Halfway Home: On Powe's *American Broadcasting and the First Amendment*

Ian Ayres

LUCAS A. POWE, JR., *American Broadcasting and the First Amendment*. Berkeley: University of California Press, 1987. Pp. 312. $25.00.

Examining the proper role of broadcast regulation remains a central means for testing our understanding of the First Amendment. This is true not only because broadcasting plays a uniquely pervasive role in shaping public debate, but because broadcast regulation has continually presented courts with commentators with real and pressing issues that force us to give concrete meaning to the lofty exhortation "Congress shall make no law . . . ." In the past year alone, the Federal Communications Commission rescinded its controversial but long-standing fairness doctrine;[1] stepped up enforcement of its decency standards;[2] and may soon force Rupert Murdoch, by the legislative legerdemain of Senator Kennedy, to divest himself of dual media ownership in Boston and New York.[3]

With these and other issues of broadcast regulation before the courts, Lucas Powe offers a powerful and thought-provoking book, *American Broadcasting and the First Amendment*, to shed empirical light on the efficacy of government control of the electronic press. By presenting a rich and detailed account of the actual history of broadcast regulation in the United States, Powe intends to distinguish among the competing First Amendment theories which, as he correctly points out in his introduction, are "contingently based on facts" (at 6).

Ian Ayres is a Research Fellow at the American Bar Foundation, and assistant professor of law at Northwestern University. Ph.D. (economics) 1988, Massachusetts Institute of Technology; J.D. 1986, Yale Law School. He thanks Mark Pals, Dan Polsby, Peggy Schmitt, and Peter Siegelman for their comments.

1. See Robert D. Hershey, Jr., F.C.C. Votes Down Fairness Doctrine in a 4–0 Decision, N.Y. Times, Aug. 5, 1987, § 1, at 1, col. 4.

2. Monroe Price, The FCC Keeps It Clean, N.Y. Times, April 30, 1987, at A31, col. 1.

3. See Charles Storch, Playing Media Monopoly: U.S. Has Tricky Task of Enforcing Ownership Rule, Chicago Tribune, Jan. 17, 1988, § 4, at 1, col. 1.

This essay suggests that while Powe's attempt is noble, his methodology is incomplete and the facts he presents are not sufficient to reject any of the competing First Amendment theories. The first section of this essay describes the theoretical landscape in which Powe operates. The second and third sections describe the weaknesses in Powe's factual approach and examine the FCC's fairness doctrine to suggest what a more complete empirical test would entail. The fourth section relates the competing theories of broadcast regulation to economic theories of capture.

I. FOUR THEORIES OF BROADCAST REGULATION

Powe's sense of history is apparent not only in his substantive account of the development of the FCC policies but also in his careful explication of the evolution of First Amendment thought within the academic community (at 3–7). His description, at its starkest, identifies the four clearly delineated theories of broadcast regulation shown in figure 1.

Broadcasting and Newspapers are

	Different	*The Same*
Reg. Neither		Powe
Reg. Only Broadcasting	Supreme Ct.	Bollinger
Reg. Both		Barron

Fig. 1

In choosing among the varying camps, free speech theorists have focused their initial attention on whether the broadcasting and print media differ in a meaningful way.[4] The four camps agree, at a fundamental level, that the degree of structural similarity between broadcast and print speech should inform our decision as to the proper role of regulation.

As Powe explains, until the 1960s the accepted and received legal tradition was that broadcasting was different and that the difference was scarcity. For example, Justice White, in his landmark *Red Lion* opinion,[5]

4. See, e.g., Frederick Schauer, Free Speech and the Demise of the Soapbox (Book Review), 84 Colum. L. Rev. 558, 559 (1984).

5. Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969).

stressed the technological basis of the scarcity difference between broadcasting and other types of communication:

> [T]he range of human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. . . . [O]nly a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.[6]

The Supreme Court's theory was, and is, that television and newspapers are not similarly situated and therefore need to be treated differently. Specifically, the scarcity of the broadcast spectrum could justify "equal time" access regulation of radio and television that would be constitutionally infirm as applied to newspapers.[7]

In contrast to the Supreme Court's spectrum-scarcity theory, the three other prevailing views of broadcasting reject any meaningful structural difference between print and broadcast communication. Starting in 1967 with Jerome Barron's "Access to the Press—A New First Amendment Right,"[8] many academics came to believe that economic forces—limiting, for example, the viability of more than one or two newspapers in a town—could effectively make printed speech just as scarce as the broadcasting spectrum. But general agreement that there are elements of relative scarcity in both broadcast and print media has not unified academics on the proper role of broadcast regulation.

Proponents of the Barron tradition focus on the similar failure of newspapers and television in the marketplace of ideas. Barron suggested that these similar failures argue for extending broadcast access regulation to newspapers.[9] The Supreme Court clearly rejected Barron's proposed

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6. *Id.* at 387–88. White elaborated: "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Id.* at 375–76 (footnote omitted).

7. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

8. 80 Harv. L. Rev. 1641 (1967).

9. *Id.* at 1666. Professor Owen Fiss goes beyond Barron's access theories to suggest that government will at times need to limit some speech to ensure that other voices will not go unheard. See Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405 (1986). See also Powe, Scholarship and Markets, 56 Geo. Wash. L. Rev. 172 (1987) (criticizing Fiss's theory).

extension in its 1974 *Miami Herald* decision.[10]

In 1976, Lee Bollinger proposed an innovative theory which, like Barron's, argued that both print and broadcast media were susceptible to market failure but which "apologized" for the Supreme Court's different treatment of the media.[11] In essence Bollinger argued that the Supreme Court had reached the correct result in *Red Lion* and *Miami Herald* but for the wrong reasons. As Powe summarizes:

> Bollinger went one step further [than Barron], to the provocative thesis that "the very similarity of the two major branches of the mass media provides a rationale for treating them differently." The separation of broadcasting from print provides the nation with "the best of both worlds": "access in a highly concentrated press and minimal government intervention." Access and balance are important goals, but governmental regulation always brings with it the risks of censorship, either private or public. The fact that print is unrestrained, however, provides a check on those risks: information not disseminated by broadcasters will be available in newspapers, and the very existence of an unregulated press will provide a competitive spur to offset any tendency of broadcasters to be excessively timid.[12]

Powe's work is explicitly written "against the background" of Barron's and Bollinger's theories (at 4). Powe agrees with Barron and Bollinger that there is no relevant constitutional distinction between print and broadcasting. And indeed, Powe presents a provocative and well-supported thesis that "difference" itself is largely a historical artifact—that new forms of communication have historically been denied free speech protection at their inception because society does not regard the content of their speech worthy of First Amendment status.[13] But Powe, unlike

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10. 418 U.S. 241.

11. Lee C. Bollinger, Jr., Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1 (1976).

12. Powe at 5 (citations omitted) (quoting Bollinger, 75 Mich. L. Rev. at 36, 27, 36).

13. Under Powe's theory, society extends First Amendment protection only after the new speakers have gained society's respect. To support this thesis Powe points out how even Milton, one of the first great exponents of the virtues of a free press in his *Areopagitica*, "did not find the licensing of newsbooks inconsistent with freedom of the press" (at 2). Powe explains: "Newsbooks were, at the time, a relatively young phenomenon, initially introduced only thirty years before. . . . Milton could easily distinguish newsbook authors from thoughtful, serious people who gave, as he himself did, time and care to their work" (at 2–3).

Similarly, Powe suggests that the courts initially refused to extend radio First Amendment protection because radio broadcasts "were much closer to circus acts" (at 29); see Trinity Methodist Church v. FRC, 62 F.2d 850, 851 (D.C. Cir. 1932). Powe extends this thesis not only to the development of cable, but to our current attitudes as to whether a child playing Pac-Man is "having a First Amendment experience" (at 23).

Powe's descriptive thesis can interestingly be tied to those of Professors Meiklejohn and Bork, who prescriptively have suggested that absolute free speech protection might be limited to public or political discourse; see A. Meiklejohn, Free Speech and Its Relation to Self

Barron and Bollinger, stresses the success of our unregulated print tradition. Accordingly, Powe turns Barron's theory on its head and argues that similar treatment should entail extending our First Amendment (nonregulated) treatment of newspapers to television and radio broadcasting (at 254–56).

American Broadcasting and the First Amendment represents Powe's brief for eliminating the regulation of American broadcasting. Powe's underlying thesis is that "abuses of licensing are an inevitable by-product of the decision to license and to supervise the licensees" (at 6). To substantiate these theories Powe provides a richly detailed account of the censorship and political manipulation that have wracked broadcasting regulation ab inititio. Here, we find not only suppressions of the colorful Fighting Bob Shuler[14] and Dr. Brinkley, the "goat doctor,"[15] but also the fallout of Nixon's assault on the networks and the Kennedy administration's manipulation of the fairness doctrine (at 22–27, 113–16, 121–41).

In providing this detail Powe has succeeded abundantly in fulfilling his desire "to write a book that is easy—and fun—to read" (at ix). More importantly, Powe has convincingly demonstrated that broadcast regulation has been continually subject to political abuse and that it will continue to be in all likelihood. But it is another matter to concede that broadcast regulation should be scrapped. Powe's attempt to empirically test the competing theories is laudatory and long overdue. The next section of this essay will suggest, however, that Powe's methods are severely biased toward rejecting any regulation of the broadcast medium. Focusing on the now-defunct FCC fairness doctrine, this essay suggests that even if we accept Powe's empirical conclusion, regulation may be justified.

II. SHORTCUTTING THE COST-BENEFIT ANALYSIS

In his conclusion, Powe claims that the primary objective of his book is to empirically refute Bollinger's thesis that "a press half free and half tethered provides us both the uninhibited reaching and the balance neces-

Government (1948), and Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971). Powe's theory might be seen as a dynamic analog to those theories whereby purveyors of new forms of communication gain protection only when they begin to seriously concern themselves with governmental affairs.

14. Shuler, a self-described "scrapper for God," broadcast from a one-kilowatt station in Los Angeles (at 13–15). In 1930 the Federal Radio Commission refused to renew his license because his attacks on local public officials were, in the commission's words, "sensational rather than instructive" (at 16; quoting Trinity Methodist Church v. FRC, 62 F.2d 850, 853 (D.C. Cir. 1932)).

15. Dr. Brinkley's epithet derives from his advertised practice of implanting the gonads of a young Ozark goat into the scrotum of a patient to increase his (the patient's) libido. In 1930 the Federal Radio Commission refused to renew his license (Powe at 26).

sary to serve First Amendment goals" (at 248).[16] One would think that to assess Bollinger's thesis Powe would need to compare the benefits of regulation with its costs. The book, however, surprisingly only examines the excesses, not the successes, of broadcast regulation.[17] How can this be? In his conclusion, Powe presents his most direct statement of how his methodology relates to his goal: "This book, quite obviously, is my dissent [to Bollinger's thesis]. The evidence I have presented demonstrates that the licensed half of the press has been subject to political abuses wholly inconsistent with a concept of freedom of expression. I do not believe, therefore, that Bollinger's thesis can stand" (at 248). This passage, on its face, is perplexing. How could it be "quite obvious" that Powe's detailed review of regulatory abuse is sufficient by itself to tip the cost-benefit scale without an investigation as to whether regulation furthered Bollinger's suggested benefits of balanced reaching? One answer could be that Powe is arguing that the costs of regulation are so significant that no benefits would be sufficient to outweigh them.

It seems, however, that Powe is taking another tack. Instead of arguing that the costs of regulation are so high that the benefits could not outweigh them, Powe seems to argue that the benefits of regulation are so low that any costs would outweigh them. Although not fully articulated, Powe's implicit faith in the success of the unregulated marketplace of ideas seems to substitute for any analysis of the benefits of regulation. Repeatedly, Powe asserts the strength of our First Amendment tradition: "[T]he older First Amendment, which rejects an affirmative government role as being fundamentally inconsistent with an open democracy, has *served us well* and ought not to be discarded" (at 254–55; my emphasis). Surely, this statement is just as much factually contingent as the theories Powe attempts to disprove; but Powe's assertion remains unexamined in his work.

It is only by making this implicit assumption—that the unregulated marketplace of ideas works well[18]—that Powe is able to focus solely on the costs of regulation. Powe's argument then goes: since the unregulated market works, any abuses in the regulated marketplace of ideas must be bad. In Powe's world, we could always do at least as well by deregulating.

Powe's tacit faith in the unregulated marketplace of ideas puts an upper bound on the possible benefits of regulation. Only by assuming this

16. See Bollinger, 75 Mich. L. Rev. at 33 (cited in note 12). Bollinger's partial-regulation thesis is deserving of such attention because it, according to Powe, "swept the legal academy . . . becoming the standard citation in any discussion of the topic" (at 5).

17. See Powe at 4: "Nor is this a book extolling the successes of American broadcasting, although to be sure there have been many."

18. Powe understandably fails to define his phrase "served us well." Notions of efficiency or wealth maximization have little empirical content in the First Amendment context. More fundamentally, it is impossible to aggregate the disparate preferences of society in a unified maximand. See K. Arrow, Social Choice and Individual Values (1951); *In re* Changes in the Entertainment Formats of Broadcast Stations, 57 F.C.C. 2d 580, 598 (1976).

upper bound could the political abuses detailed in his book be "totally inconsistent" with the First Amendment. In its extreme form, any single abuse of broadcast regulation could be sufficient to satisfy the test. The test is severely biased toward rejecting the efficacy of regulation.

But Bollinger's thesis does not rely on regulation being costless (see Powe at 281 n.1). In contrast to Powe, we might ask instead: What happens if unregulated speech also produces abuses wholly inconsistent with freedom of expression? What happens if we are troubled by the dominance of "Love Boat" programming on the networks?[19] If we begin to ask these questions, Powe's proof begins to unravel.

By implicitly relying on the success of our First Amendment tradition,[20] Powe is able to avoid embarking on the much harder comparative problem of whether regulation on balance produces a richer public debate than a wholly unregulated market. While this issue would be many times more difficult, it is necessary to resolve the question at hand.[21]

To begin to understand what a more complete cost-benefit test would look like, the next section examines one of the pivotal issues of broadcast regulation—the fairness doctrine.[22]

III. ANALYZING THE FAIRNESS DOCTRINE

In *Red Lion*, the Supreme Court upheld the constitutionality of the FCC's fairness doctrine, which required "that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage."[23] Powe and other critics of broadcast regulation

19. The "Love Boat" image of First Amendment failure was first articulated by Professor Fiss. See Fiss, 71 Iowa L. Rev. at 1411 (cited in note 10).

20. Our First Amendment "tradition" of securing and extending the right of free speech arguably only has the recent pedigree of Holmes's opinions in the 1910s and 1920s. See, e.g., Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting). See generally H. Kalven, A Worthy Tradition (1988).

21. A similar slanting of the cost-benefit balance can be found at times in the writings of Judge and Professor Richard Posner: "This slanting of the empirics rises sometimes to theoretical proportions as [Posner] ignores entire well-accepted categories of costs or benefits." John Donohue & Ian Ayres, Posner's Symphony No. 3: Thinking About the Unthinkable, 39 Stan. L. Rev. 791, 801 (1987).

22. Controversies concerning the fairness doctrine transcend the FCC's August repeal of the rule. 52 Fed. Reg. 3176 (August 24, 1987). Even before the FCC's action, the House and the Senate had passed a bill, S. 742, codifying the doctrine. On June 20, 1987, President Reagan vetoed the measure, calling it "antagonistic to the freedom of expression guaranteed by the First Amendment." Fairness Doctrine Vetoed, The Week in Congress (CCH) No. 25, at 1 (June 26, 1987). Subsequent to the FCC's repeal, the House in December attached another codification of the fairness doctrine to a $593 billion appropriations bill. House Passes All-in-One Appropriations Bill, 45 Cong. Q. 2972 (Dec. 5, 1987). This so-called Dingell amendment was subsequently sent to the Senate and defeated on the Senate floor. See 133 Cong. Rec. §§ 17719–20 (daily ed. Dec. 10, 1987). At this writing, Congress has failed to pass a statutory codification of the doctrine.

23. 395 U.S. at 369.

have long criticized the doctrine for its chilling effect on broadcasters.[24] The chilling effect argument asserts that broadcasters would rather not carry any side of an issue than be forced against their will to cover all sides.

The existence *vel non* of a chilling effect is of central importance to Powe in proving the failings of the fairness doctrine: if mandated access chills diverse coverage, then regulation fails to promote a robust public debate. Accordingly, Powe addresses Justice White's arguments in *Red Lion* that the fairness doctrine's chilling effect will be small:

> How, then, could such [a chilling] effect be avoided in broadcasting? Justice White provided a direct answer: the government would be responsible for preventing any chilling effect. Should the government perceive that a licensee is too timid, the FCC would have the duty to strip the licensee of its right to broadcast. In the Court's view, the chilling effect would not exist, because the same mechanism that was thought to cause the chill would also serve to warm it up.[25]

Under White's theory,[26] the two branches of the fairness doctrine are constitutionally complementary. The fairness doctrine's diversity branch (mandating that different sides of covered issues be presented) was constitutionally acceptable only if the coverage branch (mandating the coverage of issues of public concern) could offset the risk of a chilling effect.

The centrality of the fairness doctrine's chilling effect and White's *Red Lion* response to Powe's enterprise is made explicit in the third chapter of the book: "The remainder of this book will be directed to the question of whether government has kept the promise that Justice White believes was made" (at 44, 45). Thus, in Powe's world the efficacy of broadcasting turns on whether the government has lived up to its promise of preventing any chilling effect.[27]

Powe's statement notwithstanding, very little if any of the book addresses directly the question of whether the diversity branch of the fairness doctrine has reduced the quality or breadth of public debate. While an

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24. See Thomas G. Krattenmaker & Lucas A. Powe, The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream, 1985 Duke L.J. 151.

25. Powe at 43–44; see also Red Lion, 395 U.S. at 393–94.

26. Powe suggests that White's arguments against the existence of a chilling effect must be based on the assumption that broadcasters are "a durable lot and would be undaunted" or are "a heartier breed than print journalists" (at 44, 45). This is one of a few instances in the book in which rhetorical excess eclipses Powe's analytics. White's theory belies any notion that broadcasters are heartier than print journalists. Instead, it assumes that, in following their self-interest, broadcasters will respond to incentives under the regulatory regime.

27. It should be noted that Justice White did not rely wholly on the fulfillment of the government's promise: "And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." Red Lion, 395 U.S. at 393.

FCC dominated by Reagan appointees has investigated this issue and concluded that the doctrine does indeed chill,[28] few of the abuses that Powe catalogs can be tied to the fairness doctrine's diversity requirement. An empirical inquiry into whether our First Amendment values are enhanced by the fairness doctrine of coverage and diversity seems inherently subjective, turning on the listener's normative definition of diversity and balance. And Powe seems to eschew this empirical tack.

It is important to stress, however, that even if one determines that application of the fairness doctrine has chilled public debate, this is not necessarily an argument to scrap the diversity prong of the fairness doctrine.[29] Indeed, once we realize the complementary nature of the diversity and coverage branches, an equally plausible conclusion would be that we should step up our enforcement of the coverage requirements. Traditionally, the FCC has been slow to enforce the coverage requirement.[30] Determining what constitutes an important public issue has been thought to be more intrusive and involve more content regulation than a determination under the diversity branch of whether different sides of an issue have been adequately presented.[31]

But Powe's analysis completely fails to consider whether increasing the non-renewal threat under the coverage prong would reduce the chilling effect. Thus, even in granting that Powe has identified the costs of current regulation, it is unclear whether the response should be more regulation (i.e., heightened enforcement of the coverage requirement) or less (i.e., lessened enforcement of the diversity requirement).

A more glaring omission in Powe's efforts to discredit Bollinger's partial regulation thesis is Powe's failure to inquire into how the unregulated press affects regulated speech. Indeed, one of the beauties of Bollinger's theory is that the competitive spur of unregulated printed speech can serve as a *substitute* for the fairness doctrine's coverage requirement in reducing the all-important chilling effect. Even conceding, as Powe would like, that (1) the coverage requirement fails to deter the chilling effect, and (2) en-

28. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143 (1985); see also Krattenmaker & Powe, 1985 Duke L.J. at 165–66 (cited in note 24).

29. The recent demise of the fairness doctrine was, in fact, only a rescission of the diversity branch, as broadcasters are still required "to meet local needs as a condition for holding a license." Hershey, Aug. 5, 1987, N.Y. Times, § 1, at 1 (cited in note 1). The FCC decision also does not affect the equal time rule for competing federal political candidates; the personal attacks rule (requiring stations to offer individuals who are personally attacked during a discussion of a controversial issue a reasonable opportunity to respond); or, the political editorial rule (requiring a station taking an editorial position against a political candidate to provide a response). *Id.*

30. Telecommunications Research and Action Center v. F.C.C., 801 F.2d 501, 516 (D.C. Cir. 1986) ("In practice, . . . the Commission exercises very limited review of . . . the obligation to devote an adequate amount of time to the discussion of public issues").

31. *Id.*; Fairness Report, 48 F.C.C.2d 1, 9 (1974).

forcing the coverage requirement inappropriately interjects government content regulation into the marketplace of ideas, the Bollinger theory allows an alternative free market mitigation of the chilling effect. As outlined in the first section of this essay, Bollinger suggested that unregulated newspapers not subject to the chilling diversity requirements of the fairness doctrine would raise issues of public concern—and that once such issues were raised, the regulated broadcaster would be forced to cover them.

But Powe devotes precious little space to a consideration of how regulated and unregulated media interact—a focus that would be necessary to any reasonable assessment of the Bollinger theory. The omission is the more confounding because the task in relation to others here is less normative. It should be relatively straightforward to identify instances in which the networks responded or failed to respond to controversial issues first raised in newspapers. But here Powe does little more than analyze one of Bollinger's own examples—Watergate.

While Bollinger directly cites the Watergate episode in support of his theory that newspapers can force coverage of controversial issues,[32] Powe emphasizes the networks' dearth of pre-election coverage as evidence of a chilling effect.[33] Only CBS broadcast any significant coverage, a two-part series, which Powe marginalizes as being merely "responsible journalism, something possibly overdone but also overdue" (at 139). Paradoxically, Powe emphasizes CBS's effect on the *Washington Post* ("CBS may have helped the *Washington Post*") (*id.*). But in a book attempting to rebut Bollinger's thesis, the much more relevant issue is the *Post*'s effect on CBS: whether the *Post*'s coverage made it necessary for the networks to cover Watergate. This inversion is especially odd given Powe's recognition that the "*Post* remained the vanguard" of Watergate coverage (*id.*).

In sum, a more complete cost-benefit analysis of the fairness doctrine would require an estimate of the degree to which (1) the diversity requirement creates more diversity, (2) the current coverage requirement eliminates the chilling effect, (3) a "beefed up" coverage requirement would eliminate the chilling effect, and (4) competition from the unregulated press eliminates the chilling effect. Such a factual inquiry is alien to Powe, because he is more interested in judging broadcast regulation by its costs than its benefits. Even Powe's analysis of the costs of regulation is driven by his particular theories of regulatory abuse. The next section analyzes

32. Bollinger, 75 Mich. L. Rev. at 33 (cited in note 12) ("broadcasters may initially have been reluctant to cover Watergate events because of fears of official reprisals and access obligations, but a decision not to cover the story would have been impossible once the print media began exploring it").

33. Powe at 138: "The total time devoted on the news to all Watergate coverage on NBC was slightly over forty-one minutes; ABC had sixty-five seconds more."

Powe's theory of regulatory abuse by comparing and recasting it in terms of the regulatory capture literature.

IV. DIFFERENT THEORIES OF CAPTURE

Powe identifies two general classes of FCC regulatory abuse: favoritism and censorship (at 193). The former concerns the agency's illegitimate support of speech; the latter concerns its illegitimate hindrance of speech. While the FCC's use of favoritism or censorship to benefit any private interest would be evil, a complete understanding of broadcast regulation should include a theory of who is likely to wield the agency's potentially evil power. Powe's book provides such a theory: the president will tend to control the FCC and the FCC will tend to control the courts.[34] This section attempts to examine Powe's theory within a "capture" theory of regulatory abuse.

Traditional theories of regulatory "capture" posit that administrative agencies are susceptible to the influence of the industries they seek to regulate.[35] Under this theory, the industry captures the agency—thereby getting the agency to do the industry's bidding—commonly to establish an industry cartel. Thus the Civil Aeronautics Board was thought to set monopoly air fares for the airlines and the Interstate Commerce Commission was thought to raise rates for the trucking industry.[36]

To create a cartel, firms need to reach an agreement, detect breaches of the agreement, and punish those firms that breach.[37] Regulatory capture is an especially effective form of rent-seeking behavior because the ensuing cartel can avoid problems of enforcing the cartel agreement. While members of private cartels must construct methods of self-enforcement,[38] a cartel organized by a regulatory agency can look to the Leviathan to deter breaches of the cartel agreement. Price chiseling on the CAB or the ICC thus becomes a violation of federal law.

One strength of regulating only part of an industry is that it mitigates

34. Powe at 106–7: "Commission decisions favor, first, the president over all others and, second, incumbents over challengers."

35. For various expositions of capture theory, see George Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971); Sam Peltzman, The Growth of Government, 23 J.L. & Econ. 209 (1980); Gabriel Kolko, Railroads and Regulation: 1877–1916 (1965); John Shepard Wiley, Jr., A Capture Theory of Antitrust Federalism, 99 Harv. L. Rev. 713 (1986).

36. See, e.g., George W. Hilton, The Consistency of the Interstate Commerce Act, 9 J.L. & Econ. 87, 113 (1966); Richard E. Caves, Air Transport and Its Regulators (1962); Charles R. Plott, Occupational Self-Regulation: A Case Study of the Oklahoma Dry Clearners, 8 J.L. & Econ. 195 (1965).

37. See Ian Ayres, How Cartels Punish: A Structural Theory of Self-enforcing Collusion, 87 Colum. L. Rev. 295, 296 (1987).

38. *Id.* at 298–304.

the efficacy of administrative capture as a means of creating cartels. To be sure, the agency can still be used as a cartel "ringmaster"[39] to make it easier for an industry to reach an agreement and detect deviations from that agreement. But partial industry regulation—by explicitly exempting certain firms from agency overview—destroys the effectiveness of the agency as an enforcer of the cartel agreement. Partial regulation thus forces the cartel to face the same problems of self-enforcement that plague private cartels. If the cartel has limited private punishments at its disposal, there may be few constraints on the unregulated firms to conform to the cartel agreement.

Such a system of partial regulation is currently in place in the long-distance telephone industry.[40] Under the current regulatory regime, only AT&T's rates must be submitted for FCC approval. Thus, MCI and Sprint can legally cut prices.[41] Indeed, the system of partial regulation can significantly increase the problems of cartel enforcement by making it more difficult for the regulated firms to respond to defection. AT&T, for example, is legally constrained in the short run from engaging in a price war to punish its price-cutting rivals. Partial regulation can thus be an effective means of mitigating the risks of agency capture.

Bollinger's theory of partial regulation of the mass media can be given a similar capture interpretation. Under the standard capture theory, we would look to the dominant firms of the mass media, the networks, to capture and control the FCC. The captured agency might then establish rules that reduced competition in the marketplace of ideas. Bollinger's role for newspapers as the "competitive prod to the regulated press to publish what it might otherwise omit"[42] again has its analog in capture theory. Under the current regime of partial regulation, the FCC could entice the unregulated newspapers into collusion, but a captured FCC could not force unwilling fringe competitors to join a cartel.[43]

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39. See Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L.J. 209 (1986) (describing "ringmaster" theory of collusion).

40. In a series of rulemaking proceedings, the FCC applied antitrust analysis of market power to the telecommunications market and eliminating regulations for certain nondominant carriers. See *In re* Policies and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket 79–252), Notice of Inquiry and Proposed Rule Making, 77 F.C.C.2d 308 (1979), First Report and Order, 85 F.C.C. 2d 1 (1980). For a general discussion of the ensuing proceedings, see MCI Telecommunications, 765 F.2d at 1188–89.

41. Under the regulations adopted by the FCC, MCI and Sprint are not subject to tariff-filing regulations. Fourth Report and Order, 95 F.C.C. 2d at 578–79.

42. Bollinger, 75 Mich. L. Rev. at 33 (cited in note 12).

43. As a theoretical matter, it is not even clear that there is a direct correspondence between creating cartels and market failure in the marketplace for ideas. Professor Peter Steiner suggested that a monopolist might provide more diverse programming than competitors clustering around the median taste. See Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q.J. Econ. 194 (1952); Daniel D.

Powe, however, does not discuss the extent of network capture or the extent to which Bollinger's theory of partial regulation mitigates its effects. Instead, Powe focuses on two other types of capture: the president's capture of the FCC and the FCC's capture of the judiciary.

In chapters 8 and 9, Powe describes how a series of presidents, beginning with Roosevelt, have attempted to manipulate broadcast regulation to their own political ends. In essence, Powe argues that the FCC has been captured from above, rather than from below. Powe's analysis is interesting, and might be justified in theory on the basis that a political party has more to gain from controlling the FCC than the networks. A capture theory might predict that an agency will tend to be captured by the interest group that has the most to gain from capture.[44] In this contest, the president's political gains outweigh the network's economic gains[45] so the presidential capture is more likely. But can we say with confidence how political manipulation affects the profitability of the networks? It might be that the networks, as competitors with the president in the capture game, may constrain or counteract capture from above.

In his investigation of our broadcast regulation experience, Powe has also discovered "unintentionally" that the federal judiciary has been captured by the FCC: "No fair reading of the broadcast experience I have detailed leaves doubt that the federal courts—both the D.C. Circuit and the Supreme Court—have operated largely as rubber stamps for the Federal Communications Commission" (at 248). Powe, throughout the book, marshals substantial evidence for this thesis. The issue of judicial capture is inextricably combined with issues of proper deference, standards of review, and administrative discretion.[46] One person's rubber stamp is another's proper deference.

Possibly more thought should be given to different levels of scrutiny when one is trying to determine the proper degree of judicial deference. Although not a focus of Powe's analysis, the majority of the victims of regulatory abuse are relatively powerless speakers. Following *Carolene*

Polsby, F.C.C. v. National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion, 1978 Sup. Ct. Rev. 1.

44. See Mancur Olson, The Logic of Collective Action 29 (2d ed. 1971) ("there is a systematic tendency for exploitation of the great by the small"); Anthony Downs, An Economic Theory of Democracy 254–56 (1957); David D. Haddock & Jonathan R. Macey, Regulation on Demand: A Private Interest Model, with an Application to Insider Trading Regulation, 30 J.L. & Econ. 311, 312 (1987) ("Modern public choice theory suggests that regulatory actions . . . will divert wealth from relatively diffuse groups toward more coalesced groups whose members have strong individual interests in the regulation's effect" (footnote omitted)).

45. This is not to say that political influence might not readily translate into economic gain for the president and the ruling party.

46. See Polsby, 1978 Sup. Ct. Rev. 1.

Products and its equal protection progeny,[47] it might be better to scrutinize more carefully regulations that disadvantage relatively powerless speakers. Such an emphasis would not only serve to protect minority viewpoints from majoritarian censorship but might also be seen as a ground for moving all radio broadcasts over into the unregulated tradition. Powe tellingly points out that some of the Supreme Court's reasoning about the pervasive and dominant effect of broadcasting sounds hollow as applied to the relatively powerless radio expression (at 212).

Under a differential scrutiny approach, the less powerful the speaker, the less regulation. One especially troubling theme of the cases is that regulations like the fairness doctrine were not used by the fringe to gain access to the dominant mass media but by powerful speakers to homogenize fringe programming. Thus, fringe radio speakers like Billy James Hargis's "Christian Crusade" or the Pacifica Foundation bear the brunt of the regulatory requirements. Dominant speakers present a more clear and present danger of market failure and should face larger regulatory requirements.

Basing degree of regulation on degree of market power can also be seen as a way of making Bollinger's partial regulation theory determinant. Under Bollinger's theory, newspapers were left unregulated largely as an accident of history, because they came first (see Powe at 213). Deregulating fringe speakers divides the regulated from the unregulated more rationally. Basing the degree of regulation (or, equivalently, the degree of judicial scrutiny of administrative action) on the basis of the degree of market power in the marketplace of ideas allows the government to selectively deregulate firms that are most likely to provide Bollinger's competitive spur.[48]

CONCLUSION

In his conclusion, Powe writes: "Book reviews in legal journals are almost exclusively vehicles for the reviewer to write an essay about the subject of the book under consideration, with the book typically used only for illustration and contrast" (at 250). While this undoubtedly is one of Powe's most unassailable insights, I hope that it is clear that Powe's work has provided much more than merely a subject matter for this review.

Powe clearly situates his effort within the legal tradition that has preceded him and seeks facts to answer a factual question. As this essay has

47. See United States v. Carolene Products Co., 304 U.S. 143, 152–53 n.4 (1938); Laurence Tribe, American Constitutional Law 1001 (1978).

48. Cf. Ayres, 87 Colum. L. Rev. at 318 n.116 (cited in note 37) (targeting U.S. policies to encourage individual OPEC nations to breach cartel agreement could destabilize other nations' cartel restrictions).

suggested, however, Powe has stopped short of a full empirical answer. His belief in the efficiency of the unregulated marketplace of ideas substitutes for an analysis of the benefits of regulation. For those who are firmly convinced that the unregulated press is a worthy tradition,[49] Powe's abbreviated cost-benefit analysis[50] is compelling.

If the theoretical possibility of unregulated market failure is granted, however, the task of distinguishing between the competing regulatory regimes becomes qualitatively more difficult and unavoidably normative. A definitive empirical analysis would be a monumental undertaking. In the end, Powe should be congratulated for taking us halfway there.

49. See H. Kalven, A Worthy Tradition (1988).

50. This may more aptly be termed "cost-assumption" analysis, where Powe's assumptions substitute for the usual analysis of benefits.