

1987

# Has the First Amendment Arrived for Broadcasting?

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## Repository Citation

Collins, Tom A., "Has the First Amendment Arrived for Broadcasting?" (1987). *Faculty Publications*. 1478.  
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## Book Review

### Has the First Amendment Arrived for Broadcasting?

AMERICAN BROADCASTING AND THE FIRST AMENDMENT. By Lucas A. Powe.† Berkeley: University of California Press, 1987. Pp. 7, 295. \$25.00‡

Reviewed by Tom A. Collins\*

An understanding of broadcast regulation demands a firm foundation in its social history. With such a foundation, a doctrinal analysis of broadcast regulation gains both vigor and interest. Lucas A. Powe's *American Broadcasting and the First Amendment* provides the foundation necessary to comprehend the regulation of radio and television. Powe argues that regulation of broadcasting content should parallel and not extend beyond current regulation of the print media. This highly readable book not only provides the general audience with a firm understanding of broadcast regulation but also offers the expert a refreshing presentation of the arguments against broadcast regulation. The result is an enjoyable, interesting book that fully repays the time spent with it.

The work focuses on the fairness doctrine,<sup>1</sup> on the equal access provision of the Communications Act,<sup>2</sup> and on the regulation of offensive speech. Powe presents a convincing case for the rejection of these doctrines. He gives less attention to problems of licensing, and to emerging

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1. The Federal Communications Commission (FCC) abandoned the fairness doctrine in *Syracuse Peace Council v. Television Station WTVH*, 63 Rad. Reg. 2d (P & F) 541, 573 (1987), after the publication of *American Broadcasting and the First Amendment*. The doctrine required fair coverage of controversial issues of public importance. It was set forth in *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949) and found constitutional in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969). The Court in *Red Lion* strongly suggested that the fairness doctrine is mandated by statute. *Id.* at 380-81. This statutory mandate could be the basis for a challenge to the FCC's abandonment of the doctrine.

2. 47 U.S.C. § 315 (1982).

technologies that raise issues collateral to those discussed in the book. More attention to these areas would have been helpful.

Three points form the essence of Powe's argument for the abandonment of broadcast regulation. First, the broadcast media are functionally analogous to the print media. Second, the first amendment does not justify treating the broadcast media differently. Powe finds the Supreme Court's rationales for this distinction—scarcity and intrusion—faulty and finally unavailing. Third, the effort to regulate content has given the government (and, to a lesser degree, private parties) enormous leverage against broadcasters in a way that hampers rather than encourages an open, full debate. I am substantially convinced by Powe's argument, yet I still have distinct misgivings about the operation and function of broadcasting.

Before I consider how Powe develops his key argument, I will sketch my reservations. First, however, I note a major point of agreement: Except for quibbles, the argument that the functions of the press and broadcasting are the same is compelling. They are. Yet this analogy is not perfect. Difficulties arise with Powe's description of the abuse of power and the nature of the media as justifications for regulating potential misuse. The book focuses on the governmental power that results from this prospective regulation. This focus is correct as a first matter, but it fails to consider sufficiently the potential for abuse of private power and the possibility of checking that abuse. The differential impact of print and broadcasting media on the public may make private abuse of broadcasting a greater concern than government regulation of it.

## I. Traditional Justifications for Broadcast Regulation

Powe handily disposes of arguments accepted by the Supreme Court under the first amendment for differential treatment of broadcasting. He argues that scarcity per se is not enough to justify the special treatment of broadcasting.<sup>3</sup> Powe further asserts that intrusive/pervasive arguments for special regulation of broadcasting are flawed.<sup>4</sup> Taken together, these two distinguishing characteristics of the broadcast media do not justify greater regulation. Like print media, radios and televisions are voluntarily possessed and used, are subject to an easy—probably easier—supervision by their users or possessors, and yet are no more ubiquitous. For these reasons, the arguments deployed by the Supreme Court fail.

3. Pp. 200-09. Scarcity of frequencies is the traditional basis for regulation of broadcasting. See *Red Lion*, 395 U.S. at 376; *NBC v. United States*, 319 U.S. 190, 213 (1943).

4. Pp. 209-15. The Supreme Court developed the theory of intrusiveness as a basis to ban offensive speech. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

## Broadcasting and the First Amendment

Still, broadcasting differs from print in ways that the scarcity justification and the intrusiveness/pervasiveness rationale do not adequately describe. Powe acknowledges this in his concluding pages and takes this criticism quite seriously.<sup>5</sup> Yet these differences merit further consideration. We do fear broadcasting, in part because we do not fully understand it.<sup>6</sup> Broadcasting does, however, come at us in various ways, and we comprehend it at various levels. According to figures that Powe accepts, we watch seven hours of television on an average day.<sup>7</sup> We also listen to radio, especially in cars. Broadcasting is an entertainment medium more than an information medium,<sup>8</sup> and is ephemeral in a sense that print is not.<sup>9</sup> As a result, contemporary broadcasting is created for and encourages a short attention span. Television relies heavily on visual images. It presents prison conditions, riots, or wars more vividly than any other medium can. The immediacy of this presentation may further encourage simple reaction and discourage serious reflection.

Like every medium, broadcasting has unique characteristics. Broadcasting is as much like print as a film of Provence is like Van Gogh's paintings at Arles. None of them *is* reality; each presents a reality to some extent determined by the chosen medium. Thus, the media we choose play a large part in forming our world view. I do not mean that the medium is the message but rather that the message is deeply affected by the medium. Despite these differences, and the complexities inherent in regulation, courts never adequately articulate appropriate concern and uncertainty in rendering regulatory decisions (perhaps because the judiciary finds uncertainty unbecoming).<sup>10</sup>

In spite of its functional equivalence to the press, broadcasting has a different effect on us, and, through our government, we have sought to

5. Pp. 248-56. I do not suppose that Powe's opposition to regulation is likely to alter. Given his demonstration of regulation's failure to promote freedom and of the inadequacy of its stated rationale, for Powe this position must hold the high ground.

6. Pp. 214-15. Powe suggests that we regulate television because it is powerful and because, unlike print, "we are not . . . sure what the medium is doing to us." P. 214. But we understand the print media only partially.

7. P. 211 (citing 1986 BROADCASTING-CABLECASTING YEARBOOK A-2). The figure of course is as facially incredible as it is generally accepted. If we sleep eight, work eight, and watch seven, only one hour is left for washing, eating, procreating, and such. Of course, weekends, vacations, and holidays increase the time available for viewing, and we can do most things while watching. Nevertheless, accepted numbers like this do warrant thought and comment.

8. This assertion, like assertions of media concentration and scarcity, depends on how one counts media. If we compare television only with newspaper, television is more of an entertainment medium than newspaper. But if we include all print, the difference is far from clear. Entertainment is the goal of most books, as well as of most magazines.

9. While newscasts can be recorded, the viewer or listener does not usually replay them (as the reader does with newspapers when she wants to understand more clearly the information presented).

10. Rather, the Supreme Court has relied either on the scarcity rationale or the intrusiveness rationale. See *supra* notes 3-4 and accompanying text.

control that effect. *Red Lion Broadcasting Co. v. FCC*,<sup>11</sup> the leading Supreme Court case on broadcast regulation, makes two important points. First, the Court recognized that “[t]he general problems raised by a technology which supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news . . . .”<sup>12</sup> Problems of range and impact argue for *some* sort of regulation:

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the 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.<sup>13</sup>

The Court then characterizes the first amendment right primarily as a “collective” one retained by “the people as a whole.”<sup>14</sup>

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.<sup>15</sup>

The Court also speaks straightforwardly of the licensee’s right to freedom from censorship and of the public’s right to diversity. Neither right is necessarily inconsistent with itself, nor inconsistent with freedom generally, nor inconsistent with freedom of speech and press. This characterization of interests contemplates a hierarchy, a rational exchange on controversial issues with the Court as a mediator of first amendment rights.

11. 395 U.S. 367 (1969). Powe discusses *Red Lion* throughout the book. For the key points of his position, see pp. 121-41.

The courts have a strong tradition of treating different media differently. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (“The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers.”). The development of this tradition paralleled the development of broadcasting. See *NBC v. United States*, 319 U.S. 190, 210 (1943) (describing the evolution of broadcasting). The Court fully recognized this development in *Red Lion*, 395 U.S. at 386-87.

12. 395 U.S. at 386 n.15.

13. *Id.* at 387-88. The Court has rejected the possibility of a traffic management approach, which addresses only the technological problems. *NBC*, 319 U.S. at 215-16.

14. 395 U.S. at 390.

15. *Id.* (citations omitted).

## II. Controlling Private Abuse of Power

Those who advocate regulation of the broadcast or other media fear the implications of *Red Lion*; while they view government power with trepidation, they believe regulations are necessary to control powerful and potentially monopolistic industries. These fears reinforce, and are reinforced by, fears of a new medium of communication. Government is often the means used in efforts to control private power; much of what government does is intended to control or ameliorate private abuse, and the government sometimes succeeds. Nevertheless, whether the government can *effectively* contain private power is uncertain.

Powe characterizes the District of Columbia Court of Appeals as a rubber stamp of the FCC, a booster of its regulatory efforts.<sup>16</sup> I disagree with this harsh assessment. The court has often acted to promote diversity of viewpoints. In *Office of Communication of United Church of Christ v. FCC*, for example, the court reversed the FCC's ruling, granted consumer standing, and acted for a broader presentation of views.<sup>17</sup> In *Banzhaf v. FCC*, however, the D.C. Circuit affirmed the FCC's order that required reply advertising to cigarette commercials.<sup>18</sup> According to the FCC, media owners had failed to provide a balance to the advertisements of their powerful customers that urged consumption of a health-impairing product.<sup>19</sup> Those seeking regulation want to curb such private abuse but, as Powe demonstrates, they are rarely successful.<sup>20</sup> Ironically, regulation is more likely to exacerbate private abuse. In *Greater Boston Television Corp. v. FCC*, the court endorsed the FCC enforcement of rules encouraging diverse ownership.<sup>21</sup> A year later, the court threw out rules designed to prevent the application of the *Greater Boston* decision by permitting an applicant for an established license effectively to challenge the incumbent.<sup>22</sup>

In cases involving format changes, the D.C. Circuit reversed the FCC many times and acted to preserve unique, financially viable formats that acquiring licensees would have abandoned. In *Home Box Office v. FCC*, the court opened cable television to pay channels.<sup>23</sup> In *Business Executives' Move for Vietnam Peace v. FCC*, the court struck down a ban

16. For example, Powe states, "The D.C. Circuit, as usual, swallowed the Commission position . . ." P. 97.

17. 359 F.2d 994, 1009 (D.C. Cir. 1966).

18. 405 F.2d 1082, 1101 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

19. *Id.* at 1086.

20. Pp. 211-12.

21. 444 F.2d 841, 859 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

22. *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1214 (D.C. Cir. 1971).

23. 567 F.2d 9, 49 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

on public issue announcements.<sup>24</sup> In *Pacifica Foundation v. FCC*, the court again sided with the licensee.<sup>25</sup> One can clearly see from these cases a willingness by the D.C. Circuit to side with the FCC against the licensee coupled with a willingness to act in favor of diversity and against either public or private censorship. Powe's argument against government regulation assumes that licensees which receive a court's *carte blanche* will provide better broadcasting than they would without it. The decisions suggest that greater diversity at times may have resulted from the D.C. Circuit's willingness to rule against the licensee, often with no censorship of either party and almost always with no censorship of ideas.

The nature of the broadcast media and the fear of private power finally may serve more to explain the fears and motivations of those who desire regulations than to justify the regulations themselves. Powe demonstrates that the FCC regulatory scheme is a blunt instrument that can be, and often is, abused. We can easily express in general terms our concern about broadcasting, but our concern eludes the kind of clear articulation that facilitates a fair and effective regulatory scheme. Before discussing the ramifications of these observations, I turn to Powe's artful presentation of the problems of the current approach.

### III. The Fairness Doctrine and Content Regulation

Powe captures the nature of the problem of broadcast regulation in his descriptions of two famous cases involving contentious, controversial ministers from two different eras of broadcasting regulation.<sup>26</sup> Although only four decades separate the cases, their times were markedly different. The first case, *Trinity Methodist Church, South v. Federal Radio Commission*,<sup>27</sup> occurred in 1932. The Reverend Bob Schuler, an early radio preacher, had attacked the local power structure and the Roman Catholic church, among others. The FRC revoked the station's license because of the lack of balance in its presentation. Basing its decision solely on the general public interest, the FRC asserted that a radio station could not be used to promote only the view of its licensee. The D.C. Circuit affirmed.<sup>28</sup>

24. 450 F.2d 642, 665 (D.C. Cir. 1971), *rev'd sub nom.* *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

25. 556 F.2d 9, 14 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). The D.C. Circuit invalidated an FCC order that prohibited broadcasting indecent language over the radio when children may be in the audience. *Id.*

26. Pp. 13-21, 92-96.

27. 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); *see pp.* 13-21.

28. 62 F.2d at 852.

The second case, *Brandywine-Main Line Radio v. FCC*,<sup>29</sup> involved the revocation of a license held by the Reverend Carl McIntire's organization. WXUR operated in the 1960s and early 1970s under a more mature system of regulation. McIntire presented a relentlessly right-wing schedule of programs. In its decision to revoke the station's license, the FCC relied on the fairness doctrine and the station's misrepresentations to the FCC about efforts to comply with the fairness doctrine. The D.C. Circuit, which had earlier affirmed *Trinity Methodist Church* on the ground that the licensee's programming was not in the public interest, now chose to affirm the revocation because of the owner's violation of the fairness doctrine and its misrepresentations to the FCC, and avoided the issue of controversial programming.<sup>30</sup>

More chilling than the regulation exercised in these two cases, however, were the efforts of the Nixon administration to use the FCC's licensing and regulatory authority to pressure the networks and the *Washington Post*.<sup>31</sup> The President's views and no others (or as little of those others as possible) were to get through. Those who remember Richard Nixon as villain should also recall—as Powe makes abundantly clear—that Nixon carried forward a tradition that John Kennedy and his administration began,<sup>32</sup> culminating in the *Red Lion* decision.<sup>33</sup>

This differential treatment in broadcasting of "official" and "unofficial" political views, which would be completely protected in the print media, marks the FCC approach. While its abuse of unpopular viewpoints is disturbing, the FCC approach goes beyond attacks on the unpopular and extends to attacks on the popular and offbeat. Jerry Garcia,<sup>34</sup> leader of the Grateful Dead (which the FCC called a "rock and roll musical group"<sup>35</sup>), was the focus of an attack by the agency on offensive speech.<sup>36</sup> The FCC's attack occurred in the absence of any specific

29. 473 F.2d 16, 63-80 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); *see pp.* 92-96.

30. 473 F.2d at 52, 60. In vigorous dissent, Judge Bazelon questioned the propriety and constitutionality of the fairness doctrine. *Id.* at 63-81.

31. *See pp.* 121-41.

32. *See pp.* 113-14. The Eisenhower administration also used questionable conduct in issuing licenses to political allies. *See pp.* 75-84.

33. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *see supra* text accompanying notes 11-15.

34. *See pp.* 161-90. Jerry Garcia and the Grateful Dead were, and are, very popular. In 1970, however, they were not in the cultural mainstream of the United States. Today their classification is more difficult. I am tempted to describe them as a cultural artifact of the 1970s. They are, however, a phenomenon in that they remain popular today. The Dead had their first top ten single this summer. "Touch of Grey," *BILLBOARD MAG.*, Sept. 19, 1987, at 84.

35. *WUHY-FM, E. Educ. Radio*, 24 F.C.C.2d 408, 408 (1970).

36. *Id.*; *see pp.* 174-76. This attack on offensive speech disturbed Commissioner Nicholas Johnson, who observed:

What this Commission condemns today are not words, but a culture—a lifestyle it fears

complaint about a particular broadcast,<sup>37</sup> while it ignored numerous complaints about *Laugh-In*, a highly popular and innovative television comedy program.<sup>38</sup> Perhaps, as Commissioner Nicholas Johnson suggested, the FCC considered the presenting licensees and not simply the offensive material. Jerry Garcia appeared on Eastern Educational Radio of Philadelphia, an award-winning educational station that could "scarcely afford the postage to answer" FCC inquiries.<sup>39</sup> *Laugh-In* appeared on NBC,<sup>40</sup> which could easily afford to answer and defend against charges from the FCC. Perhaps the variety of its vignettes redeemed *Laugh-In*: Bobbi Gentry in a bikini and Richard Nixon dressed for Wall Street are arguably more tasteful than Jerry Garcia.

The FCC's treatment of the Pacifica Foundation presents a vivid picture of oppressive regulation. Pacifica has broadcast authors such as Edward Albee<sup>41</sup> and comedians such as George Carlin,<sup>42</sup> as well as roundtables on homosexuality and a Bloomsday reading from James Joyce's *Ulysses*.<sup>43</sup> In this last case, Pacifica sought special permission to read from the book<sup>44</sup> after the FCC's latest pronouncement on offensive speech.<sup>45</sup> The FCC refused either to grant or deny permission to air the reading, stating that Pacifica must take responsibility for its own decision.<sup>46</sup> These examples represent just a few of the many times Pacifica stations have been cited for violating FCC standards.

Powe's analysis of the legal theories used to justify regulating the

because it does not understand. . . . Many [of those under 28] will "smile" when they learn that the Federal Communications Commission, an agency of their government, has punished a radio station for broadcasting the words of Jerry Garcia, the leader of what the FCC calls a "rock and roll musical group." To call The Grateful Dead a "rock and roll musical group" is like calling the Los Angeles Philharmonic a "jug band." And that about shows "where this Commission's at."

24 F.C.C.2d at 422 (Johnson, Comm'r, dissenting). Powe and the FCC both erroneously characterize the objections to offensive speech as an aspect of WASP or white middle-class culture. In the 1970s Jerry Garcia appealed to a culture largely inhabited by young WASPs, and today he appeals to a great many older WASPs. Despite this appeal, many people of all classes, races, and religions neither habitually include the word "fuck" in their conversation, nor particularly want to hear it.

37. 24 F.C.C.2d at 408 n.2, 418 (Cox, Comm'r, concurring and dissenting).

38. *Id.* at 421.

39. *Id.* at 423. (Johnson, Comm'r, dissenting).

40. *Id.*

41. 36 F.C.C. 147 (1964).

42. *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978). Pacifica broadcast George Carlin's "Filthy Words" monologue, and a listener complained. The Supreme Court upheld the FCC's determination that the monologue was indecent. *Id.* at 735.

43. Letter to William J. Byrnes, Esq. (Joyce), 63 Rad. Reg. 2d (P & F) 216, 217 (1987). Bloomsday is June 16, the day on which *Ulysses* took place.

44. Specifically, Pacifica sought approval for readings from the Penelope section, which contains several terms that the FCC usually finds objectionable. *Id.* at 216.

45. New Indecency Enforcement Standards to be Applied to All Broadcast & Amateur Radio Licensees, 62 Rad. Reg. 2d (P & F) 218 (1987).

46. *Id.* at 1219.

## Broadcasting and the First Amendment

content of broadcasts and his examination of the social history of regulation combine to make the most powerful argument possible against content regulation. Powe, however, passes over a major point in the analysis: some regulation is intended to extend free speech. This thesis is central to the work of Jerome Barron<sup>47</sup> and Lee Bollinger.<sup>48</sup> But while Powe acknowledges and discusses these two seminal articles,<sup>49</sup> he does not incorporate their argument into his own. For example, although the regulation of offensive speech is meant to exclude or to censor, Communications Act section 315 is meant to assure equal terms of access (not equal access).<sup>50</sup>

The fairness doctrine was meant to encourage a balanced presentation of views, rather than to censor. To a substantial degree, however, censorship is the result of all three forms of regulation. For example, the FCC has suppressed offensive speech to some degree. Section 315 has affected the coverage of political campaigns. On the other hand, no one has shown that the fairness doctrine actually suppresses speech.<sup>51</sup> While pressures on broadcasters are expected and do occur, I doubt whether empirical data can establish that the fairness doctrine has such broad effects. Ultimately, we must rely on our own perceptions of the role and nature of the media in order to determine the proper regulatory scheme. If we believe that the media should present diverse, uncensored views, then regulation of offensive speech may be much more threatening than the fairness doctrine. Indeed, while the fairness doctrine may chill (this is the essence of Powe's argument<sup>52</sup>), it may also open broadcasting to more diverse views.

Most commentators are less than fully satisfied with the performance of radio and television as competitors in "the marketplace of

47. See, e.g., Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666 (1967) (advocating recognition of a first amendment right to mandatory access).

48. See, e.g., Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 2 (1976) (stating that legislative access regulations should be applied to one segment of the media to assure achievement of first amendment goals).

49. See pp. 4-6.

50. See Communications Act, 47 U.S.C. § 315 (1982). The decision to grant access is made by the licensee, but once access is granted, it must be on equal terms with any access granted to other candidates.

51. The Supreme Court observed nearly twenty years ago in *Red Lion Broadcasting Co. v. FCC*: "[I]f experience with the administration of [the fairness doctrine and personal attack rules] 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. The fairness doctrine in the past has had no such overall effect." 395 U.S. 367, 393 (1969). Evidence of such an effect by the fairness doctrine is still lacking.

52. See pp. 111-20.

ideas."<sup>53</sup> Powe's argument that the fairness doctrine contributes in a substantial way to the bland, uncontroversial coverage of public affairs is convincing. An alternate explanation, however, exists. The media seek large audiences and thus have chosen to avoid presenting disturbing or offensive material. As a result, broadcasters sacrifice controversy and inspired coverage of public affairs to their desire for higher Nielsen ratings.

Given the many factors that influence programming decisions, however, we cannot be certain that any approach works better than any other as a way of promoting diversity. Developing empirical data about the effect of television, radio, or print approaches the impossible. Researchers cannot create control groups for a phenomenon as embedded in our culture as broadcasting. The best approach may be interviews of varying sophistication. But these rely heavily on individual memory and reflections, which are often dubious. Because we have so little reliable empirical information, we often adopt the media's view that most closely reflects our personal philosophy or analysis.

Any discussion of the first amendment should recognize that the media's greatest good is not challenging cultural or political presentations, but its presence as a check on government power. Thus, the real focus of the discussion should be whether FCC regulations effectively encourage diversity and debates. Powe's arguments approach this issue by asserting the no-censorship principle,<sup>54</sup> but they do not decide it. I would, however, emphasize the importance of private power in the media and the differential impact of the various media on their audiences.

Any effective control of content presents problems. Just how to fashion such control and still comply with the Constitution is unclear. The entire, subtle, and inevitable push of broadcasting, particularly of television, is its depiction of what affects society—the very influences that most offend those who want regulation. Even with a critical focus on drugs, violence, indecency, or sexual innuendo, these vices are embedded in the programs offered. Great intrusion would be necessary to control them.<sup>55</sup> Powe demonstrates the elusive nature of the effort to control content when he recites attempts by the FCC to proscribe as prodrug, lyrics meant to be antidrug and to prevent Puff the Magic Dragon from

53. *Red Lion*, 395 U.S. at 390 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

54. P. 248.

55. But such control is possible. The Hays Code controlled motion pictures in considerable detail for decades, until its demise in the 1950s. See R. MOLEY, *THE HAYS OFFICE* 77-88 (1945).

leading the nation's youth to untoward conduct.<sup>56</sup> These examples illustrate that regulation of content is likely to be either tediously detailed or to rely on *ad terrorem* measures. Such efforts for the most part died with the first era of regulation, which passed in the 1950s. We should not resurrect them.

Powe's arguments concerning direct control of program content are convincing. I find his comprehensive discussions of FCC control of offensive speech,<sup>57</sup> as well as his more limited discussion of section 315,<sup>58</sup> particularly persuasive. But the fairness doctrine is more problematic. I am among those "youthful law professors" who, Powe observes, eagerly embraced the doctrine in the 1970s,<sup>59</sup> and I am hesitant to abandon it. Indeed, if the fairness doctrine worked as well in reality as it does in abstraction, I would not. But Powe's fuller explanation of its history and application emphasizes the limits of this abstract doctrine. He makes clear that the fairness doctrine is not essential to a system of full expression, although he does not finally convince me that it is unconstitutional. Following the FCC's abandonment of the fairness doctrine last summer,<sup>60</sup> the best course for Congress is to leave this arena to the operation of private forces. Probably the content of broadcasts will change so little that most viewers and listeners will not notice a difference, and fewer still will be concerned about it. If significant change does occur, Congress can legislate, and if necessary, the Supreme Court can rule on the constitutional issues. The real differences among the various media are sufficient and the underlying goals of the doctrine are such that any similar regulations should survive constitutional scrutiny in the face of abuse by licensees.

#### IV. Content Regulation by the Marketplace of Ideas

Indirect control of programming may succeed when direct control has failed. The general approach to indirect control attempts to increase programming sources. Yet these indirect efforts to encourage diversity have failed in much the same way as the direct controls that Powe describes. I will briefly sketch past and present efforts to achieve diversity in broadcasting, then turn to cable systems, which I believe offer much hope for the future of the communication media.

56. Pp. 179-80.

57. Pp. 162-90.

58. Pp. 142-61.

59. P. 146. In fact, I first became interested in the doctrine as a student.

60. *Syracuse Peace Council v. Television Station WTVH*, 63 Rad. Reg. 2d (P & F) 541, 573 (1987).

The key goal underlying the idea of diverse sources is the construction of a marketplace of ideas. This metaphor constitutes both an ideal<sup>61</sup> and a romantic myth.<sup>62</sup> As an ideal, the marketplace would present all views fully and effectively. In theory, democratic dialogue in the marketplace determines the worth of ideas and the place they are to occupy in our culture. The properly functioning marketplace will traffic all ideas without censorship. The fairness doctrine, which dictates that broadcasters present all facets of controversial issues fairly, is a good, shorthand statement of the ideal.<sup>63</sup> One can dispute how closely the multitude of regulated and unregulated media and of informal communications approaches the romantic ideal,<sup>64</sup> doubtless, it falls short. We can come closer to this ideal by merely increasing the number of voices, especially the voices of the relatively impecunious.<sup>65</sup>

In the past, the FCC has tried several approaches to increase participation in the broadcasting industry. It has limited existing ownership in particular markets, limited syndication of programs, limited networks' distribution of their programs to local affiliates, limited the total number of radio and television stations that a single entity may own,<sup>66</sup> and used diversity of ownership as a major criterion in awarding licenses.

No doubt these efforts have increased the sources of programs, but we are less certain that they have also increased the diversity of views. Increasing the diversity of sources may mean merely that multiple sources will produce more of the same type of programs. Our market system emphasizes business profit. The economics of broadcasting determine to a large degree how many media outlets will exist, what they will present, and who will view and listen. As Powe points out, private market forces as well as the federal licensing scheme limit the number of

61. See Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 16.

62. See Barron, *supra* note 47, at 1642.

63. Ingber questions the effectiveness of all equal access proposals, Ingber, *supra* note 61, at 51, whereas Barron's article is modeled on the tenets of the fairness doctrine, Barron, *supra* note 47.

64. See Barron, *supra* note 47, at 1644-47 (asserting that changes in communication technology create barriers to wide dissemination of diverse views); Ingber, *supra* note 61, at 16-49 (questioning the ideal in detail).

65. Of course a proposal to increase the number of sources does not protect the poorest segments of society. As the Supreme Court observed when it rejected a proposal for a mandatory right to purchase advertisements, only the relatively prosperous would benefit. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 123 (1973). I know of no feasible way to give everyone access. A free public access channel may help, but it is likely to be regarded as a place for eccentrics and little viewed. Perhaps call-in shows or televised public meetings would increase access for the less prosperous. Here I would accept some effort toward this end and would not demand perfection. The Cable Communication Act provided for the establishment and editorial autonomy of public access channels. 47 U.S.C. § 532(a), (c)(2) (Supp. III 1985).

66. Amendment of Section 73.3555 [formerly Sections 7.35, 73.240, and 73.636] of the Commission's Rule Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17 (1984), *reconsidered in* 100 F.C.C.2d 75 (1985).

## Broadcasting and the First Amendment

radio and television stations.<sup>67</sup>

Cable television, with its many channels, offers a strong fulcrum to encourage diversity of views. As Powe amply demonstrates, we should not burden cable with direct government regulation, although many might prefer that we do so.<sup>68</sup> The best approach to cable is a common-carrier system,<sup>69</sup> which Powe believes would avoid first amendment problems.<sup>70</sup> Cable technology offers wide potential. It makes dozens of channels both possible and financially viable and permits the presentation of diverse cultural, political, and social views. Although cable offers us a means to achieve this diversity, we are not using it to this end. As Powe demonstrates, the FCC has hampered cable for years.<sup>71</sup> Now Congress, in its rejection of a common-carrier system,<sup>72</sup> has done the same thing.

The goal of the first amendment is to maximize freedom through free expression. A cable common-carrier system will encourage the freedom and diversity necessary to this end. A cable system under single ownership, however, will create a monopoly stronger than that feared and denounced in *Red Lion*<sup>73</sup> and probably impair rather than encourage freedom. In creating a common-carrier system, we should recognize the community's role in creating the wherewithal for cable communications. The technology that makes cable possible is the result of the accumulated knowledge of people working in laboratories, schools, and universities. Full exploitation of this knowledge depends on the award of franchises with the power to use public rights of way and easements. The cable industry, as much as any emerging enterprise, draws on a common heritage of knowledge and cooperation from its community, yet cable system owners earn and deserve recompense. They have sufficient vision to be in the business, they have the skill to arrange financing, and they must possess and use the managerial and technical capabilities required to operate the systems. These skills deserve the rewards necessary to call them forth; they do not, however, deserve a quasi-monopoly of communication.

Rather than searching for the best approach to cable regulation, courts are currently trying to choose between the broadcast model and

67. Pp. 203-04.

68. Powe discusses all aspects of cable television. See pp. 218-47.

69. See I. POOL, *TECHNOLOGIES OF FREEDOM 2* (1983). "The right of access is what defines a common carrier: it is obligated to serve all on equal terms without discrimination." *Id.*

70. P. 246.

71. Pp. 216-32.

72. 47 U.S.C. § 541(c) (Supp. III 1985).

73. See *supra* text accompanying notes 13-15.

the print model.<sup>74</sup> This blinks reason. Cable is neither broadcasting nor print. It requires its own model adapted to its own unique characteristics. Cable, with its large number of channels, offers society a degree of freedom we have never had; yet the courts still argue over what kind of monopoly they will grant.<sup>75</sup> Cable television, especially with limited must-carry rules,<sup>76</sup> frightens the television industry because of its potential to fragment markets and to exclude less popular television stations. Economic realism thus tempers the ideal of diversity. A *National Review* or *Mother Jones* of the air is unlikely to develop an audience large enough to attract current cable systems, although such a program might generate an audience large enough to support independent syndication. If we fear power and dread its abuse, whether private or governmental, the control of so much potential communication must frighten us.

A common-carrier system alleviates both concerns. Such a system need not choose whom to carry, take financial risks on innovative presentations, nor judge what is appropriate for the community. Rather, vendors of programs choose what they think people want, offer it, and take the financial risk themselves. Even a partial common-carrier system can create the benefits of diversity while avoiding the problems of control. It also can diffuse private power by defeating monopoly and establishing a number of uncensored voices. Its multiple sources augment diversity without direct governmental concern with program content.

## V. Conclusion

Powe concludes his work with an emphasis on the virtues of tradition.<sup>77</sup> The core first amendment tradition is an absence of government censorship. Both cases and legislation concerning broadcasting reflect this tradition. The marketplace of ideas is a similar ideal, although most people recognize that our marketplace is imperfect. The history of broadcast regulation chronicles attempts to ameliorate these imperfections. We fear the danger this kind of intervention may bring. Regulation of offensive speech and political campaigns does little to correct such imperfections. The fairness doctrine may well be an unneeded relic of

74. See, e.g., *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403-11 (9th Cir. 1985) (rejecting the broadcast model), *aff'd*, 476 U.S. 488 (1986). Powe notes the debate. See pp. 242-44. He seems to prefer a print model, see pp. 240-44, but notes that Congress could require a common-carrier system, p. 246.

75. Pp. 225-47.

76. Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Sys., 61 Rad. Reg. 2d (P & F) 792 (1986), *modified*, 62 Rad. Reg. 2d (P & F) 1251 (1987).

77. P. 256.

another era. Although we rightly fear excessive content regulation and the excesses in early cable regulation, we should not let these fears prevent us from seeking a better approach. Now that the FCC has abandoned the fairness doctrine, we should observe the operation of broadcast media without it. Appropriate action, if necessary, can come later. Imposing a common-carrier obligation on cable systems, and removing private barriers to diversity without additional content regulation may present the best tools for achieving an informed forum. Powe's thorough, well-argued book does not bring me into complete agreement with him, but it does define three points I cannot dispute: first, the need to be wary of government regulation; second, the need to avoid excessive intervention; and third, the need to achieve an effective presentation of diverse ideas.

