CHAPTER 5

Classification

Now that we've been introduced to the four major communication services—broadcast, cable TV, telephony, and internet—it is natural to consider how new and emerging services might fit into the existing regulatory structure. For example, what about video streaming services? On the one hand, like both cable and broadcast, some streaming services provide access to television programs, so maybe they should be treated in the same way. But while broadcast networks use standardized radio signals to deliver content and MSOs use *coaxial cables* and special equipment to deliver and decode content, streaming services provide access to programs via broadband internet. Should that matter?

Such questions pose the general problem of "classification," our next key concept. When a seemingly novel communications service comes online, the first question will be whether it should be classified into some existing set of known and well-established categories. If the answer is yes, then we can apply the standard set of existing legal requirements, licensing schemes, and regulations. But what if the answer is no? What should be done then? And, as important, by whom? We start to study these questions by discussing the advent of cable television—a technology that was cutting-edge six decades ago.

A. Cable Television

UNITED STATES 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 broadcast-