

The Free State Foundation

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News Release

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Former FCC Commissioner Glen Robinson Decries FCC's "Middle Way" Regulatory Proposal

*FSF Academic Board Member Says FCC Claim of Moderation "Is An
Illusion"*

ROCKVILLE, MD – In a *Perspectives from FSF Scholars* paper released today, former FCC Commissioner Glen O. Robinson decries on both legal and policy grounds the FCC's "Third Way" rulemaking proposal to regulate broadband Internet providers. Professor Robinson declares in ["The Middle Way to Internet Regulation"](#) that "if this new middle way seems moderate, that appearance is an illusion." According to Robinson, while it is true that the FCC has forbearance authority, "Congress gave the FCC that authority for the purpose of eliminating existing regulations that were no longer needed." But, instead, the FCC's current proposal, "invokes forbearance authority not as a means of removing old regulations but as a means of affirmatively engineering new ones." In this regard, "the Commission's approach resembles its use of ancillary jurisdiction in that it involves selective use of various Communications Act provisions to achieve some particular regulatory outcome that is not part of the statutory design."

Professor Robinson, a member of the Free State Foundation's Board of Academic Advisors, served as a Commissioner at the FCC from 1974-1976. He is Professor of Law Emeritus at the University of Virginia.

Other key statements by Professor Robinson include the following:

- "By emphasizing the small number of provisions it seeks to enforce the FCC would like to create the appearance of a restrained regulatory ambition. But numbers aren't important. What is important is the substance of those provisions selected and what that selection says about the shape of the ensuing regulatory regime. Although the FCC has not made its final selection, it has said it clearly intends to retain as operative all those provisions that are necessary to support control of rates and services (Sections 201, 202, 208) for these are central to its ostensible purpose of preventing "unreasonable discrimination" in the provision of broadband service."
- With respect to the FCC's proposed restriction on two-sided pricing or differential charges for prioritized access as part of an anti-discrimination rule: "The particular pricing rule is a matter of business judgment. There is no reason to

think something nefarious is going on when a firm allocates the price of its product between two parties that benefit from it. Of course, there could be a regulatory or antitrust concern if a firm is found to have and to abuse dominant market power. However, the mere presence of two-sided pricing doesn't establish such market power or its abuse."

- "The FCC's proposed restriction on two-sided pricing for enhanced transport services isn't about correcting monopoly power in any event. It is simply industrial policy disguised as consumer protection. The FCC wants to protect content/application/service providers from having to pay for enhanced services that, given a choice, they would prefer not to pay for. The agency apparently believes that this protection is necessary in order to promote investment and innovation in content, though it concedes that this might also discourage investment and innovation in broadband service infrastructure. There is no substantial evidence that the former effect is more likely or more important than the latter."

Professor Robinson's paper is the twenty-second this year in Volume 5 of the *Perspectives from FSF Scholars* series. All 22 may be found [here](#).

A PDF version of the "The Middle Way to Internet Regulation" is [here](#).

The Free State Foundation is an independent nonpartisan, Section 501(c)(3), free market-oriented think tank.

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