



**The Free State Foundation's
Book Celebration**

A Reader on Net Neutrality and Restoring Internet Freedom

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MODERATOR:

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* This transcript has been edited for purposes of correcting obvious syntax, grammar, and punctuation errors, and eliminating redundancy in order to make it more easily readable. None of the meaning was changed in doing so.

P R O C E E D I N G S

MR. MAY: Okay. Now I'm going to ask Seth Cooper and Ted Bolema to come up, and we're going to move right into their segment. As I said before, Seth and Ted both contributed pieces to the book, actually more than one. So I've asked them to just give us a little more substance about some of the things that they wrote about. I've also asked them not to give you so much substance that you won't want to rush out and buy the book. So that's their task, which I hope they'll adhere to.

Again, Seth is a Senior Fellow at the Free State Foundation. I should mention that Ted, at the time he wrote for this book and even beyond that, was a Senior Fellow at the Free State Foundation.

I want to get this exactly right. Ted is Executive Director of the Institute for the Study of Economic Growth at Wichita State University, as of a couple months ago. But, importantly for the Free State Foundation, Ted agreed to continue on as a member of our Board of Academic Advisors. He's already contributed in that capacity and we're pleased with that.

So, with that, I'm going to call on Seth first. Then we'll just move to Ted. And they are going to give you about eight minutes' worth of what they've written about or want to talk about, whatever. Go.

MR. COOPER: Thank you, Randy, and thank you to everyone who is here today. In our book, *A Reader on Net Neutrality and Restoring Internet Freedom*, we address many aspects of these topics. One aspect, of course, is that overlooked question; the central legal question upon which the *Restoring Internet Freedom Order* will stand or fall at the D.C. Circuit. And that's the statutory definition issue. The FCC's reclassification of broadband services as a Title I service, of course, has significant pedigree, as FCC General Counsel Tom Johnson just conveyed to us. Significantly, going forward, the FCC's determination will receive *Chevron* deference by the D.C. Circuit Court if it follows the *U.S. Telecom vs. FCC* decision.

So, in other words, the court would not overturn the *Restoring Internet Freedom Order's* reclassification decision unless it were shown to be unreasonable and impermissible. I think that's highly unlikely. It can get dangerous to predict court outcomes and I've been

hesitant to do that in the past.

But on this issue before this court, I say there is no way it gets overturned under *Chevron*. I think that's going to be the ballgame on that one. It's kind of a bold prediction, but that's mine.

Now, an important result of the Title I reclassification of broadband is that it bolsters the case for federal preemption of state and local laws that conflict with federal broadband policy.

So a handful of states have passed laws or issued executive orders that effectively seek to reimpose the repealed *Title II Order* at the state level. The *Restoring Internet Freedom Order* comes out and says, "Look, these are jurisdictionally interstate services."

Broadband networks and the traffic do not conform neatly to state geographic borders. If a state tries to get involved in that, they are dealing with interstate commerce. It's going to have spillover effects on those services in other states.

The *Restoring Internet Freedom Order* taps into agency and court precedents that regard information services as jurisdictionally interstate, as interstate

commerce. And the *Restoring Internet Freedom Order* taps into important court precedent that accords preemptive force to federal agency policies favoring market competition and deregulation.

It's very important: What we have here with *Restoring Internet Freedom Order* is not an abandonment of the field on broadband policy. The FCC did not create a vacuum for states to fill in however they wish. What they did is they established an affirmative federal policy favoring free market competition. So market competition is the policy. And they set up a deregulatory framework with FCC transparency rules and FTC enforcement on a case-by-case basis.

In this book, one aspect of the preemption issue that I delve into in some detail does have to do with state executive orders and state procurement powers. A few states have purportedly used their procurement powers in such a way that it effectively reimposes some of the *Title II Order*-like restrictions within their states.

And as I discuss in the book, this, I believe, runs not only afoul of the general policy that I just discussed, but it runs afoul of the Supreme Court's market

participant doctrine. And under that doctrine, state and local governments do, importantly, receive immunity from federal preemption when they are using their procurement powers of buying and selling.

That immunity comes when they are acting like another participant in the market. But what we've seen in a couple of cases here, with the case of Vermont or Montana, is they've exercised their procurement powers in such a way as to effectively constitute lawmaking.

The doctrine is sensitive to that leveraging of procurement powers. And it does not confer immunity when that takes place.

So if you look at Montana's Executive Order, for instance, it prohibits the state from purchasing broadband services from a provider unless that provider agrees to abide by all of what are essentially the repealed restrictions under the *Title II Order*.

And they must agree to abide by those restrictions with respect not to the state government but with respect to all consumers throughout the state. So it's kind of a backdoor form of legislating. I don't think that's going to fly under this standard.

The last thing that I'll get into right now is our book also addresses the serious problems of legal uncertainty that were posed by the repealed *Title II Order*. And those are important reasons not to go back in that direction.

Professor Daniel Lyons offered an important contribution to this book. It's called "Title II Reclassification is Rate Regulation." And he makes the point that the *Title II Order*, the repealed order, did not forbear from the two most significant rate regulation provisions under Title II: Sections 201 and 202.

And he explains how that provided an open-ended avenue for challenging any number of broadband service provider protections, somewhat separate and apart from the *Title II Order* rules themselves. To get more on that, you'll have to read his contribution.

Speaking of the rules that were repealed, in our book I tackled the FCC's general conduct standard or what it called its "unreasonable interference and unreasonable disadvantage standard." So, in addition to the bright-line rules that it set up against throttling, blocking, and no-paid prioritization, the FCC adopted what Chairman

Wheeler then called a "catch-all." It was a backstop. And that standard runs into a serious problem of "constitutional vagueness."

Under the due process clause of the Fifth Amendment, laws cannot be vague. They have to provide sufficient precision and guidance to let providers and people know what kind of conduct is prohibited and what's allowed. It also has to provide sufficient guidance and precision to prevent the agency from engaging in arbitrary or discriminatory enforcement.

So you actually have a strange situation of a standard set out ostensibly to prohibit discriminatory conduct that leaves itself quite open to discriminatory enforcement. And it's a "totality of the circumstances" kind of standard where the FCC set out five very vague factors for what amounted to unreasonable. I mean, what is unreasonable and what is unfair advantage?

Well, the FCC said, "You can consider our factors. Here is one of them, end-user control." According to the Commission, "A practice that allows end-user control is less likely to violate the general conduct standard. But we are cognizant that user control and

network control are not mutually exclusive. And many practices will fall somewhere on the spectrum from more end-user controlled to more broadband buyer controlled. But there also may be practices entirely controlled by the providers that also satisfy the standard."

Now, I have no idea what that means, and I don't think that was clear at all. The other factors don't help. It got a little bit worse when the FCC acknowledged that there could be additional factors that they've not named that will be part of the consideration and the analysis. And it got just a little bit worse still when the FCC also gave itself the authority to shift the burden of proof effectively onto the service providers.

So had this standard remained in place, you would have confronted a situation where persons or parties would have challenged a broadband service provider's practices. And the provider would have had the burden to show that it met this vague standard based on these vague factors, whether known or unknown. Fortunately, in repealing the *Title II Order*, we got rid of that kind of vagueness. The general conduct standard took a backseat to other issues, but I addressed it with the book. So we hope you enjoy

it. Thank you.

MR. MAY: I thank you, Seth. You can hold your applause. By the way, we're going to ask these gentlemen to take a few questions as well. So if you have any, you can think about them. Before Ted speaks, I'll just mention again that Babette Boliek couldn't be here because of a family emergency. And she was going to talk about the economics, obviously. She's the FCC's Chief Economist. And she was going to talk about the economic effects and impacts of the *Restoring Internet Freedom Order* versus the previous regime.

So I'll just say there is a contribution in the book by Tim Brennan. He was the Chief Economist of the FCC during Tom Wheeler's administration for at least part of it and at the time of the development of the 2015 *Open Internet Order*. And this is Tim Brennan's famous essay we published, titled "Is the Open Internet Order an Economics-Free Zone"? So I just commend that entry to you as well. And that's a segue into saying that Ted Bolema is another Ph.D., famous economist, here. So, Ted, with that, go ahead.

MR. BOLEMA: Well, thank you, Randy. It's great

to be here. As Randy mentioned right at the beginning, the Free State Foundation has a very distinguished Board of Academic Advisors. And I'm very appreciative that, after I ran off to Kansas, Randy still invited me to serve on this group. So it's a great honor to be on your Board of Academic Advisors.

I'm going to focus mostly on my paper on paid prioritization, which is Chapter 12 in the book, and I'll briefly mention Chapter 19, which is a paper I wrote on why the Federal Trade Commission is the best federal agency for policing any competition and consumer protection concerns that might arise on the Internet.

Seth mentioned a moment ago that paid prioritization is one of the three conducts on the Internet that are given these bright-line bans by the *Title II Order*. Now, if you've been to other Free State Foundation events the last couple years, you've heard the industry people saying that two of the bans they could probably live with, the blocking and the throttling. But the paid prioritization ban is the one that really gives them problems.

Of course, I argue that market solutions are

better for Internet consumers than any of the bans. But the one that seems to be the greatest concern to the industry is a ban on paid prioritization. Now, in the *Title II Order*, the 2015 Federal Communications Commission spins a theory that if paid prioritization was allowed on the Internet, that would lead to fast lanes for traffic where senders pay for priority and then some slow lanes for everyone else.

And then it goes on to theorize that allowing these fast lanes would mean that that creates a perverse incentive for Internet service providers to really give lousy service on the slow lanes in order to force everybody over to the fast lanes where they have to pay for the priority.

That's not a completely implausible theory, but there are some problems with it, not the least of which that there really isn't much evidence that this kind of paid prioritization ever did lead to any anti-competitive problems. Whether it even happened in the first place is debatable. But if it did, there is really not any evidence that it led to any anti-competitive problems.

Even more fundamentally, paid prioritization

really is all over the place in the economy. In fact, I can say with some confidence that everyone in the room has encountered a paid prioritization arrangement somewhere like in the last week or so, and also that you're better off for having encountered it.

For example, suppose you send a package for delivery, whether it's through the post office or through Federal Express or one of the private carriers.

You can choose. You can choose regular delivery, or you can choose priority delivery that will get your package there faster. So if that's what you value, you can pay a little extra and get that faster delivery.

But if you don't choose to do so, I'm not aware of any systematic problems of mail carriers slowing down deliveries of their regular delivery service in order to force people to pay extra to get their priority service.

Even going beyond that, these charges for faster delivery are a revenue source for the mail carriers. If they can make more revenues there, then there is some competition in the market. Most likely, what that's going to mean is that, for those of us who might send our packages through the regular delivery process, the

carriers have recovered some of their costs already from the priority service. So they can charge less to more price-sensitive customers for the regular delivery service.

And, this is elsewhere too. So, I flew out here. I was given the option at the airline: If I wanted priority seating on the airline, I could pay a little extra to get priority boarding onto the airline. Well, I didn't pay for it. You know, I got here at the same time that I would have otherwise. Maybe I paid a little less because other customers were paying for priority boarding.

All of this really took me back to something I encountered in the 1990s when I was a staff attorney at the Antitrust Division in the Department of Justice. And back then, we spent way too much time worrying about priority placement in retail stores like slotting allowances at grocery stores or at bookstores. So if you've been in these kinds of retailers, you see that there are some end-of-the-aisle displays or some products are on the end of the aisles, making it really hard for you to miss them as you go through the store.

Other products are placed elsewhere in the store.

Often, there is a paid prioritization arrangement going on there. Some of the retailers are paying to be on the end of the aisle where you walk right by and you see their products and others are not.

According to the *Title II Order's* theory, what's likely to happen if that were allowed to continue is that, eventually, the grocery stores or booksellers would place the products that weren't paying for paid prioritization in places where customers would never find them and eventually force their manufacturers to pay for priority placement. Does that happen in practice?

We've been alert to this issue for more than 20 years now. And I'm not aware of any examples of that happening. But even more to the point, as customers, we get benefits from this sort of priority arrangement. Presumably, the reason why some sellers want to have priority placement is to call a consumer's attention to their product. They think we'll want to buy their product if we notice it. So there is some benefit to us as consumers from finding it. But, also, it's another revenue stream for the retailers.

So as long as the grocery store market is fairly

competitive, if retailers are charging for paid prioritization for some products and they've taken this extra revenue, then, through competition, they are going to be forced to lower their margins on the products that aren't paying for paid prioritization. So we're getting lower prices on the other products as a result of that.

Yet another benefit is that this is really a great way of launching some new products. If you're launching a new product that you want to get into a grocery store, you can pay a lot for TV and radio advertisements and all kinds of advertisements. Or you can pay a whole lot less and get priority placement inside of grocery stores. Rather than this being a scheme that will result in the biggest and best-established sellers coming out ahead on it, it may well, in fact, often work out just the other way around.

But, I did hint a moment ago at a situation where paid prioritization just might lead to anticompetitive harms. What if the grocery store market isn't competitive? Or in another situation, for example, some argue that Internet providers aren't sufficiently competitive.

Now, I don't think that's the case. But what if someone wants to argue that? Well, there is a possibility of an anticompetitive problem there. The good news on that is what I discussed in the other paper. There is a federal agency that's very good at evaluating these kinds of competition problems: The Federal Trade Commission.

That's the top agency in the world at looking at these sorts of things, as well as consumer protection issues. Now, the Federal Communications Commission has a lot of great people there too, a lot of outstanding economists, including the one who couldn't join us today, unfortunately, and many others too. They have good people there, but they just don't have the institutional structure in place that the Federal Trade Commission has right now. And the Federal Trade Commission has been at this a lot longer.

Randy wrote a paper about a year ago in which he pointed out that, as a result of the *Title II Order*, we actually had a time there where we had less consumer protection because the Federal Trade Commission had been precluded from its competition/consumer protection functions and the FCC was too new at this to be effective.

So I think we are in much better hands now with the pre-2015 arrangement being restored, and the Federal Trade Commission being the lead agency on these sorts of issues.

MR. MAY: Thank you, Ted. Every time I hear Ted talk about paid prioritization, I'm even more convinced, despite the fact that you came for a free lunch today here. No, that was great. So what I'm proposing to do is just take a couple questions. Then we're going to bring up Andrew Smith from the FTC. You see how the segues keep working here very nicely. Do we have any questions for Seth or Ted? Kelsey, just wait a moment for the mic. Just identify yourself, Kelsey.

MS. GRIFFIS: Hi. Kelcee Griffis with Law360. I wanted to know if you think the free flow of information is a little different than the free flow of commerce when we're talking about some of these paid prioritization examples, if paid priority in grocery stores or in the airline example might be okay. Does that change at all when we're talking about issues that might be implicating free speech?

MR. BOLEMA: I'm trying to think of how it would. I'm not coming up with any reason to think otherwise. You

know, as Randy points out, I'm an economist. So I tend to think of all of these sorts of issues in terms of the economic implications. Obviously, I think it should be the same, as long as there is some reasonably competitive activity on the Internet service provider level. One of the criticisms I also make of the *Title II Order* is it doesn't even make any attempt at finding that there is lack of competition or that there is a market concentration problem. It just asserts it.

MR. MAY: Ted, let me just put an addendum to Kelcee's question because I think you hinted at this. But I want to ask you to expand on it and see whether my intuition is right. You said that, sometimes, the ability to be able to pay for a prioritization can help newcomers establish a foothold in the market and then become a competitor.

MR. BOLEMA: I'd say yes.

MR. MAY: I've argued that in the ISP context for years and have suggested that's true. But, unlike you, I'm just a lawyer playing an economist. Can you envision that that could be true as well?

MR. BOLEMA: Yes, actually, that is a very good

point. Glad you jumped to that. But, yes, to the extent that it opens up more possibilities for speech to be disseminated.

MR. MAY: Okay. Okay. See any more questions? I'm going to ask you to join me in thanking Ted and Seth here, please.

(Applause.)