



# THE FREE STATE FOUNDATION

A Free Market Think Tank for Maryland.....Because Ideas Matter

***Perspectives from FSF Scholars***  
***February 27, 2012***  
***Vol. 7, No. 6***

**The First Amendment for the Digital Age:  
A Case for Treating Modern Technologies Equally**

by

**Seth L. Cooper \***

The First Amendment to the U.S. Constitution protects speakers from government censorship based on the content of their messages. But a little-noticed decision just last month by the U.S. Court of Appeals for the Fifth Circuit reminds us that the First Amendment provides other essential speech protections too. Among other things, it prohibits government from targeting a select group of speakers with discriminatory taxes and regulations.

This prohibition has important implications for speech using various modern media technologies and platforms. Disparate treatment of speakers based on the type of technology being used has been an unfortunate facet of mid-to-late 20th Century federal communications law and First Amendment jurisprudence. But a handful of recent federal court cases have begun to call into question the factual and analytical underpinnings of this pro-regulatory approach to free speech and modern technology.

*Time Warner Cable v. Hudson* (2012) is one such case. In it the Fifth Circuit took seriously the idea that free speech protections belong to cable video service providers, just like other speakers. Even more significantly, it made clear that the First Amendment prohibits government regulations that selectively impose burdens on certain competing

---

**The Free State Foundation**  
**P.O. Box 60680, Potomac, MD 20859**  
**[info@freestatefoundation.org](mailto:info@freestatefoundation.org)**  
**[www.freestatefoundation.org](http://www.freestatefoundation.org)**

video service providers, but not others. In fact, the Fifth Circuit's decision appears to be part of a growing trend in which federal courts are no longer willing to approve departures from equal application of free speech protections, regardless of the underlying technology at issue.

*Time Warner Cable v. Hudson* also offers a window into the future of free speech jurisprudence for modern technologies – or at least it should. In particular, the case hopefully will be a precedent that will inform a reinvigorated and principled First Amendment jurisprudence for the digital age – a jurisprudence that treats with equal respect the speech rights of all speakers using all technologies.

### **Texas's Video Franchise Law: Regulatory Reform with a Slight Catch**

In recent years, roughly half of all states have adopted statewide video franchise reforms. These reforms have reduced barriers to entry and promoted competition in the video services market. Statewide franchising allows video service providers to obtain a video franchise agreement through a streamlined process. This is particularly important for new entrants in the market, for it relieves them from the burdens of bargaining with each and every city or municipality, thereby reducing transaction costs and delays. Typically, statewide video franchise laws allow incumbent cable providers subject to numerous local franchise agreements to opt out of those agreements and obtain a statewide franchise. This opt-out availability makes the statewide franchising process an equal playing field.

At issue in [\*Time Warner Cable v. Hudson\*](#) was a rather unique provision in Texas's statewide video franchising law that targeted certain incumbent cable providers with regulatory burdens. Under Texas's law, incumbent cable providers serving cities with populations over 215,000 were *not* permitted to opt-out of their existing local franchise agreements and obtain a statewide franchise. New entrants, however, were free to seek statewide franchises. And incumbent cable providers serving smaller areas also were permitted to terminate their local franchise agreements and obtain statewide franchises.

In a well-reasoned opinion, the Fifth Circuit struck down the discriminatory provision of the franchising law for violating the free speech rights of the targeted incumbent cable providers. The Fifth Circuit's constitutional analysis drew on U.S. Supreme Court precedents holding selective and unequal taxation of certain media businesses to be violations of the First Amendment. As the Supreme Court observed in one such case, *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue* (1983):

[T]he very selection of the press for special treatment threatens the press not only with the current differential treatment, but with the possibility of subsequent differentially more burdensome treatment... Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects.

The Fifth Circuit also cited the Supreme Court's holdings in *Arkansas Writers' Project v.*

*Ragland* (1987) and *Leathers v. Medlock* (1991) for the rule that differential treatment of the press "through the narrow targeting of individual members offends the First Amendment." It analogized the selective taxation held unconstitutional in those decisions to the Texas franchising law's selective and unequal regulatory burdening of certain cable providers.

Because the Texas law's exclusion applied only to certain cable providers, the Fifth Circuit concluded that the law should be subject to strict scrutiny. Quoting *Minneapolis Star*, the court concluded, "a law that targets a small handful of speakers for discriminatory treatment 'suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.'" And the Fifth Circuit had little trouble concluding that *no* compelling government interest justified the law's discriminatory treatment of cable providers serving municipalities with more than 215,000 people.

### **Future First Amendment Implications of the Fifth Circuit's Ruling**

Since other states adopting video franchise reforms haven't adopted the discriminatory provision at issue in Texas, the direct impact of *Time Warner Cable v. Hudson* is likely limited to Texas. But broader concepts contained in the Fifth Circuit's ruling have free speech implications for the future of modern speech media regulation.

For one, the Fifth Circuit's insistence that the First Amendment prohibits modern speech media from being subject to selective, discriminatory regulations provides a hopeful indication of a return to principle. Legacy broadcast and video services regulations, in particular, were unfortunate departures from an equal application of First Amendment principles whereby free speech protections apply to all speakers alike, regardless of the technology used. In cases such as *Red Lion*, *Pacifica*, and *Turner I and II* the existence of so-called spectrum "scarcity," "unique pervasiveness," and cable monopoly "bottleneck" were asserted to excuse selectively applied regulations restricting the free speech of TV broadcasters and cable providers.

However much the scarcity and bottleneck doctrines might have reflected the times in which they were first offered, they are clearly a mismatch with today's video and modern media marketplace. Two nationwide direct broadcast satellite (DBS) providers compete with cable, while telco entrants – many of which have benefited from statewide video franchise reforms – are also giving consumers additional choices. Meanwhile, wireless and online video delivery options provide an abundance of outlets. Today's video market is characterized by abundance and competition, not scarcity and monopoly.

These dramatic, dynamic changes in modern media technology and competition have rendered pro-regulatory exceptions to full free speech protections ill-suited for today's market, and exposed First Amendment-lite jurisprudence as doctrinally hollow. Not surprisingly, decisions in the past few years by the [Second Circuit](#) and the [D.C. Circuit](#) have now called into question both the scarcity and bottleneck doctrines. The Fifth Circuit now joins their ranks, at least in a broad sense.

*Time Warner Cable v. Hudson* didn't involve so-called cable bottlenecks as such. But it did involve regulatory burdens on media speech of the type that at one time might have received an easy pass under the First Amendment-lite scrutiny that the scarcity and bottleneck doctrines helped create. Absent the Fifth Circuit's principled ruling, a government agency could have conceivably relied on the pro-regulatory thrust of the bottleneck doctrine to justify the "subsequent differentially more burdensome treatment" of certain incumbent cable providers under the Texas franchising law.

With the Fifth Circuit's decision in *Time Warner Cable v. Hudson*, however, it appears that federal courts are becoming less willing to approve further departures from principled free speech protections. In fact, there now appears to be a jurisprudential trend to limit their scope until such time as the Supreme Court might revisit its First Amendment jurisprudence for modern speech technologies.

FSF President Randolph May explained what such a revisit should look like in his 2009 *Charleston Law Review* article, "[Charting a New Constitutional Jurisprudence for the Digital Age](#)." A re-examination of cases such as *Red Lion* and *Pacifica*, as well as *Turner I* and *II*, could lead to "a new First Amendment paradigm for the electronic media, one that is much more in keeping with the Founders' First Amendment." Under a restored jurisprudence fit for today's competitive, convergent, digitally-driven media marketplace, the Court would protect the First Amendment rights of all speakers alike, subjecting all government regulation of speech to strict scrutiny regardless of the media or technology used.

Indeed, the Supreme Court has opportunity to revisit the scarcity doctrine [this term](#) in *Fox v. FCC II*. In [Fox v. FCC I \(2009\)](#), Justice Clarence Thomas called for re-examination of the Court's First Amendment jurisprudence, citing Mr. May's *Charleston Law Review* article. And in the political campaign speech context the Court has even expressed constitutional concerns about non-discrimination among media and certain media speakers akin to those raised by the Fifth Circuit and Mr. May, respectively. As Justice Anthony Kennedy wrote for the Court in [Citizens United v. FEC \(2010\)](#), "[w]e must decline to draw, and then redraw, constitutional lines based on particular media or technology used to disseminate political speech from a particular speaker."

## **The Rise of Digital Age Free Speech vs. the Rise of Digital Age Regulation**

Of course, a digital age jurisprudence for free speech still faces opposition from pro-regulatory interests and institutions proposing to turn the First Amendment on its head. In its December 2010 [order imposing network neutrality regulations](#), for instance, the FCC essentially dismissed any First Amendment rights for broadband Internet Service Providers (ISPs) in managing their networks. In its order, the FCC claimed that broadband ISPs do not even have the limited free speech protections typically recognized as belonging to cable providers. Instead, the FCC labeled broadband ISPs "conduits of speech" that may be regulated in the absence of any demonstration of market failure or consumer harm. The FCC called its network neutrality regulations a

"prophylactic" measure for promoting the free speech values of Internet edge content providers as well as consumers.

But the First Amendment is, first and foremost, a limit on government restrictions of speech. In its latest First Amendment major ruling on political campaign speech, [Arizona Free Enterprise Club's Freedom Club PAC v. Bennett \(2011\)](#), the Supreme Court rejected the idea that government regulations burdening free speech are legitimized when they promote the speech opportunities of others. As Chief Justice John Roberts put it, "[t]his sort of 'beggar thy neighbor approach' to free speech – 'restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others' – is 'wholly foreign to the First Amendment.'"

And government can't cavalierly deny free speech rights just because the speakers happen to be providing commercial services through modern technologies like the Internet. "The Framers may have been unaware of certain types of speakers or forms of communication," explained Justice Kennedy in *Citizens United*, "but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political idea when the Bill of Rights was adopted."

Nevertheless, in its network neutrality order the FCC appears intent on creating yet another exception to First Amendment doctrine to justify differential free speech protection for different types of media speakers. Might additional exceptions of that kind soon follow? Recent FCC regulatory actions suggest that the FCC will assert jurisdiction over the expanding and evolving online video delivery market, or at least parts of it.

While the FCC's net neutrality order exempted from regulation what it calls "managed services" that includes certain video services accessible via broadband networks, the agency insisted it will monitor such services. Meanwhile, the FCC's network neutrality regulations will allow the FCC or competing providers and interest groups to dispute, in future cases, just what kinds of services deserve to be labeled "managed services" and what kinds don't. Also, the agency's [Comcast/NBCU merger order](#) imposed regulatory conditions on online video delivery services similar to existing cable video regulations. And [the FCC's AllVid proposal](#) would set up a slate of regulatory restrictions and standard on video navigation devices that access video via the Internet.

Taken in combination, the FCC's disregard of the First Amendment rights of broadband ISPs, its embrace of prophylactic regulation in the absence of demonstrated market failures or consumer harm, and its interest in expanding its jurisdiction to the next generation of video services all suggest a future increase in speech-restricting regulation. A more principled, protective and even-handed First Amendment jurisprudence could provide a check on such regulation.

## Conclusion: A Building Block for Digital-Age Freedom of Speech

In sum, *Time Warner v. Hudson* provides an important contribution to current First Amendment understanding by emphasizing the free speech rights of competing video service providers and corresponding protections against discriminatory regulatory treatment. Likewise, the decision fits with a growing number of recent federal court rulings that have declined to extend the pro-regulatory, disparate treatment of media speech and speakers that was set out in Supreme Court decisions in the mid- to late-20th Century.

Viewed along with recent decisions by the D.C. Circuit and Second Circuit calling into question the cable bottleneck and spectrum scarcity doctrines, as well as recent Supreme Court decisions analyzing political speech restrictions on modern media technologies, this Fifth Circuit precedent could also provide added analytical support for a reinvigorated First Amendment jurisprudence for the digital age.

\* Seth L. Cooper is Research Fellow of the Free State Foundation a non-partisan Section 501(c)(3) free market-oriented think tank located in Rockville, Maryland.

### Further Readings

Randolph J. May, "[Constitution Day at the FCC](#)," *Perspectives from FSF Scholars*, Vol. 6, No. 23 (September 19, 2011).

Randolph J. May, "[Net Neutrality Mandates: Neutering the First Amendment in the Digital Age](#)," *3 I/S: A Journal of Law and Policy for the Information Society* 197 (Spring 2007).

Bruce M. Owen, "[The FCC and the Unfree Market for TV Program Rights](#)," *Perspectives from FSF Scholars*, Vol. 6, No. 7 (March 2, 2011).

Seth L. Cooper, "[What Citizens United Means for Free Speech in the Digital Age](#)," *Perspectives from FSF Scholars*, Vol. 5, No. 3 (January 22, 2010).

Seth L. Cooper, "[The Deregulatory First Amendment: How Video Competition and Free Speech Will Reduce Regulation](#)," *Perspectives from FSF Scholars*, Vol. 5, No. 7 (March 25, 2010).

Seth L. Cooper, "[The AllVid Proposal's First Amendment Problem: Exploring the FCC's Constitutionally Defective Device Regulation](#)," *Perspectives from FSF Scholars*, Vol. 6, No. 8 (March 30, 2011).