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FCC Over-Regulation of Video Services Undermines Free Speech

by

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The FCC is set to release its Video Competition Report. In anticipation of its upcoming report, I explained in a blog post from May 2011 that "[Video Competition Should Lead FCC to End Old Regulation](#)." And on June 17, FSF President Randolph May and I described in more detail the over-regulated state of video services in our *Perspectives* paper, "[Accelerate New Video Breakthroughs by Rolling Back Old Regulations](#)."

Restrictions on video services premised on early 1990s assumptions about competition and technology impose compliance costs that are passed on to consumers in the form of higher prices. They also limit the flexibility and innovative capabilities of multichannel video programming distributors (MVPDs) to provide new services.

But there is yet another downside to over-regulating video services. In several respects the analog-era video regulation regime burdens constitutionally protected free speech for digital-era MVPDs.

As FSF President Randolph May highlighted in a recent *Perspectives* essay, "[The FCC and the Rule of Law](#)," the U.S. Supreme Court's [Fox v. FCC II](#) decision reaffirmed that government speech regulation based on vague standards runs afoul of the Fifth Amendment Due Process Clause. As the Court declared: "A fundamental principle in

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our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." This is because "regulated parties should know what is required of them so they may act accordingly," and because "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."

The Court also explained that "[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." This reference to protected speech reveals that the rule of law is not merely adherence to fair notice requirements or a collection of formal procedures, however important they may be. Under our constitutional system, in addition to due process, the rule of law is ultimately also directed toward protecting the substance of our rights, including the freedom of speech that receives express recognition in the First Amendment.

The Supreme Court's First Amendment jurisprudence holds that content-based restrictions are presumptively unconstitutional and that government is generally prohibited from telling speakers what they must say. But many of the FCC's regulations applicable to video service providers include access or forced sharing mandates. Some agency restrictions are even based on speech content. These continuing legacy regulations governing video services infringe upon the editorial choices of MVPDs. Court precedents recognize that MVPDs are entitled to First Amendment protection. The logic of the Court's relevant First Amendment decisions therefore renders significant aspects of current federal regulation of MVPDs' free speech constitutionally suspect.

The **FCC's must-carry regulations** substitute the First Amendment's free speech guarantees with government-imposed [forced speech](#) mandates. Requiring MVPDs to carry broadcast TV content not of their own choosing undermines MVPDs' discretion in determining channel lineups and arranging channel tiers.

The **FCC's program carriage regulations** also implicate constitutionally protected free speech interests. The regulations amount to forced-speech mandates, substituting the government's judgment concerning program channel selection and lineup placement for that of an MVPD. For instance, in late 2011, an FCC administrative law judge (ALJ) made a [dubious ruling](#) that Comcast discriminated against the Tennis Channel by not acceding to its request to be moved to the same program tier as two Comcast-affiliated sports channels. The ALJ's ruling was based on an analysis and comparison of the respective channels' programming genres, target audiences, advertisers, and ratings. That amounts to content-based restriction on editorial judgment and runs against the grain of First Amendment jurisprudence.

The FCC's program access regulations include additional forced-speech requirements raising [First Amendment concerns](#). Vertically integrated MVPDs are effectively required to act as speakers in settings not of their own choosing by making their programming available to competitors on terms and conditions that are subject to second-guessing by the FCC. And FCC program access enforcement actions relying on

agency-defined "must-have" categories of programming, such as sports networks, amount to content-based speech controls.

The FCC's leased access regulations likewise pose First Amendment problems. Under the statute, MVPDs lose "editorial control over any video programming" on the leased channel capacity. Rate controls constitute another facet of leased access regulations, which are another variety of forced access regulation. MVPDs are subject to FCC-set maximum amounts that independent video programmers can be charged for leasing channel capacity.

Aspects of the legacy video regime previously have been upheld from constitutional challenge based on the presence of so-called cable "bottlenecks" and concerns that access to diverse speech would be prohibited absent regulation. But those narrowly-defined justifications for speech-restricting regulation [no longer hold in today's environment](#). Technological and competitive developments over the last twenty years have transformed the video market. The presence of direct broadcast satellite (DBS) and other new entrants in the MVPD markets as well as the rise of cross-platform competition from online video distributors (OVDs) and other sources render those legacy video regulations both outdated and unconstitutional.

Recent Supreme Court decisions, such as [Citizens United v. FEC](#) (2010), recognize the impropriety of imposing speech restrictions on one set of speakers in order to promote the speech messages of others. The Court's holdings in traditional media speech cases similarly emphasize the First Amendment's core function of protecting against *government* restrictions on speech. Taken together, these lines of cases also cast serious doubt on the continued constitutional validity of much of the legacy video regulatory regime's restrictions on MVPDs' free speech rights.

The competitive dynamics and consumer benefits of emerging OVDs and other IP-based video services will continue to transform the market. But a commitment to keep the Internet free from regulation should be conjoined with a commitment to roll back legacy video regulations, including speech controls on video services. Reducing old regulations of video services may reduce opportunities for the FCC to impose new regulations on Internet video.

Replacing last century's restrictions on the video market with greater reliance on free market forces will promote a more competitive and convergent space for video competition in the 21st Century. Just as importantly, in order to conform to recognized rule of law norms, a free market future for video will require that First Amendment protections be respected for all technology platforms.

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Further Readings

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Randolph J. May, "[The Tennis Channel Ruling: No Mere Foot Fault](#)," *FSF Blog* (December 21, 2011).

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