

**What Broadcast Licenses Tell Us About Net Neutrality:
Cosmopolitan Broadcast Co. v. FCC**

by

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Recommendation and Conclusion

The lessons of the *Cosmopolitan* case for the current net neutrality debate should now be self-evident. The sorry, if foreordained, performance of the D.C. Circuit in dealing with the broadcast licensees and the use of time brokers should give a strong warning to those who think that Congress should exert any direct control over the broadband providers. The proper limits of government action in this area should be defined by the antitrust laws. Efforts to impose additional restrictions often turn out to be far more anticompetitive than the practices they displace. The larger danger lies with government actions to expand its own authority by the repetitive use of one intellectual trick. Treat the rules that are necessary for the definition, creation and enforcement of property rights as though they are indistinguishable all other forms of regulation. Then conclude that those who accept the one system of regulation are helpless to resist on principle the full range of government controls that go far beyond the classical liberal definition of property rights. Laissez-faire, we are told, is doomed by self-contradiction because its opponents find it literally impossible to imagine how the law of property, contract and tort law can intelligently govern any substantive area. The claim is that so long as regulation is inevitable, the choice among forms of regulation cannot be governed by any intelligible principle.¹

The claim that laissez-fair falls of its own weight is not confined to telecommunications but arises in other areas. Someone announces that so long as one accepts the Statute of Frauds or the standard recordation principle, there is suddenly no principled grounds to reject the minimum wage, the antidiscrimination laws, or mandatory collective bargaining. After all, these too are all government regulations of freedom of contract. But such arguments are untenable because they ignore any connection between the chosen regulation and its effects on overall social welfare. A writing requirement and a recordation statute are intended to strengthen the system of voluntary exchange by reducing the uncertainties of transactions and giving notice to the world of the state of the title in question. The other regulations all restrict the voluntary exchange in ways that destroy potential gains from trade. So long as we understand the difference between positive and negative sum games, which should be able to assess which forms of regulation strengthen markets, and which undermine it.

¹ For an early defense of this position, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923), as defended in BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

A similar pattern is at work in the modern debates over net neutrality. The defense of that position starts out as a plea to end discrimination. Yet there is little evidence that the new dose of regulation will produce any gains in the short run. In the long run, we can expect a repetition of the sorry performance of the FCC (or, for that matter, Congress) with respect to broadcast rights to work its way through the law of net neutrality. The sad truth is that the parties who seek to develop sophisticated and sensible schemes for state control quickly lose control over the administrative process to persons whose ambitions for state control are not bound by any fine-grained rationale. The dangers for this predictable drift usually suffice to err on the side of caution. Stated otherwise, the expected rate of depreciation of sound public norms that rely on administrative discretion is high. There are too many pressure points to keep the rascals at bay. So the recommendation here is to follow classical liberal principles that treat all state intervention as a mistake until it is shown to be a good. More practically, and much to the point of the current public policy debate: Keep private control over broadband pipes by abandoning the siren call for net neutrality.