preservation." What this really means is that the general public does not assign a sufficiently high priority to historic preservation to pay taxes for the acquisition of historic buildings through eminent domain. Much the same could be said for low-income housing, access to privately-owned beaches, or a host of other public facilities. Accustomed to a large degree of judicial deference, land use planners have devised aggressive schemes to compel private landowners and developers in effect to finance projects for which taxpayers are unwilling to pay. This practice brings to mind Justice Oliver Wendell Holmes' warning that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[22]

The purpose of the takings clause, as explained by the Supreme Court, is to prevent the "government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Singling out a handful of property owners to carry the expense of providing public facilities and amenities violates the takings clause. Yet this is the effect of numerous land use regulations. Indeed, Lang acknowledges that New York City's historical landmark law places "an unfair burden on the Railroad." A broad understanding of *Nollan* would, of course, curtail the ability of land use planners to achieve ulterior purposes through regulation rather than purchase.[23]

Spurred by renewed judicial interest, the dialogue over the constitutional protection of property ownership is likely to continue. None of the volumes under review offers the final word, but they do illustrate the wide range of perspectives that participants bring to the debate.

THE FOURTH ESTATE AND THE CONSTITUTION. By Lucas A. Powe, Jr.[1] Berkeley: University of California Press. 1991. Pp. xii, 357. Cloth $29.95.

Donald M. Gillmor[2]

Unreconstructed liberalism shines through this historically agile, closely reasoned, brightly written and largely satisfying piece of

22. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

23. Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 S. Ct. Rev. 1.

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legal scholarship. To Powe's credit, he rejects single-explanation theories in favor of a "synergy among various explanations for freedom of expression that is lost when the discussion deals with the strengths and weaknesses of single theory." For this reason the works of Harry Kalven, Jr. and Thomas Emerson are appealing to him, the work of C. Edwin Baker less so.[3] Powe's historical review is authoritative.[4] His mastery of the case law also is no surprise, and the cases are all here, except perhaps for one that deserves more than passing mention: *O'Brien v. United States*,[5] the draft-card-burning case.[6]

This review will focus on two aspects of the book. The first is Powe's rejection of the "positive liberty" approach to the first amendment—that is, the argument that the government should regulate the press in order to increase the diversity of viewpoints expressed in our society. The second is Powe's discussion of the "negative liberty" of the press—the right of the press to freedom from most other forms of government regulation.

I

In his *American Broadcasting and the First Amendment*,[7] Powe concluded that "the broadcast experience with a regulated First Amendment offers the best evidence that a free press must be an autonomous press."[8] In *The Fourth Estate and the Constitution*, Powe extends the paradigm to the print media in a chapter titled "The Fourth Estate"—where "editors rather than judges should de-

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3. Harry Kalven, Jr., *Worthy Tradition: Freedom of Speech in America* (Harper & Row, 1988); Thomas I. Emerson, *The System of Freedom of Expression* (Random House, 1970). C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford U. Press, 1989).

4. Powe's insights are legion. Our free speech tradition began with an unpopular government. To criticize that government was to be assured vindication by a jury. Prosecutions for both seditious libel and contempt of either Congress or the courts were rare after the revolution. Today, and so it has been for a long time, it is the critic who is unpopular and the government that is popular. Juries in libel suits reflect this simple fact. And is this a building block in the foundational premise of those who call for government regulation of the media through positive interpretations of the first amendment?

Prosecuting Eugene Debs, presidential candidate for the Socialist party from 1904 to 1912, Powe suggests, seems as ridiculous in retrospect as the Nixon Administration prosecuting George McGovern for his speeches against the Vietnam War. The Gulf War may be the latest example of how easy it is in times of perceived crisis to check constitutional rights in the locker of patriotism and thus misplace the key.

5. 391 U.S. 367 (1968),

6. *O'Brien* ominously thrust into the law of free expression the proposition that if a governmental interest is substantial enough, incidental limitations on freedom of speech and press are constitutionally acceptable. Emerson viewed the case as a devastating qualification on freedom of expression.

7. Lucas A. Powe, Jr., *American Broadcasting and the First Amendment* (U. Calif. Press, 1987).

8. Powe, *The Fourth Estate and the Constitution* at 294.

cide whether to publish," and where "[G]overnment efforts, from whatever source, to block willing dissemination of information should be interpreted as barriers to the necessary functioning of the press in our democratic society."

The "Fourth Estate" label tends to suggest that the press functions as a branch of government, something Powe would abhor. It may also suggest the function of legitimation rather than the "checking" function that Powe, Blasi[9] and others have set for the press. Powe has something quite different in mind. He uses the model to take apart, always respectfully, its antipode, the public's "Right to Know." The latter, which may be as much a call for eventual accountability to the public as a self-serving "cover for any issue facing an embattled and litigious national press," implies a journalistic duty that, if neglected, could bring down upon the press the wrath of society, a boomerang effect not envisioned by the first amendment.

Powe's foil is Jerome A. Barron, whose landmark 1967 *Harvard Law Review* article proposing a right of reply sent shock waves through the publishing world that are still being felt today.[10] Shredding the traditional concepts of a marketplace premised on the idea of objective truth or a self-governing citizenry, rational and keen to vote, Barron, in a burst of legal realism that made him famous, would have turned the press into a public utility.

Powe's colorful account—the personalities, the institutions, the motivations and emotions—behind *Tornillo*,[11] the case Barron would argue and lose before a unanimous Supreme Court, is worth the price of the book. And, in the end, Powe, though he rejects Barron's thesis out of hand, sportingly gives him credit for the development of op-ed pages in many newspapers.

Owen Fiss and Judith Lichtenberg[12] are added to Powe's list of those who would counter the distorting power and wealth of the media industry with the facilitative power of government, a "checking" function in reverse. As Barron has been criticized for not considering how the press would function under his prescript, Powe faults Fiss and Lichtenberg for their tenacious monism (failure to consider the range of interests served by the first amendment) and

9. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar Found. Res. J. 523, 532.

10. Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967). See also Jerome A. Barron, *Freedom of the Press for Whom? The Right of Access to Mass Media* (Indiana U. Press, 1973).

11. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

12. Owen M. Fiss, *Why the State?* 100 Harv. L. Rev. 781 (1987); Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, 16 Phil. and Pub. Aff. 329 (1987).

for not considering how a "Mass Media Regulatory Commission" (Powe's imaginary horrible) would work. "Neither Fiss nor Lichtenberg," he writes, "indicates the slightest awareness of the realities of government regulation."

Despite the often shameful record of the press in defending the civil liberties of others—and Powe's own observation that Tornillo's attorney contacted a hundred newspaper editors in a fruitless effort to get the other side of the issue aired—Powe fears government more than the power of the media. He believes that "in our pluralistic society, private power over ideas and information is not monolithic. The power of the federal government can be; that is why it may stifle if it wishes." Richard Nixon and Senator John McClellan both warmly supported the idea of a federal reply law.

And yet something is missing from this analysis. Is the myth of the first amendment, putting certain rights beyond the reach of majorities, any more powerful than the myth of a self-governing citizenry? Could unrestrained corporate power become monolithic? Even Chief Justice Warren Burger's terse opinion for the Court in *Tornillo* seemingly accepted Barron's premises about a growing oligopoly of ideas. What if the oligopoly becomes truly monopolistic?

In the last of his "issues" chapters[13] Powe hints at changes in antitrust laws that could constitutionally be applied to the media so as to honor Justice Hugo Black's ringing declaration that if government cannot impede the free flow of ideas, non-governmental combinations must not be permitted to do so either.[14] But Powe, who appears to have only lingering fears, leaves it there. While libel, prior restraint, and a journalist's privilege to keep the identity of sources confidential in the interests of newsgathering lend themselves to a Fourth Estate analysis, taxation and joint operating agreements (the economics of newspapering) apparently do not.

Powe might have gone after bigger game. While Barron, Fiss and Lichtenberg either fall within the broad liberal spectrum or on its edge, some younger legal scholars would reject every overt or implied premise in Powe's analysis, beginning with the notion that we live in a democratic society. Their purpose is to disrupt an oppressive status quo, dismantle the machinery of the established order, and deconstruct the liberal principles that people like Powe live by. These are the true intellectual adversaries of a 200-year-old dialogue on free speech dominated first by libertarian and now by liberal theorists. Powe, of course, is aware of this. "As to the once

13. There are four: libel, prior restraints, access to sources and information, and antitrust.

14. *Associated Press v. United States*, 326 U.S. 1 (1945).

universal love of freedom of expression," he writes in his conclusion, " 'it's not that way any more.' The shift from universal support began, unintentionally and imperceptibly, two decades ago, when much of the best constitutional law scholarship focused on issues of equality." To his credit, Powe remains staunchly committed to free expression.

II

Much of Powe's discussion is devoted to the constitutional protection afforded the press from the judicial process itself. In what I found to be the least satisfying section of the book, Powe would experiment with proposals others have made for the reform of libel law, notably his colleague David Anderson's limitation on damages: require a plaintiff to prove actual damages and put a cap on "dignity" awards, say of $100,000.

While Powe appreciates the realities of some of the players in libel—the newspaper, which has never admitted error, tracking its official game with a constitutional hunting license, and the hourly-rate media attorney "who can do good while doing well"—he is too charitable with plaintiffs. Unfortunately, plaintiffs are not all good citizens who would run for public office if it were not for the press. They are often liars, cheats and people who would evaporate outside the glare of publicity.

Like those of his predecessors, Powe's remedy treats only the symptoms of a litigation virus that may be eating its way toward the heart of the first amendment. Given that epidemiology, I wish I could agree with Powe that the *Westmoreland* case precipitated the decline of CBS as a network. Unfortunately, that decline began many years earlier, although *Westmoreland*[15] did nothing to improve CBS's image.[16]

Powe's discussion of the issue of prior restraint and its great loophole of "national security" is fascinating. D.C. Circuit Judge Roger Robb likened the employment of a prior restraint to "riding herd on a swarm of bees." By the time the gag is applied the story is everywhere. Note Britain's experience with Peter Wright's *Spy*

15. *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170 (S.D.N.Y. 1984).

16. Burton Benjamin, *Fair Play* (Harper & Row, 1988). Burton Benjamin, a famous documentarist and CBS insider, was employed by CBS to evaluate the Westmoreland "60 Minutes" story. He found that the network had violated many of its own ethical and professional guidelines. Ann M. Sperber's colossal biography of Edward R. Morrow (*Murrow, His Life and Times* (Freundlich Books, 1986)) charts the decline of the network's journalistic leadership.

Catcher,[17] a book purporting to expose huge security gaps in MI-5. And yet, prior restraints, or the threat of using them, generate less bad publicity for the government than would prosecutions leading to the jailing of editors. They are therefore a convenient and tempting bar to public debate. Powe believes that Erwin Knoll, had he ignored the injunction not to publish the "hydrogen bomb" story in *Progressive* magazine, would have been prosecuted under the Atomic Energy Act of 1954, one of only two federal statutes that criminalizes mere publication. The other is the Intelligence Identities Protection Act of 1982. Perhaps such a proceeding eventually would have answered questions left unanswered by the landmark no-prior-restraint case, *Near v. Minnesota*.[18]

Powe presents diverse views on the prior restraint v. subsequent punishment question, the collateral bar rule, and the CIA's "licensing" system that leads to the publication of books with as many as 168 deletions,[19] or to no publication at all. He finally identifies with what he calls the press's "reflex loathing of prior restraints." "Information, even that which legal rules deem of no value," writes Powe, "is essential to public debate and potential change . . . The need to challenge the status quo, and to do so on the citizen's rather than the government's terms, provides a continuing reason for a special hostility to prior restraints."

The press should be credited with breaking stories such as large-scale CIA operations against the domestic antiwar movement, the Abrams M-1 tank fiasco, and the discovery of an immense radar system in Siberia that violated treaty obligations—all relevant to national security and all developed through unauthorized government sources. The press has never reconciled itself to *Branzburg*,[20] the Supreme Court ruling that denied first amendment protection to confidential sources. Perhaps it hasn't had to. The three-part test outlined in Justice Potter Stewart's dissent in *Branzburg*, proposing a qualified privilege, has so permeated the common law at both state and federal levels that no constitutional protection is needed. In one of those rare cases where a dissenting opinion soon overtakes the opinion of the Court, the test of (1) no alternative sources, (2) relevance, and (3) compelling public need has found favor with most journalists.

While most journalists would agree with Powe that no one

17. Peter Wright, *Spycatcher* (Viking Press, 1987). See also, Malcom Turnbull, *The Spy Catcher Trial* (Salem House, 1989).

18. 283 U.S. 697 (1931).

19. Victor Marchetti and John D. Marks, *The CIA and the Cult of Intelligence* (Knopf, 1974).

20. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

should be convicted of a crime because information relating to guilt or innocence was withheld by a reporter, they are divided on the advisability of "shield" laws. Fearing that governmentally mandated special privileges might be the wedge to a regulatory system, Powe will go no farther than opt for a *status quo ante* that he believes is reflected in both *Branzburg* and *Richmond*,[21] the latter validating open courtrooms. His position on a special status for the press is as defensible as the counter argument—and both arguments continue.[22]

III

The richness of historical allusion, case law, legal theory, political events, rational debate, documentation, and just good storytelling makes this work a model of its genre. Beyond that, Powe has set a standard of writing in both of his major works that makes them accessible to audiences far wider than those generally commanded by legal theorists. The work of Charles Rembar comes to mind.[23]

And to journalists who are committed to both the rule of law and the first amendment there is much comfort in his conclusion that "the synergy of text, purpose, history, and ongoing tradition have combined to validate an absolute right of press autonomy from government in decisions about what and what not to publish."

As a journalist, this reviewer, however much in Powe's debt, cannot help but tease him about his misspelling in both text and index of the names of two of America's most eminent journalists—Lippmann and Sevareid—and for seriously misnaming the Association for Education in Journalism and Mass Communication. All of which goes to show what a difficult calling journalism really is.

This is not to suggest for a moment that Powe doesn't understand the ways of the press. He does. His parting words are testimony to that: "The press is an essential ingredient in the democratic dialogue in America . . . Its myopia amuses. Its size worries; it professes ideals that exceed its very human capacities."

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21. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

22. As far as secrecy is concerned, there are few institutions more secretive than the mass media when it comes to their own affairs. Try to get into a newsroom or to find a reporter's home phone number or salary.

23. Charles Rembar, *The End of Obscenity; the Trials of Lady Chatterley* (Random House, 1968).