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Deregulating the Video Marketplace

by

Randolph J. May *

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In December 2011, Rep. Steve Scalise, Louisiana Republican, introduced the "Next Generation Television Marketplace Act" to deregulate the nation's decades-old, bucketful of rusty regulations that govern the distribution of video programming by cable companies, satellite operators, and broadcasters. At the time the bill was introduced in 2011, I said it "would get rid of all the protectionist video regulations enacted during a now bygone era." And I emphasized that whatever consumer protection justification existed when these regulations were adopted, such justification "no longer exists."

Well, as Congress would have it, the bill didn't go anywhere. But on July 23, Mr. Scalise — now House Majority Whip — reintroduced the bill, not only with the same name but in virtually the same form. The case for adoption of the "Next Generation Television Marketplace Act" is even more compelling now than when it was first introduced.

In today's video marketplace, with its never-before-witnessed abundance of media and diversity of voices — including the Internet — adoption of a bill like Mr. Scalise's would bolster free market competition and free speech. Consumers would benefit from the regulatory unshackling

of traditional video programming distributors. And those who understand the First Amendment's place in our constitutional system should be pleased with less government intervention in the media marketplace.

Here's a brief recounting of key regulatory restrictions that would be repealed by Rep. Scalise's bill:

(1) The requirement that cable and satellite TV operators "must carry" local TV stations on their systems or obtain "retransmission consent" from the local station to carry the broadcast signal; (2) the compulsory license regime that allows cable and satellite operators to carry certain television broadcast programming at government-established rates; (3) the various rules that grant television networks program exclusivity, for example, by restricting the distribution of programs beyond a local market; and (4) a raft of media ownership restrictions that, for example, prevent one entity from owning more than a certain number of radio and TV outlets in one area or from owning a newspaper and a broadcast station in the same community.

Not surprisingly, generations of communications lawyers have paid for their kids' college educations by specializing in interpreting the nuances and penumbras of these various video regulations or by asking the FCC to grant special exemptions.

Also, not surprisingly, the justification most often given for creating the regulatory restrictions was that one or the other was necessary to protect one kind media outlet from another more powerful one. For example, the "must carry" rules supposedly protected local TV broadcasters from the rising power of cable operators. Or it was claimed that the regulations protected consumers from excessive market power that limited the diversity of viewpoints available to the public.

You don't need to be a lawyer to appreciate that, over time, those legacy justifications have become unpersuasive. You just need to be a consumer of today's media and information alternatives.

In 1994, in *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court, in a 5-4 decision, upheld the "must carry" regulations against a First Amendment challenge by Turner and other cable operators. Justice Anthony Kennedy readily acknowledged the "must carry" regulations impinged on the cable operators' free speech rights. But he nevertheless determined the government was justified in imposing them because of what he characterized as cable operators' "bottleneck" power as the then dominant distributor of multichannel video programming.

When Turner was decided, satellite TV was just emerging as a viable multichannel video competitor, telephone companies had not yet entered the video distribution business, consumers were not accessing gazillions of videos on their phones and tablets — and Internet video distribution was no more than some entrepreneur's pipedream.

Now think 2013. In a challenge that year involving a technical aspect of the "must carry" rules in *Agape Church, Inc. v. FCC* in the Court of Appeals for the D.C. Circuit, Judge Brett Kavanaugh, in a concurring opinion, emphasized:

Things have changed. In the two decades since Congress enacted the Cable Act of 1992, the video programming marketplace has radically transformed. Cable operators today face intense competition from a burgeoning number of satellite, fiber optic, and Internet television providers — none of whom are saddled with the same program carriage and non-discrimination burdens that cable operators bear.

Indeed. By 2006, cable operators accounted for only 65 percent of the multichannel video market. When Rep. Scalise's Next Generation TV bill was first introduced in 2011, the cable operators' market share was down to 58 percent. At the end of 2017 it had decreased to 54 percent.

But the real story is the dramatic rise of Internet video distributors as a competitive threat to traditional TV providers like cable, satellite, and broadcasters. "Cord cutting" is now a household word as online video subscriptions have exploded. Netflix, with 57 million U.S. subscribers, has far more subscribers in the U.S. than any traditional cable or satellite video distributor. Amazon has nearly 100 million U.S. subscribers to its Amazon Prime video streaming service. Hulu has over 20 million video subscribers, and HBO Go, Sling TV, and others have millions more.

Consumers would benefit from allowing the various participants in the video marketplace — whether distributors or content producers — to bargain freely in what is surely a competitive marketplace. Voluntary negotiations in competitive markets always lead to greater consumer welfare than government dictates.

Moreover, absent the elimination of regulations that no longer make sense for the traditional video distributors, there likely will be increased calls to apply the panoply of legacy regulations to new Internet entrants such as Netflix and Amazon.

A good case can be made that the time had come for adoption of a bill like Rep. Scalise's deregulatory "Next Generation Television Marketplace Act" in 2011. It's past time now.

* Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland. *Deregulating the Video Marketplace* was published in *The Washington Times* on August 1, 2018.