SYMPOSIUM COMMENTS

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LESSONS FROM BROADCAST REGULATION FOR THE TWENTY-FIRST CENTURY: A SYMPOSIUM

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Former Federal Communications Commission (FCC) Chairman Julius Genchowski last week gave his farewell speech to broadcasters in Las Vegas. Chairman Genchowski takes with him two big things: a credible record of achievement and the word "broadband."

This morning, I received this telegram: "Post forty of the International Brotherhood of Electrical Workers Union wishes you a happy thirtieth anniversary of the Fowler-Reagan marketplace public interest standard, 312 to 264."

I want to thank American University Washington College of Law, all members of its *Administrative Law Review*, and the Communications Law Society for the honor of sharing the keynote address with Judge Dan Brenner.

I also want to acknowledge my debt and everlasting gratitude to Judge Brenner for his six years of service, at my side, in good times and bad. He created the intellectual foundation for moving from a "Dudley Do-Right" government regulated broadcast industry to a marketplace model, where

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the people, not the government, decide what is broadcast.

The pillar of that foundation is indeed, the subject of today's symposium: the *Texas Law Review* article we wrote thirty years ago.[1] I'll let you guess which of us did most of the writing.

I'd like to tell you of my journey of six years at the FCC from a personal perspective. Memoirs can be based on one of six levels of reality:

(a) What happened;
(b) What I believe happened;
(c) What I would like to have happened;
(d) What I want to believe happened;
(e) What I want you, assembled today, to believe happened; and
(f) What I want you to believe I believe happened.

With that simple disclaimer, where to start?

Early 1981. At the front desk of a New Orleans hotel, there was a message. It read: "President Reagan Nominates Mark Fowler as FCC Chairman." Two hours later, I was on a plane heading back to Washington, DC.

I assembled a team of bright, talented people ready to take office. We divided our efforts into three parts: idea people, front people, and action people. Our ideas departed from over fifty years of FCC regulation. Like an antique that had over the ages been painted many times, the public interest standard had gradually been slathered with layer upon layer of regulations on broadcasters. The FCC was the FCC: the Federal "Cannot" Commission.

We wanted to strip away that paint, and unveil a better standard: reliance on the people making choices on program content in the marketplace. This, after all, was the ultimate influence on broadcasters even as they put up with mindless regulations. Trouble was, so many of these regulations violated our understanding of the First Amendment: that Congress was to make no law abridging freedom of the press or speech.

While many major industries had been deregulated by the alphabet agencies—the FCC, the Federal Trade Commission, the Civil Aeronautics Board, and so on—broadcasting had remained a conspicuous exception. The FCC itself had deregulated some common carrier services, cable TV, and even CB radio. But as for broadcasting, the FCC remained the last of the New Deal dinosaurs.

In the *Texas Law Review* article, we introduced a marketplace approach to broadcast regulation. In one speech, ridiculed by many, I stated that television was just another appliance: it was a toaster with pictures. On its

[1] Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

surface, this was a seemingly silly comment.

But it posed important questions. Why did the government regulate broadcast content when all other mass media was free of regulation? Why shouldn't the electronic press, the press that used air and electrons, be as free as the press that used paper and ink? All justifications advanced for the distinction weren't valid reasons, but excuses to regulate.

Why was there no regulation of books, movies, newspapers, and so on? Television *should* be just another appliance. The First Amendment demanded it. Thus, Judge Brenner and I introduced the print model for FCC regulation.

Upon assuming office, I said that we were not going to deregulate or reregulate—we were going to unregulate and we would be henceforth guided by the First Amendment and marketplace forces. I believed that broadcasting was a business, competing for consumers, subject to competitive marketplace forces. Broadcasters were not, and could not be regarded as "public trustees," which was code for subject to government content control. We said that the consumer, acting in the marketplace, would determine what was broadcast. The public's interest would define the public interest.

The Washington, DC telecommunications community was shocked, mortified, and even outraged. They might have agreed that governing is about principles, but the principle was to never act on principle. We were called names: ideologue, "Mad Man Mark," and so on. High praise, we thought.

We would, for the next six years, work to strip away hundreds of outdated, wrong, counterproductive, superfluous, or just plain silly rules and policies. In Washington, many people have the ability to stop things, but few have the ability to move things. It's been said that Washington has the engine of a lawn mower and the brakes of a Humvee. It was a tough slog, as advocates of even more FCC regulation bitterly attacked, using a Democrat-controlled Congress and a hostile press to stymie our program.

Abolition of the Fairness Doctrine (the Doctrine) was a major goal. It was a wound with salt in the First Amendment. It required broadcasters to broadcast programming addressing all major issues of public importance in a fair and balanced way, presenting all major viewpoints.

But the Doctrine discouraged the presentation of public issues; broadcasters were afraid of loss of license or fines if issues were not properly balanced by each station, or if an issue of public importance—according to the FCC—had been overlooked. Better to minimize risk by doing the minimum public affairs programming. Typically, this mandated programming was broadcast in the wee hours of the morning or late at night.

When a complaint was filed, the FCC's staff would listen to hours of tapes, using stopwatches to measure the amounts of time devoted to an issue, deciding if an issue not addressed should have been, whether it was a controversial issue of public importance. Meantime, the license renewal was held in abeyance—a not-so-subtle chilling of broadcast political speech.

The government donned "censor robes," and with a red grease pencil censored broadcast content. We said this was unnecessary, terribly wrong, and even dangerous. We said that editing was what editors were for, not the government. In addition, there was evidence that several presidential administrations had attempted to use the Doctrine to intimidate broadcasters or political opponents.

In 1985, we issued a report based upon a record established in a public rulemaking, to establish the administrative law predicate for eliminating the Doctrine. We found that the intrusion of government into program content—caused by the enforcement of the Doctrine—restricted the electronic press' freedom and inhibited the broadcast of controversial issues of public importance.

In 1987, under the courageous leadership of my successor, Chairman Dennis Patrick, the FCC formally abolished the Doctrine. In June 1987, the Congress tried to preempt the FCC action, but the legislation was vetoed by President Ronald Reagan.

This was at a time when there were basically three broadcast networks, PBS, and the major newspapers, all of whom had a liberal bent, and all of whom continued to attack the President daily.

When we issued the order in 1985—which found the Doctrine both unconstitutional and bad policy—certain senior people in the Reagan White House groused that Fowler was eliminating the only protection the President had against the daily pounding of the liberal broadcast media.

President Reagan overruled his staff, stating that there were thirty-two things his opponents could hang him for, and this was just number thirty-three. He supported our initiative. I admired President Reagan for many things; this was just one example.

I also wish to correct the speculation that we acted to clear the way for conservative talk radio. This is wrong. From 1985 through 1987, neither Chairman Patrick nor I was aware of something called "conservative talk radio." There was no such thing. Nor could we imagine it then. It would begin to bloom around the country after the FCC acted, and grow to become a major media force in the early 1990s.

Today it's accurate to say that abolition of the Doctrine is supported by both parties, and to the credit of former Chairman Genachowski, the current FCC has also renounced the Doctrine. This entire story demonstrates the power of an idea versus the great political power or

special interests of the political class—an idea set forth in the *Texas Law Review* three long decades ago.

It is one small confirmation of the public interest benefits of the marketplace and the First Amendment. No outside force or coercion and no loss of freedom of the press or speech is necessary to produce all sorts of broadcast programming in the public interest.

It may not always be of highest quality, but is the government to be the arbiter of what is quality? And, for the diehard critics, I challenge them to name one controversial issue of public importance—federal, local, or international—not covered by broadcast media. They cannot. The print model for broadcasting works.

Reliance on marketplace forces affects an end run around the soft and not-so-soft corruption we have seen for decades in Washington. As government has grown over the past one hundred years, a large bureaucracy has grown to administer it. Success at the FCC depends, in part, on having the right lobbyists working on your behalf. The best lobbyists usually have personal relationships with the regulators.

Getting a senior position at the FCC is often a stepping stone to a lucrative job in the private sector—the so-called "revolving door." Special FCC staffed task forces on a particular area of regulation also function as job fairs for that staff.

I recall being called up to a particular Republican House member's office to be beaten up for refusing to give more subsidies to a small independent telephone company that had been a large fund contributor to the member. I was called up not once, but several times. This member was also a key member of the House Telecommunications Subcommittee and a strong backer of our deregulatory program. We stood our ground, and the relationship was never the same going forward. I called this "soft corruption."

One of the advantages of getting the government out of regulating the economy is that it stops this kind of corruption cold. Correspondingly, with today's ever more bloated, growing federal government, the skies over Washington are increasingly darkened by hundreds of Lear jets bringing in Fortune 500 CEOs to plead special interest legislation or regulatory decisions. Usually, the public interest, and the average citizen suffer.

With more rules and regulations comes more complexity. This requires more government personnel to administer them. Where the mission of one agency, for example, the Environmental Protections Agency, conflicts with another's, let's say the Department of Energy, another layer of bureaucrats is required to arbitrate between the two. Each and every major decision lies under a heavy fog of paid lobbyists and compromised congressmen. Every year, corruption seems to worsen. Today, Washington corruption is

at a high water mark, in both the Congress and the executive branch. It is one of the few signs of bipartisan activity in our capital. In some respects, Washington resembles a banana republic. Deregulation is a decisive germicide to this corruption.

There was another major objective in our administration: to foster new technologies and competition. Deregulation was the "letting go," and encouraging new entrants and competition was the "letting in." Incumbents loved the one, loathed the other. But the sting of competition forced incumbents to either get better or get a fatal case of economic pneumonia. It gave new players with new technologies and innovations the opportunity to take to the field. The public could watch the game and choose its favorite team. That better defines the public interest than any FCC commissioner or bureaucrat ever can.

If you aspire to be Chairman—and here I'm talking to you, Jessica, Tom, Larry, and others—here are some of the lobbyist presentations you are likely to hear:

"Mr. Chairman, we are for competition, but . . . ." Translated: "Disregard everything up to the word 'but,' and now start listening."

Or: "Thanks for giving us so much of your valuable time to see us." Translation: "I know I am using up a chit, so don't rub it in."

Or: "We would like to make a courtesy call." Translated: "I've got to show my new client how much clout I have in town, so please schmooze with him for fifteen minutes."

Or: "We know how busy you are." Translated: "We know how busy you are with the lobbyists for the other side."

Or: "We've supported everything you've done." Translated: "*EVERYTHING,* until you were sworn in."

Or: "We've checked with the Hill, and everyone seems to be on board." Translated: "All I can promise is that they will not impound the FCC's funding for twenty-four hours."

Or: "Whatever's best for you." Translated: "Whatever's best for me."

Finally, "We agree with you, Chairman. Of course you realize this has serious implications." Translated: "Better check under your car with mirrors."

Public service can be gratifying. I had a talented, dedicated team. Comrades at the front. We celebrate with each other every Christmas here in Washington, as we have done for each of the past thirty years.

When you are in a leadership position, it is important to hold to fundamental principles. When we decided to move in a big way on an issue, it always felt like stepping off a high cliff, knowing that fierce opposition, name calling, lobbying, manipulating, backstabbing, and rumor mongering were sure to follow. And that was just in the *Washington Post*

newsroom!

So, to sum up, I believe in the marketplace because I believe in the people's right to choose, not the government's. You may agree or disagree, but we did it our way. We are grateful that you all turned out, regardless of your politics, to hear us out, again, thirty years later. I hope you could say, "*Not* still crazy, after all these years."

Thanks, all of you.