Charting a New Constitutional Jurisprudence for the Digital Age

by

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Recommendation and Conclusion

While not likely any time soon, perhaps one day the Supreme Court will breathe some new life into the nondelegation doctrine by holding that the indeterminate public interest standard which is at the core of the Communications Act and much communications policymaking does not contain the requisite "intelligible principle" to guide agency action. And perhaps one day in the not-too-distant future, Congress will pass a new Digital Age Communications Act which will replace the statute's ubiquitous public interest standard with a competition-based one.

Hopefully, in the meantime, sooner rather than later, the Court will revisit *Red Lion, Pacifica, and Turner* in order to establish a new First Amendment paradigm for the electronic media, one that is much more in keeping with the Founders' First Amendment vision. It is possible it could move in this direction this Term in deciding the *Fox Television* case.

In short, the Supreme Court should seize the first opportunity to chart a new jurisprudential course that provides broadcasters, as well as other electronic media, including cable, satellite, wireless, and broadband Internet providers, with First Amendment protections that are the same as those traditionally enjoyed by the print media. Laws or regulations applicable to the various electronic media that have the purpose or effect of restricting program content should be subject to the same strict scrutiny the Court employed in *Tornillo* in holding unconstitutional a newspaper "right of reply" mandate. It should make no difference what type of technological platform is used to deliver the content. Thus, either explicitly or in some less direct fashion, *Red Lion* and *Turner Broadcasting* should be overturned.

Perhaps it was predictable, maybe even likely, that the First Amendment's protections would be limited substantially during the twentieth century's analog age. After all, for the most part, during the analog age the communications marketplace tended towards monopoly or oligopoly, and the lack of effective competition was not irrelevant to the outcome of major cases like *Red Lion* or *Turner*. But, now, in the face of proliferating competitive alternatives and media outlets spurred by profound marketplace and technological changes, it ought to be considered predictable, and, yes, even likely, for the Court to establish a new First Amendment jurisprudence befitting the media abundance of the twenty-first century's digital age.

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