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A La Carte Cable by Demand Forcing TV Choices on Consumers Is No Way to Choose

by

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Suppose I wish to purchase only the sports page of The Washington Times on the theory that it ought to be priced less than the whole newspaper?

No one thinks the government should — or could — mandate that a newspaper be made available on an a la carte basis just because some politician or policymaker thinks that consumers should be able to "pick and choose" only their favorite sections.

Yet politicians and policymakers over the years have suggested the government should require cable operators to make available their channels on an a la carte, pick-and-choose basis.

With his newly introduced Television Consumer Freedom Act, Sen. John McCain, Arizona Republican, is once again proposing a government-imposed a la carte regime. Mr. McCain claims his bill "is about giving consumers more choices when watching television." His proposal was a bad idea when first offered more than a decade ago. It is a worse one now.

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Consumers have never had so many choices for watching so much video programming offered by so many video providers.

Whatever the situation was when Mr. McCain first urged an a la carte requirement, it is indisputable that the video programming and distribution marketplace is now competitive.

Today's cable systems typically offer subscribers approximately 900 unique channels, and the two competing satellite operators, Dish Network and DIRECTV, offer nearly the same number. Now the telephone companies compete with similar video offerings. Presently, cable companies have approximately 58 percent of the multichannel video distributor market, satellite providers 33 percent, and telephone companies 9 percent.

As the Federal Communications Commission observed in its most recent report on video competition, even as of 2010, the emergence of "over-the-top" Internet video as a "thriving industry" further altered the marketplace environment in the direction of more consumer choice. Today, Netflix is the nation's largest subscription video service with 29 million subscribers, more than Comcast's 22 million. Other major online video programming purveyors include Hulu, Amazon, iTunes, HBOGo and Apple TV. Not to mention Google's YouTube, which recently announced a new subscription video service. Of course, all this video programming can be viewed on laptops, notebooks and smartphones, in addition to the traditional television screen.

We truly do live in the age of "TV anytime, everywhere."

Certainly, there is no basis to conclude a marketplace failure exists, warranting further government regulation. In a May 28 decision regarding Comcast's refusal to accede to the Tennis Channel's demand for placement on a program tier with broader distribution, federal appeals court Judge Brett Kavanaugh concluded in a concurring opinion that Comcast and other video providers no longer possess market power. While cable operators do not currently allow consumers to purchase channels on an individual basis, there are an increasing number of Internet video providers that already offer just such "on-demand" business models.

In the current competitive environment, it is much more likely the marketplace will satisfy consumer demand in a more efficient manner than some government-dictated offering. While the idea that all consumers should be able to purchase only the channels they choose to watch may have superficial appeal, the notion that such a regime would really benefit consumers is highly suspect. Indeed, a 2003 study by what is now the Government Accountability Office concluded that under an a la carte plan, "some subscribers' bills might decline but others might increase."

Numerous other studies have shown that a government-mandated a la carte regime might well diminish substantially the number of channels available, especially those appealing to minority or specialized tastes. With the unbundling of all channels, the costs for making available certain individual channels would rise as the audience size for those channels is reduced. Some channels almost certainly would never get off the ground because operators would not risk incurring the costs of carrying a channel with little initial expected audience demand.

Strictly speaking, Mr. McCain's bill would not, ipso facto, impose a government a la carte mandate. Rather the bill provides that the government would withhold certain existing regulatory "benefits" absent adoption of an a la carte model. It is in this sense that Mr. McCain says that his bill is "voluntary."

Without engaging in a linguistic debate concerning the meaning of "voluntary" in a regime in which the government confers and then threatens to withhold benefits absent agreement to adopt a government-preferred course of action, I will grant Mr. McCain this: Because of the past decade's remarkable changes in the video marketplace, it is time to examine on a comprehensive basis jettisoning many of the outdated legacy regulations he has identified, such as network nonduplication, syndicated exclusivity, must-carry, retransmission consent, compulsory copyright, and so forth.

The existence of such a tangle of legacy regulations in a fast-changing, competitive marketplace should not be used to justify adopting still more intrusive government intervention. Rather, it a justification for eliminating outdated regulations so the free marketplace can be allowed to work.

Now recall my desire to purchase only The Washington Times' sports pages rather than the entire paper. At the outset, I said that no one thinks the government should — or could — mandate that the newspaper be required to satisfy my desire. This is because the First Amendment prevents such government intervention with respect to the exercise of the paper's editorial discretion regarding the packaging of its content. In his opinion in the *Tennis Channel* case, Judge Kavanaugh declared the Federal Communications Commission's interference with Comcast's editorial discretion regarding what channels to carry and where to place them cannot stand "in light of the Supreme Court's precedents interpreting the First Amendment and the massive changes to the video programming market over the last two decades."

Especially in light of First Amendment considerations, Mr. McCain should direct his attention toward getting rid of existing regulations on video providers, not adding new ones.

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