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The Constitution, A La Carte

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Federal Communications Commission Chairman Kevin Martin wants to force a so-called a la carte regime on cable television operators.

Under "a la carte," cable subscribers would be allowed to pick and choose the individual channels to which they wish to subscribe. So if you think you want to watch only a classic movie channel, C-Span's BookTV, the Weather Channel and ESPN, the theory goes, you should be able to select and pay for only those channels.

The problem with Martin's renewed push for a la carte--apart from serious matters of public policy raised by such direct government interference in a competitive marketplace--is that the government may not take an a la carte approach as to which constitutional provisions it chooses to follow. By interfering with the discretion of cable operators to present their programming as they prefer, mandatory "a la carte" very likely violates the First Amendment's free speech guarantee.

What rationale is offered for government-mandated a la carte? In late April, when the FCC released its highly publicized report on television violence, Martin

repeated his oft-stated view that a la carte would be a tool "to give parents more direct control over the television content that comes into their homes." He says he is concerned about the amount of indecent and violent programming aired and its potential harmful effect on children.

Mandatory a la carte almost certainly will diminish the amount and diversity of programming available to cable subscribers, a result at odds with First Amendment values.

Martin acknowledged the constitutional difficulties whenever the government attempts to regulate program content. But he suggested that requiring cable (and satellite) television operators to adopt a la carte "would be a more content neutral means for Congress to regulate violent programming and therefore would raise fewer constitutional issues."

Mandating a la carte may pose less of a slam-dunk constitutional objection than, say, an outright government edict banning HBO's *The Sopranos* because it is "violent" or *Sex and the City* because it is "indecent." But the constitutional objection nevertheless is strong.

Imagine if the government required *The Washington Post* to be offered a la carte on the basis that readers should not be required to pay for the news section, which, with a war on, contains some "violent" content, or the style section, which contains some content that may be considered "indecent." Many readers surely would prefer to pay only for the sports section. Now imagine the same thought experiment with respect to *Time*. The magazine contains sections readers might prefer to do without if only the government required it to be sold on an unbundled basis.

No one suggests a government-mandated a la carte regime for newspapers or magazines would pass First Amendment muster.

Under the Supreme Court's current jurisprudence, it is true that laws that impose special restrictions on cable operators are not subject to precisely the same level of strict scrutiny under the First Amendment as laws that restrict the print media. But in the leading case of *Turner Broadcasting System v. FCC*, the Supreme Court nevertheless made clear that special restrictions on cable operators still call for "heightened First Amendment scrutiny." The government generally must show that the speech-restrictive law serves an important government interest that cannot be satisfied in a less restrictive manner.

Assuming there is an important government interest in protecting children from viewing indecent and violent programming, there are certainly less restrictive means to accomplish this objective. Even putting aside the notion that it might be enough that parents may choose not to subscribe to cable television at all or, if they do, restrict what their children watch, the government might require that cable operators allow blocking of channels parents find objectionable.

But Martin has acknowledged "cable operators already block any channel that a consumer requests to be blocked." Channel-blocking is a less restrictive alternative than negating cable operators' editorial discretion to decide how they wish to package program content.

An a la carte regime almost certainly would involve the government setting the prices for the unbundled channels. Otherwise cable operators could set the price for individual channels in a way that, in effect, establishes incentives not much different than those that exist in a current regime that allows blocking, but without any billing credit. This is why Martin has suggested an a la carte regime "could simply require the cable operator to reimburse consumers for the channels they request to have blocked." One way or another, the government surely will get involved in setting the reimbursement rate.

This doesn't trouble Martin. He says: "While the Constitution protects the right to speak, it certainly doesn't protect a right to get paid for that speech." But this formulation misses the mark. One of the landmark free speech cases of the 20th century, *New York Times v. Sullivan*, involved a paid ad in the *Times*. What the Constitution protects against are government restrictions, in the face of less restrictive alternatives, that affect the amount of speech a speaker wishes to convey, or the format in which the speaker chooses to convey the speech to those willing to pay to obtain it.

Mandatory a la carte almost certainly will diminish the amount and diversity of programming available to cable subscribers, a result at odds with First Amendment values. This is because the current system of packaging programming in tiers that subscribers, on the whole, find attractive allows cable operators to subsidize new program networks while they try to gain a foothold and maintain existing networks that have a narrow appeal, such as to minority interests. This is why so many civil rights groups oppose mandatory a la carte. If the government dictates a la carte, the economics of the cable business will force operators to drop some less popular individual channels.

When Martin was asked earlier this month about the Don Imus imbroglio, he said it is preferable for the market, not government, to address offensive expression. The marketplace drove Imus from the air, and it is entirely possible, especially in today's increasingly competitive video marketplace, that one or more pay television providers will decide to offer programming on an a la carte basis.

A considerable amount of video programming already is moving to the Internet and even to cell phones, platforms well-suited to a la carte video consumption. Cable, satellite and the telephone companies offering pay-television services will be responsive to consumer preferences.

But in the meantime, our government cannot choose to ignore the First Amendment. A la carte constitutionalism simply won't do.

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