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The FCC, Free Speech, and a Constitutional Culture

by

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Much has already been said and written regarding ABC's lawsuit against the FCC, led by Chairman Brendan Carr, claiming that the agency has violated the First Amendment by designating eight of ABC's broadcast station licenses for early renewal consideration. This follows various other agency actions claimed to violate the First Amendment free speech rights of broadcasters, for example, reconsideration of whether ABC's left-leaning talk show "The View" continues to warrant exemption from the FCC's "equal time" rule, or the threats by Chairman Carr to ABC-affiliated broadcast station owners suggesting Jimmy Kimmel's late night show should be terminated after remarks that Mr. Carr deemed "misleading." All these actions are claimed, in one way or another, to be retaliation for programming content that those holding government power deem offensive or disfavored.

To be sure, much more likely will be written, perhaps including by myself, regarding these and other perceived threats to free speech. But here I just want to say this.

It's quite possible, but by no means certain, that some of the claimed actions ultimately may be found to violate the First Amendment. I say "by no means certain" because there is a long history of the courts, including the Supreme Court in 1969 in the landmark [Red Lion](#) case, sustaining the FCC's regulation of the program content of broadcast stations (as opposed to print and other media) against First Amendment challenges. This is largely because, under the Communications Act of 1934, Congress has delegated to the FCC the authority to require that broadcast licenses must operate in "the public interest," a capacious and vague standard if ever there was one.

Indeed, I argued in a [law review article in 2001](#), that the public interest standard is too indeterminate to be constitutional. The Supreme Court has yet to agree, although perhaps one day it might.

And for many years, I've argued that given today's competitive media environment in which consumers have an abundance of viewing and listening choices – as opposed when the Communications Act was enacted in 1934 – Congress should eliminate the standardless "public interest" delegation, or at least highly constrain the agency's exercise of such authority. Congress has yet to agree, although perhaps one day it might.

And I argued in a yet another [law review article published in 2009](#), "Charting a New Constitutional Jurisprudence for the Digital Age," that the Supreme Court should overturn its precedents, including *Red Lion*, that, relying on the public interest delegation, have sustained the FCC's regulation of broadcasters' programming content. I argued that broadcasters should be accorded no less protection under the First Amendment than other media. Justice Clarence Thomas cited my article approvingly in a [concurring opinion](#). A Supreme Court majority has yet to agree, although perhaps one day it might.

This background should suffice to demonstrate my long-standing defense of the First Amendment and the high value I place on the protection of free speech. But it should also explain why I say it's "by no means certain," even crediting the [established "chilling effects" doctrine](#), that the FCC's actions claimed to violate the First Amendment necessarily will be found unlawful. What's more, in the case of the FCC's order designating the ABC stations for early license renewal, the agency claims – however pretextually the claim may appear to some – that the action is based, in fact, not at all on the broadcast stations' program content, but rather on ABC's failure to respond satisfactorily to its investigation into whether ABC has complied with the FCC's nondiscrimination rules.

All that said, I do not want to be misunderstood as suggesting that I agree with all of Brendan Carr's actions that are claimed to violate the free speech rights of broadcasters. To the contrary, as I have suggested previously, in my opinion he is overreaching in a way that, even if ultimately determined in the courts not to violate the First Amendment, is inconsistent with a constitutional culture that respects free speech rights. Therefore, I consider these actions, certainly taken together, at bottom, harmful.

This is not because Democrats in Congress and at the FCC have not in the past engaged in similar actions or employed similar threatening language implicating First Amendment rights regarding broadcasters' programming content. They have. Indeed, Mr. Carr has pointed to such prior actions and language to justify his own.

Nevertheless, anyone concerned about fostering free speech should be worried about the speech-denigrating one-way "ratchet effect" likely created by Mr. Carr's blunter, more pointed language and actions when next the Democrats control the FCC.

In an early essay in my ["Thinking Clearly About Speaking Freely"](#) series, I declared that the free speech values at the heart of the Founders' First Amendment are central to sustaining our nation's constitutional culture. And this is so regardless of whether courts conclude that the First Amendment dictates a particular result in a particular instance at a particular time.

To his credit, Brendan Carr already has accomplished much in eliminating or relaxing costly outdated telecommunications regulations that impede innovation and investment. But, for me, as a matter of principle, I wish he would step back from the First Amendment precipice before falling off.

Once lost, it almost certainly will be more difficult at the FCC to restore a constitutional culture that truly respects free speech. That's why now – especially as America celebrates its 250th birthday – regardless of who or which party slung the first arrow, or the most pointed one, or how disfavored or offensive the targeted speech may be to those in control of the levers of government power, it's time to ensure that respect for free speech remains at the top of the FCC's mission statement.

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