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# TELECOMMUNICATIONS & ELECTRONIC MEDIA

## CONFORMING COMMUNICATIONS POLICY TO A CONSTITUTIONAL CULTURE

By *Randolph J. May\**

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With over a decade elapsed since enactment of the supposedly (but not really) deregulatory Telecommunications Act of 1996, it is time to engage in a radical rethinking of communications law and policy.

Two of 2006's most prominent communications policy topics—so-called Net Neutrality and the AT&T-BellSouth merger—nicely illustrate the main point I wish to make: Much of communications policy throughout the twentieth century rested on foundations that run against the grain of our constitutional culture. The “contra-constitutionalism” ingrained in communications policy has continued even today, even though we now have a dramatically changed, much more competitive communications marketplace, brought about by the digital revolution.

I do not mean to argue here the unconstitutionality of particular laws or policies in the sense of contending they violate outright current constitutional jurisprudence. Rather, I contend that in the current competitive and fast-changing digital communications environment, one radically different from the staid, generally monopolistic analog era in which the counter-constitutional culture was born, a heightened respect for values that inhere in the Constitution would be a good starting point for reforming communications policy.

First consider Net Neutrality. Proposed neutrality mandates would prohibit broadband Internet service providers (“ISPs”) such as Verizon or Comcast from taking any action to “block, impair, or degrade” the ability of subscribers to reach any website or from “discriminating” against the content or applications of unaffiliated entities. A popular formulation prohibits broadband ISPs from preventing subscribers from “sending, posting, or receiving” any content or from charging different rates for prioritizing traffic transported over their networks.

Like pleas for “a level playing field” or “fair competition,” “Net Neutrality” has a pleasing ring. But pleasing sound bites do not count as constitutional points. Government mandates requiring broadband ISPs to make available their networks for carrying or posting content they otherwise might prefer not to carry or post implicates the ISPs’ free speech rights. Under traditional First Amendment jurisprudence, it is as much a free speech infringement to compel a speaker to convey messages against the speaker’s wishes as it is to prevent a speaker from conveying such messages.

Those still wedded to analog era regulatory paradigms find it difficult to grasp the notion that government-imposed “neutrality” mandates might violate the First Amendment. They cling to the traditional broadcast and common carrier paradigms that dominated communications policymaking throughout the twentieth century. Under the broadcast model, on the theory

that broadcasters use the electromagnetic spectrum, a claimed scarce public resource, it is deemed permissible to curtail broadcasters’ free speech rights in ways the First Amendment does not tolerate for non-broadcast media. Thus, the Supreme Court sanctioned the FCC’s notorious Fairness Doctrine which required broadcasters, pursuant to obligations to operate in the “public interest,” to cover controversial issues and to do so in a balanced (read: neutral) way.

Under the common carrier model, on the theory that telephone companies operate in a monopolistic environment, their rates and terms of service are controlled by the FCC. As long as carriers are allowed to earn a “reasonable” rate of return on their investment, such government control is considered constitutionally permissible. But the Fifth Amendment’s prohibition against the “taking” of private property for public use without just compensation stands as an outer boundary against unreasonable or confiscatory regulation.

Today’s digital broadband ISPs are neither broadcasters nor common carriers under the Communications Act’s regulatory classification scheme or the FCC’s rules implementing the statute. They are private businesses that have invested billions of dollars building their own high-speed communications networks. The FCC has classified broadband ISPs as unregulated “information service providers” and repeatedly has determined they operate in a competitive environment. Under these circumstances, efforts to impose neutrality mandates akin to the speech restrictions that have characterized broadcast regulation and non-discrimination mandates akin to common carrier regulation become constitutionally suspect.

Now consider the AT&T-BellSouth merger. The FCC’s merger review process has been criticized for many years on different counts. Among the primary criticisms, the Commission substantially duplicates the effort of the Department of Justice and the Federal Trade Commission, the government agencies which are the repository of expertise and experience assessing the competitive impacts of mergers. This duplication of effort is wasteful and causes the review process to drag on unnecessarily.

But a particular feature of the Communications Act adds to communications policy’s counter-constitutional milieu with respect to merger reviews. The act delegates authority to the agency to determine whether a proposed merger is in the “public interest.” This vague standard, which happens to govern much other FCC activity as well, means no more or less than whatever three of the five FCC commissioners say it means on any given day. Senator Dill, the chief sponsor of the original Communications Act of 1934, remarked that the public interest standard “covers just about everything.”

Such a vacuous standard might be thought to violate constitutional separation of powers principles to the effect that Congress may only delegate lawmaking authority when a statute contains an “intelligible principle” to which the administrative agency “is directed to conform.” While the Supreme Court

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continues to maintain the validity of the “intelligible principle” test, it thus far has refused to hold that the public interest standard violates the non-delegation doctrine.

Nevertheless, the problematic nature of the standard is evident in the FCC’s handling of the AT&T-BellSouth merger and most major mergers that come before the agency. With such unconstrained authority in the agency’s hands, merger applicants are forced to enter into unseemly—and non-transparent—negotiations with the commissioners and, in order to win approval in any sort of timely fashion, they must offer up “voluntary” concessions.

In the AT&T-BellSouth case, with one of the three Republican commissioners recused, the two Democrat commissioners refused to approve the merger unless the applicants agreed to accept a new Net Neutrality mandate that both Congress and the FCC thus far have refused to impose on an industry-wide basis. And they agreed to reduce rates for high-capacity services used by large business customers and their competitors, even though the FCC already had deregulated these rates on the basis that competition in this market segment exists. As the Republican commissioners pointed out, neither of these “voluntary” concessions constitutes sound policy. Both are likely to deter new network investment.

The applicants volunteered to abide by other conditions, such as committing to offer new retail broadband customers a \$10 per month service, offering stand-alone DSL service, and repatriating 3000 currently outsourced jobs. While some of these conditions may meet some commissioners’ notions of the public interest, the problem is that they have virtually nothing to do with any claimed anti-competitive impact of the AT&T-BellSouth merger. If the conditions have any merit at all, the FCC should consider imposing them on all similarly-situated industry participants in generic proceedings.

As conducted under the public interest standard, merger reviews almost always become what I have called a “bizarre bazaar,” an unbecoming process featuring midnight behind-the-scenes negotiations not befitting a government committed to constitutional ideals of due process. The way the FCC conducts its merger review process now, bureaucratic discretion is unconstrained by any pre-existing known intelligible principles to guide the regulators, regulated parties, or interested members of the public.

Perhaps it is understandable, if not entirely forgivable, that in an era of limited competition, communications regulatory paradigms were adopted which at least strained certain constitutional norms. But in today’s digital era characterized by information abundance, there is no reason to allow such counter-constitutional strains to persist. For anyone looking for a roadmap to reform communications policy, looking to the Constitution would be a good starting point.

