

**Remarks of Commissioner Robert M. McDowell**  
**Federal Communications Commission**  
**“Speech, Civic Engagement and the Open Internet” Workshop**  
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**As prepared for delivery**

Thank you, Stuart – and let me be among the first to welcome you to the Commission. I’m pleased to be joining a diverse and distinguished group of people here today, not the least of whom are my colleagues Mike Copps and Mignon Clyburn. But I particularly want to thank our panelists for taking the time to prepare thoughtful comments about their experiences and perspectives. We will be hearing today about many innovative uses of the Internet to broadly disseminate information, share viewpoints, and organize citizens to participate in the political process – whether at the local, regional, or national level, and from any and all political philosophies.

My friend Mike Copps just last week hailed “the genius of the Internet” for its “openness, its dynamism, its availability to one and all.” I certainly agree with that sentiment. In fact, I think it’s safe to say that we all agree that the freedom of expression made possible by the Internet is stirring – and even a bit stunning, if you’re old enough to remember life before the ’Net.

Nowhere is this truer than in the context of political speech, the fundamental lifeblood of our democracy. Political speech takes many different forms, from candidates giving speeches and running broadcast ads to concerned citizens coalescing around a cause and organizing themselves through the Internet. The number of voices and perspectives accessible on the ’Net are literally uncountable.

At no time in American history have our fellow citizens had more communications power at their fingertips. Yet the political component of the Internet success story rests to some degree on choices made by communications policymakers over the 15 years since the 'Net was privatized. At that historic moment, policymakers decided – on a bipartisan basis – to allow the Internet to grow largely unfettered by government mandates. They chose to rely instead on a cooperative model of decision-making and self-governance by a large number of interested parties, private and public, working together in collaborative forums, associations, and other non-governmental bodies. That model gave birth to the most innovative and adaptive communications tool that the world has known – and the fastest penetrating technology human beings have ever created.

So while I'm pleased that we will gain a deeper understanding today of the Internet's effect on our national civic life, it's also appropriate to discuss the legal and policy implications of any potential expansion of the government's role in regulating this medium of expression. It probably comes as no surprise that I have serious concerns, from both a constitutional and policy standpoint, about placing more regulatory mandates on the Internet.

My legal review begins, as always, with the wording of the constitutional or statutory provision at issue. The plain language of the First Amendment, of course, is a check on government power to burden speech, and not on a private party's choice to speak or stay silent. Efforts to advance "First Amendment values" through additional government regulation risks turning over two hundred years of First Amendment jurisprudence on its head. As a result, new rules likely will receive heightened scrutiny

from reviewing courts – and, based on past precedent, would seem particularly vulnerable when the regulated entities operate in a competitive environment that leave open other avenues for disseminating speech.

In addition to constitutional considerations, however, I have some practical worries – one of which is the real prospect of the government getting new regulation wrong, no matter how well intentioned its actions might be. The risks of getting it wrong are high in a fast-evolving arena like the realm of the Internet, where consumer demands and business plans evolve on a near-daily basis. And the consequences of getting it wrong are much more significant when it is the government that misjudges a changing marketplace, rather than a private-sector player competing against other, and possibly savvier, business rivals. When a company guesses wrong and builds a business model that fails, the failure hurts the company’s employees and investors – but rarely does that failure impair a competitive marketplace because consumers have the power to choose among other options. When the government guesses wrong, however, and imposes a regulatory regime based on unsubstantiated fears about the future, it can distort the development and deployment of new services by all providers for years to come. In short, what is frequently considered to be “market failure” is really the result of regulatory failure. Until such harmful policies become reversed, consumers lose out.

Concerns about well-meaning government misjudgment are not limited to my side of the political aisle. I recently ran across a quip from the economist John Kenneth Galbraith, a man who wasn’t shy about advocating for federal intervention on occasion. Yet frustration with one government agency prompted even Galbraith to say, “You will find that [the] State [Department] is the kind of organization which, though it does big

things badly, does small things badly too.”<sup>1</sup> As proud as I am of the FCC and its people, I don’t think we’re smarter than the collective wisdom of the millions of Americans – or billions of people worldwide – who comprise the private sector.

Producing ineffective regulation is one thing, but issuing harmful regulation would be irresponsible. The latter would be especially troubling when the service or product at issue concerns speech including efforts that would burden one party’s ability to speak in order to advance the speech of others. Sometimes the effect of the government’s past, failed efforts in this area is mostly an economic one. Consider the time and resources wasted in the 1990s on regulatory constructs such as the FCC’s “video dialtone” rulemaking and its statutory successor, known as “open video systems” or “OVS.” Both were designed to bring new, competing multichannel video services into being on telephone networks. Video dialtone would have inserted one independent multichannel provider onto the telco platform but barred the network operator from having any control over the content. OVS, on the other hand, would allow telcos to offer their own (and slightly deregulated) multichannel programming service, but only if they reserved two-thirds of their system capacity for one or more independent multichannel providers. Neither regulatory scheme delivered any appreciable new service options to consumers. For those few companies who tried to make the concepts work, how many resources were diverted away from productive uses that would have responded to actual consumer demand?

Other failed government efforts have imposed a more insidious burden by potentially depriving consumers of the ability to receive speech that they might value

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<sup>1</sup> [FYI – Per various online sources, this quote Quoted in conversation with Charles Frankel, *High on Foggy Bottom: An Outsider's Inside View of the Government* (1969), p. 11.

highly. One example in this regard is the Commission's old "prime-time access rule," or "PTAR." That restraint, first imposed in 1970, effectively barred the three TV broadcast networks from supplying programming to affiliated stations for the first 30 minutes of the most heavily viewed evening hours. The idea was that the freed-up time would give rise to a wealth of new and better programming more specifically targeted at local viewers' needs and desires. And what new and improved programming did the government's rule produce? A lot of syndicated game shows. The law of unintended consequences prevailed once again. The FCC finally gave up on that rule in the mid-1990s, when it became clear that the "broadcast network bottleneck" argument was no longer credible in light of competition provided by cable and other sources.

Some may say that it's too early to judge the constitutional and policy implications of any net neutrality regulations on speech. I think the better approach is to start considering the potential ramifications now in an effort to avoid repeating old mistakes.

But in the spirit of the First Amendment: Let the debate begin! Thank you to both our broadband staff and our panelists for engaging in this conversation.