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American Broadcasting and the First Amendment

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AMERICAN BROADCASTING AND THE FIRST AMENDMENT. By *Lucas A. Powe, Jr.* Berkeley: University of California Press. 1987. Pp. x, 295. \$25.

Prior to *American Broadcasting and the First Amendment*, no legal writer had "explored the question of abuses in broadcasting regulation," according to the book's author, Lucas Powe.¹ Powe attempts to fill this void with a conversational, anecdotal account of broadcast regulation calculated to appeal to the broadcast student or dilettante, as well as the legal scholar. In addition to recounting the history of broadcast regulation, *American Broadcasting* advocates nonregulation of both the broadcast and print media. This position challenges the popular theory of partial regulation of the mass media promulgated by Dean Lee Bollinger.² According to Bollinger, maintaining a regulated broadcast media in addition to a nonregulated print media provides the best of all worlds: the regulated broadcast media equalizes communicators' disparate access to media resources, while the nonregulated print media preserves "free speech" as it is traditionally known.³ While Powe's exposé of broadcast regulation abuse is intended to invalidate Bollinger's theory, his book illustrates the difficulty of responding to a major first amendment theory in a book intended to be "fun" and "easy" to read (p. ix).

Powe presents his analysis of broadcast regulation in four sections, beginning with the history of broadcast regulation and progressing to his conclusion that deregulation of the broadcast media is warranted and necessary. In his first section, "The Setting" (pp. 11-45), Powe describes the origin of the judicially created dichotomy between the broadcast media and the print media and the government's use of this distinction to justify infringement of broadcasters' free speech rights. In *NBC v. United States*,⁴ the Supreme Court found that, while the broadcast media was protected under the first amendment, broadcast spectrum scarcity necessitated government intervention.⁵ Accordingly, the Court held that Federal Communication Commission (FCC) requirements that local broadcasting affiliates be free to select programming without constraints from the commercial broadcasting

1. P. 6. Lucas A. Powe, Jr. is Bernard J. Ward Centennial Professor at the University of Texas Law School. Powe's works include *Consistency Over Time: The FCC's Indecency Rerun*, 10 HASTINGS COMM/ENT L.J. 571 (1988); *Tornillo*, 1987 SUP. CT. REV. 345; *Economic Make-Believe in the Supreme Court*, 3 CONST. COMMENTARY 385 (1986).

2. See Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

3. *Id.* at 27, 33.

4. 319 U.S. 190 (1943).

5. 319 U.S. at 226-27.

networks did not violate broadcasters' free speech rights.⁶

The Court again emphasized the scarcity-based distinction between the broadcast media and the print media in two later cases, *Red Lion Broadcasting Co. v. FCC*⁷ and *Miami Herald Publishing Co. v. Tornillo*.⁸ In *Tornillo*, the Supreme Court struck down a statute requiring newspapers to print the replies of political candidates criticized by the newspaper. Although the Court had previously upheld application of a similar regulation to broadcasting in *Red Lion*, the *Tornillo* Court held that such a requirement violated the first amendment when applied to the print media. The disparity between the two results implicitly perpetuated the dichotomy between the broadcast media and the print media.⁹

Powe illustrates his thesis that broadcast regulation is simply a misnomer for government censorship by describing the FCC's use of its scarcity-derived power to silence early broadcast personalities such as "Fighting Bob" Shuler.¹⁰ The Reverend Bob Shuler was a prohibitionist and moralist who used his local radio show to accuse Los Angeles officials of corruption. Because both the FCC and the Court of Appeals for the D.C. Circuit found that Shuler's show "exceeded all bounds of propriety," Shuler's broadcast license was not renewed (p. 18). According to Powe, the court overlooked the possibility that Shuler's allegations were correct (p. 18). Thus, Shuler was silenced for challenging the establishment — a media role which traditionally received broad first amendment protection.¹¹

6. Powe describes this decision as a syllogism that followed from the assumption of scarcity: Because the scarcity of frequencies requires the government to allocate rights to broadcast, some mechanism of allocation was necessary. In selecting the public interest, convenience, or necessity as the mechanism, Congress did not violate the First Amendment. Thus, all First Amendment rights are intact — but significantly, these rights do not include use of radio without a government license.

P. 37.

7. 395 U.S. 367 (1969).

8. 418 U.S. 241 (1974).

9. The absence of any reference to *Red Lion* in *Tornillo* supports this contention. See Bollinger, *supra* note 2, at 4-6.

10. Pp. 13-18. The case involved was *Trinity Methodist Church, South v. Federal Radio Commn.*, 62 F.2d 850 (D.C. Cir. 1932).

11. Powe further dramatizes his point by describing the government-induced demise of Dr. "Goat Gland" Brinkley's medical advice radio show. Dr. Brinkley achieved fame for his "goat gonad" operations to increase male virility, and gave medical advice complete with prescriptions of his own line of pharmaceuticals. Pp. 24-26. Brinkley achieved wide popularity; his Milford, Kansas radio station was among the most popular in the nation, and Brinkley might have won the Kansas gubernatorial race as a write-in candidate had officials not thrown out some of his votes. Pp. 23, 26. Not surprisingly, Brinkley incurred the enmity of organized medical practitioners and was attacked by both the Kansas Board of Medical Examiners and the Federal Radio Commission (a precursor to the Federal Communications Commission) at the peak of his radio career. P. 26. On the premise that radio is regulable as an entertainment medium, the FRC declined to renew Brinkley's license because his programming was "insufficiently attuned to the needs of Kansas." Pp. 26-27. Although Brinkley's focus on the prostate, rather than the political, makes his case less compelling than Shuler's, it similarly supports Powe's assertion that

In the second section, "Licensing" (pp. 49-101), Powe describes how broadcast licensing evolved from a mechanism to prevent signal interference to a governmental conscription device to secure "public service" from broadcasters (p. 61). Powe emphasizes the potential for abuse inherent in the licensing system, describing the license award process under Presidents Roosevelt and Eisenhower as "Giving Away the Pot of Gold" (chapter 5). For example, Roosevelt attempted to retaliate against his newspaper critics by blocking newspaper ownership of broadcast stations.¹² In addition, license awards to members of the President's political party were the most common form of license abuse. Powe describes the award of a lucrative Austin, Texas VHF television license to Claudia Taylor Johnson — wife of future president Lyndon Johnson — in 1952 (p. 79). Surprisingly, Ms. Johnson's application for the valuable VHF license was uncontested, while less desirable UHF licenses were highly sought. Apparently, potential applicants for the VHF license had been deterred by the political influence of the Johnson family. Thus, according to Powe, "[p]olitics is politics,"¹³ even when free speech concerns are involved.

Powe found that the license renewal process further enhances the FCC's ability to use license awards to favor political party members. While the FCC cannot dictate a broadcaster's speech, it may refuse to renew the license of a broadcaster with whom it disagrees. Although Powe concedes the FCC has not always used its power to refuse to renew a license (p. 86), he asserts that the danger lies not in actual nonrenewal, but rather in the FCC's ability to threaten nonrenewal (p. 101). Licensed stations may become willing to further the political agenda of the party in power when their investment in a licensed station is threatened. Thus, Powe argues, any licensing system accords the federal government the power not only to award licenses based upon party preferences, but to coerce license-holders by threatening nonrenewal (pp. 100-01).

Powe's third section, "Supervision" (pp. 105-90), describes additional government attempts to use its coercive licensing power to achieve political goals and silence dissent. For example, the Democratic National Committee (DNC) attempted to use the fairness doctrine to counteract the radical right during the Kennedy administration (p. 114). Although the doctrine was intended to in-

broadcast regulation results in government censorship. See *KFKB Broadcasting Assn. v. Federal Radio Commn.*, 47 F.2d 670 (D.C. Cir. 1931).

12. P. 70. Powe illustrates FDR's determination by quoting a one-sentence memorandum FDR sent to FCC chairperson James Fly: "Will you let me know when you propose to have a hearing on newspaper ownership of radio stations[?]" P. 72 (citing E. BARNOUW, *THE GOLDEN WEB* 170 (1968)).

13. P. 80 (citing *How President's Wife Built \$17,500 into Big Fortune in Television*, Wall St. J., Mar. 23, 1964 at 1, 12).

crease the breadth of information available for public debate,¹⁴ the DNC used it as a tool for silencing speakers who were unwilling to provide the forum for the DNC's response.¹⁵ Powe's discussion recapitulates the theme of earlier sections that the government constantly manipulates broadcast regulation to achieve political ends.

Yet Powe's arguments go beyond the political realm to assert that the federal government's power over the media also maintains the cultural status quo. Powe details FCC efforts aimed at radio broadcasters to squelch language and music which challenge majoritarian cultural norms (pp. 162-90). Although the FCC may be reluctant to attempt official bans on songs or speech, he argues, it may instead use its coercive power under the licensing system to encourage self-censorship among broadcasters,¹⁶ leading those broadcasters to promulgate majoritarian communications at the cost of diversity (p. 176). Powe's primary concern, however, stems from his distrust of governmental decisionmakers: He identifies misguided FCC efforts to discourage air play of such songs as the anti-drug "Acid Queen" by The Who (p. 177) and the innocent "Puff the Magic Dragon" (p. 180) to show that the government censors not only what it dislikes, but what it doesn't understand.

In his final section, "The Present and the Future" (pp. 193-247), Powe analyzes the rationales for broadcast regulation, focusing particularly on the scarcity rationale relied on in *NBC* and *Red Lion*. Powe suggests that broadcasting suffers not from a scarcity problem, but rather from the "lack of a property mechanism to allocate the right to broadcast" (p. 201). According to Powe, the "private market in broadcast licenses [which] now flourishes," with transactions subject to only pro forma FCC approval (p. 201), provides evidence that broadcast regulation is simply a matter of economic allocation. The federal government awards VHF television licenses at no cost to licensees — who immediately resell at profit. Were the frequencies allo-

14. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969) (footnote omitted):

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their views on public issues, people and candidates, and to permit on the air only those with whom they agreed.

15. Pp. 114-15. Powe gives additional evidence of the silencing effect of the fairness doctrine by citing the reluctance of Boston radio stations to report on partisan politics following its articulation in *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1941). In *Mayflower*, the FCC found a licensee had failed to fulfill its "obligation of presenting all sides of important public questions, fairly, objectively and without bias," and renewed its application only upon a showing that the station had ceased editorializing. 8 F.C.C. at 340-41.

16. Powe describes it as "a neat trick. Drug lyrics were not banned, but should a station play such songs, it could lose its license. That, of course, has been the charm of licensing from its inception." P. 181.

cated at market cost, "excess demand [would] vanish[]" (p. 203) and there would be no need for a Federal Communications Commission (p. 201).

In a coda to this broadcast regulation analysis, Powe explores the regulatory response to cable networks. Powe asserts that the courts' rationales for broadcast regulation are inapplicable to cable because cable does not suffer from any spectrum scarcity.¹⁷ While first amendment protection of cable has evolved to a level comparable to that of the print media,¹⁸ Powe poses the FCC's initial reaction to cable as the paradigm FCC response to new technology: regulate it. Powe suggests that this is a typical governmental response to technological innovation in communications. For example, printing presses were regulated upon their introduction in England. "The rulers didn't know what to make of this new technology, and the easiest way to make sure it did not get out of hand was to keep it under royal scrutiny" (p. 214). Powe cites the American judiciary's similar response to motion pictures (pp. 27-28), broadcasting (p. 12), and more recently, cable (pp. 220-21). Powe ominously warns that, "as newer technologies become available to the public there will be an intense desire to keep them under control" (p. 215). Accordingly, Powe suggests that all new technologies should be greeted with a presumption of nonregulation.¹⁹

Powe's book thus provides the uninitiated with a guided tour through the world of broadcast regulation. On your right is the FCC, on your left are the broadcasters it silences, including not only the colorful figure of Reverend Shuler, but all-time favorites such as Puff, the Magic Dragon. Because the book is calculated to reach an audience unfamiliar with the legal theories, Powe finds it unnecessary to explore free speech theory beyond a general preference for a laissez-faire marketplace model. Powe's failure to examine adequately other theories of "free speech" is unfortunate. The lay reader encountering broadcast regulation for the first time receives only cursory exposure to the major first amendment theories which form the premise of broadcast regulation. Similarly, the legal reader will find the superficial analysis inadequate to support Powe's preference of nonregulation over Bollinger's partial regulation scheme.

17. P. 217. This point appears superfluous, considering Powe's rejection of these rationales in the previous chapter, "The Modern Rationale for Broadcast Regulation" (pp. 197-215).

18. The FCC realized soon after the introduction of cable technology that its regulation could not be premised on broadcast regulation rationales, but continued to regulate cable in a politically compelled effort to protect broadcasters from cable competition. Pp. 219-20. Eventually, in *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), the Court of Appeals for the D.C. Circuit held that the absence of spectrum scarcity required that cable receive the same first amendment protections as the print media. 567 F.2d at 44-51. This position has yet to gain Supreme Court approval.

19. See pp. 254-56.

In contrast to Powe's laissez-faire approach, Bollinger's thesis rests on "public access theory."²⁰ Under this doctrine, the "uninhibited, robust, and wide-open" public debate envisioned by the Supreme Court in *New York Times Co. v. Sullivan*²¹ cannot take place when the most pervasive communications media are controlled by a small group of private parties concerned only with maximizing profits.²² Because profits depend upon audience size, these owners promulgate mainstream perspectives designed to appeal to the maximum number of readers, viewers, or listeners, while unorthodox or unpopular views are unable to gain access to comparable forums.²³

To Bollinger, a completely unregulated media — both broadcast and print — would perpetuate these marketplace inequities. While government regulation of both media might correct these inequities, it might endanger other first amendment values by chilling speech, risking government abuse, and increasing the amount of speech regulation.²⁴ In contrast, regulation of the broadcast media and nonregulation of the print media creates a "beneficial tension" that minimizes the costs associated with each of these approaches.²⁵ While Bollinger agrees with Powe that the distinction between the broadcast media and the print media is ill-founded,²⁶ he asserts that the distinction has yielded a desirable result.

Powe rejects Bollinger's thesis on the ground that the FCC's abuse of its licensing power renders regulation of the broadcast media undesirable. Powe focuses on Bollinger's assertion that there has been an "absence of egregious abuses of power by the FCC."²⁷ Powe disagrees; he believes the FCC frequently and egregiously abuses its regulatory power.

However, Powe's attempt to refute Bollinger does not specifically address Bollinger's arguments. For example, Powe describes the Nixon Administration's attempt to silence its critics among the press

20. The leading authority for this theory is Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

21. 376 U.S. 254, 270 (1964).

22. Because this theory assumes a scarce medium imposed by sociological and economic factors, rather than the physical scarcity of broadcast frequencies relied on in *Red Lion* and *NBC*, it applies to natural monopoly newspapers as well as to the broadcast media. See Barron, *supra* note 20, at 1643-47; see also Jacklin, *Especially Protected Speech: Rights of Access to the Media*, in *FREE BUT REGULATED* 248, 250 (D. Brenner & W. Rivers eds. 1982).

23. See W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 88-90 (1984); Barron, *supra* note 20, at 1647.

24. See Bollinger, *supra* note 2, at 27-33.

25. *Id.* at 33.

26. See *id.* at 8-16. Like Powe, Bollinger focuses extensively on the scarcity rationale relied on in *NBC* and *Red Lion*. "The scarcity rationale does not . . . explain why what appears to be a similar phenomenon of natural monopolization within the newspaper industry does not constitute an equally appropriate occasion for access regulation." *Id.* at 10.

27. *Id.* at 33.

by using the Antitrust Division of the Justice Department, the Internal Revenue Service, and the FCC "to intimidate a news medium which depends for its existence upon government licenses."²⁸ Powe uses Nixon's efforts to illustrate the federal government's ability to control any medium which depends upon the federal government for its existence.

Bollinger, on the other hand, used the Nixon attack to illustrate his assertion that the nonregulated print media functions as a check upon the regulated broadcast media.²⁹ While "broadcasters may initially have been reluctant to cover Watergate events because of fears of official reprisals and access obligations," Bollinger stated, "a decision not to cover the story would have been impossible once the print media began exploiting it."³⁰

Still, Powe asserts that broadcast regulation poses a greater threat to free speech than Bollinger anticipated. Although the FCC is permitted to regulate only the broadcast media, it may influence print media establishments which own broadcast affiliates. For example, the Nixon administration attacked the *Washington Post* indirectly by challenging its broadcast holdings (pp. 121, 131-32). Powe appears to be arguing that the FCC can achieve a degree of indirect control upon the print media which Bollinger did not anticipate.

However, Powe ignores the benefit side of Bollinger's partial regulation equation. Bollinger's theory does not necessarily fail upon a showing that the traditional free speech costs of partial regulation are high. Rather, such costs must outweigh the potential free speech benefits of correcting the access inequities which precede government regulation. For example, Powe might argue that such inequities do not exist and therefore require no corrective regulation. Powe might also argue the regulations do not and cannot correct marketplace errors,³¹ or that federal regulation threatens the marketplace-of-ideas to the degree that the value of correcting its inequities is negligible. However, Powe's anecdotal presentation precludes the systemic balancing necessary to support such assertions.³²

28. Pp. 124-25 (citing R. NIXON, *THE MEMOIRS OF RICHARD NIXON* 412 (1978)). According to Powe, this "titanic test of strength" between the President and the broadcast media was ended only by the advent of Watergate. P. 132.

29. Bollinger, *supra* note 2, at 32-33.

30. *Id.* at 33.

31. See, e.g., former FCC Commissioner Glen O. Robinson's assertion that the FCC's notable lack of success in achieving diversity and responsiveness to community needs through broadcast regulations, in addition to the "serious constitutional issues raised by such an activity," constitute strong reasons to doubt the wisdom of broadcast regulation. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 261 (1978).

32. *Cf.*, e.g., Alderson, *Everyman TV*, in *FREE BUT REGULATED* 255, 256-57 (D. Brenner & W. Rivers eds. 1982) (access requirements imposed upon cable franchises have resulted in discussion of ideas ranging from astrology to feminism and parapsychology that are unable to gain access to network channels, as well as more programs featuring women, blacks, Hispanics, and

While Powe's mistrust of the government motivates his deregulation advocacy, his failure to respond to public access theory denies him the opportunity to argue why market allocation is preferable. For example, Powe agrees with Bollinger that television broadcasters function within economic constraints that impose a censorship function similar to that of the government.³³ However, were Powe's deregulation model adopted, such majoritarian censorship would likely pervade all profit-motivated communication media.³⁴ It remains unclear why majoritarian domination of communication channels is preferable if imposed by the marketplace rather than by the government.

Powe's failure to respond fully to Bollinger's theory of partial regulation may have frustrated both of his goals in writing *American Broadcasting and the First Amendment*. Although his stories may be "fun" and "easy" to read, Powe's one-sided presentation of the broadcast regulation debate risks misleading the lay reader toward whom he targeted his book (p. 1). After reading the parade of horrors Powe presents as representative of broadcast regulation, uninitiated readers will wonder at the judiciary's idiocy in allowing any form of broadcast regulation.

Despite his articulated goal of refuting Bollinger's partial regulation theory, Powe apparently believes his targeted audience is unable to digest the finer points of Bollinger's arguments. Thus, he presents only half of the equation — the costs half — without account for potential benefits access regulation may create. Because Powe has proficiently analyzed public access theory in other settings,³⁵ this shortcoming is unfortunate for *American Broadcasting* readers.

Powe hopes, at a minimum, to shock the "complacency of Bollinger's followers" (p. 248). Even if the harms of governmental abuse do not outweigh the benefits of access regulation, such abuses still injure the values and goals that regulation seeks to achieve. Powe's identifi-

members of other minorities than are available on major networks); Weissman, *The FCC and Minorities: an Evaluation of FCC Policies Designed to Encourage Programming Responsive to Minority Needs*, 16 COLUM. J.L. & SOC. PROBS. 561 (1981) (the FCC has the capability to implement minority representation in radio programming, but presently does not due to an inadequate regulatory scheme); Wimmer, *Deregulation and the Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform*, 8 HASTINGS COMM/ENT L.J. 329 (1986) (the deregulation movement has undercut FCC efforts to equalize minority participation in the broadcast media).

33. See pp. 163-65 for Powe's discussion of the economic incentives for retaining violence on television while censoring sex and immorality.

34. William Van Alstyne asserts that, despite abuses of federal regulations, it would almost surely be a serious mistake literally to "privatize" the airways completely. In a society where the effective speech-rights of all are already by no means equal (to the extent that they obviously depend significantly upon one's "speech-property" holdings), it is not obvious that the freedom of speech would be appropriately enhanced by exclusive reliance upon a private property system that would literally drive out all those unable to compete effectively with dollars.

W. VAN ALSTYNE, *supra* note 23, at 88 (emphasis in original).

35. See Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243.

cation of flagrant broadcast regulation abuse should thus be taken seriously by even the most ardent partial regulation theorist. However, shocking Bollinger's followers and converting them are two different things. While Powe's litany of abuse may achieve the former goal, his arguments fail to compel the latter.

— *René L. Todd*