

# The Free State Foundation

A Free Market Think Tank For Maryland...Because Ideas Matter

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*In this essay, “Net Neutrality Mandates: Neutering the First Amendment in the Digital Age,” Free State Foundation President Randolph J. May argues that the various proposals to impose net neutrality mandates likely would violate the First Amendment free speech rights of the broadband Internet service providers. May concludes: “This strange push for new access mandates under the guise of net neutrality presents a clear case where greater appreciation for the First Amendment’s free speech values will lead to sounder communications policy. We should not allow net neutrality to neuter the First Amendment in the digital age.” With a full discussion of the pertinent First Amendment jurisprudence, this essay is a significantly expanded version of an opinion column published in the National Law Journal in August.*

*Almost all of the proposed net neutrality mandates, either explicitly or as a matter of practical effect, require broadband Internet service providers to allow their subscribers to access any content made available over the Internet and to post or send any content of the subscriber’s choosing. For example, a recent draft version of the Senate Commerce Committee bill provides that every ISP shall allow every subscriber “to access and post any lawful content of that subscriber’s choosing.” And, more pointedly, it provides that no ISP “may limit, restrict, ban, prohibit, or otherwise regulate content on the Internet because of religious views, political views, or any other views expressed in such content....” According to May, because net neutrality mandates “require an ISP to send or post content which the ISP otherwise might prefer not to send or post, net neutrality mandates are, in effect, speech restrictions that impinge on the ISPs’ constitutional rights.” Net neutrality mandates “are, for all practical purposes, compelled access mandates.” While the Supreme Court has upheld compelled access mandates in limited circumstances, May’s essay explains why in this instance, in today’s competitive and technologically dynamic communications and information services environment, net neutrality restrictions are unlikely to pass constitutional muster.*

*The full essay is below and the PDF [here](#).*

# **Net Neutrality Mandates: Neutering the First Amendment in the Digital Age**

**by  
Randolph J. May\***

## **Introduction**

There are many reasons why Congress should not adopt new laws mandating so-called net neutrality for broadband Internet service providers (ISPs). But an often overlooked and underappreciated one is that net neutrality mandates likely would violate the First Amendment free speech rights of the ISPs, such as Verizon Communications Inc. and Comcast Corporation, to which they would apply. This is a case where greater sensitivity paid to constitutional values, if not outright constitutional dictates, will lead to sounder communications policy than ignoring such values.

While at this writing several different net neutrality proposals have been put forward in United States Senate and House of Representatives, all have this in common: One way or another, they propose to restrict outright, or grant the Federal Communications Commission (“FCC”) the authority to restrict, broadband ISPs from taking any action to “block, impair or degrade” consumers from accessing any Web site or from “discriminating” against any unaffiliated entity’s content. For example, one of the most fulsome expressions of restrictions, a bill drafted by Senators Olympia Snowe, R-Maine, and Byron Dorgan, D-N.D., felicitously called the “Internet Freedom Preservation Act,” states that ISPs shall not “block, interfere with, discriminate against, impair, or degrade the ability of any person to use a broadband service to access, use, send, post, receive, or offer any lawful content . . . made available over the Internet.”<sup>1</sup> The most recent draft version of a bill that will be reported out of the Senate Committee on Commerce, Science, contains similar language. It provides that every ISP shall allow each subscriber to “access and post any lawful content of that subscriber’s choosing.”<sup>2</sup> And, to put a finer point on the matter, the bill further states that “no Internet service provider engaged in interstate commerce may limit, restrict, ban, prohibit, or otherwise regulate content on the Internet because of religious views, political views, or any other views expressed in such content unless specifically authorized by law.”<sup>3</sup> A bill passed by the House of Representatives contains a provision that grants the FCC the authority to enforce a net neutrality mandate, stating that “consumers are entitled to access the lawful Internet content of their choice.”<sup>4</sup>

## **The Competitive Broadband ISP Marketplace**

It is generally agreed that except for a very few isolated and quickly remedied incidents,<sup>5</sup> neither the cable operators nor the telephone companies providing broadband Internet services to date have blocked, impaired or otherwise restricted subscriber access to the applications and content of unaffiliated entities. This is not surprising given that the broadband Internet access market is rapidly becoming more competitive.<sup>6</sup>

The FCC most recently had occasion to comment on the competitiveness of the broadband ISP marketplace in July 2006 when it approved the applications for consent to the assignment and transfer of control of the Adelphia cable system licenses to Comcast and Time Warner Cable Inc.<sup>7</sup> Rejecting contentions that the proposed transactions would increase incentives for either Comcast or Time Warner to engage in conduct harmful to either consumers or to competition with respect to the delivery of Internet content, services, or applications, the Commission concluded that “competition among providers of broadband service is vigorous.”<sup>8</sup> The Commission determined that broadband penetration was increasing “rapidly,” and “[i]ncreased penetration has been accompanied by more vigorous competition.”<sup>9</sup> Moreover, the agency recounted the increase in the number of consumers that have a choice of multiple broadband providers and the increasing number of subscribers to new broadband technologies such as cellular, WiFi, WiMax, and now Broadband over Powerline (BPL).<sup>10</sup> According to the FCC’s most recent data, the percentage of zip codes served by four or more different broadband ISPs increased from 43.7% in 2003 to 59.7% in 2005.<sup>11</sup>

Given what the Commission characterized as this “vigorous” competition, it is unlikely that ISPs like Verizon and Comcast, or for that matter, broadband providers using other technological platforms such as wireless, powerline, or satellite operators,<sup>12</sup> will take any action that meets with material consumer objection or resistance. As a matter of policy, Congress should be very hesitant to pass net neutrality mandates in anticipation of conjectured harms that may never materialize.<sup>13</sup> This is especially so with regard to a technologically dynamic area like communications and the Internet. As broadband networks and the Internet continue to evolve, laws with open-ended and vague terms at their core, such as “interfere with,” “impair” and “degrade,” almost certainly would turn out to be overly broad in application.

This overbreadth inevitably would restrict or inhibit ISPs from entering into what otherwise might be economically efficient business arrangements with applications or content providers or from integrating their own applications and services in the most economically efficient manner. But for the prohibition, these arrangements presumably would allow the ISPs to make available higher quality and/or lower cost services demanded by consumers. Moreover, apart from practices that ISPs might assume outright to fall within the prohibitory language, the vagueness of the neutrality mandates would be grist for the litigation mills for years to come. This too, of course, would chill the development of new, more efficient offerings that otherwise would be demanded by consumers.

### **Net Neutrality: Neutering the First Amendment**

Even if net neutrality mandates made good policy sense, which they do not, there is another, more fundamental reason why they should not be adopted. Because they require an ISP to send or post content which the ISP otherwise might prefer not to send or post, net neutrality mandates are, in effect, speech restrictions that impinge on the ISPs’ constitutional rights. The First Amendment’s language is plain: “Congress shall make no law . . . abridging the freedom of speech.” ISPs like Comcast and Verizon possess free speech rights just

like newspapers, magazines, movie and CD producers or the man preaching on a soapbox. They are all speakers for First Amendment purposes, regardless of the medium used. While the medium --technological platform employed-- may impact the degree of First Amendment protection accorded, calling forth, at least for now, one standard of review or another,<sup>14</sup> there should be no doubt that broadband ISPs possess First Amendment rights as speakers.

There also should be no doubt that under traditional First Amendment jurisprudence, it is just as much a free speech infringement to compel a speaker to convey messages that the speaker does not wish to convey as it is to prevent a speaker from conveying messages it wishes to convey. As the Supreme Court proclaimed in the *Pacific Gas & Electric* case: “Compelled access...both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.”<sup>15</sup> There the Court explained that the “essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”<sup>16</sup>

In perhaps the most notable compelled access case, *Miami Herald Publishing Company v. Tornillo*,<sup>17</sup> the Supreme Court held unanimously that a Florida statute requiring a newspaper that published an editorial critical of a political candidate to print the candidate’s reply violated the First Amendment. In doing so, the Court acknowledged—and rejected—Tornillo’s argument that the Florida mandatory access statute does not amount to a restriction of the newspaper’s right to say whatever it pleases:

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.<sup>18</sup>

Neutrality laws mandating that an ISP is required to “post” or “send” or allow “access” to any content of the subscriber’s choosing are, for all practical purposes, compelled access mandates akin to the Florida right to access statute at issue in *Tornillo*. Even though these mandates do not literally “restrict” an ISP from publishing content of its own choosing, they compel the ISP to convey or make available content it otherwise, for whatever reason, may choose not to convey or make available.

Relying expressly on *Tornillo*, a federal court in Florida held unconstitutional a county ordinance requiring a cable operator to allow competitors access to its cable system on terms at least as favorable as those on which it provides such access to itself.<sup>19</sup> The court declared: “Under the First

Amendment, government should not interfere with the process by which preferences for information evolve. Not only the message, but also the messenger receive constitutional protection.”<sup>20</sup> And in language directly pertinent to the current net neutrality debate, the court proclaimed: “Compelled access like that ordered by the Broward County ordinance both penalizes expression and forces the cable operators to alter their content to conform to an agenda they do not set.”<sup>21</sup>

In *Tornillo*, Chief Justice Burger painstakingly took note of claims by proponents of the compelled access statute that newspapers had come to exercise monopolistic control over the dissemination of information in their communities. He characterized the proffered “concentration of control” justification for compelled access this way:

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues.<sup>22</sup>

In other words, said the Court, it is argued that “[t]he First Amendment interest of the public in being informed is said to be in peril because ‘the marketplace of ideas’ is today a monopoly controlled by the owners of the market.”<sup>23</sup>

No matter. For purposes of First Amendment protection, the Court said: “However much validity may be found in these [concentration of control] arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.”<sup>24</sup>

Although the *Tornillo* Court emphasized the result would have been the same even if the mandated right to reply was costless to the newspaper, it pointed out that the Florida statute necessarily imposes penalties and burdens on the newspaper required to print a reply: “The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the costs in printing and composing time and materials and in taking up space that could be devoted to other material that the newspaper may have preferred to print.”<sup>25</sup> Similarly, in the Broward County case, the court observed that the equal access provision applicable to cable operators “distorts and disrupts the integrity of the information market by interfering with the ability of market participants to use different cost structures and economic approaches based on the inherent advantages and disadvantages of their respective technology.”<sup>26</sup> Compelled access

requirements that are central to all of the net neutrality proposals have this very same effect, of course, and thus suffer the same defect.

To put the matter of free speech rights in its most stark (and probably least likely to occur) form, a mandate—and all the net neutrality proposals contain similar ones—that prevents an ISP from “blocking” access by its subscribers to any lawful Web site would mean that the ISP could not choose to restrict access to material that in its view, say, is “indecent” or “homophobic” or, say, “unpatriotic.” (Please understand that I am not suggesting that an ISP should adopt practices restricting access to any lawful content or that such a restriction would be a successful business strategy.<sup>27</sup> The examples simply illustrate the free speech interests at stake.) Indeed, recall the provision in the current draft version of the Senate Commerce Committee bill stating that “no Internet service provider engaged in interstate commerce may limit, restrict, ban, prohibit, or otherwise regulate content on the Internet because of religious views, political views, or any other views expressed in such content unless specifically authorized by law.”<sup>28</sup> The intent to restrict free speech could not be stated more straightforwardly.

To be sure, freedom of speech under the First Amendment is not absolute. For example, in 1994 in *Turner Broadcasting System v. FCC*,<sup>29</sup> the Supreme Court, in a narrow 5-4 decision, rejected the argument that, at least on its face, a law requiring cable operators to carry the signals of local broadcast stations violated the First Amendment. The Court readily acknowledged that such a carriage mandate seriously implicated the cable operators’ First Amendment rights, declaring, “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”<sup>30</sup>

Nevertheless, relying very heavily on Congress’ judgment that local stations providing free television deserved special economic protection, the *Turner* Court refused to invalidate the “must carry” law outright without further fact-finding on remand concerning the law’s actual effect and effectiveness. Significantly for present purposes, net neutrality mandates are not claimed to have anything to do with the protection of local broadcast stations. And as significantly, the *Turner* Court assumed that cable operators possessed a bottleneck that allowed them to play a “gatekeeper” role controlling programming that entered subscribers’ homes. In today’s competitive environment, it cannot be contended seriously that cable operators any longer have “bottleneck” control of the video content that enters consumers’ homes, assuming for the sake of argument they ever did.

Although little commented upon to date, the proposed neutrality mandates are eerily reminiscent of the Federal Communications Commission’s Fairness Doctrine, which the agency jettisoned two decades ago in light of the new media proliferating even then. The Fairness Doctrine required that broadcasters must present adequate coverage of public issues and do so in a balanced way.<sup>31</sup> When the Supreme Court upheld this form of compelled access regulation against First Amendment challenge in 1969 in *Red Lion Broadcasting Co. v. FCC*,<sup>32</sup> it did so on the basis that it considered broadcasters different from other speakers because they use the radio spectrum, which the court characterized as a scarce public resource.<sup>33</sup> Apart from whether the Court today

would reach the same result regarding broadcasters' free speech rights,<sup>34</sup> it has refused to extend such scarcity-based reasoning to other media. We certainly do not want to import Fairness Doctrine-type speech restrictions into the newly-competitive environment of broadband ISPs.

## Conclusion

In effect, what the current crop of net-neutrality proposals really seeks to do, without saying so explicitly, is to reverse the Supreme Court's 2005 decision in *National Cable & Telecommunications Assoc. v. Brand X Internet Services*.<sup>35</sup> *Brand X* affirmed the FCC determination that broadband ISPs are not common carriers subject to the requirement to carry all messages indifferently and to grant compelled access to all comers. Net neutrality mandates, in effect, reimpose common carrier obligations on the broadband ISPs.

It may well be that, as a matter of law, Congress or the FCC have the authority, consistent with the Constitution, to reimpose common carrier or common carrier-like nondiscrimination obligations and/or rate regulation on the broadband ISPs, although there is doubt about the extent of the authority to do so in a competitive communications environment such as that which presently exists.<sup>36</sup> If broadband ISPs affirmatively were, in accordance with proper procedure, designated common carriers, assuming for the sake of argument that such designation is not an infringement of their property rights under the Fifth Amendment, then their free speech rights might not be implicated by net neutrality proposals. But, of course, post-*Brand X*, this has not happened.

The main point here is that largely unappreciated but nevertheless fundamental First Amendment interests are at stake in the raging net-neutrality debate. In this age of content abundance that was almost unimaginable even a decade or two ago, it is baffling that the imposition of Fairness Doctrine-type speech restrictions is even being seriously considered. The *Broward County* court put it well back in 2000, when competition among broadband ISPs, although already beginning to flourish, was not nearly as robust as it is today: "It is ironic that a technology, which is permitting citizens greater ease of access to channels of communication than has existed at any time throughout history, is being subjected to the same arguments rejected by the Supreme Court in *Tornillo*."<sup>37</sup>

Ironic indeed. This strange push for new access mandates under the guise of net neutrality presents a clear case in which greater appreciation for the First Amendment's free speech values will lead to sounder communications policy. We should not allow net neutrality to neuter the First Amendment in the digital age.

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<sup>1</sup> S. 2917, "Internet Freedom preservation Act," introduced May 19, 2006.

<sup>2</sup> S. -----, "Advanced Telecommunications and Opportunities Reform Act," § 903(a)(1).

<sup>3</sup> *Id.*, at § 904(2).

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<sup>4</sup> H.R. 5252, “Consumer Opportunity, Promotion, and Enhancement Act of 2006,” as passed in the House of Representatives on June 8, 2006, granting the FCC the authority to enforce the neutrality principles that the agency had promulgated in a Policy Statement (FCC 05-151; CC Docket No. 02-33) released on September 23, 2006.

<sup>5</sup> See, for example, the Consent Decree between Madison River Communications, LLC and the FCC under which the Madison River Telephone Company agreed to cease blocking ports used by Voice over Internet Protocol applications that competed with Madison River’s traditional local telephone service offerings. Madison River Communications, LLC, DA 05-543, File No. EB-05-IH-0110.

<sup>6</sup> In its most recent report tracking penetration of high-speed broadband services, the FCC found that, as of December 31, 2005, on a nationwide basis at least 94% of the country’s zip codes had available two or more broadband providers. Indeed, approximately 88% of the nation’s zip codes had available three or more broadband competitors. This does not mean the competition was available ubiquitously throughout the zip code, but it is a good indication of the extent to which competition is proliferating. (The figures are approximate because of rounding errors. See FCC Report, “High-Speed Services for Internet Access: Status as of December 31, 2005,” released July 2006, at Table 17.

<sup>7</sup> Applications for Consent to Assignment and/or Transfer of Control of Licenses, FCC 06-105, MB Docket No. 05-192, released July 21, 2006 (hereinafter “*Adelphia/Comcast/Time Warner Order*”).

<sup>8</sup> *Id.*, at para. 217.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 217-218.

<sup>11</sup> *Id.*, at 217.

<sup>12</sup> In the *Adelphia/Comcast/Time Warner Order*, the FCC stated that “[p]ress reports indicate that both DBS providers have signed distribution agreements with WildBlue Communications, Inc., a provider of satellite-based Internet service.” *Id.*, at 218.

<sup>13</sup> Even in 1996 Congress embraced this precautionary principle with respect to Internet services when it declared: “It is the policy of the United States...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*” Telecommunications Act of 1996, 47 U.S.C. § 230(b)(2) (emphasis supplied).

<sup>14</sup> The Supreme Court, for example, has afforded broadcasters a lesser degree of protection than cable television operators and cable operators a lesser degree of protection than newspaper publishers. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)(broadcast model) with *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994)(cable model) with *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974)(print model). See generally Christopher S. Yoo, *The Rise and Demise of the Technologically-Specific Approach to the First Amendment*, 91 GEO. L. J. 245 (2003)(describing and critiquing the different models and standards of review employed by the Supreme Court in evaluating claims of First Amendment violations relating to different media using various technologies.) In *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978), the Court stated: “We have long recognized that each medium of expression presents special First amendment problems.”

<sup>15</sup> *Pac. Gas & Electric Co. v. Pub. Util. Comm’n*, 475 U.S. 1, 9 (1986)(Electric utility could not be compelled, consistent with the First Amendment, to include a consumer group’s views with which it disagreed in its billing envelope).

<sup>16</sup> *Id.*, at 11, quoting *Harper & Row Publishers, Inc., v Nation Enterprises*, 471 U.S. 539, 559 (1985), quoting *Estate of Hemingway, Random House*, 23 N.Y. 2d 341, 348, 244 N.E. 2d 250, 255 (1968)(emphasis in original)

<sup>17</sup> 418 U.S. 241 (1974).

<sup>18</sup> *Id.*, at 256.

<sup>19</sup> *Comcast Cablevision of Broward County, Inc. v. Broward County, Florida*, 125 F. Supp. 2d 685 (S.D. FL. 2000).

<sup>20</sup> *Id.*, at 693.

<sup>21</sup> *Id.*, at 694.

<sup>22</sup> 418 U.S. at 250.

<sup>23</sup> *Id.*, at 251.

<sup>24</sup> *Id.*, at 254.

<sup>25</sup> *Id.*, at 256.

<sup>26</sup> 125 F. Supp. 2d at 694.

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<sup>27</sup> See notes 6-11 *supra* and accompanying text discussing the current competitive environment that is most likely to inhibit the broadband ISPs from taking any action that is inconsistent with the marketplace preferences of consumers.

<sup>28</sup> See note 3 *supra*.

<sup>29</sup> 512 U.S. 622 (1994).

<sup>30</sup> *Id.*, at 641. As Christopher Yoo puts it, in addition to affirmative prohibitions on speech, “liberty-oriented theorists would find interference with individual speakers’ editorial discretion to be a First Amendment harm, even in the absence of evidence that particular content was favored or disfavored. Access requirements are particularly problematic in this regard.” Christopher S. Yoo, *Architectural Censorship and the FCC*, SO. CAL. L. REV. 699, 714 (2005).

<sup>31</sup> For a description of the doctrine, its impact on broadcasters, and a history of its demise, see Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), *aff’d*, 867 F. 2d 654 (D.C.Cir. 1989). Also see Meredith Corp. v. FCC, 809 F. 2d 863 (D.C. Cir. 1987).

<sup>32</sup> 395 U.S. 367 (1969).”

<sup>33</sup> “[B]ecause the frequencies reserved for public broadcasting were limited in number, it was essential to tell some applicants that they could not broadcast at all because there was room for only a few.” 395 U.S. at 388.

<sup>34</sup> There has been considerable criticism of the “scarcity doctrine” for many decades, even before the Supreme Court employed the rationale in *Red Lion*. The most famous and persuasive early critique was that offered by Ronald Coase. R. H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959). For an excellent comprehensive discussion critiquing the “scarcity doctrine,” including references to much of the academic work critiquing the doctrine and also to court decisions subsequent to *Red Lion* that have considered the doctrine’s continuing vitality, see Yoo, *supra* note 13, at 266-292.

<sup>35</sup> 125 S. Ct. 2688 (2005).

<sup>36</sup> In *Turner Broadcasting*, Justice Kennedy stated: “The First Amendment’s command that the government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.” 512 U.S. at 657. Even assuming this is an accurate statement of existing First Amendment jurisprudence, and note that it is at odds with the Court’s unanimous rejection of the relevance of the “monopoly” control argument in *Tornillo*, in today’s communications environment there is no one ISP that can be said to control a critical pathway of communication.

<sup>37</sup> 125 F. Supp. at 694.

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