulously . . . refrain from any attempt to censor the provocative programing content of a licensee, whether by license revocation, punitive fine, or other form of censure."[70] In other words, the Commission's first job is to generate an uninhibited marketplace of ideas, but the Commission is not supposed to trade in that market. The FCC is to be a disinterested spectator—appreciative of the aesthetic charms of the debate, clamoring for more action, but cheering for no team.

Consider Mr. Johnson's vitriolic dissent on the occasion of the Commission's decision to move against the "drug culture." On March 5, 1971, the FCC released a public notice advising licensees that they have

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"owns" the broadcast frequencies simply because the Congress has chosen to regulate their use.

Free Speech and the Mass Media, 57 VA. L. REV. 636, 648 (1971).

[68]Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971). The Court here essentially embraced the logic of Comm'r Johnson's dissent in Business Executives' Move for Vietnam Peace, 25 F.C.C. 2d 242 (1970).

[69]It used to be that liberals were people who wanted to extend the full protections of the freedom of press guarantee of the first amendment, traditionally enjoyed only by the printed press, to the electronic media. Now the liberal position is to regard all communications media as equally susceptible to government regulation in the name of a first amendment "right to be heard." Professor Barron, for instance, rejects the conventional understanding of New York Times v. Sullivan, 376 U.S. 254 (1964), and argues that "the actual effect of the decision is to perpetuate the freedom of a few in a manner adverse to the public interest in uninhibited debate." Barron, *supra* note 66, at 1657. He argues that the old idea that freedom of the press requires freedom from governmental restraint is now obsolete, and urges that the *Times* doctrine be "deepened to require opportunities for the public figure to reply to a defamatory attack." *Id.*

[70]United Fed'n of Teachers, 17 F.C.C. 2d 204, 213 (1969).

a responsibility to review the lyrics of popular records in order to determine whether or not they tend to encourage illegal drug use (an action taken shortly after similar remarks on the subject by Vice-President Agnew). Although the threat was carefully veiled, the Commission showed its iron fist when it warned that failure to exercise such editorial discretion would raise "serious questions as to whether continued operation of the station is in the public interest."[71] Commissioner Johnson objected:

> This public notice is . . . an attempt by a group of establishmentarians to determine what youth can say and hear. . . . Under the guise of assuring that licensees know what lyrics are being aired on their stations, the FCC today gives out a loud and clear message: get those "drug lyrics" off the air (and no telling what other subject matter the Commission majority may find offensive), or you may have trouble at license renewal time.[72]

" 'No law' means no law,"[73] and that means that speech that promotes the commission of crimes is protected by a first amendment guarantee that is absolute.

From Mr. Johnson's point of view all speech, no matter how obnoxious, is protected by the first amendment. Consider Mr. Johnson's position in a case involving radio station WUHY-FM, Philadelphia. The majority issued a Notice of Apparent Liability explaining the issues involved and denying that the case had first amendment implications:

> The issue in this case is not whether WUHY-FM may present the views of Mr. [Jerry] Garcia or "Crazy Max" on ecology, society, computers, and so on. Clearly that decision is a matter solely within the judgment of the licensee. . . . Further, we stress, as we have before, the licensee's right to present provocative or unpopular programming which may offend some listeners. . . . Further, the issue here does not involve presentation of a work of art or on-the-spot coverage of a bona fide news event. Rather the narrow issue is whether the licensee may present previously taped interview or talk shows where the persons intersperse or begin their speech with expressions like, "S—t, man . . .", ". . . and s—t like that", or ". . . 900 f—n' times", "right f—g out of ya", etc.[74]

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[71]Records, Review of by Broadcast Licensees, 28 F.C.C. 2d 409 (1971). Requiring licensees to exercise editorial discretion over programming content is nothing new. *See* Commission Policy on Programing, 20 R.R. 1901. *See also* Port Huron Broadcasting Co., 12 F.C.C. 1069 (1948); Palmetto Broadcasting Co., 33 F.C.C. 265 (1961); and Pacifica Foundation, 36 F.C.C. 147 (1964).

[72]Records, Review of by Broadcast Licensees, 28 F.C.C. 2d 409, 412 (1971) (Comm'r Johnson, dissenting).

[73]Mr. Johnson, a former law clerk to Mr. Justice Black, refers to him as his "idol." N. JOHNSON, *supra* note 12, at 45.

[74]Eastern Educ. Radio, 24 F.C.C. 2d 408, 409–10 (1970). In a similar case Mr. Johnson concurred with the FCC's decision to protect anti-Semitic speech. Mr. Johnson

The majority concluded, "However much a person may like to talk this way, he has no right to do so in public arenas, and broadcasters can clearly insist that in talk shows, persons observe the requirement of eschewing such language."[75] The problem with such language, according to the majority, is that it, "conveys no thought, has no redeeming social value, and in the context of broadcasting, drastically curtails the usefulness of the medium for millions of people."[76] The Notice ended in classic FCC fashion: for its indiscretion WUHY-FM was fined $100.00. (The reader may wish to compare the outcome of this case to that of *Esther Blodgett. See* text accompanying note 19, *supra.*)

Commissioner Johnson, who indicated that he personally considered the speech in question to be distasteful (and who, like his idol Justice Black, was in the habit of absenting himself from sessions where allegedly obscene materials were exhibited to the Commission[77]), nevertheless defended the station's right to broadcast the interview as a matter of principle—the principle being the absolute right of free expression guaranteed by the first amendment. In his dissent in *Eastern Educational Radio*[78] he once again charged the FCC with acting in a manner repugnant to the Constitution:

> What this Commission condemns today are not words, but a culture—a lifestyle it fears because it does not understand. . . . What the Commission decides, after all, is that the swear words of the lily-white middle class may be broadcast, but that those of the young, the poor, or the blacks may not.[79]

V

As we have seen, Nicholas Johnson believes that the public interest is served by an uninhibited, robust, and wide-open debate. While pro-

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wrote in that case: "Although the views expressed by the remarks in question are strongly repugnant to me, I fully support the Commission's decision. . . ." United Fed'n of Teachers, 17 F.C.C. 2d 204, 212 (1969) (Comm'r Johnson, concurring).

[75]Eastern Educ. Radio, 24 F.C.C. 2d 408, 410 (1970).

[76]*Id.* at 412.

[77]One such case in which Mr. Johnson failed to join his colleagues in a tape monitoring session involved a highly-rated Chicago talk show called "Femme Forum," which, among other things, had featured "explicit exchanges in which female callers spoke of their oral sex experiences." Sonderling Broadcasting Corp., 41 F.C.C. 2d 919 (1973). Noting that he found portions of the programs transcribed in the Commission's opinion "extremely distasteful," he explained that he did not monitor the tapes because of a firm belief that the Commission should not "sit as a program review committee—imposing its tastes upon both broadcasters and the American public." *Id.* at 922 (Comm'r Johnson, dissenting).

[78]24 F.C.C. 2d 408 (1970).

[79]*Id.* at 422–23 (Comm'r Johnson, dissenting).

moting this debate, the FCC is to act as if it were indifferent to the outcome of the debate. How is the public interest served by such a debate and by the manner of FCC "regulation" urged by Mr. Johnson? At first blush it might appear that Mr. Johnson adheres to a more or less conventional conception of the public interest. The editors of the journal entitled *The Public Interest* caution that the public interest should not be regarded as some kind of pre-existing, platonic idea; rather, it emerges out of differences of opinion, reasonably propounded.[80] But the similarity between this conception and Mr. Johnson's is more apparent than real.

To begin with, Mr. Johnson does not care whether or not the opinions expressed in the debate are reasonably propounded. He cares only that they be "sincere." Mr. Johnson believes that all expressions of opinion, inasmuch as they derive from subrational forces (e.g., economic interest), are equally "valid" (that is to say, invalid). Moral principles are mere assertions that cannot be shown to be objectively true or right. Mr. Johnson is, in other words, a subjectivist. He propounds the doctrine that individual feeling or apprehension is the ultimate criterion of the good and the right. Walter Berns understands that this is now the prevailing opinion among most educated, informed people:

> According to the orthodox view today, freedom of expression, being primary, serves no purpose beyond itself. All expression is equal, not only in the arts, or so-called arts, as we must now say, but in the area of political speech as well. There can be no distinction in the manner in which the law treats good speech and bad speech, the speech we like and the speech we hate.[81]

This brings us to the second difference between Mr. Johnson's conception of the public interest and that of the distinguished social scientists who founded *The Public Interest*. For Mr. Johnson the public interest does not emerge out of the expression of diverse opinions; it simply is the expression of these opinions. This is because the act of expressing oneself, mounting an "electronic soapbox" in the twentieth century, is viewed as a tacit acknowledgement of everyone's right to express himself. The regime stands for the principle of free expression. Therefore, speaking out on controversial issues of public importance, even if all one has to say is "S—t, man," is an affirmation of one's

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[80] *See* Bell and Kristol, *What is the Public Interest?*, 1 THE PUB. INTEREST 3 (1965).

[81] Berns, *The Constitution and a Responsible Press*, in THE MASS MEDIA AND MODERN DEMOCRACY 133 (H. Clor ed. 1974). The Supreme Court has endorsed the idea that the function of free speech is to invite dispute, even if that "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. Chicago, 337 U.S. 1, 4 (1948).

belief in the regime. Thus the sincere expression of one's opinions becomes a kind of political genuflection.

This is why access to the media is so critical. From Mr. Johnson's point of view, the height of injustice is for the Establishment (read: the hucksters of industrial garbage and their minions) to use its favored position to censor the opinions of unpopular minority groups. This has the effect of "alienating" them from the political community. The first item on our national agenda, therefore, must be to restore democracy by using the mass media as electronic soapboxes for those who have not been allowed to air their opinions:

> The black resident of the big city ghetto is cut off from the community that controls his life. His resultant feeling of helplessness and alienation makes it essential that communications media, such as WBAI, offer to isolated minority group members some access to the broadcast forums the media control. . . .
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> The individual resident of the ghetto cannot match big corporations or the Government in speedy, easy access to the mass media. Stations such as WBAI, which turn over their microphones to residents of large city ghettos, perform an inestimable service both to the public and to those individuals who are able to speak. Members and representatives of this country's minority groups must be given the broadcast time to speak for themselves. It is no longer sufficient for the "establishment" to serve as their "interpreters" to the predominantly white majority. . . . [I]t is rapidly becoming clear that this country needs many more such electronic soapboxes for those citizens who have been deprived of an "effective" voice to communicate with their fellow citizens. . . . WBAI's programing today is to many what the New England town hall meeting was to others in past years. . . . WBAI and other communications media have initiated a partial return to the fundamentals of "participatory democracy."[82]

Those who fear the unleashing of pent-up hostilities by these residents of big city ghettos need not worry because, strange as it may seem, this is the first step toward conflict resolution:

> It is an important but oft-forgotten proposition that dissension and strife are better uncovered and exposed to public view than left to smolder in silence and darkness. The sources of prejudice and hatred can only be fought when it is known that they exist. This is the important "disclosure" function of broadcasting: To communicate to the public the problems and sources of dissension within their own communities.[83]

Furthermore, the airing of prejudice and hatred actually tends to relieve social conflict through a kind of cathartic process—much as por-

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[82]United Fed'n of Teachers, 17 F.C.C. 2d 204, 217–18 (1969) (Comm'r Johnson, concurring).

[83]*Id.* at 215.

nography is often alleged to relieve pent-up sexual frustrations that otherwise would be relieved in an "anti-social" manner. "The broadcast by WBAI of the sentiments in question [anti-Semitic sentiments] may well have lessened, not increased, the feelings of prejudice in the New York community."[84]

Of course all of this requires an important concession on the part of those participating in the uninhibited, robust, and wide-open debate. All participants must be willing to concede that all expressions of opinion are equally valid; they must embrace the subjectivism that is fundamental to Nicholas Johnson's thought. This, of course, means that we must not take the opinions being expressed in the debate too seriously. Since the expression of opinions is more important than the opinions themselves, we must be prepared to defend to the death the first amendment rights of those who utter "the speech we hate." That is, we must not really hate "the speech we hate." We must learn to be tolerant.

The unhappy truth is that many Americans do not worship the gospel of tolerance as they should. It must even be conceded that there is much prejudice and hatred abroad in the land. Because of this the mass media cannot serve simply as the mouthpieces of the people. The broadcasting industry has a special mission. "[T]he press must," Mr. Johnson has written, "sometimes, lead the people." Our system will not work unless the press uses its freedom "to inform, to expose, and to persuade."[85]

To persuade us of what? To persuade us to "listen to the unheard."[86] The voices of the unheard will tell us the extent of prejudice and hatred in America. It is essential that we listen. "If necessary, we must be forced to listen."[87]

> Only confrontation with the terrible truths of race relations in this country can liberate the moral and material resources needed to do the job which must be done. These truths can set us free, and in my judgment, only the media can provide them.[88]

Fortunately, the press can find inspiration in "the magnificent role they have played in the past in spurring progress in the South."[89] There is, of course, the example set by the Kerner Commission:

84*Id.* at 215–16.
85N. JOHNSON, *supra* note 12, at 102.
86*Id.* at 101.
87*Id.*
88*Id.* at 103.
89*Id.* at 104.

> These leaders of society and government tried to tell it like it is. If they can do it, so can America's mass media. These men were able to say: "What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it."[90]

It will, however, take a herculean effort to purge the American soul:

> There is a big job to be done by anyone concerned with the role of the media in contemporary America. We must ensure that the image which Americans have of every city accurately reflects the real-life trials and triumphs of life in schools, buses, tenements, public housing projects, and welfare offices. Documentaries and front-page features are not enough—though they are important. . . . The message which white America needs to hear must be sent out every day—with thirty-second and minute spots (as KSFO has done in San Francisco), with daily reports, and even in commercials, serials and soap operas, and on the fashion, society, women's and sports pages.
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> These are not new thoughts, of course, but I think they are important—important enough to bear repeating. I also think that they represent no more than a first step.[91]

It is no more than a first step because the other items on our national agenda constitute an almost complete reconstruction of the American way of life:

> What it comes down to is whether you and I, as private citizens, are willing to do what thoughtful Americans say must be done: President Johnson, the Kerner Commission, responsible journalists, numerous scholars and political leaders. The similarities between the recommendations are far more striking than the differences: dignity, jobs, decent income, education, housing, equal justice. But, as the Kerner Commission reported, "The major need is to generate new will—the will to tax ourselves to the extent necessary to meet the vital needs of the nation."[92]

Now we should know why Mr. Johnson resists the notion that the public interest is served by "whatever interests the public." The public, saturated as it is with prejudice and hatred, cannot be expected to spontaneously generate the will to tax itself to the extent necessary to meet the vital needs of the nation. The public does not know that it is in its interest to listen to the voices of the unheard and, therefore, the public must be "persuaded" to make the sacrifice. In short, the hucksters of industrial garbage are not the only ones who have a contemptuous view of the American public. Berns, for one, is well aware of where this manner of cynicism leads:

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[90] *Id.* at 106.
[91] *Id.* at 107–08.
[92] *Id.* at 103.

> But if the privilege [of free speech] is extended to the speech we hate, why is freedom of speech good? Because when "truth grapples with falsehood" truth will prevail? But [Mr. Justice] Holmes and the modern civil libertarians do not make this contention. Because monarchists (fascists, communists) can thereby advance the cause of monarchy (fascism, communism)? If we accept this answer, and it is today the accepted answer, we commit ourselves to being indifferent to the outcome of the debate among the advocates of these opposing doctrines, which means—and there should be no concealing of this fact—we do not prefer free government to the alternatives, monarchy then or either of the varieties of slavery now. . . .[93]

VI

There is nothing very mysterious about the operation of the interests in American politics. Every school child learns how special interest groups come to be represented on Capitol Hill and how they are sometimes adopted as the "clients" of the independent regulatory agencies. It certainly is not hard to understand why so many Americans have been disappointed by the regulatory performance of the Federal Communications Commission.

What is not so generally understood is that the public interest standard proposed by Mr. Johnson and others who have glibly arrogated the term "public interest" for their own exclusive use reflects a distinctive political ideology which, if it were recognized for what it really is, would itself constitute a controversial issue of public importance. Mr. Johnson's public interest standard is not the only manifestation of this ideology in American broadcasting. On the contrary, the "public interest" mentality, of which Mr. Johnson's written FCC opinions constitute the most representative expression, can be clearly perceived in several conspicuous features of American broadcasting, including the liberal bias of the media, the ascension of journalists to the status of Guardians, the substitution of the cult of sincerity for genuine substance, and the residual appeal of righteous indignation. Each feature merits consideration.

The liberal bias of the media. The creed of tolerance underlies the uninhibited, robust, and wide-open debate that Mr. Johnson equates with the public interest. The effect of this is to render that debate something less than completely uninhibited, robust, and wide-open. Specifically, there is one opinion that must be regarded as somewhat "less equal" than all the others—that is the opinion that some opinions are "more equal" than others. It is not merely poor sportsmanship to hold such an opinion, it is heresy, and as such it cannot be tolerated.

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[93]Berns, *supra* note 81, at 134.

For the one thing that the cult of tolerance will not tolerate is intolerance.

The cult of tolerance, as a manifestation of a manner of thought that denies even the possibility of objective truth, is thus endemic to the ideology of modern democratic man. It is the ubiquity of this ideology that gives the mass media in America their distinctive liberal bias, not any conspiracy among the "radiclibs" of the "Eastern liberal establishment." The tyranny of this ideology is nonetheless oppressive for its being insidious, even inadvertent. As for Mr. Johnson, we have already seen that his ardent love of freedom does not cause him to shy away from forcing the rest of us to be free.

Let there be no mistaking the fact that Mr. Johnson's public interest standard is not neutral. It is fantastically skewed in favor of those whose message is fairness and tolerance (read: equality), and against those who would resist this ideology. For instance, Mr. Johnson thinks that the general thrust of a licensee's programming should be reviewed by the FCC for the purpose of determining whether it is properly balanced.[94] The license renewal process, in other words, takes on the aspect of a Fairness Doctrine Writ Large. Thus, Commissioner Johnson explained his reluctance to renew the license of WLBT, Jackson, Mississippi:

> [T]he real problem with WLBT's programs was . . . that the station carried a remarkable surfeit of right-wing and segregationist material as a general practice. . . . The church's exhibit 49, . . . which notes all the station's con-

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[94]Mr. Johnson has written that a broadcaster "must make sure that his overall programing pattern fairly reflects all relevant viewpoints, whether or not individuals demand an appearance." Lamar Life Broadcasting Co., 14 F.C.C. 2d 431, 454 (1968) (Comm'rs Cox and Johnson, dissenting).

In other words, guaranteeing access is not enough. The licensee is to provide "vicarious access" for ideas that cannot find aggressive sponsors. Let there be no misunderstanding as to what this all adds up to. Licensees are not allowed to exercise any editorial discretion over what passes over the airwaves; they must indiscriminately be an "electronic soapbox" for anyone who petitions to so use their facilities —or even if they don't! Put more baldly, Mr. Johnson would have the FCC dictate an editorial policy ("fairness") for every radio and television station in the country, and then he would throw out the long-time FCC commitment to the idea that "stations have a duty to exercise due care in the selection of program content." *See* 25 F.C.C. 2d 242 (1970). At the same time he would have the FCC undertake a massive program of surveillance in order to determine what is being transmitted over the people's airwaves. At renewal time a licensee would be expected to submit incredibly detailed reports on its programing—reports that would describe, among other things, "what it is doing for specific age groups of children." Broadcast License Renewals, 43 F.C.C. 2d 1, 176 (1973) (Comm'r Johnson, concurring). Finally, he would strip those who fail to exercise editorial discretion as dictated by the FCC (*i.e.*, those who would substitute some other standard for "fairness") of their licenses to operate. All this is in the name of an absolute right to free expression.

> troversial issue programing during a 3-month segment in 1962 and 1963, reveals routine carriage of shows like "Life-Line" and "The Dan Smoot Report," "Freedom University of the Air," John Birch Society programs and the White Citizens' Council, as well as speeches by segregationist officials of the State.[95]

Of course, FCC action to ensure an editorial policy of fairness at WLBT is not to be confused with censorship.[96]

The ascension of journalists to the status of Guardians. Mr. Johnson believes that the public interest is served by an uninhibited, robust, and wide-open debate, access to which is virtually equated with democracy. This is why he so often speaks of journalists as if they were public servants.[97] It is because Mr. Johnson's view is shared by so many in the broadcasting industry that the superstars of the mass media have recently ascended to their lofty status. Like every other elite group, the journalists are not so embarrassed by their special privileges—the privilege, for example, of shielding their confidential sources against criminal prosecution—that they are unwilling to take full advantage of them.

Thus it is that reporters have achieved star status. What do they really think? In the end our tendency to confuse the news with its messengers means that "the public's right to know," an excrescence grafted onto the Constitution by our zealous Guardians, devolves into the public's right to be told about Barbara Walters' salary or the name of her hairdresser.

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[95]Lamar Life Broadcasting Co., 14 F.C.C. 2d 431, 454 (1968) (Comm'rs Cox and Johnson, dissenting).

[96]Two other cases deserve the reader's consideration. The first involves a citizen complaint against a radio station in Worcester, Massachusetts. One Stephanie A. Riopel, Mr. Johnson explains, has alleged ". . . that the radio station and newspaper in Worcester are under the monopolistic control of Robert W. Stoddard, whom she identifies as a director of the John Birch Society. We are advised by our staff that, 'the Broadcast Bureau does not believe that the letter raises any substantial question about the qualifications of the applicant. . . .' " State Mutual Broadcasting Corp., 15 F.C.C. 2d 736, 741 (1968) (Comm'r Johnson, dissenting). Mr. Johnson objects: "The majority obviously agrees [with the Broadcast Bureau's judgment]. I do not. I believe it is not only insulting, but irresponsible, for us to ignore such a complaint." *Id.*

The second case is Chapman Radio and Television Co., 34 F.C.C. 2d 299 (1972). In 1969 Channel 21 in Birmingham, Alabama, was awarded to Alabama Television, Inc. Later it was revealed that the president of Alabama Television had refused to bury a black man killed in Vietnam in the cemetery he owned. Citing this revelation, Comm'r Johnson urged the FCC to "enlarge the issues and reopen the records." *Id.* at 303 (Comm'r Johnson, dissenting).

[97]*Supra* notes 3 and 67. This conception of broadcast licensees has often been endorsed by the federal courts. Chief Justice Warren Burger, then Appeals Court judge, wrote in 1966: "Like public officials charged with a public trust, a renewal applicant . . . must literally 'run on his record'." Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1007 (D.C. Cir. 1966).

The substitution of the cult of sincerity for genuine substance. Since the content of opinions is no longer important because they are all of equal value, the packaging in which they are transmitted becomes crucial. On this point McLuhan is right: the medium is the message, and the message is a kind of massage—"stroking," to borrow from the lexicon of the Ervin Committee. Tolerance, the message transmitted by most of the Guardians, cannot be championed, it must make itself manifest in the demeanor of the sender. As David Riesman has put it, tolerance is deflated from the status of a moral principle to that of a character trait. The cult of tolerance, then, breeds the cult of sincerity. According to Riesman:

> The performer puts himself at the mercy of both his audience and his emotions. Thus sincerity on the side of the performer evokes the audience's tolerance for him: it would not be fair to be too critical of the person who has left himself wide open and extended the glad hand of friendliness.[98]

The glad hand of friendliness becomes everything. It is the idea that we consume:

> [T]he popular emphasis on sincerity means that the source of criteria for judgment has shifted from the content of the performance and its goodness or badness, aesthetically speaking, to the personality of the performer. He is judged for his attitude toward the audience, an attitude which is either sincere or insincere, rather than by his relation to his craft, that is, his honesty and skill.[99]

In politics this means that instead of critically evaluating the messages that we receive from public figures, we assess their ability, or willingness, to manipulate us. We adopt the same attitude toward our Guardians.

This is why the news media places such a premium on glibness, glamor, and affability. Since we are not able to take the ideas or opinions that are being transmitted seriously, we must look for the ubiquitous, irresistible glad hand of friendliness. The friendly news teams are the news. Who cares about what happened in Washington or Kankakee when we can enjoy the interplay between our virile young anchorperson and the madcap band of sidekicks?

The residual appeal of righteous indignation. Modern, "other-directed" man, Riesman contends, does not know what he wants. This is why he develops sophisticated radar equipment to divine the opinions and judgments of others. Other-directed man is not propelled by

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[98] D. RIESMAN, N. GLAZER & R. DENNEY, THE LONELY CROWD 194 (1961).
[99] *Id.*

moral principles; he is incapacitated by his relativism. It is precisely because of this that modern man finds the old moral characteristic of "inner-directed" man so fascinating; he finds the courage that comes with moral conviction awe-inspiring. Riesman explains that there is a reservoir of indignation that is regularly tapped by the media, especially in their coverage of politics:

> In commercial sports, for instance, he [other-directed man] enjoys a rivalry and display of bad temper—even if he knows in a way that it is cooked up for his benefit—that is vanishing or banished from other spheres of life [because of the cult of toleration]. As a result, displays of aggression and indignation in the arena of politics are popular with all types. . . . "Pour it on, Harry!" the crowds shouted to President Truman. As Americans, whatever their class or character, can enjoy boxing or a rodeo, so they still look upon a political brawl as very much a part of their American heritage, despite the trend toward tolerance.[100]

Perhaps this explains why, as Alexander Bickel observed, Watergate unleashed a tidal wave of righteous indignation from the media that threatened to engulf us. Perhaps it also explains why the media complained incessantly about how "boring" the 1976 presidential election campaign was.[101] In any event, it certainly explains why there is a market both for the friendly, albeit mindless, news teams and for some of the irascible Guardians employed by the networks. The reservoir of indignation also accounts for the self-righteous, moralizing tone that is characteristic of so many of the self-appointed defenders of the public interest.

CONCLUSION

Here we have the moral of the Nicholas Johnson story: the FCC will never be able to formulate a satisfactory public interest standard if it conceives of the public interest in abstraction from all consideration of the common good; and that requires a consideration of what constitutes good, practical public policy. If the Commission is to take the public interest injunction of the Federal Communications Act seriously,

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[100] *Id.* at 202.

[101] Jimmy Carter became boring when he successfully ran the "ethnic purity" gauntlet. The press was seldom bored back in the days when naive politicians were in the habit of disqualifying themselves for high public office in hilariously original ways. The press was decidedly not bored, for instance, when George Romney told of his having been "brainwashed" by our generals in Vietnam. Entertaining Ed Muskie dramatically displayed his unfitness for the presidency when he "broke down" in front of the *Manchester Union-Leader*. And Earl Butz left them laughing by revealing his incompetence as Agriculture Secretary to investigative reporter John Dean.

then it will necessarily embark upon a course that culminates in its reviewing the content of all broadcast programming to determine whether or not it is up to snuff (i.e., a course that culminates in censorship) with all talk of fairness and balance notwithstanding. The alternative is to abandon the concept of government regulation beyond such minimal functions as allocating the broadcast frequencies.

All this is not to take private broadcasters off the hook. If it is conceded that the public interest emerges from rational discourse, then it is incumbent upon the mass media, regardless of government enforcement of some public interest standard, to engage in rational discourse. That is, it is incumbent upon the media to assume responsibility for cultivating among the citizenry a capacity for mature reflection on the controversial issues of public importance that confront the republic.[102] Few would contend that radio and television have done this well.

The media have performed badly in part because they tend to conceive of the public interest in much the same way that Nicholas Johnson does. According to this view the public interest is served by an uninhibited, robust, and wide-open debate. The participants in this debate talk about the big issues, but the biggest issue of all is the issue of access, having the opportunity to talk about the big issues. Thus the question of what constitutes the common good is never forthrightly addressed. Since "fairness" will not suffice as an answer,[103] Mr. Johnson and the media are alike doomed to run together on the treadmill of

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[102]That even the best of American journalism fails uttterly in this regard is shown by Weaver, *The Politics of a News Story*, in THE MASS MEDIA AND MODERN DEMOCRACY 85 (H. Clor ed. 1974). Weaver takes an apparently straightforward *New York Times* news story and shows that it systematically thwarts a cast of mind:

> which attempts to understand the world of events from a comprehensive rather than a partial viewpoint, which is committed to intellectual honesty rather than to a simplistic preconception, and which treats all practical questions of policy and administration for what they undeniably are—practical problems of finding means that efficaciously bring about desired ends in a world where policy must serve many ends, all of them conflicting.

Id. at 111.

[103]And neither will the suggestion that television be abolished. *See* Anastaplo, *Self-Government and the Mass Media: A Practical Man's Guide*, in THE MASS MEDIA AND MODERN DEMOCRACY 161 (H. CLOR ed. 1974). Anastaplo's essay contains much insight, but he, like so many others, seems to view television as a kind of autonomous agent of corruption, an *elan vital* that works its mischief on us while remaining immune from any effect that *our* natures might have on it. Thus, Anastaplo is exclusively concerned with "what the mass media . . . do to the character of a people such as ours." *Id.* at 194. But surely it would also make sense to investigate the manner in which television is shaped by the character of a people. I am certain that Mr. Anastaplo would agree that ideas have consequences, and that idea counsels against taking his (or McLuhan's) brand of technological determinism too seriously.

infinite regress. They must talk incessantly about the importance of having a chance to talk about important things. That falls far short of rational discourse because it begs every question that is important or interesting. It is merely a harangue.

See, e.g., Professor Jaffe's warning against "equating its [television's] influence with its ubiquity." *Supra* note 64. Jaffee writes:

> The *New York Times*, the *Chicago Tribune*, NBC, ABC, and CBS play a role in policy formation, but clearly they were not alone responsible, for example, for Johnson's decision not to run for re-election, Nixon's refusal to withdraw the troops from Vietnam, the rejection of the two billion dollar New York bond issue, the defeat of Carswell and Haynsworth, or the Supreme Court's segregation, reapportionment and prayer decisions. The implication that the people of this country —except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening.

Id. at 787.