

PERSPECTIVES
ANALYSES OF COMMUNICATIONS POLICY ISSUES

Defining Away the First Amendment

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Ever since the D.C. Circuit in *Comcast Corporation v. FCC* on April 6 reminded the Commission that Congress first had to give it authority before it can regulate broadband networks, the Washington policy debate has drifted toward one word – reclassification.

The term isn't nearly as snappy as other slogans, like network neutrality, which have dominated recent discussions about Internet and broadband policy. It seems by comparison so bureaucratic and so ... well, so *retro*.

And so it is. The idea behind reclassification is to rewind (another nostalgic term) FCC Internet policy of the past five years in which broadband service was treated as an information service and to reclassify it as telecommunications. Like a drunk who lost his keys across the road but who searches for them under the streetlight because of the better visibility, advocates of reclassification seek authority over broadband service where they believe it resides – in Title II of the Communications Act, which governs common carriers.

Never mind the fact that the Federal Communications Commission repeatedly found that Internet and broadband service providers that offer more than a mere transmission path to the end user are information services because of their integrated multimedia functions. And forget the fact that the Commission persuaded the Supreme Court that such services should be free from common carrier obligations in *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005). As an administrative agency, the FCC is free to change its mind, so long as those pesky facts about the nature of broadband service don't get in the way.

It is far from a foregone conclusion that the facts would not be hard to explain away if the FCC tried to stuff broadband services into the Title II box, but the difficulties the Commission would face are not limited to the strictures of administrative law. There is an even more fundamental problem with reclassification (or, perhaps it is more apt to call it recalification),

and it is this: The FCC's current ability to change the level of First Amendment protection for a medium simply by changing its regulatory definition is quite limited, if not nonexistent.

Primarily for historical reasons, the First Amendment has provided different degrees of protection for different media. Generally, this has meant that newer forms of mass communication have received differing levels of immunity from government regulation, and the FCC has institutionalized such differences via a system of regulatory classification. For example, the government has exerted different types of control depending on whether an entity was classified as a broadcaster, a cable operator, or, in the case of broadband, an information services provider.

Apart from the bureaucratic response, the clear judicial trend of the past two decades has been to examine the particular characteristics of the various media and to invalidate government restrictions that could not be independently justified. The FCC sought to regulate cable television much like broadcasting when the medium first emerged, but a series of court decisions eventually made clear that the First Amendment does not permit the same degree of government control. Same with the Internet. The Supreme Court struck down the attempt by Congress to impose broadcast-type indecency regulations.

Which brings us back to reclassification. Could Congress or the FCC impose indecency regulations and other public interest obligations on cable operators simply by reclassifying them as broadcasters? Of course not. Similarly, could Congress or the FCC regulate providers of integrated broadband services as common carriers merely by redefining them as Title II services? No court decision answers that question definitively, although there are some telling judicial trends.

In the mid-1990s, for example, a number of lower-court decisions invalidated restrictions on the provision of video service by telephone companies on First Amendment grounds. Two circuit courts and four district courts had reached this conclusion, and the matter was under review by the Supreme Court when Congress mooted the case by enacting the Telecommunications Act of 1996, which, among other things, allowed telephone companies to provide video service. So, how would the Supreme Court have resolved that issue? And what might it do if advocates of reclassification succeed in persuading Congress or the FCC to regulate broadband providers as common carriers?

Predicting how the Supreme Court will rule on a given question is inherently risky. This is particularly true in cases involving novel questions and new technologies. That being said, *Citizens United v. FEC*, 558 U.S. ____ (2010), the recent decision invalidating campaign finance restrictions, provides some important clues about the Court’s current thinking about technology and the First Amendment.

Justice Kennedy’s majority opinion stressed that “[t]he Framers may have been unaware of certain types of speakers or forms of communication, 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 ideas when the Bill of Rights was adopted.” As if to anticipate the reclassification issue, he wrote that “[w]e must decline to draw, and then redraw, constitutional lines based on the particular media or technology used” to disseminate speech. Doing so is necessarily suspect, because “those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.”

To be sure, the Court’s 5-to-4 *Citizens United* decision is controversial, but much of the uproar centers on the political and policy ramifications of invalidating restrictions on corporate political spending. The majority’s core First Amendment findings point to a continuing recognition of full First Amendment rights for new communications technologies. This trend necessarily would limit any attempt to expand FCC jurisdiction over new media simply by manipulating regulatory classifications.

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