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Post-Election Reflections

by

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There will be many interpretations by the politicians, policymakers, pundits, and provocateurs, regarding the blue wave that swept across America Tuesday night and what it portends.

Many of these views rightly will be concerned with a broad swath of issues roiling American politics – ranging from war and peace, "Medicare for All," data centers, "affordability," DEI, and all the rest – while some will focus more narrowly. Here, I want to focus on what the election results may portend for the direction of law and policy in the telecommunications and media space in some, admittedly selective, areas.

First, and most importantly, I acknowledge that my frame of reference is the set of fundamental principles which I proclaimed when founding the Free State Foundation in 2006 and which have guided our work ever since – a commitment to free markets, free speech, property rights, and the rule of law. Others have their own frame of reference.

With those principles stated above in mind, here are some "macro level" reactions, very briefly put. There will be plenty of time later for expansion and further explanation, and perhaps adaptation and readjustment to account for changing circumstances.

1. **Congress is likely to renew efforts to impose "net neutrality" mandates or similar forms of nondiscrimination regulation on Internet service providers.**

There has never been a sound justification for net neutrality regulation over the years, and in today's competitive and technologically dynamic environment, in which almost all consumers have a choice of ISPs, there is even less so. Nevertheless, when Democrats assume control of Congress, there are likely to be renewed efforts to impose net neutrality, or net neutrality-like, mandates on ISPs. And there will be similar efforts in various states as well. These efforts must be opposed, whether at the federal or state level. Aside from all else, these "nondiscrimination" and "nondifferentiation" strictures suppress both investment and innovation, and they make it more difficult for new competitors to emerge.

2. **There likely will be more efforts to impose various forms of rate caps and price regulation.**

As part of initiatives put forward to address the "affordability" issue, there most likely will be proposals to cap the rates, or even mandate price reductions, for various communications services, including cable TV, streaming video, wireline, and wireless services. Sometimes these price regulation/rate cap proposals may be a component of measures to implement "net neutrality," and at others they may be offered independently. In any event, they should be resisted. Price regulation always suppresses investment and innovation, especially in competitive and technologically dynamic markets.

3. **There likely will be renewed, and more widespread, efforts to increase government-ownership of communications facilities, or at least to exert more ownership-like control over them through various means.**

While this tendency is not strictly partisan, the reality is that Democrats, now in control not only of both houses of Congress, but also across more state and local governments, have always been more philosophically disposed to favor government-ownership of communications facilities just like they are more favorably disposed toward net neutrality and price regulation. Now that an explicitly pro-socialist ideology has become more firmly embedded among a growing segment of Democratic officeholders and policymakers, expect to see more outright calls, especially in municipalities, for government ownership of networks on the theory that "communications networks are too important to be left in private hands."

It is important to resist all efforts that, in one form or another, propose to give the government ownership or control over the operations of communications networks, whether at federal, state, or local level. Such ownership or control by government almost always leads to inefficiencies and waste of taxpayers' dollars. But, more fundamentally, history has shown – as if history had been needed to show – that government-ownership or control of communications facilities is inconsistent with a free press and free speech, both foundational requisites for maintaining a free people.

4. **The FCC should cease invoking the "Public Interest Doctrine" to threaten broadcasters unless their programming content clearly and convincingly violates an existing statue or Commission rule or policy.**

The election results don't necessarily dictate any changes in the direction of the FCC, nor, for the most part, should they. FCC Chairman Brendan Carr has done an admirable job in most respects in leading the agency, with the support of Commissioners Olivia Trusty and, on at least some issues, of Anna Gomez. There have been important measures adopted, or which are in the works, to hasten the availability of more spectrum for private sector use; to implement policies to facilitate network modernization, including by exercising the agency's preemption authority; to reform outdated and wasteful universal service policies; and to remove devices from the U.S. market that are not secure. Actions in these areas and others are important for promoting consumer welfare, strengthening the nation's economy, and enhancing national security. There is no reason that they should not be undertaken and applauded on a bipartisan basis.

But there is an area in which I think Chairman Carr should change direction, and this relates to invoking the public interest doctrine with respect to regulating broadcasters' programming content. Over a quarter-century ago, I contended in a law review article that the vague congressional delegation of authority to the FCC to act in "the public interest" was unconstitutional as a violation of the nondelegation doctrine because it was essentially standardless, and hence unconstrained. Countless times since, I've argued that Congress should eliminate or constrain the doctrine, or, as in this 2008 law review article, that the FCC should use its discretion to meaningfully narrow the scope of the exercise of its public interest authority.

Mr. Carr has invoked the FCC's public interest authority in a way that threatens to impose sanctions on broadcasters based on the content of their programming. I have criticized this approach, for example, here after his remarks regarding Jimmy Kimmel and elsewhere. I understand that the Supreme Court has not yet declared the capacious public interest doctrine unconstitutional, and Congress has yet to eliminate or constrain it. And, as I have pointed out several times previously, Democratic FCC chairs and commissioners also have invoked the FCC's public interest doctrine to justify regulation of program content or to target broadcasters whose speech they disfavored. And congressional Democrats have urged the FCC to target broadcasters whose speech they disfavored.

All that said, as I suggested in this September 2025 piece, "I don't like Brendan Carr's threats whether or not they have risen to actual violations of the First Amendment, which under the Supreme Court's current jurisprudence they may not have." And I don't like them even though I readily acknowledge that "the other side" may have engaged in similar conduct – and may well do so again when next in control of the FCC.

In my view, as a matter of principle and prudence, Brendan Carr should now back off from further threats to broadcasters regarding their programming content unless the content clearly and convincingly violates an existing statue or Commission rule or policy. In 2019, Brendan Carr declared: "The FCC does not have a roving mandate to police speech in the name of the 'public interest.'" He was right then. Just because it's possible that the government may have the authority to act doesn't mean that it ought to do so.

There is still more work to be done in the areas in which Mr. Carr already has accomplished much. Now it's time for Chairman Carr, as America's 250th birthday celebration draws to a close, to reaffirm first principles regarding free speech and the key role that it plays in sustaining our constitutional culture.

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