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Don't Neuter the First Amendment in the Digital Age

by

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In December 2010, after a long, contentious administrative proceeding, the Federal Communications Commission adopted new "net neutrality" regulations. These would prevent Internet providers from blocking access to any website and from "unreasonably" discriminating in transmitting traffic over their broadband networks.

While the regulations may have a superficially appealing ring to them, they would subject Internet providers, for the first time, to common carrier-like regulation similar to the regulation applied to Ma Bell last century. Of course, Ma Bell operated in a monopolistic environment, whereas today's Internet providers – like Verizon, AT&T, Time Warner Cable, Comcast, Sprint, T-Mobile and so on – operate in a generally competitive one.

The policy argument against net neutrality mandates is that they place Internet providers in a regulatory straitjacket that will deter innovation and investment. Confronted with the prospect of constant FCC complaints of "discrimination" whenever they attempt to do something new and different from their competitors, the Internet providers will become more reluctant to invest and innovate.

But net neutrality mandates are likely unconstitutional as well. In an amicus brief filed recently in the federal appeals court in Washington, the Free State Foundation, with

others, argues the regulations violate the First Amendment rights of the Internet service providers.

The FCC has a view of the First Amendment that turns the free-speech guarantee on its head. Rather than understanding it, as the Founders intended, as a bulwark against government censorship or interference with the speech of private individuals or entities, the FCC interprets the First Amendment as authorization for the government to take affirmative steps to ensure "neutrality" and "nondiscrimination" with respect to Internet speech.

To enforce such neutrality, the FCC's regulations compel Internet providers to convey messages and content they would rather not. In other contexts, the Supreme Court has held that this is just as much a free-speech infringement as it is to prevent a speaker from conveying messages he wishes to convey.

But the Obama FCC, with its pro-regulatory mindset, doesn't really consider Internet providers like Verizon to be speakers or their networks to be private property. In its net neutrality order, the commission said that, unlike cable television operators, Internet providers are best described not as speakers, but rather as mere "conduits for speech." Because Internet providers do not exercise editorial discretion in the same way as cable operators, the FCC wrongly refused to acknowledge that they possess any editorial discretion at all.

The FCC characterized Internet providers as "conduits of speech," despite the fact that in 2002, the agency had decided Internet providers should not be regulated as "common carriers" – like phone companies. Because the Bush FCC determined that common-carrier regulation would deter innovation and investment by Internet providers, it defended its deregulatory decision all the way up to the Supreme Court – and won. Now, without explicitly reclassifying the Internet providers as common carriers, the FCC's net neutrality regulations have the same practical effect.

The agency also suggests its net neutrality mandates are intended only to prevent Internet providers from impeding "the public's use of this important resource." This "public resource" language is reminiscent of the scarcity rationale that the agency used to justify the Fairness Doctrine, which required broadcasters to balance their presentation of issues of public importance.

Broadcasters were freed from the Fairness Doctrine over two decades ago in light of the FCC's findings that it had a chilling effect on speech and that, even at that time, there had been a proliferation of new media outlets. Likewise, today's users have a number of options for accessing broadband Internet – DSL, Verizon FiOS, the cable company (at times they can choose more than one), Clear's 4G service, satellite services like HughesNet, and of course every 3G and 4G cellphone provider.

Whatever justification the FCC may have to regulate Ma Bell as a "conduit for speech" during last century's analog age, or subjecting broadcasters to a Fairness Doctrine

requiring balanced presentations, there is no justification in today's digital age, with its abundance of media outlets and diversity of viewpoints, for infringing the First Amendment rights of Internet providers.

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