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PROGRAM CONTROL AND THE FEDERAL
COMMUNICATIONS COMMISSION:
A LIMITED ROLE

Ben C. Fisher†

Television is enormous in its impact, frightening in its potential. Television creates its own destiny; it selectively focuses on the events of the day; it deals primarily with motion and action, and hence with violence; it brings into the living room — vividly — the hell of Viet Nam and the beauty of Michelangelo’s Sistine Chapel. In the 1960’s television emerges as the number one communications medium with an unlimited capacity to shape man’s destiny for better or worse.

The growth of the industry in the years since World War II has been truly phenomenal. It has passed the newspaper as the medium most relied upon for news and information. Its success in the entertainment field has required a restructuring of the movie and publication industries. As a mover of goods and services, its success is unparalleled. Whether selling cigarettes, soap or candidates, the industry’s record is most impressive.

With well over 650 television stations, television revenues in 1967 totalled $2.3 billion and profits exceeded $400 million.¹ There are close to 60 million television homes in the country; a popular program in prime nighttime hours will reach almost 35 million homes. One Commissioner recently estimated that by the time a five year old enters kindergarten he has spent more time in front of the television set than the average college student spends in class during his entire four years of college.² The involvement by the viewer in the actual events of history — from the assassination of a President to the Apollo moon flight — profoundly influences his attitude, his fears and his aspirations.

It is not surprising, in light of television’s emergence as a prime influence in society, that there has arisen the tremendous clamor for improvement of the medium. Max Lerner recently suggested that television has helped fire up the current “revolution of rising expectations.” It has opened a huge cornucopia for all to see the blessings of our material society; but for many viewers, it is only “look, don’t touch.”³

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In a sense, television has become the symbol of the new material, technological society. As Archibald MacLeish observed: "It is not without significance that the targets of the mobs in the burning streets are supermarkets and television outlets rather than the courthouses and city halls which would have drawn the mobs of earlier times." So it is that the general frustrations of those participating in this revolution are visited against the symbol of the new society, television. Television is blamed for all of society's ills.5

There is a more restrained view, an expression of regret over opportunities lost. Here the critics do not blame all of our troubles on television; rather, they criticize the industry for failure to seize the initiative in solving society's problems.

In any event, whether the critics are virulent or merely disillusioned, their complaints compel an answer to the very difficult question raised by this Symposium: To what extent should the Federal Communications Commission assume a major role in the determination of programming operations? My answer is clear. The role of government should be extremely limited. Before documenting this answer, let me state certain basic assumptions upon which all of my argument rests.

*Fundamental Assumptions Regarding the Nature of Industry*

In the first place, television is an industry of private enterprise, conducted for profit. The profit-making aspect of this enterprise overshadows all other aspects; all other services which television provides must be considered in this light. Secondly, broadcasting is neither a common carrier nor a public utility type industry; the latter, although profit-making, are nevertheless subject to severe government restrictions as to capital investment, rate of return, and public responsibilities for service to all comers. Such restrictions are not applicable to broadcasting.

A third basic assumption is that television serves primarily as an entertainment medium and secondarily as a news and educational medium. Finally, television is not a public instrumentality of government policy. The accepted theory in other nations that government should be directly involved in television ownership so as to guarantee


5. Commissioner Nicholas Johnson, a virulent critic of the industry, in an appearance before the National Commission on the Cause and Prevention of Violence stated: "One cannot understand violence in America without understanding the impact of television programming upon that violence." *Broadcasting Magazine*, note 2 *supra* at 42.
that televisions will inform, educate, and uplift is simply foreign to our system.

Obviously, any one of these assumptions can be challenged. Television can be totally reshaped in purpose, goals and structure. For purposes of our discussion, I am accepting the structure as it now exists. I have suggested as my basic thesis that government involvement in program control should be extremely limited. I base this on both policy and pragmatic considerations. Policy considerations lead to the conclusion that were the Commission to assume any significant role in program control the adverse consequences of implementation would far outweigh the benefits. Pragmatic considerations lead to the conclusion that government involvement in program control would not, in fact, lead to better programming.

Summary of Constitutional Background

I will briefly touch on the constitutional aspects of program control to lay the background for further discussion of these pragmatic and policy considerations. Obviously, the Commission is bound to observe the limitations of the first amendment and the prohibitions of Section 326 of the Communications Act of 1934, as amended. The Commission, however, argues that the constitutional free speech rights of broadcasters are of a lower order than rights of other citizens. This lower order status results from the fact that the Commission has the authority to choose from among a number of applicants for the limited facilities available in accordance only with a general standard of "public interest, convenience and necessity."

To what extent does this choice permit or require a consideration of programming? Here the different schools of thought part company. The NBC case held that the Commission has not only the duty to set technical standards and supervise the "traffic," but also the duty to determine "the composition of the traffic." According to the Commission, the "composition" of the traffic must mean programming. The Commission concludes it has the authority to "determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve."


Yet the NBC case is capable of a much narrower reading and one, incidentally, consistent with the earlier Sanders Brothers decision,\(^1\) namely, that although the scarcity of frequencies requires standards for choosing among applicants, such standards should include primarily the character of the applicant, its business practices and operating proposals. Consideration of programming matters is neither necessary nor appropriate.

For purposes of this discussion, we need not totally resolve this conflict.\(^1\) In part, any such effort would be premature. A major aspect of the overall question, the constitutionality of the fairness doctrine, is now before the Supreme Court. In brief, the fairness doctrine states that if licensees permit their facilities to be used for presentation of one side of controversial matters, they must "afford reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance."\(^1\) The Supreme Court's treatment of the fairness doctrine should provide considerable insight into the general question of program control.

Two cases are before the Court. In the Red Lion case,\(^1\) from the District of Columbia Circuit Court of Appeals, the court held that the fairness doctrine as implemented by the Commission was a reasonable exercise of authority and no violation of the first amendment. Rather than limiting the right of free speech, the court concluded the fairness doctrine encouraged free speech by requiring that all sides of controversial matters be presented.\(^1\) The court conceded that the broadcasters' freedom was curtailed but emphasized the greater interest of the public in hearing all sides.

In the second case, the Radio Television News Directors Association case,\(^1\) the Seventh Circuit used quite a different analysis in finding the rules regarding "personal attacks" and "editorials" contrary to the first amendment. The rules regarding "personal attacks" and "editorials" are two facets of the broader fairness doctrine. The court was careful not to rule on the constitutionality of the fairness doctrine. Nevertheless, the holding casts serious doubts on its validity.

\(^{10}\) FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

\(^{11}\) See articles cited in note 6 supra for a more detailed consideration of the constitutional question.


\(^{14}\) Judge Tamm, for the Court, mistakenly in my opinion, relied not upon the public's right to hear all sides, but rather on the rights to respond of the victim of the personal attack; I know of no constitutional rights accruing to a member of the public simply because he was criticized over the air.

\(^{15}\) Radio Television News Director Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968), rev'd, 395 U.S. 367 (1969).
The petitioners in the second case sharply attacked the Commission's assertion that the rules promoted free speech. They claimed that the rules inhibited the free exchange of ideas; that broadcasters were discouraged from carrying matters of controversy; that the rules result in self-censorship by broadcasters; that the burdens and sanctions available under the rules are unfair to the broadcasters; and that even if controversial matters are discussed, there will be a rather "bland and anemic treatment of the issues." The Seventh Circuit accepted these arguments, finding that the rules would indeed inhibit robust discussion, thus violating the first amendment rights of the broadcasters.

The interesting point to me is that the issue before the Supreme Court ultimately will turn on a factual question: Do the rules result in the actual carriage of more controversial matters or do the rules deter free discussion. It will not be enough to find merely that the rules are a burden on the broadcaster's freedom to program. His rights may have to give way to a greater public interest in having free and open debate. However, if the rules act to, in fact, inhibit open and robust discussion, then presumably there would be no constitutional basis for upholding them as reasonably related to the public interest standard.

*Reasons for Limiting Commission Authority and Examples of Commission's Activities in Program Regulation*

It is not essential that we predict the result of the Supreme Court's determination. The policy and pragmatic considerations favoring a limited Commission role will still be present. The trend over the past ten years has been one of increasing involvement by the Commission in programming matters. The "camel's nose" is very much "into the tent," to borrow a phrase from Professor Zechariah Chafee, and the ever present danger is that zealous officials, no matter how well-meaning, will try to shape general program service in accordance with their own ideals. All Commissioners agree they have no role to play in regulating specific program content, but several feel very keenly their responsibilities to cause a general improvement in program service.

I don't believe this increased involvement can be effective. Most significantly, seven Commissioners sitting in Washington, D.C., cannot make the qualitative judgment on individual performances of almost 7,000 radio and television stations which is essential to improvement in programming. Even if they could, there is no common denominator as to what constitutes good or better programming. What is one man's meat is another man's poison. Bach may be better than the

Beatles, but to whom? A former activist Chairman of the Commission, Newton N. Minow, made precisely this type of analytical error in his famous 1961 speech when he referred to television as a "vast wasteland." I don't doubt that Mr. Minow would rather hear Leonard Bernstein than the Smothers Brothers. He can persuasively claim that "Meet the Press" better serves the public than does "Bonanza." But it so happens the public prefers "Bonanza" by a margin of 10 to 1. So who is right — the public or Mr. Minow?

In this regard, even some of the polls are misleading. It can be demonstrated that many who profess to prefer "higher quality" programming on TV when polled, immediately go home to an evening of "Ed Sullivan" and "Mission Impossible." It is my firm belief that personal preferences of Commissioners are totally irrelevant; to the extent they believe that government has a direct role to uplift the sensibilities of the citizenry, they are moving into dangerous waters.

In fact, I have seen very little evidence that the Commission en banc attempts to assert this broad authority. Instead, efforts to improve programming have involved processing techniques, exhortation, threats, and attempted regulation by the lifted eyebrow. They have also attempted, with indifferent success, to use the comparative hearing process for selecting the best qualified applicant as an indirect method to upgrade programming.

The "Blue Book" and Balanced Program Fare

The first major regulatory effort goes back to 1946 with the issuance of the famous "Blue Book," in which the requirement of "balanced program fare" was established for the first time. The Commission proposed a quantitative evaluation of a station's overall performance. A half-dozen categories of programming were established, such as sustaining (non-commercial) programming, local live, public issues programming, and the like. So long as stations maintained a fair balance between the various categories, their renewals were automatic.

This quantitative analysis technique lasted until 1961. It was never successful in a meaningful way. It satisfied neither the broadcaster nor the conscientious administrator. One criticism was cogently summarized as follows:

One of the troubles with labeling "types" of radio programs and reducing the phrase "balanced fare" to even approximate per-

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18. FEDERAL COMMUNICATIONS COMMISSION, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946) (Blue Book).
centages is that the label is likely to look much more impressive in a log book than the program sounds on the home receiver.\textsuperscript{19}

A creative entertainment program under the balanced program fare concept would have a lower priority than carrying an unrehersed PTA meeting. There were further built-in inadequacies. Even specific “types” of programs weren’t necessarily enough. Which is better, a Billy Graham sermon, an organ music recital, “The Rosary,” or a live broadcast from a local fundamentalist church? All are “religious” programs. Is one better than the other? Should the Commission choose between them? Indeed, does the Commission have any business at all in requiring religious programming?

Another complicating factor for the “balanced fare” concept was the emergence in the late ’40’s and early ’50’s of the “specialized” station. For economic reasons, primarily in the larger urban areas, these stations were programmed to cater to a specialized audience — good music, foreign language or minority groups. The Commission recognized this as a worthwhile development and ignored its own general requirements.

Over and above the foregoing complications, the overall program service concept suffers a major flaw. How does one inquire into the general program service except by inquiring into the specifics? The total is always the sum of the parts. As Professor Kenneth Culp Davis has appropriately pointed out,\textsuperscript{20} “The focus is always necessarily upon the questionable parts.”

Take the current common complaint that there is too much “violence” on television. Presumably, this suggests program imbalance and some would suggest this might appropriately be explored in a renewal hearing. Should the Commission consider only the performance of the one station, or all stations in town? Should it attempt to define violence? Should it attempt to distinguish between violence portrayed in “Macbeth,” as opposed to violence portrayed on the “Untouchables”? There are many other questions. The point is that the final judgment on overall program balance would depend upon a great many detailed facts and inquiries. Inevitably a value judgment would have to be reached about which reasonable men could differ. The Commission cannot effectively undertake this type of detailed analysis.

\textit{The Present Standard: Survey of Community Needs}

For these many reasons, the “Blue Book” test of balanced program fare never really worked and was finally abandoned in 1961. The present test was adopted in its place. This test required that applicants

\textsuperscript{19} L. \textsc{White}, \textit{The American Radio} 194 (1st ed. 1947).

\textsuperscript{20} K. \textsc{Davis}, \textit{Administrative Law} 149 (1st ed. 1951).
and broadcast licensees conduct a thorough area survey to determine the tastes, needs, and desires of the community and to determine the type of programming which would serve those discovered needs and interests.\textsuperscript{21} The Commission suggested fourteen separate program "elements" which fairly encompassed all facets of public interest programming. These included such elements as programs for children, public affairs programs, and service to minority groups. The categories were flexible; no licensee was compelled to carry all fourteen elements.

The Commission modified its application form in 1961 to require an extensive showing of the measures the licensee or applicant had taken to determine the needs and interests and the manner in which it proposed to meet them. The showing was to be prepared after "assiduous" planning and consultation with leaders in community life and the listening public.

Has this new standard been any more successful in guaranteeing better programming? Absolutely not! The theory of a documented survey of area needs has many of the same inherent weaknesses which were present in the "Blue Book" test — the tendency to emphasize mediocre coverage of a variety of interests, standardization in programming, and the need of the Commission's staff to inquire into ridiculously detailed minutiae.

Furthermore, there is one inherent weakness which the Commission cannot overcome. The only way this new procedure can be effective is if the Commission, itself, through independent research, determines the needs and interests of the communities involved. If the licensee's inquiry is sketchy, if he's talking to the wrong people, if he's receiving unreliable information, if his polling skills are inadequate, if his evaluation is faulty, if he relies on unstated techniques to determine program needs — if any one or a combination of these factors are present, the programming may not be reasonably responsive to the community's needs. Yet the Commission will never know, unless it has its own sources of information.

From a realistic point of view, the Commission hasn't the time or resources to engage in these detailed studies. It is compelled to rely on the judgment of the broadcaster himself. This has caused considerable discomfort to some of the staff and Commissioners and has led to a constant tightening and enlargement of the requirements for full disclosure.

What was originally two steps, namely to survey the area and propose programming, has now become at least four steps:\textsuperscript{22} (1) to

\textsuperscript{21} See note 9 supra.

conduct a survey of community leaders; (2) to list their suggestions; (3) to evaluate those suggestions; (4) to describe proposed programming. The emphasis has shifted from determining program needs to determining community needs — apparently because the latter are more easily identified. The unfortunate part of this whole exercise is that the Commission is no closer to discerning the truth and upgrading programming than before.

I have suggested that the Commission must rely ultimately on the broadcaster’s showing. This is not because the Commission is without power to require a more complete showing or because it cannot, through massive efforts, discover the community’s needs for itself. Rather the reason is simply that the final program effort rests on many factors, such as economic considerations, competitors’ programming, audience surveys, availability of talent, creativity, intuition, experience and knowledge. How do you describe these influences in a program exhibit? What objective standard is available to measure creativity, knowledge, and experience? Moreover, some of the most significant factors affecting programming have nothing to do with the area survey. Furthermore, as to some of these critical factors, for example, actual experience, the Commission won’t let the broadcaster rely on it!

The inability to test programming performance effectively has led to a rather stereotyped and routine review. Commissioners Cox and Johnson rail at this. I think their complaints are misplaced. To me, the process itself is an exercise in futility.

Program Control and the Fairness Doctrine

Another current technique directly involved with programming is, of course, the fairness doctrine. I will deal with only limited aspects of it for purposes of this discussion.

One of the basic theses of the Commission, in support of its enforcement of the fairness doctrine, is the principal that the initial determination of whether to carry a matter of controversy is left to the licensee. This basic principle is demonstrably false. The Commission has plainly indicated that the carriage of matters of controversy is a necessary ingredient to operation in the public interest. The 1960 En Banc Programming Report made this clear. The Policy on Editorializing, adopted in 1949, made this clear. The program form expressly calls for a description of the policy regarding the carriage of controversial matters. A recent case held that carriage of

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23. See note 9 supra at 1913-14.
25. FCC Forms, 301, 303, 314 and 315, Section IV-A, Paras. 4, 6, and 16; Section IV-B, Paras. 4, 7, and 15.
editorials is an important ingredient in the comparative hearing process. Directly and indirectly, the Commission compels licensees to carry matters of controversy.

Thus, a fundamental premise, underlying the Commission’s assertion of authority in support of the fairness doctrine, is simply not valid. Having compelled the broadcaster to carry matters of controversy, the Commission, then, imposes the correlative duty to present opposing viewpoints, even if this requires that he furnish tapes and other broadcast material or even if he must donate time without compensation, or even if the only opposing spokesman is a thousand miles away.

To compound the broadcaster’s problem, he is constantly subject to second-guessing when, with the benefit of hindsight, the Commission decides he failed to exercise the care or diligence required in the presentation of opposing views. Perhaps he failed to give a sufficient amount of time to the opposing view; perhaps his decision that certain news and informational programming qualified as “opposing” matter was found deficient; perhaps his apportionment of time in terms of number of exposures or placement during the day was faulty; perhaps his choice of opposing spokesmen or the format for the show indicated poor judgment; perhaps his efforts to find other spokesmen were inadequate; or finally, he could discover that matters once not considered controversial were now so considered by the Commission.

Based on these examples, I would pose this simple question: Do you think these responsibilities for presentation of contrasting viewpoints and these details of enforcement result in the broadcast of more matters of public controversy than would be true were there no fairness doctrine? My personal experience indicates that the answer is “no.”

I think broadcasters generally prefer to carry all sides of controversial matters. Perhaps because of a different training and background, they don’t have the crusading zeal of the newspaper editor. They prefer balanced coverage. The fairness doctrine has not been the responsible agent for this attitude. On the other hand, the fairness doctrine has led to a failure to carry significant matters of controversy, has resulted in the cancellation of many programs because of

their controversial aspects, and, on occasion, has led to a rather bland and ineffective fare. Once again, the Commission's involvement in programming has not led to better programming.34

A. The Comparative Hearing Process and Promise v. Performance

Another indirect method of program control involves the use of the comparative hearing process and the related technique of judging "promise versus performance." In the ideal regulatory scheme, an applicant for a new station describes in detail his programming plans as required by the form. Because of the possibility of competition for the frequency, the programming plans tend to be extensive and ambitious. His application and any others are then designated for hearing. In our hypothetical situation, he would win the hearing. A primary basis for the award would be his exemplary programming commitments.

After three years in operation, he would be required to file for renewal of license. The renewal form requires a full disclosure of the past programming. By the simple device of comparing his past operation with his original promises, the Commission could determine whether he had performed substantially in accordance with those promises. A failure to do so would warrant, at a minimum, a reprimand, and at a maximum, the possible loss of his license. These sanctions would presumably encourage the broadcaster to perform in accordance with his original ambitious proposal. This, in turn, would result theoretically in better programming in the public interest.

This analysis describes, in theory, the way the system works. In practice, the system breaks down at almost every stage. When filing the initial application, many applicants file very modest programming proposals, planning that if competition develops, they will amend, as they are permitted to do, and improve their proposals. If no opposition develops, they are home free with only a modest proposal.

At the hearing level, seldom, if ever, is a case decided where the primary basis for the decision is either the proposed programming of the applicant or the past programming record of other stations owned by the applicant.35 With rare exceptions, the Commission is unable to judge program proposals or performance qualitatively even after a voluminous hearing record.

34. There are any number of specific Commission rulings on fairness complaints; there is also a 19-page Primer summarizing some 28 specific examples. See note 12 supra.

35. The only case found since adoption in 1965 of the Comparative Policy Statement, relying in major part on the programming issue is Farragut Television Corp., 8 F.C.C.2d 279, 10 R.R.2d 50 (1967); even here, other factors played a role.
The Commission's Policy Statement on Comparative Hearings as interpreted in the recent WHDH case even carries this difficulty one step further. The Commission now holds that no consideration will be given for a past programming record which is "within the bounds of average performance." The only time that past broadcast records will be taken into account is where the record shows an unusual attention to the public's needs or, conversely, shows a failure to meet the public's needs or a failure to carry out promises earlier made.

It is my opinion that this most recent policy is a confession by the Commission that judging programming is too difficult a responsibility; the holding of the WHDH case represents a significant departure from the Commission's earlier attitude on programming. By concluding that programming rarely, if ever, becomes a factor of comparative importance, the Commission recognizes that its review at renewal time is rendered considerably less effective. Finally, in comparing promise versus performance the Commission must take into account changed circumstances, economic limitations, or changes in character of community needs. It cannot hold an applicant to the letter of its promises.

Thus, in summary, although the comparative hearing process and the promise versus performance doctrine should theoretically lead to improved programming, in practical effect they have not done so and give little future promise of doing so.

B. Other Policy Considerations Affecting Program Control

Related to these practical limitations on the Commission's authority are also policy considerations. I have already mentioned the danger I see in permitting seven Commissioners in Washington, no matter how well-intentioned, to set the programming tastes and uplift the cultural level of the citizenry. Although authorities should not be needed to support that simple proposition, the case of Hannegan v. Esquire, Inc., seems directly on point. The revocation of the mailing permit by the Postmaster on the grounds that the contents of Esquire Magazine were not "for the public good" and did not make any "special contribution to the public welfare" was certainly a well-intentioned effort to protect the public interest. "But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system."

38. Id. at 158.
Yet there are those who respond that the grant of a license is a matter of privilege rather than a right and that the licensee serves as a "trustee" for the public. This theme keeps popping up among those activists who wish to impose a higher standard on the industry. They must find some legal theory to treat the broadcaster as a second-class citizen. I find no judicial precedent which persuasively establishes a basis for this distinction. The mere fact that a license was conferred does not make the holder of that license, once validly obtained, any less entitled to the constitutional protections of other citizens.

A number of cases have expressly repudiated the assumption that a licensee serves as a public trustee.\(^{39}\) It is perfectly obvious that the initial determination of program content ought to be the responsibility of the broadcaster. With some qualifications, he can normally decline to carry any particular program, no matter how urgently pressed upon him.\(^{40}\) Were this not the rule, either individual members of the public or the government would have the power to control content. Individual members of the public are even less subject to regulatory authority; the government, as I firmly believe, is not the appropriate source for this determination.

There are other arguments advanced by opponents of regulation which I don't believe help resolve the problem. One is the argument that by virtue of the first amendment, the government has absolutely no role to play in programming. But here I agree with Professor Chafee — the government cannot "keep its hands off radio."\(^{41}\) In the process of determining the "composition of the traffic," when in almost every desirable market there are more applicants available than there are channels, the Commission inevitably must devise ways to pick and choose. The Commissioners would be less than human if they chose to ignore entirely the one thing that counts — the programming.\(^{42}\)

This simple fact of regulatory life creates the difficulty. The problem is not whether the Commission has any role in programming; the problem is how much of a role should it assume and what are the parameters of its exercise. It is perhaps significant in this regard to note that some of the most violent complaints and requests for relief against broadcasters' improper programming operations come from other broadcasters. This is not simply a case of whose ox is being

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41. See note 16 supra at 638.
42. Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949).
gored. Rather, it is also a recognition that programming is the name of the game.

Another popular argument of industry against regulation runs as follows: Television is primarily an entertainment and sales medium where its techniques are professional, its impact unexcelled; yet on matters of public controversy and politics its influence is affected by other considerations and certainly is nowhere near as demonstrably effective. I don’t think the industry can have it both ways. Its power to move merchandise is closely geared to its power to mold opinion. This power imposes a special responsibility on broadcasting. But this same uniqueness is not inevitably a basis for government regulation. That depends on different considerations.

Another commonly held view is that television is of no higher order nor lower order than the print media and therefore should be subject to the same freedom from restraint. Personally, I do not find the tie-in to newspapers persuasive. Television is basically different from the print media. Its impact, as earlier suggested, is unparalleled. Television is Hollywood and Broadway combined. The need to cap-sulize, to compress, to depict action and movement, to distort in terms of time and space — all combine to distinguish television from the print media. Its immediacy and its direct involvement in the action set it further apart. Unlike newspapers, television cannot simply add another section for classified ads or travel. It cannot be a general pot pourri for all shades of interest; time limitations forbid. Unlike newspapers, television cannot be skipped, scanned or shared with other activities. One finds himself involved in the television experience. His only real alternative is to turn off the set.

The Role of the Commission

All of these considerations lead me to conclude that the role of the Commission in program control should be extremely limited. I should stop right here! However, I feel a responsibility to suggest in broad outline the scope of authority lying within the Commission’s power. This is only a broad outline because, in my judgment, the problem is largely one for the future; its solution depends in large measure on technological developments not yet fulfilled. It also depends upon a further development of the roles each means of communication will play in the social order: AM, FM, CATV, subscription or Pay TV, taped material, phonovision, data processing information, satellite communication, informational channels for retail selling and stock market reports, facsimile newspapers — all of these means of communication involve entertaining, informing and educating the public. Free television as we know it should not have to bear the total responsibility.
However, so that there is coordination and orderly development, the overall regulation of these means should be under the control of the Federal Communications Commission or another agency similarly constituted. Free television should be maintained without basic change in structure — a competitive private enterprise. Of course, individual television stations must be devoted to a public interest rather than to the licensee's private interest. That is to say, no one should have the authority to devote the public's TV time substantially to his personal business interests or his personal notions of what is right or wrong. There should be a higher order of responsibility upon licensees not to preach consistently a private theory of social justice or morality, nor to use the facilities disproportionately to promote a private economic interest.  

Moreover, licensees should be of good character and should be held to a high standard of performance in terms of their promises to the Commission and their compliance with the Commission's technical and operating rules. If there is a basic lack of character established, a pattern of irresponsible presentations over the air, or clear violations of the Commission's rules, the Commission has the responsibility to take appropriate remedial action. Licensees also should be well financed. Sadly overlooked is the fact that good local programming costs money. The Commission clearly has the authority to assume sound financing which in turn guarantees the resources for better programming.

It is also perfectly appropriate for the Commission to select in a comparative hearing that applicant it thinks will give the best practicable service, for, as stated in the well-known Johnston Broadcasting Company case, "it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service."  

Another appropriate use of the regulatory power is the selection of applicants in terms of diversification of the control of the media. It seems rather obvious that if the Commission is attempting to encourage diverse sources of information, it should not permit the development of large concentrations of control. Balanced against this is the need to encourage the growth of the industry by making it attractive to new capital. But I believe a balance can be struck between permitting too few commonly owned facilities and too many.

45. E.g., Trinity Methodist Church, South v. Federal Radio Comm., 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933).
Also, the promulgation of rules and policies which promote rather than stifle the free exchange of ideas is appropriate. I think Section 315 of the Communications Act of 1934, as amended,\(^4\) does this and is thus a desirable law, although somewhat limited in its effectiveness.

Regarding the fairness doctrine which, as I have suggested, inhibits free speech, I would substitute an overall review of a station’s performance in the areas of controversy and discussion for the present complex system of duties. Where the Commission could discern a pattern of continuing and consistent presentation of information in favor of one viewpoint, then the Commission should be entitled to take remedial action. This authority stems not from free speech considerations; rather, it stems from the concept that a broadcaster is required to utilize his facilities for a public rather than a private purpose.

Finally, in the establishment of standards, past experience suggests that the only possibility of effectiveness lies in the establishment of quantitative rather than qualitative standards of performance. The Commission’s role obviously would be passive, one of supervision and policing. I suggest, also, “minimum” standards only; if more than a minimum is involved, the Commission will find itself inevitably involved in matters of qualitative judgment. The broadcaster ought to know where the line is; not simply because he wants to know how close he can come, but more significantly, because the penalty for misjudgment can be severe.

**Conclusion**

My suggestions regarding the Commission’s role have been far from definitive. In part, this is because television’s role in helping to solve society’s ills is not firmly fixed. I do confess a certain disappointment in the limited role that commercial television has played. Nevertheless, on the whole I think the industry has been constructive and effective. It is a serious mistake to assume that the industry is not sensitive, indeed, supersensitive, to public opinion and demand.

For example, I see in the offering a settlement regarding cigarette advertising. I believe limitations will be set, though only by Congressional action. The point is that the industry will cooperate. You are familiar with many complaints regarding the amount of violence on television. *Broadcasting Magazine* predicts that for the 1969-1970 season, there will be an almost total absence of violence in the television programming.\(^4\) Critics generally agree that the performance of the television networks in the field of news is most exemplary. Yet this has never been a profitable portion of their operation.

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\(^{4}\) Broadcasting Magazine, Nov. 4, 1968, at 42.
Finally, if one scans a weekly television guide, he will find — if he really wants to find — a wide diversification of programming appealing to every significant segment of the listening public, at least in the larger markets. Today the charge that television "remains a vast wasteland" reflects only the prejudices of the speaker.

I suggested earlier that there are fundamental differences between television and newspapers. It may be prudent, in the short run, to cling to the shirt-tails of newspapers for their unlimited right to free speech is well established. But in the long run, I believe the television industry is better off to shape its own destiny and relationship to government.

Television is a new and total experience. It is part of a communications revolution. Old rules and old attitudes will not be adequate. New relationships between television and all of the other competing electronic media must be established and new concepts must be developed as to the role each will play. I do not think a responsible industry needs to be afraid to strike out on its own. We do not need newspaper precedent to stake a claim to industry freedom and responsibility.

On the contrary, the most likely guarantee that commercial television will remain free of substantial government restraint lies in the very fact that there will be a variety of communications resources. The public itself will be directly involved in the technology. To borrow a popular phrase today, within this communications revolution there will be significant "participatory democracy," thus diminishing the need for super-governmental control from Washington. You have heard, I am sure, the prediction that in the near future each home will have its own communications center in which the family will have a maximum choice of what to hear and see. Television will carve its own niche in this communications plethora.

While this cacophony of communications resources is not necessarily a pleasant thought to one born of a different generation and technology, it is, I submit, a more realistic appraisal of the direction in which we should be moving. Such a development is fully consistent with the principles of free speech, as so eloquently stated by Judge Learned Hand: 

On what have we staked our hopes? Is it less than the thesis, as yet quite unverified, that the paths toward the Good Life is to assure unimpeded utterance to every opinion, to be fearful of all orthodoxies and to face the discords of the Tower of Babel; all with the hope that in the end the dross will somehow be automatically strained out, and we shall be left with the golden nuggets of truth?