

“Net Neutrality: First Amendment Rhetoric in Search of the Constitution”

Remarks by Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association before the Media Institute in Washington, D.C.

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Patrick, thank you for that kind introduction.

A couple of years ago, I spoke at a Media Institute luncheon like this about the First and Fifth Amendments and telecommunications policy. And, I suppose, since we never really resolve these issues once and for all, I'll be back in a couple more years.

So, I appreciate your having me here again, Patrick. And thank you for the great work by you and the Media Institute to promote a National Freedom of Speech Week and for your strong and consistent voice in defense of the First Amendment. One of the things I really want to emphasize today is that consistency of principle . . . because it is human and very easy to confront times of great change and just assume core principles have to change too. Maybe some do . . . but I don't think our core First Amendment rights are among them.

And we are definitely going through one of those periods of great change . . . creative destruction, as Schumpeter coined the phrase, where it may be easier to discern the destruction than the creativity that is still emerging. The media landscape, the telecommunications landscape . . . just think about the truisms of even five years ago, and it is somewhat humbling how little any of us really perceived what would actually unfold.

Most observers, however, did expect that the explosion of goods and services, new applications, and new devices accessing the Internet over a newly deployed broadband infrastructure would bring enormous change. And indeed it has . . . although I would argue that all of this is still in its infancy.

But only now can we see real structural changes taking place as a result. One has only to think about the newspaper industry to realize that. And while I don't profess to know what the emerging model will look like, I know that a free and robust press is critical to our democratic experiment and I am confident that emerging models will supply that need. That is, if we have the courage of our convictions.

What is fascinating, and frankly disturbing, however, is how often in recent years that First Amendment principles have been turned upside down in an attempt to advance agendas that themselves threaten true First Amendment rights. I will talk more about this shortly, but let me just say this up front: no matter how much the Internet or broadband or new competition in telecommunications has changed the landscape, there is no justification for just pretending that the First Amendment means something completely different from our understanding of its meaning for over 200 years. Indeed, this proper understanding of the First Amendment is all the more vital in these times of technological change.

For today, I will just focus on the grand, seemingly endless, debate over net neutrality. We do this against a backdrop of an FCC proceeding that will conclude in all likelihood sometime next year. My intention today is not to debate the pros and cons of new network neutrality rules but I do think it is important to point out where this discussion can go astray.

First, even though we have a respectful disagreement over whether and to what extent net neutrality rules are needed, I do want to acknowledge and thank FCC Chairman Genachowski for how he has proceeded so far. An objective reading of the Notice of Proposed Rulemaking, I think, makes clear that he and his colleagues intend to fairly and openly explore a number of difficult and contentious issues. The NPRM, for example, asks for comment on the First Amendment implications of net neutrality rules. The NPRM acknowledges that the First Amendment does not govern the conduct of ISPs. And the NPRM asks for comment on the implications of the proposed rules on free speech, civic participation, and democratic engagement. The FCC, in fact, has scheduled a workshop next week to explore these and other issues.

Lurking behind all of this, of course, is something we can all agree is important: the Internet *is* a critical means of promoting democratic values we all share. Where we may part company, however, is in understanding whether, and if so how, those values are promoted by government regulation.

It should not be lost on anyone that the strongest and loudest voices for net neutrality rules often cloak their agenda as advancing the First Amendment or, just as frequently, First Amendment “values.” But urging the government to impose rules that supposedly promote First Amendment values is too often used to justify regulations that instead threaten First Amendment rights. By its plain terms and history, the First Amendment is a limitation on government power, not an empowerment of government. Making these arguments is, ironically, almost proof that First Amendment rights are being implicated.

Net neutrality rules have the potential to restrict protected speech in myriad ways – and not just the speech of Internet Service Providers. In some ways, from the millions of consumers who interact and engage on the Internet, to the facilities that provide those services, to the applications and content providers on the Web, the Internet is all speech. So as the FCC considers regulating in this area, it’s important that the agency carefully examine whether net neutrality rules can be justified under First Amendment standards.

Let’s start by not standing the First Amendment on its head. As I mentioned, some proponents have pushed rules they describe as the equivalent of the First Amendment for the Internet. They, in fact, convinced the FCC in the Comcast network management case to impose a “strict scrutiny” standard with all of the trappings of Supreme Court First Amendment jurisprudence on the conduct of ISPs. Given the importance of a strict scrutiny standard in court decisions that seek to defend every American’s right to freedom of expression against government restraint, it was kind of creepy. And to this FCC’s credit, they seem in the NPRM to propose moving away from that to a different kind of analysis. Whatever our present-day policy disagreements about net neutrality, or even differing politics, let’s not forget that the First Amendment is framed as a shield for citizens, not a sword for government. It is true that the

First Amendment promotes democratic values, as some have said, but it does so best by freeing citizens from government regulation of their speech, not by regulating it.

Next, almost every net neutrality proposal would seek to control how an ISP affects the delivery of Internet content or applications as it reaches its customers. This is particularly odd for two reasons: First, there is plenty of case law about instances of speech compelled by the government – “forced speech” -- that suggests such rules should be scrutinized closely. Second, and perhaps more importantly, it is an almost completely unnecessary risk. All ISPs have stated repeatedly that they will not block their customers from accessing any lawful content or application on the Internet. Competitive pressures alone ensure this result: we are in the business of maximizing our customers’ choices and experiences on the Internet. The counter examples used to debate this point are so few and so distinguishable as to make the point for me.

Beyond the forced speech First Amendment implications, however, net neutrality rules also could infringe First Amendment rights because they could prevent providers from delivering their traditional multichannel video programming services or new services that are separate and distinct from their Internet access service. While the FCC’s NPRM acknowledges the need to carve out “managed” or “specialized” services from the scope of any new rules, it also expresses concerns that “the growth of managed or specialized services might supplant or otherwise negatively affect the open Internet.” Meaning what? Well, the strong implication is some kind of guaranteed amount of bandwidth capacity for services the government deems important.

But in this case, the FCC is not engaged in the allocation of the public airwaves. The bandwidth we’re talking about is capacity on private transmission facilities constructed by ISPs. Imposing regulations that prevent providers from using “too much” capacity for speech-related services not even associated with Internet access should cause all sorts of First Amendment and Fifth Amendment Takings alarm bells to go off.

It’s not just broadband providers whose First Amendment rights are implicated by new net neutrality rules. Content and applications providers are also affected. For example, the FCC’s net neutrality rules as proposed would prohibit ISPs and applications providers from

contracting for any enhanced or prioritized delivery of that application or content to the ISPs' customers. Under the proposal, ISPs wouldn't even be permitted to offer such prioritization or quality-of-service enhancements at nondiscriminatory prices, terms and conditions to anyone who wanted it. Such arrangements would be simply off limits.

What does that mean for content providers? Well, for some, it may mean that they can't provide material in the enhanced form that they want. And the First Amendment protects the right not just to decide what to say, but how to say it. Not all content providers may need the same speed, prioritization of data and quality of service as, say, providers of high-definition video, or maybe 3D video or who-knows-what-else may be invented by application providers. But ISPs can't prioritize all content, due to the physical limitations of their systems. And it may be entirely too costly (as well as unnecessary and inefficient) to offer the same quality of service that a video game service requires to every single content provider. And so the effect of such a rule would be simply to prevent the offering of services consumers might want that require such enhancements. Does the First Amendment really allow the government to prohibit a content or applications provider from paying to acquire the means to distribute its content in the form or manner it wishes? Such a rule would ultimately decrease the overall amount of speech on the Internet, thus harming, not helping, First Amendment interests.

In a dynamic marketplace, we must also consider that a rule seeking to impose equality of treatment on today's terms can have the effect of freezing in place today's dominant players to the detriment of tomorrow's start-ups. Wholly apart from whether preservation of the status quo promotes First Amendment "values," it's likely to infringe First Amendment rights. To tell a new entrant or an existing content provider that it cannot enter into arrangements with an ISP for unique prioritization or quality of service enhancements that might enable it to enter the marketplace and have its voice heard along with those of established competitors interferes with that provider's speech rights in a way that should immediately invite First Amendment scrutiny.

And speaking of First Amendment scrutiny, if there's one thing the Supreme Court has made clear, it's that rules that directly restrict protected speech cannot be justified by a government interest that is merely hypothetical. As the Court said back in the *Turner* case,

When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." . . .It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

That's an admonition that should ring loud and clear in the net neutrality proceeding. Because when all the dire warnings of the net neutrality proponents are stripped away, there really are no signs of actual harm. Yes, there've been a couple of isolated incidents that keep being held up as examples of what needs to be prevented, but nothing that suggests any threat to the openness of the Internet. Meanwhile, the "openness of the Internet" – and the First Amendment "values" in a robust marketplace of Internet speech – have done nothing but flourish and expand beyond anyone's wildest imagination. That is what happens when speech is left free to thrive in the marketplace of ideas – the very point of First Amendment rights.

And that is really the key here: my friends with whom I debate net neutrality shake their heads when we call net neutrality a solution in search of a problem. But it is exactly that. Because all of the openness, all of the civic participation, all of the democratic engagement we could possibly want is happening right now . . . without net neutrality regulation.

A decade ago, I and a small group of folks formed an Internet start-up that was designed to be what we would call a social networking site today. And our niche, if you will, was that we could provide citizen activists the tools, the online communities and networking, for every possible political cause across the ideological continuum. It didn't really work in 1999 and 2000 because we still lived in a dial-up world. But, because of broadband, those types of social networking ideas have transformed how we interact in a myriad of ways. There are so many ways to describe this transformation . . . but just consider that Google announced in 2008 that they had discovered one trillion unique URLs . . . that Twitter, created in 2006, reached 10 percent of all active Internet users this past June . . . and that, according to Pew, more than a third

of all Americans are involved in a civic or political group, and over half of them use digital tools to communicate with other group members.

The point is that the very civic participation, openness, and diversity of opinion and information we all say we want is the product of a broadband ecosystem that matches an innovative technology platform with the genius of applications and content providers in ways that promote First Amendment “values” through citizen collaboration not government regulation.

I don’t know how to say it any more clearly than this: Internet Service Providers do not threaten free speech; their business is to enable speech and they are part of an ecosystem that represents perhaps the greatest engine for promotion of democracy and free expression in history.

Now, let’s face it: it’s not like proponents of net neutrality have likely missed any of this. That’s why for the last several years, some of them have been churning out speeches and writings that attack the idea that an ISP could be a First Amendment speaker (they really don’t like the *Turner* decision); that dismiss First Amendment doctrine as a “mess;” and that cobble together new theories whereby restrictions on speech and speakers that would otherwise run afoul of the First Amendment are OK if they promote the sort of political discourse that they (and the government) think is best. I don’t pretend to be a First Amendment scholar, but I recognize rhetoric over sound analysis when I see it, and I do know that the First Amendment is at its zenith when the right to choose the content of one’s own speech is taken away by government.

And, while I don’t know how courts will view all this, all I can ask is that as the FCC conducts its analysis, it will carefully consider the First Amendment implications of what it is doing. I believe and hope it will.

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