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Communications Policy Pirouettes

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More than a decade has elapsed since Congress passed the Telecommunications Act of 1996. It is time to engage in a radical rethinking of communications law and policy.

Two of 2006's hottest communications policy topics -- so-called Net neutrality and the AT&T-BellSouth merger -- nicely illustrate my main point: Much communications policy thinking continues to rest on foundations that run against the grain of our constitutional culture.

I do not argue here that particular laws or policies violate current constitutional jurisprudence. Rather, I contend that in today's competitive, fast-changing digital communications environment, radically different from the staid, generally monopolistic analog era in which the counter-constitutional culture was born, heightened respect for values derived from 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 Web site or from "discriminating" against the content or applications of unaffiliated entities. A popular formulation prohibits broadband ISPs from preventing subscribers from "sending" or "posting" any content.

"Net neutrality" has a pleasing ring. But government mandates requiring broadband ISPs to make available their networks for carrying or posting content they might prefer not to carry or post implicates 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 messages.

Those still wedded to analog era paradigms do not grasp the notion that

government-imposed "neutrality" mandates might violate the First Amendment. They cling to traditional 20th century broadcast and common-carrier regulatory paradigms. 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 nonbroadcast media. Thus, the Supreme Court sanctioned the FCC's notorious Fairness Doctrine which required broadcasters to cover controversial issues in a balanced (read: neutral) way.

Under the common carrier model, on the theory 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" 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 is an outer boundary against confiscatory regulation.

Today's digital broadband ISPs are neither broadcasters nor common carriers under the Communications Act's classification scheme. They are private businesses that have invested billions of dollars building high-speed communications networks. The FCC has classified broadband ISPs as unregulated "information service providers" and repeatedly determined they operate in a competitive environment.

Under these circumstances, efforts to impose neutrality mandates akin to broadcast-like speech restrictions and common carrier-like nondiscrimination mandates 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, including that it substantially duplicates the effort of the Justice Department and the Federal Trade Commission But a particular feature of the Communications Act adds to communications policy's counter-constitutional milieu. The act delegates authority to the agency to consider whether a proposed merger is in the "public interest." This vague standard means no more or less than what three of the five FCC commissioners say it means on any given day.

Such a vacuous standard might be thought to violate constitutional separation-of-powers principles allowing Congress to delegate lawmaking authority only when a statute contains an "intelligible principle" to which an agency is directed to conform. While the Supreme Court still embraces the "intelligible principle" test, thus far it has refused to hold the public interest standard unconstitutional.

Nevertheless, the standard's problematic nature is evident in the FCC's handling of the AT&T-BellSouth merger. With such unconstrained authority in the agency's hands, merger applicants often are forced to enter negotiations with commissioners to win approval in any timely fashion.

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 "voluntarily" accepted new Net neutrality regulation that both

Congress and the FCC have refused to impose industrywide. And they "volunteered" to reduce rates for certain high-capacity circuits, even though the FCC already had deregulated these rates. As the Republican commissioners explained, both concessions are likely to deter new network investment.

The applicants volunteered other conditions, such as repatriating 3,000 currently outsourced jobs, which have nothing to do with any claimed anticompetitive impact of the merger. If these unrelated conditions have any merit at all, the FCC should consider imposing them on all industry participants in generic proceedings.

In short, FCC merger reviews too often deteriorate into an unbecoming process of behind-the-scenes midnight negotiations not befitting a government committed to constitutional ideals of due process and constrained bureaucratic discretion.

It may be understandable that in an era of limited competition, communications policies were adopted which strained constitutional norms. But in today's era of information abundance, there is no reason to allow such counter-constitutional strains to persist.

For anyone looking for a roadmap for reforming communications policy, the Constitution is a good starting point.

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