



By Randolph J. May

In the bygone analog era of mass media and telecommunications, government officials seized power to regulate speech in ways one might have thought violated the First Amendment. For instance, by proclaiming the radio spectrum a scarce public resource requiring regulation to prevent broadcast signals interfering with each other, the Federal Communications Commission justified promulgation of a variety of content regulations, including the notorious “Fairness Doctrine.”

The Fairness Doctrine required broadcasters to present “balanced” coverage of issues of public importance. Of course, FCC bureaucrats exercised broad discretion in deciding whether programming was balanced. The Supreme Court upheld the Fairness Doctrine against First Amendment challenge in 1969 in *Red Lion Broadcasting Co. v. FCC*. The Court

invoked the scarcity of broadcast frequencies as the rationale for approving the regulation of broadcast content: “Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast that is comparable to the right of every individual to speak, write, or publish.”

Nearly two decades after *Red Lion*, the Reagan-era FCC jettisoned the Fairness Doctrine in light of the proliferation of new forms of media, especially cable and satellite television. The FCC’s 1987 decision also rested on the agency’s recognition that the regulation had the effect of chilling speech on topics of public importance. Now, more than two decades since the Fairness Doctrine’s demise, there are even more media platforms available

for conveying information. For example, in addition to over-the-air-broadcasting, newspapers, and magazines, most consumers have access to cable and satellite television, satellite radio, a variety of wireless services, and, of course, the Internet.

With the transition from the analog to the digital age, and the proliferation of new media outlets, you might expect that the FCC would eliminate many of its outdated forms of regulation, including those that threaten free speech rights. You would be wrong. Indeed, in several respects, the FCC is acting, or proposing to act, in ways that would enhance its regulatory oversight of speech. The agency wants, for instance, to impose net neutrality restrictions on Internet providers—sort of like a digital must-carry mandate. Meanwhile, the agency’s “Future of Media” project appears ready to provide justification for more government control of private media and more government funding for public media. And don’t forget the agency’s maintenance of outmoded speech regulations such as cable must-carry rules.

NET NEUTRALITY REGULATIONS

The FCC wants to impose new regulations on the Internet that would force broadband Internet service providers (ISPs), such as Time Warner and Verizon, to adhere to “net neutrality” mandates. These mandates would require ISPs to post, send, or allow access to any content of the subscriber’s choosing, without any differential treatment of the content whatsoever. While President Obama’s FCC Chairman Julius Genachowski and other net neutrality

advocates claim the regulations would promote free speech values, in fact they turn the free speech guarantee of the First Amendment on its head. Government-enforced neutrality mandates likely violate the Internet providers’ First Amendment rights.

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Internet service providers possess First Amendment rights. According to traditional First Amendment jurisprudence, it is just as much a free speech infringement to compel a speaker to convey messages the speaker does not wish to convey as it is to prevent a speaker from conveying messages it wishes to convey. For instance, the Supreme Court proclaimed in *Pacific Gas & Electric Company v. Public Utility Commission* (1986) that “[c]ompelled access ... both penalizes the expres-

sion of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.” Similarly, in *Miami Herald v. Tornillo* (1974), the Supreme Court held that a state law requiring newspapers that criticize a political candidate to also publish the candidate’s reply violated the First Amendment.

Even though the proposed net neutrality regulations may 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, might choose not to convey or make available. And they prohibit an ISP from in any way, and for any reason, prioritizing or preferring some content over other content, even if this is done in response to perceived new consumer



demands or as an effort to differentiate its service from its competitors' services.

The FCC apparently hopes to circumvent the First Amendment problem raised by net neutrality regulations by claiming that any burdens on speech would be outweighed by new speech opportunities created by the open access mandates. But the First Amendment isn't intended to work this way. It restricts the actions of government entities, not private actors. It does not grant the FCC the power to balance infringement of ISPs' speech rights by enabling the speech rights of others.

In effect, the compelled speech requirements inherent in the FCC's proposed net neutrality regulations are akin to the discarded Fairness Doctrine. It is somewhat doubtful that today's Supreme Court would reach the same decision concerning broadcasters' First Amendment

rights as it did in *Red Lion*. Regardless, the Supreme Court has refused to extend the same scarcity-based reasoning to other media. If anything, the Court's ruling earlier this year in *Citizens United v. FEC*, the campaign finance reform case, signaled its reluctance to continue applying varying First Amendment standards to different media technologies. The Court stated that courts "must decline to draw, and then redraw, constitutional lines based on particular media or technology used to disseminate political speech from a particular speaker."

Nevertheless, despite these free speech concerns and a recent ruling by a federal appeals court in *Comcast v. FCC* (2010) that undermined the agency's claimed jurisdictional basis for Internet regulation, the FCC's Democrat majority appears bent on charging ahead with

net neutrality regulations. The majority's latest gambit is to propose classifying broadband Internet services as so-called Title II services under the Communications Act and regulating them as common carriage under the same provisions that were applied to Ma Bell in the 20th century when the telephone company operated in a monopolistic environment. At the heart of the Title II common carrier regime is a nondiscrimination obligation that the agency would employ to enforce its notion of net neutrality.

THE FUTURE OF MEDIA PROJECT

The FCC's Future of Media project raises First Amendment concerns as well. The agency says the objective of this inquiry, which it began in March 2010, "is to assess whether all Americans have access to vibrant, diverse sources of news and information that will enable them to enrich their lives, their communities and our democracy." The public notice initiating the inquiry asks 42 wide-ranging questions, ranging from whether there should be an expansion of public media such as public broadcasting, to whether public-interest obligations relating to program content that traditionally have applied to broadcasters should be applied to a broader range of media or technology companies, to whether newspapers can remain sufficiently financially healthy to perform their traditional journalism role, to whether schools and libraries are playing a role in supporting community "information flow." And on and on.

Of course, the FCC doesn't have jurisdiction over many of the entities it is studying—such as newspapers, schools, and libraries. And there certainly are questions concerning

its institutional competence to do so. But there is another very fundamental concern. Despite its protestations that it will be sensitive to First Amendment concerns, the agency's history suggests otherwise. Many observers think that the FCC will conclude, despite today's media abundance, that there are certain "public interest" information needs that are not being

met. Indeed, some advocates of greater government support and control of the media acknowledge that we now live in an age of media abundance. But turning the previous scarcity rationale on its head, they point to such information abundance to urge that government-supported media should act as a "filter" to reduce information overload and to be a "megaphone" to amplify the

voices of the unheard.

In today's environment, we do not need, and should not want, government-supported or government-controlled media acting as a "filter" or a "megaphone," or deciding what programming is in the "public interest." Such "filtering" or "megaphoning" necessarily involves the government in making decisions based on content. How else to decide what information should be filtered or amplified to meet some "public interest" objective? This government involvement in content selection runs against the grain of our First Amendment values.

CABLE MUST-CARRY REGULATION

Under the FCC's cable must-carry regulation, certain over-the-air TV broadcasters can compel carriage of their programming on cable networks. Must-carry mandates dating back to the Cable Act of 1992 were premised on the existence of supposed cable operator bottlenecks and the need to protect local over-the-air

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broadcasting. The video marketplace of 2010, however, is characterized by competition. Satellite television operators and, increasingly, telecommunications companies engage in head-to-head competition with cable operators. And video programming is routinely delivered over the Internet. Nevertheless, in the face of such alternatives, the FCC continues to enforce legacy must-carry regulations premised on a lack of competition in the video marketplace.

The Supreme Court recently rejected a petition by Cablevision, a cable operator, that challenged the constitutionality of must-carry regulation on First Amendment grounds. Cablevision's petition pointed to last summer's decision by the D.C. Circuit in *Comcast v. FCC* (2009), in which the court concluded that cable operators no longer have the dominance in the video market that concerned Congress in 1992. Perhaps the most significant argument raised by Cablevision is that the Supreme Court's 1994 *Turner Broadcasting System, Inc. v. FCC* decision upholding the must-carry statute should no longer be controlling in light of the vastly changed marketplace circumstances.

Unfortunately, the FCC's briefs to the Supreme Court argued doggedly for continued regulation on the basis that the decreasing number of over-the-air viewers makes carriage on cable systems even more critical to further the congressional interest in ensuring that local broadcasters are financially able to provide an alternative source of programming. But this line of argument seeks to make a virtue out of must-carry's mismatch with the current video marketplace realities. Aside from the competition offered by satellite and telephone company providers, increasing numbers of broadcasters now make content available via broadband using services and applications such as iTunes and Hulu. Acceptance of the FCC's logic entrenches compelled access mandates that do not fit today's marketplace reality.

TIME FOR THE FCC TO RESPECT THE FIRST AMENDMENT

In early 2009, after fits and starts, over-the-air television finally transitioned from the analog to the digital world. But the flurry of activity by President Obama's new FCC chairman—including proposed net neutrality mandates, potential expansion of government-supported media, more “public interest” regulation of private media, and staunch defense of legacy cable must-carry regulations—indicates that the Commission itself has yet to make the analog-to-digital transition. The FCC's regulatory initiatives fit far more comfortably with a 20th century analog-age mindset fixated on scarcity and bottleneck phantoms than on the 21st century digital realities that characterize today's abundant media marketplace.

In sum, the FCC's analog-age mindset leads it to adopt or maintain unsound regulations and policies unsuited to the digital age. Apart from the harm to consumers and the nation's economy caused by these outdated policies, there is an additional, more fundamental harm—a violation of free speech rights, or if not outright First Amendment violations, the chilling of free speech by threatened violations. From the beginning of the agency's existence in 1927 as the Federal Radio Commission, there has always been a tension between the FCC's actions affecting content decisions and First Amendment rights. But in this age of information abundance, this tension is substantially heightened. It is time—past time, really—for the FCC to begin acting in a way that conforms to a constitutional culture that respects the First Amendment.

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