

Abstract

In this paper, I will argue that the Federal Communications Commission's decision to repeal regulations on net neutrality violate several legal protections granted in the Constitution. These are the 14th Amendment Equal Protection Clause, the 1st Amendment Free Speech Clause, and procedural due process. In the introductory paragraph, with my thesis statement at the end, I briefly list the most recent events regarding efforts to reverse the FCC's repeal of these regulations. This is to demonstrate the relevance of the issue to the current time period as well as to show that the actions of the majority of officials in the U.S. Senate and Democratic Party are in alignment with my stance that the FCC's repeal should not be allowed to go into effect. I provide more background information and relate it to my first argument regarding inequality of access. I also explain ways in which freedom of speech could be suppressed by the repeal of Title II. Furthermore, I explain how the FCC violated procedural due process regarding an issue with a large number of comments posted under false or stolen identities on its website.

Keywords: 14th Amendment, equal protection, 1st Amendment, free speech, net neutrality, Title II, FCC, Federal Communications Commission

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The Net Neutrality Repeal as a Violation of Constitutional Protections

Following widespread public opposition to the pending repeal of net neutrality regulations, on May 16, 2018, the Senate recently voted to overturn the repeal of net neutrality regulations implemented by the Obama administration, in a vote of 52-47 ("Senate Votes to Overturn FCC's Repeal of Net Neutrality Rules", 2018). However, the vote by the Senate has not prevented the Federal Communication Commission's vote to repeal net neutrality regulations from taking place on June 11, 2018, the day of writing (Chappell, 2018). Sen. Edward Markey, D-Mass, has filed a Congressional Review Act to challenge the FCC; the date of the repeal taking effect is one day before the deadline to vote on the CRA (Chappell, 2018). Democrats are confident there is enough approval to bring the CRA to the Senate floor and to achieve a majority vote (Chappell, 2018). These recent events reveal that members of the U.S. Senate as well as the Democratic Party both agree the repeal of regulations by the Federal Communications Commission should not be allowed to take effect. The Federal Communication Commission's vote to repeal net neutrality regulations violates several constitutional protections.)

My first argument is that the vote violated the 14th Amendment Equal Protection Clause because its effects were intended to create inequality of internet access based on preferences of internet providers. The Equal Protection Clause disallows states from denying equal protection of the laws to any individual, under the Fourteenth Amendment (Cross & Miller, 2012, p. 111). Title II of the 1934 Communications Act regulates internet access as a public utility; by voting to repeal this regulation, the Federal Communications Commission (FCC) wished to open up more freedom in its operations (Frieden, 2018, p. 657). Under Title II regulations, dominant carriers are subject to more regulations and have more strict requirements for filing tariffs than

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nondominant carriers (Pershing, “N :: Title II”, 2016). Following is an explanation of court cases leading up to the repeal, as well as a discussion of what Title II entails.

A series of events involving the court case *USTA v. FCC* resulted in the vote to repeal Title II, which threatens equal protection of internet access; the original court opinion, however, supports equality of internet access. The *USTA v. FCC* (DC Cir. 2016) court case resulted in a ruling favoring treatment of the Internet as a utility as opposed to a luxury, and it maintained the classification of broadband providers as being common carriers; in this case, net neutrality was upheld (Hanna, p. 80). A court opinion on this case stated that Title II requires carriers to “...furnish...communication service upon reasonable request,” to refrain from engaging in “unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services,” and to charge “just and reasonable” rates (United States Telecommunications Association v. Federal Communications Commission, 2016). The opinion presented in this court case is that carriers should treat their customers fairly and equally. On May 1, 2017, there was a petition for rehearing in which the Open Internet Order, or net neutrality rule, was upheld; afterward, the FCC filed petitions for review and considered replacing the existing rule using a Notice of Proposed Rulemaking (Pershing, “Open Internet 2015 Rules”, 2017). However, under the Trump administration, the FCC ultimately voted for ISPs to repeal net neutrality on December 14, 2017 (Hanna, p. 80). This would have had negative consequences for internet users because the repeal of net neutrality regulations would have resulted in reduced accessibility of the internet and of some websites for some individuals. More specifically, internet activity and connection quality both would have been vulnerable to exploitation for corporate profits (“What is Net Neutrality?”, 2017). The result of this vote would have been that “companies could disfavor controversial viewpoints or smaller websites and favor

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the content providers who have the money to pay for better access” (“What is Net Neutrality?”, 2017). These are examples of inequality of access, which is protected under the 14th Amendment.

The consequences resulting from the repeal would have violated the Open Internet Order of 2010 put forth by the FCC, which offered three protections: transparency, no blocking, and no unreasonable discrimination (*Before the Federal Communications Commission, Washington, D.C. 20554: Report and Order, 2010*). The description for the last protection states that “fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic” (*Before the Federal Communications Commission, Washington, D.C. 20554: Report and Order, 2010*). Not only is the FCC violating legal protections put forth by the Constitution, but also it is in violation of its own regulations.

In the absence of Title II regulations, individuals in similar positions would have been treated differently. Under Title II regulations, no distinctions are made between individuals or their ability to access websites for internet accessibility. The Equal Protection Clause includes the fact that “similarly situated individuals” may not be treated differently under the law (Cross & Miller, 111). Thus, the vote to repeal was in violation of the Equal Protection Clause.

The claim that the FCC violates the Equal Protection Clause could be countered with the idea that the internet should be considered a commodity rather than a utility because current regulations restrict internet providers too tightly. If the internet is considered a commodity, supply and demand would control the availability and the price of internet access (Brunetto, 2015). If internet accessibility were a commodity, the Equal Protection Clause would be in violation due to the prioritization of profitability over equal access. However, under Title II protections, internet access is considered a utility, meaning it is under heavy regulations and equally to all its customers (Brunetto, 2015). I prefer this interpretation of the internet as a utility

because of the unique value the internet has as an instrument for communication in today's society. The internet has been a tool which encourages "...innovation, scientific, research, economic competition, and free expression" (Hanna, p. 79). It is argued that because "net neutrality became a standard to enshrine these principles and uphold the open architecture of the Internet", its intention was for the Internet to be a public good (Hanna, p. 79). I agree with this stance; the role the internet plays in society as a communicative and innovative tool is too valuable to diminish by allowing companies to selectively throttle access for the sake of their own ability to profit.

My second argument is that the vote violated the 1st Amendment Free Speech Clause because it aimed to inhibit the ability to communicate over the internet. As stated previously, one of the protections in the Open Internet Order of 2010 was no blocking; this meant that broadband and mobile providers were not permitted to block content that was legal or competed with their services (*Before the Federal Communications Commission, Washington, D.C. 20154: Report and Order*). The blocking of content that is either legal or that competes with the services the company provides would provide the company with an unfair advantage; it could also be interpreted as a form of censorship, since the receiving party would have their content restricted against their will. The First Amendment protects religion, expression, assembly, as well as petition rights; more importantly to this topic, it "...guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely" (Cross & Miller, 2012, p. 103). Content blocking is one such restriction of the right to freely communicate.

The censorship of controversial viewpoints under lack of Title II regulations would violate 1st Amendments rights ("What is Net Neutrality?", 2017). If an internet customer's

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connection were negatively impacted due to unpopular views, their ability to use the internet and therefore to communicate would be hindered. Censorship of controversial viewpoints would be an example of content blocking that violates the 1st Amendment.

A counterargument to the claim that the FCC violates the First Amendment right to freedom of speech is that since nothing like the internet existed or could be conceived of when the Constitution was created, concerns related to free speech—or other Amendments, for that matter—are not necessarily applicable. The concept of a living constitution, as opposed to strictly adhering to original intent, is that it “...evolves, changes over time, and adapts to new circumstances, without being formally amended” (Strauss, 2010). This concept is relevant since the world has changed in ways the authors of the Constitution would not have imagined; technology is one of these changes (Strauss, 2010). If the Constitution was meant to always be applicable, then Constitutional rights will need to be applied to situations which may not have been thought of when the document was drafted. I believe the Constitution should be interpreted as a living document, especially in this context, since the internet involves completely different technology and thus different legal implications from what was available at the time the Constitution was created.

Finally, I argue that the Federal Communications Commission did not follow procedural due process after stolen identities were being used to overwhelm the comment section of the organization’s website and it did not comply with an investigation of this matter. Procedural due process is a Constitutional protection stating that when the state or federal government deprives a citizen of life, liberty, or property through its actions, the citizen must be provided notice and an opportunity to be heard (Cross & Miller, 2012, p. 111). In addition, the requirement for fair procedure is that the individual in question must have an opportunity to object to the action

proposed to an objective, third-party decision maker (Cross & Miller, 2012, p. 111). The FCC hosted an open comment section on its website regarding the then-upcoming repeal of net neutrality rules; however, many comments began to appear which contained the same message and were posted under the names of individuals who did not make the comments (Roseberg, 2017). If the U.S. government is preventing individuals from having complete ownership of their identity, procedural due process postulates that the individuals victimized should have been notified.

According to Eric Schneiderman, the New York State Attorney General, the office of FCC Chairman Ajit Pai refused to provide the records necessary for the investigation into this matter (Rosenberg, 2017). The greater purpose of the false comments and the suppression of the investigation was to bypass procedural due process. There was no attempt to notify individuals that their identities were being used to post fake comments, nor was there any intention to allow an investigation. These actions on the part of the FCC negatively impacted liberty and property rights of individuals involved. The individuals impacted did not consent to the use of their identities by others to post such comments that may or may not have aligned with their own opinions. The first part of the fair process requirement is not fulfilled either, since genuine comments were buried by the overwhelming number of false comments on the forum. Furthermore, the refusal to cooperate with the investigation goes against the transparency protection introduced in the Open Internet Order protections from 2010 (*Before the Federal Communications Commission, Washington, D.C. 20554: Report and Order, 2010*). By refusing to provide the documents, the FCC was unclear about its intentions and if it had any involvement in posting the comments.

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With regard to procedural due process, one fact to consider is that the public has been fully aware of the net neutrality issue as the process of the regulation repeal has been transpiring. Therefore, it could be argued that there was no violation of procedural due process since there would be no need to notify the public of any rights jeopardized as the result of the Title II repeal; the public would already be aware of these events. In this argument, the common knowledge and discussion of the issue would serve as the notice and opportunity to be heard aspect of procedural due process. However, even if this argument were correct, the fraudulent comment section posts are an issue in and of itself that was not handled properly by the FCC, because the FCC failed to notify Americans that their comments were being overshadowed by false comments and that their identities were also being stolen for this purpose.

In this paper, I have argued that the Federal Communication Commission's vote to repeal net neutrality regulations is in violation of Equal Protection Clause due to the inequality of internet access the repeal of regulations will create. I also have argued that the repeal vote violates the Free Speech Clause because the reduced ability to access the internet thusly decreases the ability to communicate freely using the internet. Third, I argued that the FCC did not properly follow procedural due process regarding the comment fraud on its website, due to its failure to notify those affected as well as its resistance to investigation of the matter. In current events, a majority of members of the U.S. Senate and Democratic Party have acted to attempt to reverse the repeal. The Federal Communications Commission's repeal of Title II regulations violates constitutional protections; therefore, it should not be placed into law.

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