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Constitution Day at the FCC - 2011

by

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September 17th was Constitution Day, commemorating the day the delegates to the Constitutional Convention met for the last time on September 17th, 1787 to sign the document they had created.

While Constitution Day still remains relatively little observed, it has enjoyed a welcome revival in recent years, especially the last few. This is in no small measure due to the Tea Party's emphasis on constitutional constraints – and this is something to be applauded.

At the Free State Foundation, much of our work addresses matters of policy, often with an economic frame of reference. This is especially so with respect to the impact of existing and proposed Federal Communications Commission regulations. In other words, we frequently examine the FCC's existing and proposed regulations in light of their impact on the nation's economy and job creation prospects.

Obviously, this frame – the policy perspective – is more important than ever now, given the nation's current economic difficulties.

But make no mistake, here at the Free State Foundation, a proper legal perspective, and especially a proper constitutional perspective, is as important as a proper policy perspective, if not more so.

As regular readers of this space know, many of the FCC's regulations and policies substantially implicate First Amendment free speech interests, and we often address these interests in our publications. (Too numerous to link to here, you can find many of them on our website's Publications page and on our blog.)

On the one hand, some FCC regulations and policies mandate that communications and Internet providers, and broadcasters, cable operators, and other media purveyors, *must carry* certain programs or information content they may prefer *not* to carry. On the other hand, some regulations proscribe carriage of some programs and content that communications companies and information purveyors would prefer to carry.

The actions of no other federal agency implicate free speech interests to the extent FCC actions do. Hence, to perform their jobs, the agency's commissioners and staff should have a heightened interest in the Constitution, and its proper meaning.

Without trying at all to be exhaustive -- in fact, trying not to be -- here are some of the FCC's regulations and proposals that implicate the First Amendment's free speech guarantee by prescribing or proscribing program and content decisions of private speakers. (I understand that in some instances the FCC is, more or less, carrying out congressional mandates. For First Amendment purposes, the effect is the same, of course.)

Cable television and satellite operators must carry on their systems certain channels and programs that they may prefer not to carry, and they may be required to place such programming in a particular channel location on their systems that they may not prefer. The must carry mandates include local broadcast programming, and public, educational, and government channels.

Cable operators and other multichannel video program distributors (MVPDs) are subject to program carriage and program access rules that dictate circumstances under which they must make available their limited system capacity to carry programming of others instead of programming of their own choosing and under which they must make available their own proprietary programming on terms not of their own choosing.

The FCC's proposed "AllVid" rule would establish mandates applicable to cable operators and other MVPDs relating to the design of video navigation devices, requiring disaggregation and unbundling of certain search menus and program display functionalities in accordance with government specifications. In other words, the government would dictate the presentation of certain navigation content.

The FCC's proposed "bill shock" regulations would require wireless operators to provide certain types of information concerning customer usage in certain government-specified formats, using certain specified language, at government-mandated intervals.

And, in the name of non-discrimination and fairness, the FCC's new "net neutrality" rules prevent Internet service providers from blocking access to websites even if the ISP might prefer to avoid using its own facilities to make available a particular kind of content, say, certain forms of rabid hate speech. And the regulations require the Internet provider to carry messages and content indiscriminately – common carrier-like – that the ISP might prefer not to carry.

And, of course, there are various rules still on the books concerning broadcast content, ranging from the regulation of children's programming to political programming to indecency.

It is not my position that all of the above rules and proposed regulations violate the First Amendment under current jurisprudence. They all don't, and whether some would be held by courts to do so in any individual instance depends on factors such as whether, if challenged, the government demonstrates a compelling interest for imposing the speech regulation and shows it has employed the least restrictive means to achieve the government objective. This is difficult to do in today's competitive media marketplace.

But whether or not these FCC regulations would survive First Amendment scrutiny if challenged in court is not my point on Constitution Day. Rather the point is that the FCC, as the federal agency that exercises the most control over communications companies, information providers, and other media purveyors, should, of its own accord, be very sensitive to First Amendment concerns arising from actions interfering with free speech. Most importantly, contrary to the thrust of many FCC's actions, the agency needs to appreciate that the First Amendment was included in the Constitution to prevent government interference with private speech, *not* to authorize the government to censor or interfere with private speech on the premise that it is enabling more important speech, more balanced speech, or fairer speech.

Indeed, it is fitting that, so close to Constitution Day, the FCC finally removed from its rules, a quarter century after ceasing to enforce them, the Fairness Doctrine mandates applicable to broadcasters. Recall the Fairness Doctrine required broadcasters affirmatively to cover controversial issues of "public importance," and to do so in a "balanced" way that presented contrasting viewpoints. When Fairness Doctrine complaints were presented to the FCC, the agency obviously had to conduct an intrusive examination of the content of a broadcaster's programming in order to resolve the complaint.

For many of us, the notion that the government, for several decades, engaged in deciding whether a broadcaster's programming was or was not of public importance, and whether such programming was or was not balanced, strikes us today as rather creepy.

But regardless whether the Fairness Doctrine ever was justified in the more monopolistic media environment in which it was first adopted in the 1940s, today we live in an extraordinarily different environment -- a competitive communications and information marketplace, an era of undisputed media abundance.

In a law review article published in 2009, *Charting a New Constitutional Jurisprudence in the Digital Age*, I ended this way:

> "Perhaps it was predictable, maybe even likely, that the First Amendment's protections would be limited substantially during the twentieth century's analog age that tended towards a monopolistic or oligopolistic communications marketplace. But, now, in the face of proliferating competitive alternatives attributable to profound marketplace and technological changes, it ought to be considered predictable, and, yes, even likely, for the Court to establish a new First Amendment jurisprudence befitting the media abundance of the twenty-first century's Digital Age."

Those particular remarks, in the context of the law review article's examination of the *Red Lion*, *Pacifica*, and *Turner* cases, were directed to the Supreme Court.

But the FCC bears its own special responsibility to comport its actions with a proper interpretation of the First Amendment, and, in the exercise of its regulatory authority, to be sensitive to the First Amendment's free speech values. Indeed, in *Meredith Corp. v. FCC (1987)*, one of the cases leading to the Fairness Doctrine's demise, the D.C. Circuit made clear that a commissioner's constitutional oath requires him or her to make determinations concerning whether FCC regulations or policies are constitutional.

This constitutional responsibility requires the FCC to consider much more carefully than it often does the impact of its various regulations and policies on the free speech rights of those subject to its authority.

In this sense, every day ought to be Constitution Day at the Federal Communications Commission.

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