

# The Free State Foundation

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

## *Perspectives from FSF Scholars*

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*In a commentary published in the September 18 edition of Broadcasting & Cable magazine, Free State Foundation President Randolph J. May contends that net neutrality mandates likely would violate the First Amendment free speech rights of the broadband Internet service providers. Most legislative net neutrality mandates require broadband Internet Service Providers to post or send any content presented to them. May stated that: "Such compelled-access mandates are akin to the right-of-reply statute the Supreme Court in 1974 held violated a newspaper's First Amendment rights. Granted, competition among ISPs will likely prevent them from adopting such non-neutral practices. But the government shouldn't."*

*May says that mandates imposing "neutrality" obligations on broadband Internet Service Providers are reminiscent of the long-defunct Fairness Doctrine that once applied to broadcasters in the analog age. According to May, mandated neutrality obligations for broadband ISPs are not likely to be constitutional in the digital age "in light of the abundance of media outlets we enjoy."*

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

*A much longer essay on the subject of net neutrality and the First Amendment may be found [here](#).*

### **Net Neutrality and Free Speech**

**By Randolph J. May -- Broadcasting & Cable, 9/18/2006**

The debate over Internet neutrality continues to rage. Proposed net-neutrality laws would commonly prohibit all broadband service providers, such as Verizon and Comcast, from blocking or degrading access to any lawful content on the Internet or from "discriminating" against any unaffiliated entity by refusing to send or post any content.

There are sound policy reasons why net-neutrality mandates should not be adopted. But there is a more fundamental reason, which to date has received little

public attention: Net-neutrality mandates almost certainly would violate the First Amendment rights of the broadband Internet service providers (ISPs).

Broadband providers possess free-speech rights just like other media. Last year, in its Brand X decision, the Supreme Court upheld the FCC's determination that ISPs are not common carriers required to carry all content indifferently.

Under traditional First Amendment jurisprudence, it is as much a free-speech infringement to compel an entity to convey messages it does *not* wish to convey as it is to prevent it from conveying messages it wishes to convey.

Net-neutrality mandates would prevent an ISP from restricting access, say, to content that it thinks is indecent or homophobic. Similarly, a service provider would be compelled to allow subscribers to post any messages they choose. Such compelled-access mandates are akin to the right-of-reply statute the Supreme Court in 1974 held violated a newspaper's First Amendment rights.

Granted, competition among ISPs will likely prevent them from adopting such non-neutral practices. But the government shouldn't.

Sure, the First Amendment is not absolute. In 1994, the Supreme Court narrowly rejected the argument that the law requiring cable operators to carry local broadcasting stations violated the First Amendment. The Court relied heavily on Congress' judgment that local broadcasters needed special protection. The Court also relied on what it characterized as cable's "gatekeeper" role, controlling the video programming entering consumers' homes. But net neutrality is not about protecting local broadcasters; in today's competitive communications environment, it cannot credibly be argued that cable companies or any other ISPs can maintain a gatekeeper position.

When you think about it, laws imposing "neutrality" are eerily reminiscent of the defunct Fairness Doctrine that required broadcasters to present a balanced view of controversial issues. Although the Supreme Court upheld the constitutionality of the Fairness Doctrine in the 1969 Red Lion decision, it did so on the basis that the spectrum used by broadcasters is a scarce public resource. Many doubt the Court would reach the same conclusion today, in light of the abundance of media outlets we enjoy.

**May is president of the Potomac, MD-based Free State Foundation.**

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