



Perspectives from FSF Scholars
May 20, 2021
Vol. 16, No. 26

Why Biden's Broadband Plan Is Constitutionally Suspect

by

Randolph J. May and Seth L. Cooper *

[The Federalist](#)

May 19, 2021

Prioritizing government-owned broadband networks would be inconsistent with the Constitution's provisions regarding private property and commerce.

As part of its massive \$2 trillion infrastructure proposal, the Biden administration is proposing an ambitious \$100 billion broadband plan. The plan overreaches, misdirecting subsidies in ways that are wasteful, such as shoveling funds to areas already served instead of those lacking service. And the plan suggests the need to regulate the broadband prices of private service providers as if they were public utilities.

As a matter of policy, these aspects of the Biden broadband plan are serious enough defects. But here we want to focus on a part of the plan that also is unsound as a matter of law.

The White House fact sheet delineating the Biden broadband plan declares it “prioritizes support for broadband networks owned, operated by, or affiliated with local governments – providers

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

with less pressure to turn profits and with a commitment to serving entire communities.” This express favoritism for local government networks over private networks is constitutionally suspect.

According to the Framers, one of the primary purposes of government is to protect individual rights to acquire, use, and keep property. Importantly, the political philosophy of the Framers strongly favored private property ownership.

Their background expectation was that commerce would be carried out among private providers of goods and services. They also considered it the government’s responsibility to promote commerce. Thus, the Constitution’s Commerce Clause entrusts Congress with prescribing rules regarding how commerce ought to be conducted.

By expressly elevating support for government-owned communications networks over private networks, the Biden plan would expand greatly the occasions for local governments to serve in the incompatible dual roles of regulator and competitor. Because local governments typically control access to the rights of way necessary for private telecom providers to construct and operate networks and the permitting process and levying of various fees, they can disadvantage private providers who are or might wish to be their competitors.

Indeed, local governments often have done so. The dual role they play has the effect of suppressing investment in private broadband networks that are now an integral part of the stream of interstate (and international) Internet communications that the Constitution’s Commerce Clause is intended to facilitate.

Apart from the explicit prioritization of government networks, the Biden plan suggests “lifting barriers that prevent municipally-owned or affiliated providers” from “competing on an even playing field with private providers.” This is a not-so-subtle code for advocating federal preemption of existing state laws that limit local government ownership and operation of broadband networks. This too is constitutionally suspect.

Almost 20 states restrict local government entry into the broadband business. Some prohibit government-owned networks outright while others impose various conditions, such as preparation of business plans subject to public disclosure and local voter approval.

These state restrictions reflect genuine concerns regarding the inherent conflicts of interest and resulting ill-effects that arise when local governments serve as both a regulator and a market participant. Also, given the history of financial troubles encountered by many municipal broadband networks, states rightly have been concerned about the financial harm to taxpayers resulting from municipalities engaging in financially risky business ventures about which they have little experience or expertise.

The Biden plan’s suggested federal preemption of state laws clashes with fundamental principles of constitutional federalism. Local governments derive their authority from the states, and states retain the power to alter or dissolve these state-sanctioned creations.

Longstanding U.S. Supreme Court precedents recognize that local governments are mere subdivisions or instrumentalities of states. Accordingly, states are well within their sovereign rights to adopt laws restricting the ability of their local governments to enter business markets and compete against private market providers.

Even if Congress were to adopt a law that manifests a clear intent to preempt state limits on government-owned broadband networks, as the Biden plan may contemplate, such a law would still conflict with federalism principles at the core of the Constitution. The clear statement rule is a method of statutory interpretation, not a Constitution-altering doctrine.

In other words, even if Congress unambiguously declared its intent to preempt state laws limiting government-owned networks, states would still have strong grounds for objecting based on their inherent state sovereignty interests protected by constitutional provisions such as the Tenth Amendment.

In sum, expressly prioritizing government-owned broadband networks over private networks with subsidies would discourage investment in private networks in a way inconsistent with the Constitution's provisions regarding the protection of private property and the facilitation of interstate commerce. And the Biden plan's supposed preemption of state laws limiting municipal government ownership of broadband networks is inconsistent with the Framers' notion of state sovereignty which the Constitution embodies.

There are many reasons for rejecting aspects of the Biden administration's broadband plan, not the least of which is that its prioritization of government-owned broadband networks almost certainly will waste taxpayer money. But poor policy aside, such government-ownership prioritization is also constitutionally suspect.

That should be reason enough for President Biden to go back to the drawing board.

* Randolph J. May is President and Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free-market-oriented think tank in Rockville, Maryland. *Why Biden's Broadband Plan Is Constitutionally Suspect* was published in *The Federalist* on May 19, 2021.