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NET NEUTRALITY, FREE SPEECH, AND DEMOCRACY

IN THE INTERNET AGE

- DAWN C. NUNZIATO¹

“[W]e could be witnessing the beginning of the end of the Internet as we know it.”

-- Michael J. Copps, F.C.C. Commissioner, “The Beginning of the End of the Internet?,” New America Foundation, Washington, D.C., October 9, 2003

“The potential for abuse of this private power over a central avenue of communication cannot be overlooked....

-- Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 657 (1994)

“When we balance the constitutional rights of owners of property against those of the people to enjoy [First Amendment freedoms], . . . we remain mindful of the fact that the latter occupy a preferred position.”

-- Marsh v. Alabama, 326 U.S. 501, 509 (1946)

PREFACE

The Internet provides the greatest forum for communication and expression that the world has ever seen. At the same time, however, the Internet is ultimately subject to the control of a handful of dominant, private entities that are unregulated under the First Amendment in their duty to facilitate communication and expression. That paradox lies at the center of this book.

More than any time in our history, a small number of private entities enjoy unfettered control over what speech to facilitate – and what speech to restrict or disfavor – within our most important medium for expression. Although the Internet is generally seen as a forum for free expression, in reality speech on the Internet is subject to

¹ Associate Professor, The George Washington University Law School. This preface is from *Net Neutrality, Free Speech, and Democracy in the Internet Age*, by Dawn C. Nunziato, (c) 2009 Board of Trustees of the Leland Stanford Jr. University. All rights reserved. Forthcoming with Stanford University Press, by permission of the publisher, www.sup.org. No further distribution, use, and/or reproduction is allowed without the prior written permission of the publisher.

unfettered censorship and discrimination at a variety of chokepoints. Internet speech conduits – like broadband service providers – are now responsible for facilitating a vast amount of expression and are unregulated in carrying out this responsibility. Unlike telephone companies or the postal service -- which have long been legally required not to discriminate against the content they are charged with carrying – these Internet speech conduits are not similarly regulated. While many individuals may be content to entrust their ability to communicate to the market, recent developments suggest that such trust is misplaced and may very well lead to the “end of the Internet as we know it.”

U.S.-based Internet speech conduits have recently invested extensive resources into developing methods to restrict expression at the behest of speech-restrictive regimes like China.² With such methods in hand, Internet speech conduits are increasingly poised to restrict speech by United States’ Internet users – to advance their commercial, political, or other interests. In recent incidents, Comcast – one of the nation’s dominant broadband providers – secretly restricted its subscribers from using legal file-sharing applications and prevented its email subscribers from receiving communications from two public interest groups critical of President George W. Bush. Comcast blocked emails from www.AfterDowningStreet.org, an organization that sought to lobby Congress to impeach the president for his conduct in bringing about the War with Iraq, and from the anti-war organization www.MeetWithCindy.org, established by anti-war activist Cindy Sheehan. Similarly, DSL provider AT&T censored the anti-Bush lyrics of Pearl Jam lead singer Eddie Vedder during a live cablecast of a concert. Google for its part has restricted speech that is critical of its role in censoring speech in overseas markets. Speech on political and protest issues is traditionally accorded the highest degree of protection within our constitutional scheme, but because such speech restrictions as these occur at the hands of “private” conduits, they are not cognizable as First Amendment violations under the prevailing understanding of the free speech guarantee.

How is it that we find ourselves at this juncture in free speech jurisprudence? And what, if anything, should be done about it? Over the past two decades, the U.S. government divested itself of ownership and control of the Internet’s infrastructure and

² See, e.g., Andrew Keen, *Google in the Garden of Good and Evil: How the Search Engine Giant Moved Beyond Mere Morality*, Daily Standard, May 3, 2006, <http://www.WeeklyStandard.com/Content/Public/Articles/000/000/012/176wtlbv.asp> (explaining that “[e]verything that the Chinese government blocks, Google also blocks”); John Leyden, *Skype Uses Peer Pressure Defense to Explain China Text Censorship*, The Register, Apr. 20, 2006, <http://www.theregister.co.uk/2006/04/20/skype-China-censorship-row> (VoIP firm Skype’s Chinese partner filters instant messages sent using its software to comply with local censorship laws); Glenn Kessler, *Cisco File Raises Censorship Concerns*, The Washington Post, May 20, 2008 ([Senate Judiciary Committee](#) on the Global Internet Freedom Act considers Cisco internal documents suggesting that Cisco was willing to assist the Chinese Government in combating the “Falun Gong evil cult and other hostile elements.”)

ceded ownership and control to a handful of private entities. At the time it did so, those private speech conduits were still legally required to facilitate, and not to discriminate against, speech. Providers of narrowband and DSL Internet access were regulated as telecommunications providers and were prohibited from discriminating against content. Since 2002, however, the F.C.C. has embarked on a path of gradually removing such obligations from Internet speech conduits. And in its decision in *Brand X* in 2005, the United States Supreme Court approved of this course of action. Our free speech rights on the Internet are quietly slipping away.

Since 2005, individuals concerned about the future of the Internet have sought to remedy these (and related) problems of unfettered control by those few powers who serve as gatekeepers for the Internet's content. They have proposed "net neutrality" legislation and have sought to convince the F.C.C. to impose meaningful constraints on such power. While proposed net neutrality regulation is aimed at limiting conduits' power in a variety of ways, my focus is on constraining their power to discriminate against Internet speech on the basis of its content. Constraining Internet conduits' discretion in this manner is essential to protecting individuals' free speech rights within a liberal democracy such as ours.

A few decades ago, the fact that conduits for speech were privately owned would not necessarily have insulated them from First Amendment obligations. In a number of early decisions, the Supreme Court adopted an affirmative conception of the free speech guarantee and imposed obligations on public and private conduits of speech to facilitate individuals' right to speak without discrimination. In recent years, however, the Court has unwisely trended toward a negative conception of the First Amendment, in which individuals' free speech rights apply only against government censorship and private speech conduits are left unfettered in their ability to regulate expression.

This book is intended to serve as a wake up call and a call to action for those who are concerned about our free speech rights as U.S. citizens in this unprecedented forum for expression. Courts and policymakers – and members of the public – should embrace an affirmative conception of the First Amendment for the Internet age. The prevailing negative conception of the First Amendment fails to recognize and protect the important role that the state should serve in regulating these dominant private conduits of expression in order to facilitate the conditions necessary for democratic self-government. Simply put, entrusting all speech decisions to a market dominated by a few powerful speech regulators disserves democracy and the freedom of speech that democracy requires. Those of us who are concerned with the role that free speech plays in facilitating liberal democracy must rethink the appropriate conception of the First Amendment in the context of the media landscape of today – and tomorrow. Decisions regarding what speech is allowed – and what speech is censored – should not be committed solely to the dictates of the dominant private entities that control expression on the Internet. A fundamental rethinking of the meaning of the First Amendment's protections, and of free speech values generally, is therefore in order.