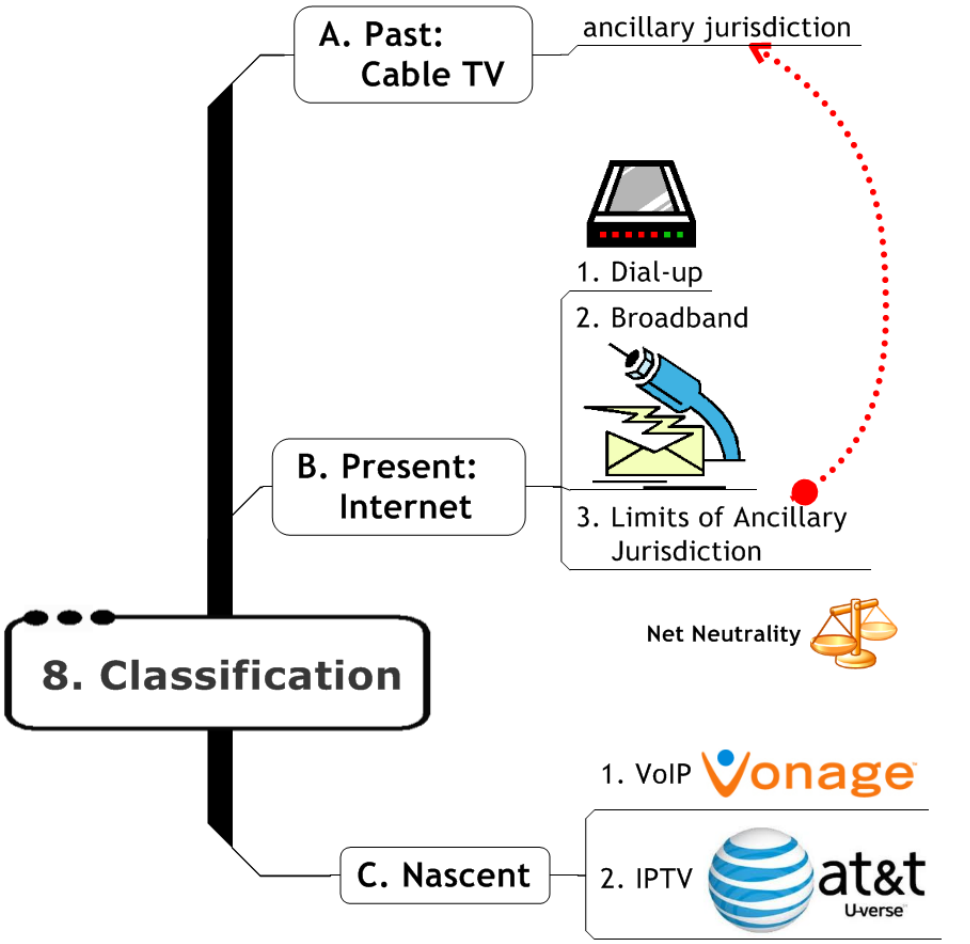
CHAPTER 8

Classification



Now we turn to the final chapter and concept of the book, *classification*. As we learned in CHAPTER 1: POWER, new technological power constantly creates new communication possibilities. When some new communications device or service comes online, the law has to engage in an initial act of classification. Is it really something new, or is it simply a novel implementation of a well-understood communications service? To take a trivial example, when Apple created the iPhone, one might have thought that the communications world was forever

changed. But from a regulator's perspective, that new device—as neat as it is—was essentially a mobile phone that was end-user equipment for a Commercial Mobile Radio Service (CMRS).

Suppose, however, that the service is in fact new, something that isn't just another example of an existing service—e.g., cable television in the 1950s. Then what? Next, we have to decide whether that new service falls into a known "family" of services for which we have rules and regulations. For example, should cable TV be classified as "broadcasting" under Title III of the Communications Act since it is, after all, "television"? Or should it be common carriage under Title II since it uses wires, like telephony? This classification can be performed through agency interpretation of existing statutes and regulations (which may permit substantial discretion and expert judgment), judicial review of that interpretation, and finally congressional intervention. Obviously, such classification can have huge economic, social, and political implications.

In some cases, the new service will be such a game-changing communications innovation that it cannot be classified into any existing "family" of communication services. In such cases, the entirely new service might not even fall under the generic authority of the FCC, under Title I of the Communications Act, in which case, the FCC would be truly powerless to regulate. For instance, suppose that some new computer chip architecture is invented that supplies supercomputer-like processing power in handheld devices, for mere pennies. This innovation could offer all kinds of different computing and communication possibilities, but that in and of itself doesn't mean that the chips fall into any of the current Titles of the Communications Act, including even Title I's generic authority over interstate wire and radio communications. It is mistaken to presume that the FCC can regulate everything digital.

On the other hand, the new service might still be fundamentally about communications via "wire or radio" and thus fall under the FCC's generic Title I authority. This is what happened, for example, with cable TV in the 1960s. In such cases, there will be difficult battles over what the agency can actually do under that generic authority. Again, answering this question will involve agency interpretation and judgment, as well as judicial review, and in the end (perhaps after the industry has matured), congressional intervention. For example, Congress in 1984 created a Title VI "family" within the Communications Act for cable TV.

The constant march of technology ensures that this classification process will repeat endlessly. Accordingly, it behooves us to study the process carefully. We start by studying a *past* classification question concerning cable TV, which decades ago was a "new" service. We move onto *present* questions concerning Internet access, which regulators have recently classified in a relatively stable manner. Then we conclude with *nascent* technologies, voice over IP (VoIP) and IP television (IPTV), which we are still struggling to classify. Again, enormous economic, social, and political questions are on the line.

We start with what was cutting-edge, six decades ago.

A. Past : Cable TV

U. S. v. MIDWEST VIDEO CORP. (MIDWEST VIDEO I)

406 U.S. 649 (1972)

Mr. Justice BRENNAN announced the judgment of the Court, and an opinion in which Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join.

Community antenna television (CATV) was developed long after the enactment of the Communications Act of 1934 as an auxiliary to broadcasting through the retransmission by wire of intercepted television signals to viewers otherwise unable to receive them because of distance or local terrain. In *United States v. Southwestern Cable Co.* (1968), where we sustained the jurisdiction of the Federal Communications Commission to regulate the new industry, at least to the extent 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting,' we observed that the growth of CATV since the establishment of the first commercial system in 1950 has been nothing less than "explosive." The potential of the new industry to augment communication services now available is equally phenomenal.

[T]he Commission on October 24, 1969, adopted a rule providing that 'no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services.' 47 CFR § 74.1111(a).

[T]he United States Court of Appeals for the Eighth Circuit set aside the regulation on the ground that the Commission 'is without authority to impose' it.

I

In 1966 the Commission promulgated regulations that, in general, required CATV systems (1) to carry, upon request and in a specified order of priority within the limits of their channel capacity, the signals of broadcast stations into whose service area they brought competing signals; (2) to avoid, upon request, the duplication on the same day of local station programming; and (3) to refrain from bringing new distant signals into the 100 largest television markets except upon a prior showing that that service would be consistent with the public interest. In assessing the Commission's jurisdiction over CATV against the backdrop of these regulations, we focused in *Southwestern* chiefly on § 2(a) of the Communications Act, 47 U.S.C. § 152(a), which provides in pertinent part: 'The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio . . ., which originates and/or is received within the United States, and to all persons engaged within the United States in such communication . . ..' In view of the Act's definitions of 'communication by wire' and 'communication by radio,' the interstate character of CATV services, and the evidence of congressional intent

that '[t]he Commission was expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio," we held that § 2(a) amply covers CATV systems and operations.

This conclusion, however, did not end the analysis, for § 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over CATV might properly be exercised. We accordingly went on to evaluate the reasons for which the Commission had asserted jurisdiction and found that 'the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities.' In particular, we found that the Commission had reasonably determined that "the unregulated explosive growth of CATV," especially through 'its importation of distant signals into the service areas of local stations' and the resulting division of audiences and revenues, threatened to 'deprive the public of the various benefits of [the] system of local broadcasting stations' that the Commission was charged with developing and overseeing under § 307(b) of the Act. We therefore concluded . . . that the Commission does have jurisdiction over CATV 'reasonably ancillary to the effective performance of (its) various responsibilities for the regulation of television broadcasting . . . [and] may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.'' (quoting 47 U.S.C. s 303(r)).

The controversy [in this case] centers on whether the Commission's program-origination rule is 'reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting.' We hold that it is.

[T]he critical question . . . is whether the Commission has reasonably determined that its origination rule will 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . ..' We find that it has.

The goals specified are plainly within the Commission's mandate for the regulation of television broadcasting. In *National Broadcasting Co. v. United States* (1943), for example, we sustained Commission regulations governing relations between broadcast stations and network organizations for the purpose of preserving the stations' ability to serve the public interest through their programming.

Equally plainly the broadcasting policies the Commission has specified are served by the program-origination rule under review. To be sure, the cablecasts required may be transmitted without use of the broadcast spectrum. But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming the same objective underlying regulations