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# Policy-Making at the Fowler FCC: How Speeches Figured In

by DANIEL BRENNER\*

The influence of government speech writers varies considerably. Few who do this for a living can properly claim to be students of Svengali,<sup>1</sup> hypnotically directing the thoughts and words of the principal. On the other hand, a speech-writer must do more than simply string together ideas jotted down during a brainstorming session with the boss. And on policy matters, the speech-writer should help the principal develop plans of action and, ideally, a philosophy of regulation.

In comedy writing, the rule is, funny stays in. In recitals of history, accuracy and the search for truth guide. In policy addresses, rules are less clear. Too great a degree of clarity in evolving areas approaches the appearance of prejudice. On the other hand, no official intentionally wants to bore an audience, however much he or she may appear to be striving to do so.

What can an independent government official like a Federal Communications Commission chairman aim for? Not seeking reelection or campaign contributions, there is no necessity to flatter an audience or curry pecuniary or voting booth favor. Reappointment is an issue for some, but the average tenure on the FCC falls short of a full term. The use of the office to promote business opportunities through the revolving door between the private and public sectors is not as effective as before, given the glut of qualified communications lawyers and lobbyists. Instead, ideas predominate. Their discussion and adoption become the focus of a writing and speaking campaign.

Like the President who appointed him, FCC Chairman Mark Fowler understood the importance of communicating ideas to

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1. Svengali was the musician and hypnotist in George Du Maurier's 1894 novel *Tribby*.

change policy. "Phrasemaking" was a virtue he cherished, reducing concepts to pointed, perhaps memorable, expressions. This FCC tradition started with the most famous Chairman's speech of all, Newton Minow's "vast wasteland" address to the National Association of Broadcasters (NAB) in 1961.<sup>2</sup> The chairmen between Minow and Fowler<sup>3</sup> were often individuals who enjoyed a gift of rhetoric, contributing to the lively tradition of public speaking by the FCC Chair.

No doubt this forensic prowess develops partly from the cycle of speeches that the chairman of the FCC gives. Leading off with the Politburo-style International Radio-Television Society (IRTS) luncheon in New York City in early autumn, the FCC Chair receives dozens of requests for speeches. The IRTS event, boasting a dais the destruction of which would signal the end of the New York based media and advertising world as we know it,<sup>4</sup> must be a heady experience for any government official. Beyond that platform are the rostrums of the enormous conventions of broadcasters at which a chairman is expected to appear.

The NAB annual meeting, which attracts around 30,000 conventioners, is the largest of a series of speaking engagements that arise in the calendar of an FCC chairman. Less grandiose, but no less significant, are addresses to universities, public interest groups, and the opportunities to appear before committees of Congress.

Given this array of speaking opportunities, the royal, though recently somewhat crabbed, hospitality<sup>5</sup> shown to an FCC commissioner by the host, and the opportunity to speak about one

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2. Speech to National Association of Broadcasters (May 9, 1961), *reprinted in* N. MINOW, *EQUAL TIME* 52 (1964).

3. These include E. William Henry (1963-66), Rosel H. Hyde (1966-69), Dean Burch (1969-74), Richard E. Wiley (1974-77), Charles D. Ferris (1977-81), and Robert E. Lee (1981).

4. The gravity of this risk is pictorially represented each autumn in *Broadcasting's* photo of the event, *see, e.g.*, *BROADCASTING*, Oct. 5, 1987, at 37.

5. Thanks to a request by the FCC General Counsel, the Government Ethics Office in 1987 severely restricted the hospitality permitted to be shown an FCC (or any, for that matter) government official. Generally, buying a commissioner lunch to discuss an issue or get acquainted, whether it be lawyer or reporter, is forbidden. This prohibition starkly contrasts with the tradition of *Broadcasting's* longtime publisher, Sol Taischoff, of dining on Mondays with the FCC chairman. *See BROADCASTING*, Aug. 23, 1982, at 32-33. This tradition more or less ended with Charles Ferris, who responded to the luncheon invitation by inviting Mr. Taischoff to a brown bag meal at the FCC. Declining, Mr. Taischoff and Chairman Ferris became less than best friends. A rapprochement was effected toward the end of the Ferris Administration.

of society's most observed and debated group of industries, it is no wonder that Mark Fowler viewed speech-making as an important component of his tenure. Add to the fact that Chairman Fowler served longer than any other chairman in FCC history<sup>6</sup> and the importance of the speech-making constant grows even larger.

In general, a speech-writer does not "write" a speech. This observation applies to the work I did for Chairmen Fowler and Charles Ferris, his Democratic predecessor. It is probably unfair even to say that speech-writing amounts to a collaborative effort. The fact remains that the principal, whether it be a Chair of the FCC, U.S. Senator or dean of a law school, is in charge. The words spoken, ultimately, are the responsibility of the speaker.

As I was also legal advisor to Chairman Fowler, my policy views and legal opinions carried some weight in the office. A word, then, is in order about the role of the legal advisor. In the communications policy firmament, few jobs are as interesting, and sometimes as exasperating, as being the communication law's equivalent of the Commander-in-Chief's legal lieutenant. Anyone who assumes one of these jobs, which are similar to the role of staff counsel on Capitol Hill, or special assistant in the Executive Branch, must be willing to represent the viewpoints of the principal faithfully and zealously. Whether it is a congressman or a commissioner, that individual is a client. But as in any client-lawyer relationship, the views of the principal and the deputy may not be identical.

At the FCC, expertise, more than partisanship, has proved the relevant qualification for an assistant's slot. Willard Nichols, Chief of Staff under Mark Fowler, also served in policy roles for Chairman Richard Wiley, a Republican, and Chairman Ferris, a Democrat. Henry Geller was General Counsel and legal advisor for chairmen appointed by Presidents Kennedy, Johnson and Nixon and served as head of National Telecommunications and Information Administration under President Carter.

My speech-writing service for Chairman Fowler began almost as an accident. During the few weeks I had stayed on to help smooth the transition between chairmen, I worked on one of Chairman Fowler's first speeches. In it, he expressed the

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6. Mark Fowler served as Chairman from May 18, 1981 to April 17, 1987.

theme, by then well associated with the Reagan administration (and in truth, with President Carter<sup>7</sup>) of cutting back on government overregulation of broadcasting.<sup>8</sup>

Over the summer of 1981, Chairman Fowler and I worked on a law review article to express in detail a philosophy about what was wrong with broadcast regulation and what the FCC and Congress might do to change it.<sup>9</sup> Three important themes which characterized his approach to broadcasting grew out of that article.

First, regulation of broadcasting had to be made more rational. Reliance on platitudes about government superintendence over programming, maintenance of paperwork requirements that bore no rational relation to the actual regulation of broadcasters,<sup>10</sup> artificial restrictions on business practices that were not grounded on any discernible principle of regulatory economics or empirical evidence<sup>11</sup> — all needed to be addressed. Under the Fowler Administration's interpretation of the Communications Act, the burden was to show that a rule should be retained. In 1982, a regulatory task force combed through all of the FCC's rules. While that effort was not entirely successful, it led to several "underbrush" decisions that eliminated needless regulations.<sup>12</sup>

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7. See, e.g., *Deregulation of Radio*, Report and Order, 84 F.C.C.2d 968, *recon. granted in part*, Memorandum Opinion and Order, 87 F.C.C.2d 797 (1981), *aff'd in part and remanded in part*, Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

8. Address by Chairman Fowler before the Oregon Association of Broadcasters, Newport, Ore. (June 12, 1981).

9. Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

10. A classic form of this paperwork requirement was formal community ascertainment. Through individual and group interviews, the "broadcaster" (often a publicly traded corporation with principal officers nonresident in the community) could be said to "know" the needs and interests of the community. These requirements were eliminated for radio by the Ferris Commission (*Deregulation of Radio*, 87 F.C.C.2d at 797, para. 49) and for television by the Fowler Commission (*Television Deregulation*, Report and Order, 98 F.C.C.2d 1076, paras. 45-54 (1984), Memorandum Opinion and Order, 104 F.C.C.2d 358, paras. 18-19 (1986)).

11. In 1962, the FCC adopted a rule creating a strong presumption that a licensee which failed to operate a station for at least three years before reselling was guilty of "trafficking" in licenses, that is, buying stations only to resell them at a profit. *Procedures on Transfer and Assignment Applications*, Report and Order, 32 F.C.C. 689, para. 27 (1962). The Fowler Commission abolished this rule, finding no basis to punish a broadcaster who, having brought or restored a station to successful operation, desired to go on to repeat the effort elsewhere. Amendment of Section 73.3597, and Report and Order, 99 F.C.C.2d 971, paras. 7-8 (1985).

12. See, e.g., *Elimination of Unnecessary Broadcast Regulation*, Policy Statement

Second, the theoretical foundation of broadcast regulation, the spectrum scarcity argument, stemming from its fundamental articulation in the 1943 *NBC* case,<sup>13</sup> needed to be reexamined. The economic concepts upon which the notion of "scarcity" had been based were suspected of being wrong since Professor Ronald Coase's seminal article in 1959,<sup>14</sup> and maybe before.<sup>15</sup>

Apart from the theoretical shortcomings of the rationale, the world of video had changed considerably by 1981 and would change even more dramatically in the years ahead. Under Chairman Ferris, the alphabet soup of technologies, including low power TV (LPTV), multipoint distribution service (MDS), direct broadcast satellite (DBS), and cable (CATV)<sup>16</sup> was ready to boil. Cable penetration, boosted during the deregulatory initiatives advanced by Chairman Ferris, continued to expand under Chairman Fowler's leadership. By 1987, the industry had reached the magic fifty percent of American homes.<sup>17</sup> LPTV was an administrative nightmare, but only because of an overabundance of interest.<sup>18</sup> The subsequent freeze and thaw of low power TV application processing, along with the slow, but non-hemorrhaging growth of low power occurred during the Fowler years. Microwave video services (MDS), Instructional Television Fixed Service (ITFS) and Private Operational Fixed Service (OFS) were joined at the hip, as it were, in 1983, to provide the opportunity for Multichannel Multipoint Distribution Service (MMDS).<sup>19</sup> Higher power DBS was given as

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and Order in Docket No. 19743, 94 F.C.C.2d 619 (1983); Unnecessary Broadcast Regulation ("Underbrush Policies"), Policy Statement and Memorandum Opinion and Order, MM Docket No. 83-376, F.C.C. 83-375, 48 Fed. Reg. 49,852, 54 RAD. REG. 2d (P & F) 1043 (1983).

13. *NBC v. United States*, 319 U.S. 190, 216-17 (1943).

14. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959).

15. See Comment, *Old Standards in New Context: A Comparative Analysis of FCC Regulation*, 18 U. CHI L. REV. 78, 83 (1950).

16. Cable television often was referred to in the 1960s as CATV, standing for community antenna television. As the head end of the cable system began importing distant signals by microwave links and cable networks by satellite, the CATV label dropped out of use.

17. See *Television's Shifting Balance of Power*, BROADCASTING, Oct. 12, 1987, at 42.

18. From 1984 to 1987, 37,000 applications had been processed. Low Power Television and Television Translator Service, Report and Order in MM Docket No. 86-286, F.C.C. 87-44, 52 Fed. Reg. 7,420, 62 RAD. REG. 2d (P & F) 423, para. 5 (1987).

19. Instructional Television Fixed Service, Report and Order, 94 F.C.C.2d 1203, paras. 4, 16 (1983), *recon.*, Memorandum Opinion and Order, 98 F.C.C.2d 129, para. 27 (1984).

much of a regulatory green light by the Fowler Administration as possible,<sup>20</sup> but got stalled out in the marketplace.

In short, the technology revolution that the 1970s predicted continued to roll on during the Fowler Administration. There was no discernable protectionism applied against new competitors to over-the-air UHF and VHF broadcasting. Indeed, the FCC continued the earlier approach of allowing the competitive marketplace to blossom.<sup>21</sup> Chairman Fowler, however, went further in assessing regulation of broadcasting. Having found the fundamental basis for treating broadcasting different from print spectrum scarcity to be wanting, he advocated an end to the content-based regulation of the broadcaster.

Mark Fowler maintained an abiding appreciation for the first amendment. On the most prominent wall in his office hung a reproduction of a Norman Rockwell painting depicting "freedom of speech," a gift from Commissioner Dennis Patrick. Chairman Fowler was an avid reader during his chairmanship, particularly of economics and history, notably the *Federalist Papers*.<sup>22</sup> He felt time was overdue for a reading of the first

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20. Direct Broadcast Satellites, Report and Order, 90 F.C.C.2d 676, paras. 7, 21 (1982). After some reluctance, the FCC allowed DBS licensees to use the frequencies for nonbroadcast services as well. United States Satellite Broadcasting Co., Memorandum Opinion and Order, 1 F.C.C. Red. 977, para. 18 (1986), *recon.*, Memorandum Opinion and Order, 63 RAD. REG. 2d (P & F) 201, para. 9 (1987).

21. Chairman Ferris campaigned to end "protecting protectionism," a goal generally thought to be directed against the broadcasting industry and in favor of cable TV, long disabled by overregulation. This effort led to a view by 1981 that broadcasters had been left out of the opportunities offered by newer technologies. The notion of remedying this impression arose in several Fowler speeches. In these speeches, he urged broadcasters to enter into new technologies such as cellular telephone and digital paging, as they were more familiar than others with the workings of the FCC's licensing apparatus. (Lin Broadcasting and Metromedia became major players in these fields.) Further, the Fowler Administration authorized broadcasters to use their subcarrier frequencies and aural basebands which are part of the frequencies granted with a broadcast license, but audible only with special receiving equipment, for nonbroadcast uses like paging and narrowcasting. FM Subsidiary Communications Authorizations, First Report and Order in BC Docket No. 82-536, F.C.C. 83-154, 48 Fed. Reg. 28,445, 53 RAD. REG. 2d (P & F) 1519, para. 54 (adopted Apr. 7, 1983); Second Report and Order in BC Docket No. 82-536, F.C.C. 84-113, 49 Fed. Reg. 15,079, 55 RAD. REG. 2d (P & F) 1308, para. 5 (adopted Mar. 29, 1984) (FM subcarriers); Television SCA Use, Second Report and Order in Docket No. 21-323, F.C.C. 84-116, 49 Fed. Reg. 18,100, 55 RAD. REG. 2d (P & F) 1642, para. 25 (adopted Mar. 29, 1984) (TV aural baseband). Not all opportunities to expand the number of outlets were seized under Chairman Fowler, however, see *infra* notes 52, 54.

22. It was not uncommon for morning staff meetings (held at eight a.m. the first few months, later rescheduled to eight-thirty a.m., mercifully for the night owls in the group) to be spent discussing what Fowler had read the night before. He used his

amendment that gave parity to print and broadcasting.

Articulation of his principal themes — focus towards a more rational broadcast regulatory regime, repudiation of the trusteeship approach and advocacy of a market approach, and championing of the first amendment right of broadcasters — all occurred in “The Public’s Interest,” his first IRTS address, in 1981.<sup>23</sup> His market approach to broadcasting could be summed up in this sentence from the speech: “From here onward, the public’s interest must determine the public interest.”<sup>24</sup>

The next major milestone in Chairman Fowler’s addresses occurred before the North Carolina Association of Broadcasters in 1982. In remarks entitled “Free the Broadcasting 10,000,” Chairman Fowler, for the first time, articulated in greater detail his “print model” for broadcasting. The model proposed that:

[B]roadcasters should be as free from regulation as the newspaper you share the press table with and compete with for advertisers. No renewal filings, no ascertainment exercises, no content regulation, no ownership restrictions beyond those that apply to media generally, free resale of properties, no petitions to deny, no Brownie points for doing this right, no finger-wagging for doing that wrong.<sup>25</sup>

At the same time, he also introduced as his ultimate vision for broadcasting the concept of a modest user charge as a way to win legislative change for the print model. The user charge would not be imposed upon broadcasters alone; Fowler anticipated that all spectrum users, from common carrier microwave to private radio licensees, would face some fee.

This was strong language from a chairman who was also the champion of broadcaster freedoms, and who was often viewed as a favorite of the broadcasting industry. The North Carolina speech overlapped with an effort by the National Radio Broadcasters Association, a short-lived trade association of radio licensees that had defected from the NAB and eventually rejoined them. The NRBA Chairmen had proposed some sort of

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time as Chairman to rediscover the writings of Madison and Hamilton, and discussions of philosophical issues sometimes overtook the day’s scheduled appointments.

23. Address by Chairman Fowler before the International Radio Television Society, *reprinted in* Fowler, *The Public’s Interest*, 4 COMM. & L. 51 (Winter 1982).

24. *Id.* at 56.

25. Address by Chairman Fowler before the North Carolina Association of Broadcasters (Oct. 25, 1982), *reprinted in part in* Fowler’s *Analogy; Use of Print Model for Deregulation*, BROADCASTING, Oct. 25, 1982, at 23-25.

license fee in exchange for a contract from the government.<sup>26</sup>

In the spring of 1983, Tim Wirth, who was Chairman of The House Telecommunications Subcommittee, also endorsed a fee as part of a deregulation approach to radio.<sup>27</sup> Moreover, Fowler's viewpoint was later endorsed by the *New York Times* when it editorialized: "It's time to acknowledge that commercial television runs itself at least as well as government could run it. Congress should stop thinking about broadcast licenses as public trust and should start thinking about them as a public treasure."<sup>28</sup>

In Fowler's world, the broadcaster would respond to market forces. There might or might not be some sort of fee, and non-market needs, such as long-form news, public affairs and instructional children's programs, would be addressed through public broadcasting. This theme renewed itself in Fowler's last year, when he advocated, unsuccessfully, that Congress adopt a spectrum auction system for unlicensed high frequency channels.<sup>29</sup>

Just as Chairman Fowler wanted to articulate a vision in broadcasting, so, too, did he assay to set forth a future for telecommunications. Here, his speech-making had considerable international significance. The international focus was intentional.

Domestic common carrier policy had already incorporated reliance on competition instead of regulation. Consider the precedents awaiting Fowler: the "open skies" policies encouraging free entry into providing domestic satellite service;<sup>30</sup> MCI's Execunet service entry into AT&T's long distance markets and competitive entry into the telephone equipment market;<sup>31</sup> the deregulation of receive-only earth stations;<sup>32</sup> the

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26. See *Fowler Hails FCC Proposal*, BROADCASTING, Sept. 20, 1982, at 42.

27. *Name of the Game in Las Vegas: Spectrum Fees*, BROADCASTING, Apr. 18, 1983, at 39.

28. *What's Properly Public About TV*, N.Y. Times, July 16, 1984, at A22, col. 1.

29. *Spectrum Auctions: FCC Proposals for the Airwaves, Hearings on H.170 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess. 8 (1986)* (statement of Chairman Fowler).

30. Domestic Communications—Satellite Facilities, Second Report and Order, 35 F.C.C.2d 844, paras. 6-7, recon., Memorandum Opinion and Order, 38 F.C.C.2d 665, para. 30 (1972).

31. *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978); *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590 (D.C. Cir.), cert. denied, 439 U.S. 980 (1978).

decartelization of international record carriers;<sup>33</sup> the competitive carrier proceedings, aimed at loosening regulation of non-dominant carriers such as MCI;<sup>34</sup> and other like-minded policies. With competition a well-accepted piece of the U.S. policy apparatus for telecommunications regulators, the real opportunities for policy makers lay among highly-regulated European and Asian nations.

Here, Mark Fowler could carry a message of U.S. success. But, more importantly, by priming the regulatory environment overseas for privatization and greater competition,<sup>35</sup> it was possible to ease U.S. entry into those markets.

In Chairman Fowler's view, the U.S. experience in deregulation should be studied and emulated by other countries previously resigned to requiring state operation of telecommunications and broadcasting. One of his favorite images for this vision was what he called the "Popcorn Principle," first articulated at Georgetown University in 1985.<sup>36</sup> In his address he described a hot air popper that someone had given his family for Christmas: "The amazing thing about this machine is that it produces so much popcorn, far more than it appears that the machine can handle. And it produces all this popcorn without the use of what was long thought to be the essential ingredient of the process."<sup>37</sup> The principle thus adduced was this: "Remove what was thought an essential ingredient—heavy government regulation—and it still works. In fact, it works better."<sup>38</sup>

Chairman Fowler enjoyed sharing this message not only with those who would visit his office in Washington, but in his travels to other nations. In an address before the Organization for Economic Cooperation and Development in Paris in 1985,<sup>39</sup> con-

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32. Regulation of Receive-Only Domestic Earth Satellite Stations, First Report and Order, 74 F.C.C.2d 205, para. 1 (1979).

33. See International Record Carriers, Policy Statement and Order in Docket No. 19660, 76 F.C.C.2d 115, para. 116 (1979).

34. For a good review of this landmark march from regulation to permissive forbearance of nondominant common carriers in the communications field, see MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

35. One way privatization was recognized was the FCC's support of private competitors to INTELSAT's satellite system. International Satellite Systems, Report and Order, 101 F.C.C.2d 1046, para. 68 (1985).

36. "U.S. Global Telecommunications: The Popcorn Principle," Address by Chairman Fowler, Georgetown University Center for Strategic and International Studies (Feb. 26, 1985), reprinted in 2 *TELEMATICS* 11 (1985).

37. *Id.*

38. *Id.*

39. "American Telecommunications: Notes of A Friendly Gardener," Address by

sidered a highlight of his administration, Fowler urged European nations just awakening from the slumber of state ownership of telecommunications services to give private systems a chance. In a companion speech delivered a few days later in London,<sup>40</sup> he articulated his belief in market forces as opposed to government intervention:

And there is nothing base or crude at all in allowing people to live life literally to their heart's content. The marketplace is one important way people have to express what they want with their lives and in their lives. The market is not the Alpha and Omega of satisfaction. There are some things money cannot buy, to be sure. But a vigorous market, one that allows ease of entry and a range of choice, is the start of the stuff of human happiness. And those who would over-regulate it would rob us of the flea market and leave us with the flea.<sup>41</sup>

Beyond this, and back at home, Chairman Fowler proposed a radically deregulated domestic telephone environment, applying the competitive model even to the monopoly situation of local telephone exchange service. His "Back to the Future" speech<sup>42</sup> came to describe an entire regulatory strategy. Fowler envisioned the future as one in which competition, not regulation, would dictate choice and service in the marketplace. In this far-reaching, but by no means implausible vision of common carrier regulation,<sup>43</sup> Fowler challenged the assumption

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Chairman Fowler, Organization for Economic Cooperation and Development (Nov. 18, 1985).

40. "On Gardening, Telecommunications and Capitalism," Address by Chairman Fowler, Information Technology Committee of the United Kingdom Parliament (Nov. 21, 1985).

41. *Id.*

42. Fowler, Halprin & Schlichting, "Back to the Future:" *A Model for Telecommunications*, 38 FED. COMM. L.J. 145 (1986) (The speech was used as the basis for this article.).

43. For example, in Nebraska, the local phone company may, on 90 days' notice, increase rates up to ten percent annually, unless two percent of affected consumers sign a petition opposing the increase, in which case the state public utility commission must hold a hearing and pass upon the increase. Services other than local exchange are nearly free of rate-of-return regulation. See TESKE, REPORT ON STATE REGULATION 1 (1987) (prepared for U.S. Congress Office of Technology Assessment). Under the Vermont Public Service Board's "Social Contract," the Vermont Public Service Advocate is allowed to negotiate a five-year price contract not based on rate-of-return formulas with the local exchange carrier. *Id.* In addition, Alfred Sikes, NTIA Administrator, views the FCC's proposed changes as "considerably less comprehensive" than his own agency's recommendations. Sikes, *Reforming Regulation of the Telephone Business: The NTIA Regulatory Alternatives Report*, 5 COMM. LAW. 17 (Fall 1987).

that monopoly carriers required tariffs to control market power.

While much attention is paid to what is said by an FCC chairman, the initial significance of this attention may be more a function of the status of the office than the words spoken. The FCC Chair, let alone the FCC, does not operate in a vacuum. The FCC is, after all, an agency of Congress,<sup>44</sup> and Congress can at any time eliminate the agency. Moreover, as the saga of the AT&T divestiture reminds us, other parts of the government, in particular the judicial and executive branches, play a role in deciding communications policy in the United States. Finally, when discussing international matters, one cannot ignore the Department of State, the National Telecommunications and Information Administration (NTIA) in the Department of Commerce, the U.S. Trade Representative, and the international organizations to which the United States is a party.

Given this, it is remarkable that one individual can make a difference in setting the course of the communications agenda in the United States, particularly where the issues involved are complicated and hard for the public to understand. For example, who outside of those following the intricacies of the divestiture decree can be persuaded to discuss Judge Harold Greene's judgment call in his 1987 line-of-business restrictions ruling?<sup>45</sup> But the current communications policy debate seems to hinge on such matters.

As for broadcasting, the Fowler Administration varied from the prevailing attitude about regulation, but it did not cause a wholesale dismantling of the regulatory apparatus. The FCC operates under the "public interest, convenience, or necessity" standard in the Communications Act of 1934,<sup>46</sup> a vague articulation that admits of regulatory variations on most matters.

Despite extravagant claims about the demise of the Commission's primary content regulations<sup>47</sup> and the Fairness Doctrine,<sup>48</sup> they remained in force<sup>49</sup> during his tenure. Even non-

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44. 47 U.S.C. § 151 (1982).

45. *United States v. Western Elec. Co.*, 797 F.2d 1082 (D.C. Cir. 1986).

46. 47 U.S.C. § 307(a) (1982).

47. For example, *id.* § 315 requires that a licensee who gives a candidate for public office an opportunity, free or paid, to appear, must give all other candidates for that office an equal opportunity. News programs, news interviews, on-the-spot coverage and documentaries are exempt. *Id.*

48. The fairness doctrine required licensees to cover controversial issues of public importance and to afford opportunities for contrasting viewpoints on those issues. It

renewal of an FM station for failure to make good faith efforts to meet its program commitment to the agency was affirmed under his administration.<sup>50</sup> Furthermore, broadcasters continue to have an obligation to program to the needs of children.<sup>51</sup>

Even so, the era should be characterized as producing both philosophical and structural change, and generating energy, concrete achievements, and some failures. The Fowler Commission avoided some proposals unpopular with broadcasters. In particular, it declined to adopt a proposal submitted during the Carter Administration to increase the number of VHF allocations based on a revised (and contentious) definition of the protection to be afforded existing licensees.<sup>52</sup> However, the Commission did increase the number of FM radio allocations by more than 600, a substantial rise in service and competition.<sup>53</sup> Nevertheless, it declined to space AM stations closer together, thereby allowing more stations, a position favored by Chairman Ferris.<sup>54</sup> This rejection, though unfaithful to marketplace principles, seems wise given the public's preference for FM and the resulting financial difficulties of many AM stations. Further, the Commission's reluctance to change the rules imposing mandatory carriage of local signals by cable systems can be viewed as an accommodation to broadcasters, despite the first amendment infirmities posed by the original rules.<sup>55</sup>

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was eliminated as unconstitutional and contrary to public policy under Chairman Dennis Patrick's chairmanship. Syracuse Peace Council, Memorandum Opinion and Order, 52 Fed. Reg. 31,768, 63 RAD. REG. 2d (P&F) 541, paras. 17-26 (1987), *appeal pending*.

49. See, e.g., Syracuse Peace Council, Memorandum Opinion and Order, 99 F.C.C.2d 1389 (1984), *remanded sub nom.* Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987).

50. See, e.g., West Coast Media, Memorandum Opinion and Order, 86 F.C.C.2d 331 (1981), *aff'd sub nom.* West Coast Media v. FCC, 695 F.2d 617 (D.C. Cir. 1982).

51. TV Programming for Children, Report and Order, 96 F.C.C.2d 634, para. 46 (1984), *aff'd sub nom.* Action for Children's Television v. FCC, 756 F.2d 899, 901 (D.C. Cir. 1985).

52. Table of Television Channel Allotments, Notice of Proposed Rule Making in Gen. Docket No. 80-499, FCC 80-545, 45 Fed. Reg. 72,902, 72,934-35 (released Oct. 21, 1980).

53. FM Broadcast Stations, Report and Order, 94 F.C.C.2d 152, para. 87 (1983). The actual number of additional stations and their locations did not appear until the ground rules providing for shorter separations were established. Increasing the Availability of FM Broadcast Assignments, Notice of Proposed Rule Making in MM Docket No. 84-231, FCC 84-66, 49 Fed. Reg. 11,214, 11,216-17 (released Mar. 14, 1984).

54. AM Broadcasting in Region 2, Fourth Report, 89 F.C.C.2d 546, para. 6 (1982).

55. Quincy Cable TV v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985).

The rule limiting the number of AM, FM or TV stations one individual could own was raised to twelve (with a percentage concentration cap). This change was a relatively modest adjustment.<sup>56</sup> The rule forbidding transfers of broadcast licenses within three years of acquisition was eliminated.<sup>57</sup> But there is no hard evidence of the harm or benefit from this change with respect to the public. Other structural changes occurred as well.<sup>58</sup>

There were limits, however — legal, political, and self-imposed — which narrowed Fowler's field of action. He failed to win repeal of the financial interest/syndication rules,<sup>59</sup> stymied by a whirlwind lobbying effort mounted by the Hollywood production community and independent television stations. This led Congress to interdict the proposal and previously supportive Reagan administration agencies, such as the Departments of Justice and Commerce, to abandon it. The rule increasing station ownership to twelve was itself a compromise imposed by Congress. The original Fowler proposal would have uncapped the number of broadcast properties one entity could own, subject to antitrust laws regulating local or national concentration. In his final days as chairman, and after years of strong defense of the first amendment in broadcasting, he found himself in the unanimous majority which concluded that a group of radio broadcasts were indecent, although no punishments were meted out.<sup>60</sup>

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56. Seven-Station-Rule, Memorandum Opinion and Order, 50 Fed. Reg. 4,666, 57 RAD. REG. 2d (P & F) 966, para. 23 (1984).

57. Transfer of Broadcast Facilities, Report and Order in BC Docket No. 81-897, FCC 82-519, 47 Fed. Reg. 55,924, 52 RAD. REG. 2d (P & F) 1081, para. 21 (1982).

58. *See, e.g.*, Subscription Video, Report and Order in Gen. Docket No. 85-305, FCC 86-526, 52 Fed. Reg. 6,152, 62 RAD. REG. 2d (P & F) 389 (1986) (releasing subscription TV and DBS services from 47 U.S.C. § 315 (equal opportunity) and 47 U.S.C. § 312(a)(7) (reasonable access) provisions of the Communications Act and reclassifying such services as non-broadcast); Multiple Ownership (Regional Concentration of Control Provisions), Report and Order, MM Docket No. 84-19, FCC 84-156, 49 Fed. Reg. 34,541, 55 RAD. REG. 2d (P & F) 1389 (1984) (repealing regional concentration of control provisions of FCC's multiple ownership rules which prohibited common ownership of three radio or TV stations where two are located within 100 miles of the third).

59. *See, e.g.*, Amendment of the Commission's Syndication and Financial Interest Rule, Notice of Proposed Rule Making in BC Docket No. 82-345, FCC 82-300, 47 Fed. Reg. 32,959 (1982).

60. Infinity Broadcasting Corp. of Pennsylvania, Memorandum Opinion and Order, (WYSP(FM)), 2 F.C.C. Rcd. 2705 (1987); Pacifica Found., Memorandum Opinion and Order, 2 F.C.C. Rcd. 2698 (1987); Regents of the University of California, Memorandum Opinion and Order, 2 F.C.C. Rcd. 2703 (1987).

There is no denying that Chairman Fowler will be remembered for trying to change the terms of the debate. As noted, his operating assumption was that the absence of government regulation was the natural order of things. Those wishing to advance or maintain regulation had the burden of persuasion. He was a tireless advocate for the proposition that broadcasters should be treated no differently from newspapers when it came to first amendment rights.

Perhaps his sensitivity to expression grew out of his experience as a radio broadcaster. His towering height, his booming voice, and his indefatigable congeniality towards perfect strangers, made him an ideal speaker and public personality. If the Chautauqua Platform Society was still underway in this country, no doubt Chairman Fowler would have been a leading celebrity on the circuit.<sup>61</sup>

Ultimately, with Mark Fowler, what you saw was what you got. He was an unmitigated protagonist of the Reagan Administration. During the first term, perhaps more than at any other federal agency, the "Reagan revolution" which favored market solutions had an opportunity to be considered sincerely on its merits.

Of course, anyone who hangs around in Washington, D.C. long enough knows that there is a huge, though invisible, pendulum that swings over the city. Regulatory approaches follow the path of that suspended orb. Through his words and through the actions of the Commission, Chairman Fowler might be seen as a modern day Jean Bernard Foucault. Foucault, it will be recalled, was the nineteenth century French physicist who recognized that a pendulum could prove that the earth rotated. For Fowler, the pendulum continued to swing, but the policy debate could rotate.

In Fowler's world, competition deserved a try at least as much as regulation. In Fowler's world, broadcasters and print journalists would receive the same treatment under the first amendment. In Fowler's world, market forces rather than their government proxies would decide the flow of services and goods in society. And in Fowler's world, market forces, with their genie of competition, generally would lead to benefits for all segments of society. As he was fond of saying, when the

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61. See W. SHIRER, 20TH CENTURY JOURNEY: A MEMOIR OF A LIFE AND THE TIMES 155-64 (1985).

water level increases, all the boats rise up.<sup>62</sup>

In the short time since he left the FCC, it is impossible to gauge whether Fowler's policies were ahead of their time, right on target, or quite wide of the mark. But through his nearly 200 public addresses, Mark Fowler managed to light the sparks of a vigorous policy debate.

Certainly there is more choice in both video and telecommunications. The number of over-the-air television stations increased about twenty-five percent during Fowler's term,<sup>63</sup> and the choice of telecommunications offerings, from equipment to services, continued to expand. Choice is difficult, of course, and some of the new choices may not mark a new height in technological cultural development.<sup>64</sup> Further, one need not be a content analyst to conclude that in commercial over-the-air television, there is no yawing overload of instructional or educational children's programs. And one senses a fresh concern about commercials that appear among the children's programs that remain.<sup>65</sup> At some point in the debate about children's television and the marketplace, we need to remind ourselves that we are, after all, talking about children.

Finally, in writing the history of a deconstructionist period, one must not attribute too little to independent vectors operating outside government. The era in which Chairman Fowler served in government saw unparalleled development of the technologies of mass media and telecommunications and of the attention the economy paid to them.<sup>66</sup> On that score, he was at the right time and at the right place. It was a time for rethink-

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62. At the same time, he recognized that not all programming would emerge in the marketplace and so he supported public financing of non-commercial broadcasting. In addition, he favored target subsidies for poorer telephone subscribers through lifeline programs.

63. See BROADCASTING CABLE YEARBOOK A2 (1981) (there were 1,020 TV stations, commercial and non-commercial, in the U.S. by the end of 1980); BROADCASTING CABLE YEARBOOK A2 (1987) (there were 1,285 TV stations by the end of 1986, a gain of over twenty-five percent).

64. See, e.g., Brenner, *Rise of Home TV Shopping Proves Theory of the Ledger Class*, L.A. Times, May 10, 1987, at IV3, col. 2.

65. *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

66. *Channels of Communication*, a monthly magazine initially devoted to social criticism of television, was highly critical of the Fowler administration during its first few years. By the time Chairman Fowler left office, the magazine had renamed itself *Channels, The Business of Communications*, and transformed its editorial focus to concentrate almost exclusively on the economics of the video transmission and production marketplace.

ing old ideas. As a result, things will never be quite the same again.