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The Deregulatory First Amendment: How Video Competition and Free Speech Will Reduce Regulation

by

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On March 12, 2010, the FCC won a victory in the U.S. Court of Appeals for the District of Columbia Circuit with respect to its regulatory authority over the video marketplace. But in all likelihood the win will be short-lived. Rapidly changing conditions in the video marketplace have obliterated the factual and conceptual underpinnings of older video regulation designed for a bygone era. As legacy cable regulation is revisited by courts in light of new facts about the video market, judicial application of the First Amendment will lead to the removal of many regulatory barriers.

Cablevision v. FCC: The Programming Exclusivity Ban's Last Hurrah?

In *Cablevision v. FCC*,ⁱ a split ruling by the D.C. Circuit upheld the Commission's 5-year extension of the prohibition against exclusive contracts between cable operators and cable affiliated programming networks. Section 628 of the 1992 Cable Act directs the FCC to adopt regulations prohibiting exclusive contracts for cable and broadcast programming between a cable operator and a cable programming vendor in which a cable operator has an attributable interest.ⁱⁱ The 1992 Act's exclusivity prohibition includes a sunset provision after 10 years, but allows the commission to extend the prohibition if it determines such "to be necessary to preserve and protect competition and diversity in the distribution of video programming."ⁱⁱⁱ In 2002, when the statutory prohibition period of 10 years drew to a close, the FCC voted to extend the prohibition for 5 more years.^{iv} And in 2007, the FCC yet again chose to extend the prohibition.^v The

FCC's 2007 order relied in part on a "case study" using terrestrially-delivered regional sport networks (RSNs) to predict how satellite-delivered regional and national networks would be withheld from competitors by vertically integrated cable companies if the exclusivity prohibition were to be lifted. (The 1992 Act's programming exclusivity prohibition provisions expressly pertain to satellite-delivered programming. A recent FCC rulemaking and order now applies those same rules to terrestrially-delivered programming.^{vi})

As the FCC recognized in its 2007 order, competition and diversity in the video marketplace had undergone rapid expansion in the prior 15 years.^{vii} By 2007 there were 531 national programming networks – an increase from some 294 in 2002 and merely 68 in 1992. Also, the percentage of vertically integrated programming networks decreased to 22 percent – down from 35 percent just five years earlier, and down from 57 percent ten years prior to that. In sharp contrast to 1992's video marketplace in which cable operators predominated, the 2007 market was characterized by strong competition from direct broadcast satellite (DBS) operators, with significant competitive entry by wireline video services.

Cablevision challenged the 2007 extension on both administrative procedural grounds and First Amendment grounds. Or, at least it thought it did. However, Chief Judge David Sentelle concluded that Cablevision did not expressly challenge the constitutionality of FCC's 2007 order. So the court's majority skipped the free speech issue and instead analyzed the FCC's order under the deferential "arbitrary and capricious" standard under the Administrative Procedures Act (APA). It observed that the video marketplace had been transformed substantially since 1992, but nonetheless asserted that "the transformation presents a mixed picture."^{viii} Referencing the FCC's 2007 order, the court pointed out that cable operators still controlled two-thirds of the national market and that less competitive entry had taken place in certain designated marketing areas (DMAs) where only one cable company operates.

But even on APA grounds, the court's ruling suggests that the FCC will face a heavy burden should it choose to invoke any future extension of the programming exclusivity prohibition:

We anticipate that cable's dominance in the MVPD market will have diminished still more by the time the Commission next reviews the prohibition, and expect that at that time the Commission will weigh heavily Congress's intention that the exclusive prohibition will eventually sunset. Petitioners are correct in pointing out that the MVPD market has changed drastically since 1992. We expect that if the market continues to evolve at such a rapid pace, the Commission will soon be able to conclude that the exclusivity prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming.^{ix}

On its own terms, the court's ruling suggests that FCC will be much less likely to succeed in *extending* the exclusivity prohibition for satellite-delivered programming should it decide to do so by next year. For the same reason, the ruling also casts added doubts on

the FCC's recent rulemaking order *expanding* the exclusivity prohibition to terrestrially-delivered programming. (Because the statute expressly addressed only satellite-delivered programming, doubts about the statutory authority for the FCC's expansion of the exclusivity prohibition to terrestrially-delivered programming have already been raised by dissenting Commissioner Robert McDowell.^{x)})

Did *Cablevision v. FCC* Give the Dynamic Market its Due?

The court's ruling in *Cablevision v. FCC* is arguably at odds with the D.C. Circuit's decision last fall in *Comcast v. FCC*.^{xi} In *Comcast*, the D.C. Circuit held that the FCC's regulations limiting the market share of any single cable operator to 30% of all subscribers were "arbitrary and capricious." The *Comcast* court concluded that the FCC's "open field" analysis supporting the 30% limit was contradicted by "overwhelming evidence" concerning "the dynamic nature of the communications marketplace" and by "the entry of new competitors at both the programming and distribution levels."^{xii}

Unlike the *Comcast* ruling, the *Cablevision* ruling gave more weight to existing market share and less weight to the dynamic nature of the marketplace, downplaying the significance of potential competition in the video market. True, the *Comcast* court was also holding the FCC to account for its failure to follow instructions from a 2001 D.C. Circuit ruling that ordered the FCC to consider competitive entry and potential competition in setting its 30% subscribership limit.^{xiii} But consideration of competitive entry and potential competition is not peculiar to the D.C. Circuit's jurisprudence for cable subscribership limits. The D.C. Circuit has insisted the FCC consider these aspects of the dynamic market in the regulatory forbearance setting for telecommunications providers, for instance.^{xiv} Moreover, consideration of competitive entry and potential competition seems all the more fitting in the programming exclusivity context because the statute's sunset provision contemplates the eventual removal of regulatory constraints through a carefully considered Commission proceeding.

Judge Bret Kavanaugh, who authored the opinion for the court in *Comcast v. FCC*, also penned the dissenting opinion in *Cablevision v. FCC*. The only judge to serve on the panels for both cases, Judge Kavanaugh's excellent dissent captures the dynamic video marketplace and the decreasing relevance of regulatory assumptions from the early 1990s. For that reason alone, it deserves to be read in its entirety. But Judge Kavanaugh's dissent is also significant for how it fits within a larger phenomenon that now appears to be gaining steam: deregulation triggered by the application of free speech principles to new facts of the modern, dynamic video marketplace.

The Deregulatory First Amendment

Many of the regulatory restraints placed on cable providers pursuant to the 1992 Act were spared by the federal courts on account of a purported cable "bottleneck." The U.S. Supreme Court's *Turner I* and *II* decisions epitomized the notion that various kinds of "forced access" and other speech limitations that would normally be considered unconstitutional could be imposed on cable providers because of the existence of market conditions that precipitated the 1992 Act.^{xv} Applying First Amendment intermediate-

level scrutiny, the *Turner* decisions upheld "must-carry" regulation that required cable providers to include broadcast programming in their channel lineups. Lower courts followed the *Turner* line of reasoning. But there is now ample reason to believe that courts will soon begin ruling that many once-sustainable 1992 Act cable regulation requirements violate the First Amendment. Application of the First Amendment in future cases will likely lead to deregulation.

For deregulatory First Amendment purposes, the significance of *Comcast v. FCC* is the D.C. Circuit's stated conclusion that the "bottleneck" relied on to uphold cable regulation from intermediate scrutiny no longer exists. Although the Comcast court struck down the 30% cable subscribership limits on APA grounds tied to lack of reasoned decisionmaking and did not directly reach the First Amendment issue, the court's opinion in *Comcast* nonetheless gave a nod to the cable provider's First Amendment interests while demolishing the prevailing rationale for government's trumping of that interest with such regulation.^{xvi}

Judge Kavanaugh's *Cablevision v. FCC* dissent picks up from the *Comcast* ruling with an extensive First Amendment analysis. As Judge Kavanaugh maintained, cable and other video programming distributors have constitutionally-protected editorial discretion over what stations to carry and include in its offerings. That being the case:

[T]he Government cannot compel video programming distributors to operate like 'dumb pipes' or 'common carriers' that exercise no editorial control. The video programming distributors are similar to publishing houses, bookstores, playhouses, movie theaters, or newsstands in the sense that they exercise editorial control in picking the content they will provide to consumers.^{xvii}

Moreover:

The exclusivity prohibition forces them to sell to video programming distributors when they might otherwise chose not to do so. This forced-sharing mandate poses a First Amendment issue because the right of a First Amendment-protected editor or speaker *not* to speak and associate 'serves the same ultimate end as freedom of speech in its affirmative aspect' and is entitled to similar constitutional protection.^{xviii}

In the face of such burdens on free speech, Judge Kavanaugh proceeded to explain why the old rationale for regulation no longer passes muster under the First Amendment:

The major change since our 1996 *Time Warner* decision [upholding the programming exclusivity prohibition's restriction on speech as necessary to further the Government's interest in fair competition] is that cable operators no longer possess bottleneck monopoly power in the video programming distribution market in any geographic area in the continental United States. As we recently explained in *Comcast*...home consumers can obtain service from the local cable operators, DIRECTV, DISH, and in many places Verizon FioS and AT&T as well. Providers of

programming on the Internet – like Hulu, YouTube, iTunes, and Apple TV – also increase competition in the market...Based on a careful assessment of the market in our recent *Comcast* decision, we *definitively concluded* that cable operators 'no longer have the bottleneck power over programming that concerned the Congress in 1992.'^{xix}

Judge Kavanaugh went on to conclude that the absence of any "bottleneck" and the presence of a "radically changed and highly competitive marketplace...completely eviscerates the justification we relied on in *Time Warner* for the ban on exclusive contracts."^{xx}

In light of *Comcast's* definitive conclusion, Judge Kavanaugh determined that the programming exclusivity ban unconstitutionally infringes on the editorial and free speech rights of cable operators and programmers. Had Judge Kavanaugh's views prevailed in *Cablevision*, the resulting judicial invalidation of programming exclusivity ban would have effected cable deregulation by virtue of the First Amendment.

Running through both the *Comcast* ruling and Judge Kavanaugh's *Cablevision* dissent one can discern a deregulatory First Amendment jurisprudence that will eventually prevail in future cases. The deregulatory First Amendment formula can be summarized as follows: the absence of cable bottleneck power and the rise of new competition in the video marketplace eliminates the government's interest in promoting competition through the placement of regulatory burdens on the speech and editorial rights of cable providers; the First Amendment now requires the old regulation be removed. The breakout moment for the deregulatory First Amendment may already be at hand in a case involving 1992 Act regulation currently pending before the U.S. Supreme Court.

Cablevision v. FCC: Video's First Amendment Future?

The deregulatory First Amendment may find near-term application in another *Cablevision v. FCC* case, this one concerning "must-carry" programming requirements. "Must-carry" rules were justified in the 1992 Act and in the *Turner* decisions largely by the same purported presence of a cable "bottleneck."^{xxi} The U.S. Supreme Court is now considering a petition challenging an FCC ruling that *Cablevision* must carry the signal of a home-shopping station on its Long Island cable systems.^{xxii} *Cablevision* insists that the FCC's application of "must carry" fails intermediate scrutiny, and it goes a step further by asking the Supreme Court to overturn the *Turner* decisions. In particular, *Cablevision's* petition asks the Supreme Court to decide: "Whether the imposition of must-carry obligations is consistent with the Constitution now that the facts undergirding the *Turner* decisions have evaporated with the emergence of vibrant competition and other dramatic market and technological changes."^{xxiii} *Cablevision* cites *Comcast v. FCC's* definitive conclusion that cable operators no longer possess bottleneck power justifying 1992 Act regulation. With the claimed bottleneck rationale rendered obsolete, the *Turner* decisions' upholding of "must-carry" rules is now entirely unsupportable under intermediate-level scrutiny.

What's more, this *Cablevision* case may be the moment when the Supreme Court dismantles the *Turner* framework entirely by treating all modern media speech equally

and subjecting all regulatory burdens on modern media speech to strict scrutiny.^{xxiv} Four of the nine Justices on the Supreme Court when *Turner I & II* were decided would have subjected must-carry to strict scrutiny, requiring a compelling governmental interest and a narrow tailoring to uphold such a forced-speech mandate.^{xxv} And the *Turner I & II* majorities and concurrences conceded that factual conditions might require a scrutiny level reevaluation at a future time.^{xxvi} As the D.C. Circuit observed in *Comcast*, in the absence of cable bottlenecks and in the presence of video competition, that future has arrived. And the Supreme Court can build off of its own warnings against favoring or disfavoring different forms of speech media technologies in *Citizens United v. FEC* by extending strict scrutiny to "must-carry" mandates.^{xxvii}

...

As a matter of sound policy, the dynamic video marketplace of 2010 is increasingly ill-suited for early 1990s cable legacy regulation. As mobile and other broadband-delivered content and other services continue to emerge, both old and new regulation of video programming will be increasingly difficult for the FCC to justify. Now it appears increasingly likely, as a matter of law, that FCC attempts to ignore the factual evidence concerning today's competitive and diverse video market by maintaining in place outdated regulation will eventually be thwarted by the deregulatory First Amendment.

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ⁱ No. 07-1425 (D.C. Cir. 2010); Slip Opinion available at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/201003/07-1425-1234601.pdf>.

ⁱⁱ See 47 U.S.C. § 548.

ⁱⁱⁱ See *id.* at § 548(c)(5).

^{iv} See FCC, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act – Sunset of Exclusive Contract Prohibition*, Report and Order, 17 F.C.C.R. 12,124, (2002).

^v See FCC, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act – Sunset of Exclusive Contract Prohibition*, Report and Order Rulemaking, 22 F.C.C.R. 17791 (2007).

^{vi} See FCC, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order*, MB Docket No. 07-198 (January 20, 2010), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-17A1.pdf.

^{vii} Numbers referenced in this paragraph are provided in *Cablevision*, Slip. Op. at 5 (summarizing findings of the FCC's 2007 order).

^{viii} *Cablevision*, Slip. Op. at 5.

^{ix} *Id.* at 15-16.

^x See First Report and Order, MB Docket No. 07-198, fn 6, *infra*; Dissenting Statement of Commissioner Robert McDowell, MB Docket No. 07-198 at 1-2 ("The plain language of Section 628 bars the FCC from establishing rules governing disputes involving

terrestrially delivered programming, whether we like that outcome or not"), available at:

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-17A4.pdf.

^{xi} 579 F.3d 1 (D.C. Cir. 2009); Slip. Op. available at:

<http://pacer.cadc.uscourts.gov/common/opinions/200908/08-1114-1203454.pdf>. For brief discussion of the case, see Seth L. Cooper, "D.C. Circuit: Vindicating Video Competition," *FSF Blog* (August 31, 2009), available at: <http://freestatefoundation.blogspot.com/2009/08/dc-circuit-vindicating-video.html>.

^{xii} *Comcast*, 579 F.3d at 8.

^{xiii} *Id.* at 9 ("The Commission's dereliction in this case is particularly egregious. In the previous round of this litigation we expressly instructed the agency on remand to consider fully the competition that cable operators face from DBS companies") (citing *Time Warner Entm't v. FCC* ("*Time Warner II*"), 240 F.3d 1126, 1134 (D.C. Cir. 2001)).

^{xiv} See, e.g., *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); *Verizon v. FCC*, 570 F.3d 294 (D.C. Cir. 2009); *AT&T v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001).

^{xv} See *Turner Broad. Sys., Inc. v. F.C.C.* ("*Turner I*"), 512 U.S. 622 (1994); *Turner Broad. Sys., Inc. v. FCC* ("*Turner II*"), 520 U.S. 180, 224 (1997).

^{xvi} *Comcast*, 579 F.3d at 9 ("Were the Rule left in place while the FCC tries a third time to rationalize the cap, and however, it would continue to burden speech protected by the First Amendment. Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment") (quoting *Turner I*, 512 U.S. at 636).

^{xvii} *Cablevision*, Slip. Op. Dissent at 15 (Kavanaugh, J., dissenting).

^{xviii} *Id.* at 16 (Kavanaugh, J., dissenting)(internal cite omitted).

^{xix} *Id.* at 18 (Kavanaugh, J., dissenting)(discussing *Time Warner Entm't v. F.C.C.*, 93 F.3d 957 (D.C. Cir. 1996)).

^{xx} *Id.* at 20 (Kavanaugh, J., dissenting).

^{xxi} See *Turner I*, 512 U.S. 622; *Turner II*, 520 U.S. 180.

^{xxii} No. 09-901, docket listing available at:

<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-901.htm>; for brief discussion and background see Seth L. Cooper "Will the Supreme Court Decide 'Must-Carry' Must Go?" *FSF Blog* (February 24, 2010), available at: <http://freestatefoundation.blogspot.com/2010/02/will-supreme-court-decide-must-carry.html>.

^{xxiii} *Cablevision*, Brief of Petitioner, at i (Questions Presented).

^{xxiv} For discussion of this issue see Randolph J. May, "[Charting a New Constitutional Jurisprudence for the Digital Age](#)" *Charleston Law Review* 373 (2009), available at:

http://www.freestatefoundation.org/images/Charting_a_New_Constitutional_Jurisprudence_for_the_Digital_Age-Charleston_Law_Rev.pdf; Randolph J. May, "Constitutional Reckoning Still to Come," *FSF Blog* (April 29, 2009), available at: <http://freestatefoundation.blogspot.com/2009/04/constitutional-reckoning-still-to-come.html>.

^{xxv} See *Turner I*, 512 U.S. at 675 (O'Connor, J., dissenting); *id.* at 685 (Ginsburg, J., dissenting).

^{xxvi} See, e.g., *Turner II*, 520 U.S. at 227-228 (Breyer, J., concurring).

^{xxvii} For discussion of the implications of *Citizens United* for regulation of modern communications technologies, see Seth L. Cooper, "What *Citizens United* Means for Free Speech in the Digital Age," *Perspectives from FSF Scholars*, Vol. 5, No. 3 (January 22, 2009), available at:

http://www.freestatefoundation.org/images/What_Citizens_United_Means_for_Free_Speech_in_the_Digital_Age.pdf.