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Voiding the Constitution FCC Rules Could Counter Freedom of Speech

by

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The Federal Communications Commission has proposed new regulations to force broadband Internet service providers (ISPs) like Time Warner and Verizon to adhere to "net neutrality" mandates.

The FCC Chairman Julius Genachowski and other net neutrality advocates contend it is necessary to put in place the new regulatory regime to promote free speech values, and Tuesday the agency holds a forum designed to further this notion.

Just one big problem: This view turns the free speech guarantee of the First Amendment on its head. If the government enforces its version of neutrality on the Internet, it almost certainly will violate the Internet service providers' First Amendment rights. Here's why.



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While, if adopted, net neutrality rules will be complex in application, stated simply, they mandate that all ISPs must carry all lawful messages that any subscriber wishes to send over the ISPs' network. And they prohibit ISPs from discriminating in any way against any Internet content or application.

Such nondiscrimination and neutrality requirements enforced by the government may sound benign, even appealing. And, in any event, because the broadband ISP marketplace is now competitive, it is difficult to imagine an ISP favoring a particular application or content provider in a way that would adversely impact consumers.

Although Google has been the most vociferous proponent of net neutrality mandates, you can imagine the marketplace reaction if, say, Comcast or Verizon decided to block access to Google. Consumers would abandon the ISP in a cyberspace minute. Indeed, in making its proposal, the FCC cites only two isolated instances of purported discriminatory conduct by ISPs. They were remedied quickly when the ISPs' actions came to light. And the net neutrality proponents concede that the Internet now is a robust platform for open debate.

Even though the two instances of purported "discrimination" thus far have been self-correcting, let's assume that, as the Internet continues to evolve, an ISP wants to favor particular applications or content providers to differentiate its service from other ISPs in response to a perceived consumer demand. To take the starkest example, suppose an ISP wants to offer a service that restricts access to Web sites promoting homophobic or racist views. Or suppose an ISP wants to prioritize the distribution of certain content such as video games or news feeds in order to make that content more attractive to consumers. Or to provide certain service quality enhancements that would allow a new content provider to have a better chance to compete against an entrenched content provider, say, Google. I am not suggesting that any of these practices, which all implicate the availability of information, should be adopted, or that they would find marketplace acceptance. But all of these instances of supposed discrimination, and many more, would run afoul of the FCC's proposed neutrality rules.

The First Amendment's language is plain: "Congress shall make no law ... abridging the freedom of speech." ISPs possess free speech rights just like newspapers, magazines, cable operators, movie and CD producers - and the man preaching on a soapbox. They are all speakers for First Amendment purposes.

And under traditional First Amendment jurisprudence, it is as much a free speech violation to compel a speaker to convey information that the speaker does not wish to convey as it is to prevent a speaker from transmitting information it wishes to make available.

To be sure, freedom of speech under the First Amendment is not absolute. For example, in 1994 in *Turner Broadcasting System v. FCC*, perhaps the closest analogous case, the Supreme Court, in a 5 to 4 decision, rejected the argument that a law requiring cable operators to carry local broadcast stations violated the cable operators' First Amendment rights. But the court relied heavily on Congress' judgment that local stations providing "free" television deserved special protection. It also assumed at the time that cable operators possessed a bottleneck that allowed them to play a "gatekeeper" role controlling programming entering subscribers' homes.

Net neutrality mandates have nothing to do with the protection of over-the-air broadcasting. And, in today's competitive broadband marketplace, it cannot be seriously argued that cable operators have bottleneck control of the video content that enters consumers' homes.

The proposed neutrality regulations are eerily reminiscent of the FCC's Fairness Doctrine, which the agency jettisoned in the mid-1980s in light of the new media outlets proliferating even then. The Fairness Doctrine required broadcasters to present a balanced view of controversial issues.

When the Supreme Court upheld the regulation against First Amendment challenge in 1964 in *Red Lion Broadcasting Co. v. FCC*, it did so because it determined that broadcasters' use of the radio spectrum, which it characterized as a scarce public resource, differentiated broadcasters from other speakers. While scholars differ as to whether the court would reach the same result today, it is unlikely the court would sustain the importation of analog-age Fairness Doctrine-type speech restrictions into the digital world of subscription-based broadband ISPs, especially in an environment in which consumers have a choice of providers.

There is no doubt that the Internet already has proven to be a remarkable means of facilitating speech and promoting democracy here at home and in many places around the world. But we are all too familiar with the actions of authoritarian

governments from Iran to China in interfering with Internet connections in order to silence protesters and censor speech. Curiously, the network neutrality proponents, including recently Andrew McLaughlin, the Obama administration's deputy chief technology officer, point to such government censorship abroad as a reason for adopting net neutrality regulations in this country.

But this argument equating private and government censorship of speech evidences a profound misunderstanding of our First Amendment. History - and our nation's founding principles - belies the notion that we have more to fear from private parties freely choosing whether or not to favor certain speech than we do from government censorship. Our liberty surely is more secure when the promotion of "neutrality" and "non-discrimination" in our media resides in the hands of citizens exercising choice in today's abundant media marketplace rather than in the hands of the government enforcers.

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