CLASH OF THE TITANS

REGULATION, TECHNOLOGY, AND EXPRESSION IN THE INTERNET AGE

Materials for Alumni College, June 2-4, 2010

Colin S. Diver

Reading 1.

Administrative Law: Cases and Materials
Ronald A. Cass, Colin S. Diver & Jack M. Beermann
(Aspen Pub., 5th ed. 2006), pp. 6-10

A. THE ORIGIN AND MANDATE OF ADMINISTRATIVE AGENCIES

The administrative state is so firmly established today that it may seem purely academic to inquire into the causes of its emergence and growth. Yet, administrative agencies are continuously being created or abolished, their mandates enlarged or curtailed. Each of those events calls forth a demand for explanation. Furthermore, any effort to develop a normative theory of administrative power must rest in some antecedent descriptive account.

1. Theories of the Origin of Administrative Agencies

Administrative agencies perform a bewildering variety of functions in our society. They regulate the personal behavior of individuals and the conduct of businesses, distribute subsidies and benefits, provide services, collect revenues, and manage and develop resources. They issue licenses, promulgate rules, conduct inspections, seize goods and people, prosecute offenders, and adjudicate claims. They deal with transportation, energy, housing, mental and physical health, education, natural resources, and foreign and military affairs. Any attempt to explain their origins, it would seem, will quickly bog down in endless detail. Indeed, the explanations one encounters are as varied as the forms of administration they describe. Yet, one can perceive two distinct kinds of argument running through these accounts. The first focuses on an underlying social problem or need to which the administrative apparatus is viewed as the response. According to this view, administrative agencies are created to serve some kind of "public interest" or promote some "public value." The second type of explanation views the creation of an administrative agency as the outcome of a struggle among self-serving legislators and the factions, interest groups, and powerful individuals who compete for legislative prizes. This is the "public choice" story of agency origin.

Professor Frank Michelman attempts to capture the distinction between public interest and public choice explanations in the following passage:

> In the economic or public choice model, all substantive values or ends are regarded as strictly private and subjective. The legislature is conceived as a market-like arena in which votes instead of money are the medium of exchange. The rule of majority rule arises strictly in the guise of a technical device for prudently controlling the transaction costs of individualistic exchanges.

> Legislative intercourse is not public-spirited but self-interested. Legislators do not deliberate towards goals, they dicker towards terms. There is no right answer, there are only struck bargains. There is no public or general or social interest, there are only concatenations of particular interests or private preferences.…
>
> The opposed, public-interest model depends at bottom on a belief in the reality—or at least the possibility—of public or objective values and ends for human action. In this public-interest model the legislature is regarded as a forum for identifying or defining, and acting towards those ends. The process is one of mutual search through joint deliberation, relying on the use of reason supposed to have persuasive force. Majority rule is experienced as the natural way of taking action as and for a group—or as a device for filtering the reasonable from the unreasonable, the persuasive from the unpersuasive, the right from the wrong and the good from the bad.

Frank I. Michelman, Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 Ind. L.J. 145, 148-149 (1977).

These two perspectives produce strikingly different accounts of legislative decisions both to intervene in a particular area and to utilize the administrative form as its chosen instrument. Consider the enactment of the Interstate Commerce Act of 1887, widely acclaimed as the prototype for the modern regulatory statute. Why did Congress choose to intervene in a field—transportation by railroad—previously consigned to a combination of the unregulated market and selective state regulation? The public interest account stresses the widespread "abuses" by railroads resulting from "market failures" such as monopoly power in the railroad industry. By this account, regulation promoted the public value of "efficiency" or perhaps "individual autonomy." *See, e.g.,* Robert W. Harbeson, Railroads and Regulation: 1877-1916: Conspiracy or Public Interest?, 27 J. Econ. Hist. 230 (1967); I. L. Sharfman, The Interstate Commerce Commission: An Appraisal, 46 Yale L.J. 915 (1937). Public choice theorists, by contrast, explain the Act's passage as an attempt by the nation's leading railroads to impose a legally binding cartel on their newer or more aggressive rivals, or as an attempt by a coalition of disfavored shippers to gain pricing and service advantages at the expense of their competitors. *See, e.g.,* Gabriel Kolko, Railroads and Regulation: 1877-1916 (1965); Robert M. Spann & Edward W. Erickson, The Economics of Railroading: The Beginning of Cartelization and Regulation, 1 Bell J. Econ. & Mgt. Sci. 227 (1970); Thomas W. Gilligan, William J. Marshall & Barry R. Weingast, Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887, 32 J.L. & Econ. 35 (1989).

The divergent explanations of railroad regulation illustrate the different focus of each theory. Public interest theory endeavors to identify benefits to the general welfare of society that flow from a government action. Four principal public interest rationales have been offered to justify most government regulation of the marketplace: natural monopoly, public goods, external effects, and asymmetric information. The first explanation begins with the claim that in some industries economies of scale are sufficiently great that one producer can satisfy the entire market demand more cheaply than two or more. These natural monopoly industries will be characterized by either excessively high prices (if the monopolist faces no competition) or wasteful competition (if other producers, attracted by the monopolist's high profits, seek to enter). Concerns over the resulting misallocation

of social resources ostensibly justify the regulation of public utilities and antimonopolization features of antitrust law.

The public goods explanation observes that the market will underproduce certain goods or services whose enjoyment cannot easily be restricted to those who pay for them. Most United States citizens presumably benefit from a strong national defense, but few would be willing to pay for their "share" of that good without assurances that other beneficiaries will do likewise. Public goods explanations traditionally have been advanced to justify direct governmental provision of services, such as police protection or parks, but they also crop up in the defense of certain regulatory programs, such as the requirement that television broadcasters offer a certain amount of "public service" programming.

The external effects explanation is the reverse side of the public goods rationale: public "bads" (adverse side effects of private activity) will be overproduced. A standard example is air or water pollution. In a sense this explanation lies at the foundation of our entire legal system—certainly most of property, tort, and criminal law. More recently it has been utilized widely by advocates for direct governmental regulation of many health, safety, and environmental risks.

Asymmetric information is an explanation that could be collapsed into the prior categories but so often appears as a distinct argument for regulation that it merits separate treatment. The instinct behind this explanation is that consumers will find it too costly to acquire or evaluate information about the quality of certain goods or services in the marketplace. As a consequence, so the argument goes, government should prohibit outright certain unfair or unethical business practices or license certain occupations and trades that affect health and safety.

Public choice theory, by contrast, focuses on the way in which individual preferences will be aggregated and expressed through public decisionmaking processes, rather than the way in which overall social welfare will be advanced. From assumptions about the distribution and intensity of voter preferences, opportunities for and costs of political participation, and the mechanics of legislative decisionmaking, public choice theorists seek to explain how a process such as our majoritarian-representative system of government systematically favors certain interests over others.

The explanations for legislative behavior generated by public choice theorists are often quite divergent from public interest explanations. Thus, public utility franchises are often viewed as a form of "unnatural" monopoly granted by the state to a dominant firm in a formative industry seeking to perpetuate its position. Public choice theory also predicts that, while genuine public goods will be underprovided by the political process, legislatures will often provide private goods masquerading as public goods. Much of public television programming is sold as propagation of "culture," when in fact it is highbrow entertainment for the affluent few. One can likewise explain much regulation of adverse external effects as self-serving. Eastern coal producers, for example, supported stringent air pollution controls as a way of protecting their markets against competition from "cleaner" Western coal. Asymmetric information interests public choice theorists, too: not as a justification for regulation, however, but as a source of political advantage enjoyed by particular groups with specialized training or knowledge. For classic examples of public choice explanations for government regulation, *see* Sam Peltzman,

Toward a More General Theory of Regulation, 19 J.L. & Econ. 211 (1976); Richard A. Posner, Taxation by Regulation, 2 Bell J. Econ. & Mgt. Sci. 22 (1971); George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgt. Sci. 3 (1971). For an excellent anthology of writings on public choice, *see* Maxwell L. Stearns, Public Choice and Public Law: Readings and Commentary (1997).

In addition to these disparate explanations for legislative decisions to regulate, the public interest and public choice accounts produce different answers to the question of why a legislature elects to place enforcement authority in the hands of an administrative body, rather than, say, to rely solely on private actions brought in the courts. The typical public interest answer stresses such values as efficiency and effectiveness. A specialized agency like the (now-defunct) ICC, the argument runs, can better provide "continuous expert supervision, capable of ad hoc development to parallel the development of the subject matter involved." Walter Gellhorn, Federal Administrative Proceedings 9 (1941). The distinguishing feature of the ICC, public choice theorists would reply, is not its expertise or its expeditiousness, but its amenability to influence. A political body like the ICC would be much more responsive than the courts to the coalition of carriers and shippers who won the legislative prize, or to the legislators whose constituents stood to benefit most from its rulings. *See, e.g.,* Morris P. Fiorina, Legislative Choice of Regulatory Form: Legal Process or Administrative Process?, 39 Pub. Choice 33 (1982).

Both approaches, clearly, have their limitations. As Michelman says, the public interest model is "as sentimental as the public-choice model is unlovely." The public interest theory has been justly criticized for failing to articulate any coherent conception of "public interest" and for failing to contain any explicit assumptions about the motivations of legislators and lobbyists. *See* Richard A. Posner, Theories of Economic Regulation, 5 Bell J. Econ. 335 (1974). In particular, it has done a poor job of explaining the highly protectionist, anticompetitive behavior of most "economic" regulatory agencies like the ICC, the Federal Communications Commission, or the Civil Aeronautics Board during their infancy and maturity. In contrast, the public choice model, positing a clear link between individual motives and group actions, yields a number of hypotheses about legislative and administrative behavior that seem broadly consistent with the creation and operation of these regulatory agencies. Yet the public choice model has struggled to explain the dramatic reversal of form by these same agencies in later years. Arguably, the public choice model also has difficulty explaining the spate of anti-industry "social regulation" enacted during the 1960s and 1970s. *See* James Q. Wilson, The Politics of Regulation, in The Politics of Regulation 364 (James Q. Wilson ed. 1980). *See also* Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction (1991). While general theories about the way government processes (in gross) operate may provide a useful starting place, those who seek to explain administrative origins must remain sensitive to the irreducible complexity of a messy reality.

Reading 2.

A Brief History of American Telecommunications Regulation
Tim Wu, Professor of Law, University of Virginia
Oxford Encyclopedia of Legal History (forthcoming); SSRN, posted Feb. 28, 2007

While the history of governmental regulation of communication is at least as long as the history of censorship, the modern regulation of long-distance, or "tele," communications is relatively short and can be dated to the rise of the telegraph in the mid-19th century. The United States left the telegraph in private hands, unlike [other] countries and as opposed to the U.S. postal system, and has done the same with most of the significant telecommunications facilities that have been developed since. The decision to allow private ownership of telecommunications infrastructure has led to a rather particularized regulation of these private owners of public infrastructure -- similar to other laws governing "regulated industries," yet also influenced by the U.S. First Amendment and antitrust law.

Prototypes for Regulation

Broadly speaking, the regulations have been of three main types: 1) common carriage requirements; 2) interconnection requirements; and 3) scarcity management. Each of these types of regulation can be illustrated through the examples of the three main telecommunications industries of the Nineteenth and early Twentieth century: the telegraph, the telephone and broadcast radio.

The first commercial telegraph was constructed in 1839 in Great Britain. In the United States, by the 1850s the industry was intensely competitive, with multiple carriers frequently serving identical routes. The lack of integration between systems and the low profits for providers prompted a process of consolidation that culminated in Western Union's gaining a monopoly on long-distance telegraph service by 1866. At the time, no federal antitrust law was available as a tool for regulation, so Congress responded to criticisms of Western Union by passing the United States' first telecommunication regulatory statute, the Telegraph Act of 1866. The Telegraph Act was intended to foster competition by allowing any company to erect telegraph lines along post roads, and it also included a provision whereby the United States could buy out telegraph companies if it so chose. In practice, the Telegraph Act had little practical effect, as it failed to create effective competition for Western Union, and Congress never exercised its option to buy out the company and nationalize the industry. As a result, through the latter half of the Nineteenth century, Western Union was able to charge monopoly prices, support a newswire monopoly (the Associated Press) and discriminate against disfavored customers through its pricing. The firm was also able to use its monopoly to exert substantial political influence by, among other things, refusing to give certain news organizations access to its system to transmit their reporting. For example, in the contested

Presidential Election of 1876, Western Union's backing of Presidential candidate Rutherford Hayes gave the candidate important advantages both in reaching newspapers and detecting the plans of his rival.

In the Mann-Elkins Act of 1910, Congress declared both telegraph and telephone companies (including AT&T, which at the time not only owned Western Union but also had its own monopoly in long-distance telephone lines) to be common carriers. The act placed communications, for the first time, under the jurisdiction a federal agency: the Interstate Commerce Commission (ICC). Being a common carrier meant that telephone and telegraph companies had to offer their services without discrimination to all willing customers who were able to pay, and that they had to charge reasonable rates set by the ICC. In return, the telegraph and telephone companies received certain benefits, such as immunity from liability for the content they carried. The "common carriage" concept, originally a product of English common law remains the basis for the regulation of telephone carriers today.

Shortly after the Mann-Elkins Act, the United States addressed a different but related aspect of AT&T's business practices. In addition to its long-distance monopoly, AT&T provided local phone service, where it faced competition in local markets. In an attempt to eliminate this competition, AT&T routinely refused to allow non-affiliated local carriers to use its long-distance lines, thereby limiting the value of the services they could provide. In response to pressure from the Justice Department, in 1913 AT&T entered into what became known as the "Kingsbury Commitment," which required it to allow competing local providers to interconnect with AT&T's long-distance services.

While important, the Kingsbury Commitment was not a full anti-discrimination remedy. It did not require that AT&T, for instance, connect its local service to that of its competitors, nor did it require AT&T to interconnect its long distance or local networks with competing long-distance carriers, should they arise in the future. The Kingsbury Commitment did not hinder AT&T from creating the phone service monopoly that it enjoyed for most of the Twentieth century, and in the view of many, it represented the U.S. acceptance of an AT&T monopoly.

Scarcity management, the third major form of communications regulation in the United States, became an issue with the rise of broadcast radio in the 1920s. The first commercial station in the country, KDKA in Pittsburgh, Pennsylvania, began broadcasting in 1920. By 1924, the United States had over 1,000 radio stations broadcasting in a state of anarchy under the *ad hoc* supervision of Herbert Hoover, the then-Secretary of Commerce. Throughout the mid-1920's, Hoover managed the station's mutual interference by making case-by-case decisions to have broadcasters either shift their frequencies or share them by operating only limited hours in a day. Ultimately, the courts held that Hoover lacked the legal authority to impose even this minimal level of order, and the ensuing broadcast free-for-all prompted Congress to pass the Radio Act of

1927.

Because the broadcast spectrum is a physically scarce commodity, the Radio Act made plain that the spectrum would be publicly owned, that the government would regulate entry into the business of broadcasting, and that it would grant broadcasting licenses only "if public convenience, interest or necessity will be served thereby." To this end, the Radio Act established a commission charged with dividing the spectrum into different classes of stations and issuing licenses to broadcast at particular frequencies, times, locations and power levels. The law also barred the government from censoring broadcasts and required any broadcaster who gave time to a political candidate to "afford equal opportunities to all other such candidates for that office." The newly created Federal Radio Commission would also declare the first version of what would be called the "Fairness Doctrine"-- requiring that broadcasters give notice and time for advocates on both sides of an issue to be heard.

The provisions of the Radio Act of 1927 were folded into the Communications Act of 1934, which established the Federal Communications Commission and gave the Commission authority to regulate not only radio but interstate and international telegraph and telephone services as well. Its authority eventually extended to broadcast and cable television, as well as internet services. The Communications Act continues to this day to form the foundation for the regulation of these industries.

At the time of the Communications Act, and indeed as early as the Kingsbury Commitment, regulators generally believed that telephone services were a natural monopoly. That is, they thought that even if there were competition in the market, the nature of the underlying technology and business were such that it was highly likely that a dominant firm would emerge to control the industry and, moreover, that this was the most efficient result. Rather than insist on what was viewed as detrimental competition in the industry, then, until the 1970s regulators supervised the Bell monopoly and regulated matters such as the rates it could charge, the quality of services it provided, and its areas of service coverage.

The Era of Deregulation

For most of the 20th century the main telecommunications carriers were classic regulated industries. Monopoly was tolerated, and even encouraged, by government limits on market entry and exit. In exchange government set prices at reasonable rates of return, and imposed various public interest duties (such as the fairness doctrine discussed above). However, beginning in the late 1960s and continuing through the 2000s, a deregulatory movement transformed telecommunications policy.

By the 1920s the AT&T telephone monopoly was complete enough that the company was able to control vertically integrated markets. For instance, AT&T in the

1930s promulgated a tariff that precluded consumers from attaching any device to their phone lines that was not specifically approved by the company. This "foreign attachments" rule effectively extended AT&T's phone service monopoly into the market for phones themselves, with the result that customers could only obtain equipment from AT&T. While this vertical integration may have represented a high watermark for AT&T's monopoly, it became the site of the first cracks in the company's monopoly.

In the word of Richard Vietor, "deregulation began more or less with a rubber cup." In the 1950s a company called Hush-a-Phone contested AT&T's foreign attachments rule, seeking permission to market what a special cup that attached to a phone and made conversations more private. The FCC, at the behest of AT&T, precluded the sale of the attachment, but the Court of Appeals for the District of Columbia reversed the decision and set forth, for the first time, the rule that a consumer had a "right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." In 1968, in the *Carterphone* decision, the FCC adopted this principle, and over time promulgated the Part 68 Rules, which allowed users to connect whatever they wanted to the system as long as it did not harm either the network or other users. While it would take until 1981 for the FCC to create a full consumer right to attach devices to the network, the *Carterfone* and *Hush-a-Phone* decisions represented the first introduction of competition against AT&T, and the first limiting of its extended monopoly. Eventually, the *Carterfone* decision was extended into a general quarantine on AT&T's involvement in consumer equipment. It also, importantly, led to rules that forced AT&T to allow others to provide "information services" over its phone lines (which would later mean "internet services") and to support the rise of the internet service provider industry.

At the same time, several other deregulatory initiatives were underway. In the 1970s, the firm Microwave Communications Inc. (MCI) took advantage of regulatory loopholes and non-enforcement to begin offering limited long-distance services between St. Louis and Chicago, offering AT&T the first long-distance competition it had faced in decades. AT&T took various measures to try to destroy and block its rival, leading to MCI filing an important private antitrust suit. On November 20, 1974, the Justice Department began its own antitrust action against AT&T, alleging that it monopolized the markets for a broad range of telecommunications services and equipment. While the Justice Department had brought antitrust actions against AT&T previously, this suit for the first time sought as a remedy the actual break-up of the company, and in particular the divestiture of the Regional Bell Operating Companies (RBOCs) from AT&T.

On January 8, 1982, AT&T and William Baxter of the U.S. Justice Department reached an agreement that forced AT&T to divest the RBOCs by January 1, 1984. Thus as of that date the twenty-two RBOCs were formed into seven regional holding companies (Bell Atlantic, NYNEX, BellSouth, Ameritech, U.S.West, Pacific Telsis, and Southwestern Bell). These divested companies were not allowed to provide long-distance

services in their territories or manufacture telecommunication equipment, both of which were businesses that remained with AT&T. Likewise, AT&T was precluded from providing local telephone service in competition with the RBOCs and from acquiring stock in any of the RBOCs.

The history of cable television has the same pattern of regulation and reregulation. The early cable systems were known as "Community Antennas," and were constructed in the late 1940s to capture broadcast television signals and transmit them to consumers in remote towns where the broadcasts would not have reached otherwise. By the late 1950s, cable systems had grown into a potential competitor to broadcast televisions, and the broadcasters launched an effort to protect their markets against cable using state and federal lawsuits. After the lawsuits failed, the broadcasters turned to the FCC and convinced it to assert jurisdiction over cable in 1962. The broadcasters argued that cable systems would fragment the audience for broadcast television, destroy the economic viability of free television, and also, by importing distant signals, threaten the values of "localism." Agreeing with the broadcasters, the FCC placed effective limits on cable's growth in the late 1960s by requiring that cable operators receive special permission to enter urban markets, effectively blocking the further development of cable television. The hostile approach to cable changed during the deregulatory period of the 1970s, many of the most onerous restrictions on cable were gradually relaxed, in part due to an exchange for new copyright royalties payable to broadcasters.

Another chapter in the deregulatory movement of the 1970s and 1980s was the FCC's controversial repeal of the fairness doctrine, described above. First set forth by the FRC in 1928, and codified in 1949, the fairness doctrine had been upheld against a First Amendment challenge by the Supreme Court in the *Red Lion v. FCC*. However, in the mid-1980s the FCC stopped enforcing the fairness doctrine and eventually repealed most of it. The FCC argued that, *Red Lion* notwithstanding, the fairness doctrine was a violation of the First Amendment, and also claimed it failed to promote speech in the public's interest. Since that time Congress and numerous groups have attempted to have the Fairness Doctrine reinstated, but have not succeeded.

In the 1990s, the FCC also took its first steps away from the traditional model of spectrum management it had employed since the 1930s. Whereas previously the FCC allocated licenses either by lottery or to whomever it believed would "best serve the public interest," in 1994 it conducted the first spectrum auctions, granting the licenses to the highest bidder. While not free from controversy, the auctions have generally been thought to have been a success, as they led both to the market entry of new cellular phone firms, such as long-distance provider Sprint, and proved to be a more streamlined way of awarding licenses, which has encouraged the timely building of networks. The FCC has conducted several other spectrum auctions since 1994, frequently at Congress's direct command.

The Contemporary Regulatory Framework

The Telecommunications Act of 1996, the first major revision of the country's telecommunications laws since the Communications Act of 1934, altered some features of the basic telecommunications system just described. One of the foremost goals of the 1996 Act was to promote competition in local telephone service. AT&T was allowed to return to the local service market, while local Bell phone companies were allowed to enter the long-distance market and to merge with each other. In addition, the 1996 law created a "line sharing" scheme whereby market entrants would purchase the rights to use the "local loop" facilities owned by the local Bell companies and sell competitive local services. The 1996 Act also preempted all state and local barriers to entering the local phone service market, and since the passage of the 1996 Act the FCC has forborne from enforcing any restrictions on building or acquiring long-distance lines. Despite these substantial changes to the law, most believe the 1996 Act's effort to create local service competition was a failure. Whether due to the economics of local competition, or foot-dragging on the part of the local Bell company, few viable local phone service companies have emerged since the passage of the Act.

The 1996 Act also failed to address the challenge of internet and broadband internet services. Pursuant to existing rules, telephone companies have long been regulated as common carriers, as discussed above. That meant that providers of DSL service – which runs over phone lines – were common carriers, while the status of cable operators who sell broadband services remained unclear. In 2002 FCC deemed cable broadband an unregulated "information service" not subject to common carriage rules, and it later classified DSL broadband similarly. In 2005, in the case of *FCC v. Brand X*, the United States Supreme Court upheld the FCC's right to categorize cable broadband providers as "information services." The practical import of these technical classifications has been to release broadband services from most anti-discrimination, common carriage or line-sharing obligations.

The arrival of broadband in the 2000s led to the rise of the issue of "network neutrality" on the internet, and the more general topic of internet regulation. The Internet's technologies were born mainly out of government-funded research in the 1960s and 1970s. While no specific regime governed the internet, in the 1980s and 1990s, new "internet service providers" took advantage of quarantines placed on the Bells to offer dial-up internet services independent of the Bell system. In the early 2000s, as cable and DSL broadband providers replaced dialup ISPs, the issue of Bell and cable control over the vertical internet markets again arose. In the mid-2000s, the center of the network neutrality debate is a debate over the merits or problems with discriminatory carriage -- favoring some content or applications over others. Ironically, today's debates over network neutrality and discriminatory carriage echo the same concerns that first prompted calls to regulate telegraph companies in the 19th century.

Reading 3.

The Architecture of Innovation
Lawrence Lessig, Professor of Law, Stanford Law School.
Conference on the Public Domain
Duke Law School, November 9-11, 2001

Every society has resources that are free and resources that are controlled. A free resource is one that anyone equally can take; a controlled resource one can take only with the permission of someone else. E=MC2 is a free resource. You can take it and use it without the permission of the Einstein estate. 112 Mercer Street, Princeton, is a controlled resource. To sleep at 112 Mercer Street requires the permission of the Institute for Advanced Study.

A time is marked not so much by the ideas that are argued about, but by the ideas that are taken for granted. The character of an era hangs on what one need not question; the power in a particular moment runs with the notions that only the crazy would draw into doubt. . . .

We live in an era when the idea of property is just such a thought, or better, just such a non- thought; when the importance and value of property is taken for granted; when it is impossible, or at least for us, very hard, to get anyone to entertain a view where property is not central; when to question the universality and inevitability of complete propertization is to mark yourself as an outsider. . . .

As Yale Professor Carol Rose puts it, we live in a time when the view is that "the whole world is best managed when divided among private owners." The most creative of our public policy minds get turned to the question of how best to divide up resources. The assumption is that well divided resources will always work best.

We have this view—this taken for granted, background view—because for the last hundred years, we've debated a related question, and that debate has come to an end. For the last hundred years, the question exciting political philosophy has been which system of control works best. Should resources be controlled by the state, or controlled by the market. And this question, we all rightly believe, has been answered. In all but a few case, for a wide range of reasons, we know this: that the market is a better tool for controlling resources than the state. That between the two, there is no real debate. The communists roll on the dustbin of history.

But this confidence obscures a distinct and more basic question. This certainty about the market over the state leads us to ignore an issue that comes before. Not the question of which system of control is best for any given resource; but instead the question – should a resource be subject to control at all? Not the market vs. the state, but controlled vs. free.

If communism vs. capitalism was the struggle of the 20th century, then control vs. freedom will be the debate of the 21st century. If our question then was how best to control, our question now will become whether to control. What would a free resource give us that controlled resources don't? What is the value in avoiding systems of control? . . .

NYU Law Professor Yochai Benkler is a theorist of free communication who says to think about a system of communication as divided among three layers. These layers interconnect; each depends upon the other; any communication depends upon all three. At the bottom of these three, there is the physical layer—the wires that connect the phones or the computers; the cable across which television might be broadcast; above that, the logical layer—the system that controls who gets access to what, or what gets to run where; and above that, the content layer—the stuff that gets said or written within any given system of communication.

Now each of these layers in principle could be controlled or free. They would be free if they were organized in a commons—organized so that anyone could get access or equal terms, whether they had to pay (a fixed and neutral charge) or not. They would be controlled if they were the property of someone else—someone who had a right to exclude, or to grant access or not based on his or her own subjective reasons. And depending on whether these layers are free, or are controlled, the communications system that gets built differs.

Consider four possibilities as we vary whether each of these layers is owned or free.

Speakers Corner: Orators and loons gather every Sunday in Hyde Park's Speakers' Corner to rage about something or nothing at all. It has become a London tradition. It is a communication system organized in a specific way. The physical layer of this communication system (the park) is a commons; the logical layer (the language used) is also a commons. And the content layer (what these nuts say) is their own creation. It too is unowned. All three layers in this context are free; no one can exercise control over the kinds of communications that might happen here.

Madison Square Garden: Madison Square Garden is another place that people give speeches. But Madison Square Garden is owned. Only those who pay get to use the auditorium; and the Garden is not obligated to take all comers. The physical layer is therefore controlled. But like speakers corner, both the logical layer of the language and the content that get uttered is not controlled in the context of the Garden. They too remain free.

The Telephone System: Before the breakup, the telephone system was a single-unitary system. The physical infrastructure of this system was owned by AT&T; so too was logical infrastructure—determining how and who you could connect to—controlled by AT&T. But what you said on an AT&T phone (within limits at least) was free: The content of the telephone conversations was not controlled, even if the physical and logical

layer underneath were.

Cable TV: Finally, think of cable TV. Here the physical layer is owned—the wires that run the content into your house. The logical layer is owned—only the cable companies get to decide what runs into your house. And the content layer is owned—the shows that get broadcast are copyrighted shows. All three layers are within the control of the cable TV company; no communications layer, in Benkler's sense, remains free.

This then is the range. A communications system, and hence, a system for innovation, could be any of the four, or of course, more than these four. But these four set the range that will best help us understand a very specific example. The Internet. . . .

The Internet is a communication system. It too has these three layers. At the bottom, the physical layer, are wires and computers, and wires linking computers. These resources are owned. The owners have complete control over what they do with their wires or computers, or wires linking computers. Property governs this layer. On top of the physical layer is a logical layer—the protocols that make the net run. . . . Their essence is a system for exchanging datagrams, but we miss something important about the system if we focus exclusively on the essence. For at the core of this logical layer is a principle of network design. At the core of the Internet's design is an ideal called end-to-end. First articulated by network architects Jerome Saltzer/David Reed/David Clark, end-to-end says build the network so that intelligence rests in the ends, and the network itself remains simple. Simple networks, smart applications.

The reason for this design was simple. With e2e, innovation on the Internet didn't depend upon the network. New content or new applications could run regardless of whether the network knew about them. New content or new applications would run because the network simply took packets of data and moved them along. The fundamental feature of this network design was neutrality among packets. The network was simple, or stupid in Isenberg's sense, and the consequence of stupidity, at least among computers, is the inability to discriminate. Innovators thus knew that if their ideas were wanted, the network would run it. That this network was architected never to allow anyone to decide what would be allowed.

This means that this layer of this network—this feature of the network that distinguished it from all that had been built before—built this network into a commons. One was free to get access to this network, and share its resources. The protocols were designed for sharing, not exclusive use. Discrimination, at the heart of a property system, was not possible at the heart of this system. This system was coded to be free. That was its nature. Thus on top of a physical layer that was controlled rests a logical layer that is free. And then on top of this free layer was a content later that is both free and controlled.

The free part is all the content that effectively rests in the public domain. The facts, data, abandoned property, undiscovered theft—this is the content that is open for the taking and that is taken openly. But it also includes a part dedicated to be open: open source or free software, dedicated to be free. This free resource does more than entertain,

or build culture; this free resource teaches the world about how this resource of the net functions, or is free. Like every web page that both displays and carries its source, so that its source can be copied and modified for different displays.

This free content coexists with content that is controlled. Software that is sold; digital content—music, movies, greeting cards—that is controlled. You can link to mp3.com and listen to music that is free; you can link to amazon.com and read a book that is controlled. The network doesn't care much what linking occurs. It's neutral among the linking, and the result of this neutrality is a mix.

This, then, is a picture of the complexity we call the Internet. At the bottom is a physical layer that is controlled; on top of it is a logical layer that is free; and on top of both is a content layer that mixes free and controlled. This complexity builds a commons. And this commons has been the location of some of the most extraordinary innovation that we have seen. Not innovation in just the .com sense; but innovation in the ways humans interact, innovation in the ways that culture is spread, and most importantly, innovation in the ways in which culture gets built. The innovation of the Internet—built into its architecture—is an innovation in the ways in which culture gets made. Let the .com flame; it won't matter to this innovation one bit. The crucial feature of this new space is the low cost of digital creation, and the low costs of delivering what gets created.

Now I have dissected this commons into these layers to help us see more precisely just how it will be enclosed. So far my message has been fairly bright; but my brand is pessimism, and so we need a good dollop of darkness. And the fact is, darkness here is not hard to find. For though we have just begun to see how this freedom functions, we are quickly coming to see how this freedom will be removed. These layers mixing the free and the controlled are quickly becoming layers that simply mix different kinds of control.

We are in the midst of a process by which, through law and through technology, these features of this initial architecture are changing. Because we believe "the whole world is best managed when divided among private owners" we are changing the architecture of the net to enable it to be divided and controlled; because we believe "the whole world is best managed when divided among private owners" we are expanding and reinforcing control over content through [intellectual property] law; because we believe as our ideology says, we are remaking the Internet to fit this ideology. Without even pausing to understand it; without taking a moment to see how it might actually work. We are map makers, who upon finding the city doesn't quite fit our map—an extra building here, and river we didn't expect there—proceed to remake the city to make sure it fits the map.

Consider . . . providers of broadband services. As the Internet moves from the telephones . . . to broadband—to fast, always-on connections, the physical layer across which the Internet travels is different. The dominant technology today for serving this broadband content is cable. Now as cable converts itself to make itself open to the Internet, it is modifying the architecture of the Internet in an important way. While the essence of the commons the Internet was neutrality, and simplicity, the essence of what

the broadband cable Internet will be is the power to discriminate in content and services. The aim of this form of Internet access will not be openness and neutral platforms; the aim of this form of Internet access will be control over the content that gets played.

For example: Cable companies make a great deal of money streaming video to television sets. That is the core of their legacy monopoly power. Some think it would be useful to stream video to computers. Cable companies are not eager to see this form of competition. So they imposed rules on broadband users—no more than 10 minutes of streaming video could be contracted for at any time. When they are smart, they said they were worried about congestion. But when they were honest they said something different. Said Somers, of AT&T, "we didn't spend 56 billion on a cable system to have the blood sucked from our veins." Broadband providers will insist that this control is their right—that nothing should interfere with their right to layer onto the free logical layer a system of control. And a budding line of First Amendment doctrine . . . strongly supports this claim.

These cases are Blade-Runner-esque. Remember one of the million amazing puzzles in that extraordinary film is the slow recognition that these machines are human. Well here too, with cable system, it is the increasing recognition that these systems to deliver electricity are in fact First Amendment speakers. . . . And hence we should expect, as the Internet moves to this broadband, that the rules governing the providers will be different. Unlike the telephone company, these providers will be allowed to discriminate; and discriminate, they will; and when they do, this open feature of the Internet commons will be removed. Enclosed. Chopped up and sold off. With the consequence that innovation here will be different.

That's a change at the logical layer—or more precisely, a set of controls that gets layered on at the logical layer. But the changes are not just here. More dramatic, less justified, but more likely are changes at the content layer. These are the changes most remarked upon here. And hence these will be a bit easier to describe.

The content I want to focus on here is controlled by copyright law. Ideas, or more properly inventions, get controlled by patent law; context, or expression of ideas, is regulated by copyright. Copyright law has changed. In the sense that oak tree is a change of the acorn, modern copyright law is a change over the copyright law that was. . . . When the United States was formed, the Constitution gave Congress the power to grant "authors" exclusive rights for their "writings" for a "limited time" to—as the Constitution expressly states, "promote progress." The promote progress clause is unique in the Constitution's enumeration of powers; every other clause leaves the purpose unspecified; only this clause says what the power must be used for.

The first federal copyright statute was enacted in 1790. That Act regulated the "printing" and "vending" of "map[s], chart[s] and … book[s]" for an initial term of 14 years. While in principle anyone could violate the exclusive right to vend, in 1790, there were only 127 printing establishments in the United States. Copyright was not automatic; registration was required; most of the early registrations were for scientific or

instructional texts. Between 1790 and 1799, 13,000 titles were published in America, but only 556 copyright registrations were filed. More than 95% of published work therefore fell immediately into the public domain—including, of course, 100% of foreign work. Our outrage at China notwithstanding, we should not forget that until 1891, foreign copyrights were not protected in America. We were born, in other words, a pirate nation. Thus the law was slight, as was the actual scope of protection slight. Copyright did not protect derivative works; you could translate or adapt or abridge or set to song copyrighted works, without the permission of the author. The monopoly rights that the 1790 statute granted were essentially protections against pirate presses. The target of the regulation was the press that would take an American author's book, and simply reproduce it without compensation to the original author. These pirate presses were to focus their energy on stealing from the British and French; Americans were to be exempted from the pirate trade.

Copyright has changed. It no longer is limited to maps, charts and books. It now touches practically any creative work reduced to a tangible form. It protects music, and performances, and architecture, and certain design. It protects machines written in words – we call that software—and words written on machines – we call that the Internet.

And it protects these creative acts no longer for an initial term of 14 years. It protects these creative works for the life of author plus seventy years—which means, for example, in the case of Irving Berlin, a term that exceeds 140 years. It protects this work not contingently; not, that is, upon registration. It protects it, and all creative work, automatically—for a term that does not have to be renewed, for a life that exceeds the author's.

And it protects not just against pirate publishers. The scope of copyright now protects an extraordinarily broad derivative right. The right to translate, with some works, the right to perform, the right adapt to a play, or make a movie—all these are rights that now included within the originally sparse "exclusive right" that the original copyright act granted.

And finally, because it doesn't protect only against pirate publishers, because in 1909 the statute shifted its terms, to speak of "copies" and not printing, and because the technology of copying has now exploded to cover just about anything anyone does with a computer, the reach of this regulation is no longer the 127 publishers that existed in 1790. The reach of this regulation on the right to speak extends to the 127 million who today use computers. This tiny regulation of a tiny proportion of the extraordinary range of creative work in 1790 has morphed into this massive regulation of everyone who has any connection to the most trivial of creative authorship.

No doubt, and I certainly believe, much of the expanse in copyright over the past two hundred years was completely justified under a proper reading of the balance the framers meant to strike. Though they didn't protect music, it would be wrong for us not to protect music. I realize there are those on the other side—those who note that while our system of protection has produced Brittany Spears and Madonna, the framers' system

of non-protection produced Beethoven and maybe that means the framers were on to something—but I'm not on the side of free music if free music means artists don't get paid. In my view the issue is not whether artists get paid; the issue is how. And Congress has been correct in its efforts to extend rights to assure artists get paid, so as to assure a sufficient incentive to produce art.

Thus we should notice this expansion not so much to oppose it, but to recognize its inertia. Control is our direction, and our velocity has been set. Something big will have to happen if this inertia is to be checked. Something significant in the culture must block it if the inevitable it promises—the inevitable of perfect control—is to be avoided.

Instead, something big has happened that has accelerated the push to perfect control. And paradoxically . . . that something big that will push copyright to perfect control is this architecture of freedom we call the Internet. . . . When [controls get] encoded into the wires, then this discipline is bizarrely more important than when it is simply the overreaching of [copyright] lawyers. Now the overreaching of an ebook that says you can read this on a windows machine, but not on Macintosh is something more than bluster. It is a set of controls with the power of mathematics behind it – we call that encryption—and now these controls have the power of law to defend them—we call that the Digital Millennium Copyright Act.

This layer of control is new in the game; this layer is exploding and the law is expanding to back it up. And hence now, just at the moment that technology could enable a billion life-like innovations, a billion iMacs crafting movies by remixing culture from the past, just at the moment when the technology could make real the idea captured in an apple commercial—rip, mix, and burn, after all, as the commercial ends, it is your music—the technology is taking that freedom away. The very same iMac which Apple tries to sell with this picture of freedom—rip mix and burn—is encoded with software to handle DVDs that does not enable the rip, mixing, or burning of Hollywood's movies. Try to rip mix and burn that stuff and the system will quickly crash. Control of that content has been encoded; and this system of "freedom" has been encoded to respect that control.

This is the conflict between two pictures of the future. One, the future of imperfect control at the content layer—music that gets ripped, mixed, and burned; the other, the future of perfect control—of DVDs that get ripped, mixed, and burned only as Jack Valenti allows. . . .

At every layer, we are displacing the free with control; and the reasons for this displacing are not hard to see. This architecture of innovation that we call the Internet threatens the systems of control that thrived before there was such a thing as the Internet. And those whose interests are most threatened by this innovation have rallied to undermine what is special about this innovation.

This is nothing new with the Internet. In his extraordinary work, the Prince, Machiavelli has this to say about innovation:

> Innovation makes enemies of all those who prospered under the old regime, and only lukewarm support is forthcoming from those who would prosper under the new. Their support is indifferent partly from fear and partly because they are generally incredulous, never really trusting new things unless they have tested them by experience.

We allow these changes, they don't just happen. We stand back as they occur, they don't happen in the night. We let them occur because most of us believe they should; control is good, better control is better, these systems of control are ways to make sure the better comes from the good.

It is an attitude and blindness and a pathetic resignation that permits this change. So enamored we are with the invisible hand, so convinced we are of the genius of property, so blind we are to what makes innovation possible, that we allow the undoing of the most significant chance for something different that we have ever seen. . . .

Reading 4.

COMCAST CORP. V. FEDERAL COMMUNICATIONS COMMISSION
United States Court of Appeals for the District of Columbia Circuit
Argued January 8, 2010, decided April 6, 2010

TATEL, *Circuit Judge*: In this case we must decide whether the Federal Communications Commission has authority to regulate an Internet service provider's network management practices. . . .

I.

In 2007 several subscribers to Comcast's high-speed Internet service discovered that the company was interfering with their use of peer-to-peer networking applications. Peer-to-peer programs allow users to share large files directly with one another without going through a central server. Such programs also consume significant amounts of bandwidth.

Challenging Comcast's action, two non-profit advocacy organizations, Free Press and Public Knowledge, filed a complaint with the Federal Communications Commission and, together with a coalition of public interest groups and law professors, a petition for declaratory ruling. Both filings argued that Comcast's actions "violat[ed] the FCC's Internet Policy Statement." Issued two years earlier, that statement "adopt[ed] the . . . principles" that "consumers are entitled to access the lawful Internet content of their choice . . . [and] to run applications and use services of their choice." Comcast defended its interference with peer-to-peer programs as necessary to manage scarce network capacity.

Following a period of public comment, the Commission issued the order challenged here. . . . On the merits, the Commission ruled that Comcast had "significantly impeded consumers' ability to access the content and use the applications of their choice," and that because Comcast "ha[d] several available options it could use to manage network traffic without discriminating" against peer-to-peer communications, its method of bandwidth management "contravene[d] . . . federal policy." . . .

II.

Through the Communications Act of 1934, as amended over the decades, Congress has given the Commission express and expansive authority to regulate common carrier services, including landline telephony (Title II of the Act); radio transmissions, including broadcast television, radio, and cellular telephony (Title III); and "cable services," including cable television (Title VI). In this case, the Commission does not claim that

Congress has given it express authority to regulate Comcast's Internet service. Indeed, in its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a "telecommunications service" covered by Title II of the Communications Act nor a "cable service" covered by Title VI. The Commission therefore rests its assertion of authority over Comcast's network management practices on the broad language of section 4(i) of the Act: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."

Courts have come to call the Commission's section 4(i) power its "ancillary" authority, a label that derives from [two] foundational Supreme Court decisions: *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), [and] *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*) . . . . [These] cases dealt with Commission jurisdiction over early cable systems at a time when, as with the Internet today, the Communications Act gave the Commission no express authority to regulate such systems. (Title VI, which gives the Commission jurisdiction over "cable services," was not added to the statute until 1984.

In the first case, *Southwestern Cable*, the Supreme Court considered a challenge to a Commission order restricting the geographic area in which a cable company could operate. At that time, cable television, then known as "community antenna television" (CATV), functioned quite differently than it does today. Employing strategically located antennae, these early cable systems simply received over-the-air television broadcasts and retransmitted them by cable to their subscribers. Although they rarely produced their own programming, they improved reception and allowed subscribers to receive television programs from distant stations. Seeking to protect Commission-licensed local broadcasters, the Commission adopted rules limiting the extent to which cable systems could retransmit distant signals and, in the order at issue in *Southwestern Cable*, applied this policy to a particular company. The Supreme Court sustained that order, explaining that even though the then-existing Communications Act gave the Commission no express authority over cable television, the Commission could nonetheless regulate cable television to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Four years later, in *Midwest Video I*, the Court again sustained the Commission's use of its ancillary authority, this time to support issuance of a regulation that required cable operators to facilitate the creation of new programs and to transmit them alongside broadcast programs they captured from the air. . . .

We recently distilled the holdings of these . . . cases into a two-part test. In *American Library Ass'n v. FCC*, we wrote: "The Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." Comcast concedes that the Commission's action here satisfies the first requirement because the company's Internet service qualifies as "interstate and foreign communication by wire" within the meaning

of Title I of the Communications Act. Whether the Commission's action satisfies *American Library*'s second requirement is the central issue in this case. . . .

IV.

The Commission argues that the *Order* satisfies *American Library*'s second requirement because it is "reasonably ancillary to the Commission's effective performance" of its responsibilities under several provisions of the Communications Act. These provisions fall into two categories: those that the parties agree set forth only congressional policy and those that at least arguably delegate regulatory authority to the Commission. We consider each in turn.

A.

The Commission relies principally on section 230(b), part of a provision entitled "Protection for private blocking and screening of offensive material," 47 U.S.C. § 230, that grants civil immunity for such blocking to providers of interactive computer services. Setting forth the policies underlying this protection, section 230(b) states, in relevant part, that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services" and "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet." In this case the Commission found that Comcast's network management practices frustrated both objectives.

In addition to section 230(b), the Commission relies on section 1, in which Congress set forth its reasons for creating the Commission in 1934: "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . at reasonable charges, . . . there is created a commission to be known as the 'Federal Communications Commission' . . . ." The Commission found that "prohibiting unreasonable network discrimination directly furthers the goal of making broadband Internet access service both 'rapid' and 'efficient.'"

Comcast argues that neither section 230(b) nor section 1 can support the Commission's exercise of ancillary authority because the two provisions amount to nothing more than congressional "statements of policy." Such statements, Comcast contends, "are not an operative part of the statute, and do not enlarge or confer powers on administrative agencies. As such, they necessarily fail to set forth 'statutorily mandated responsibilities'" within the meaning of *American Library*. The Commission acknowledges that section 230(b) and section 1 are statements of policy that themselves delegate no regulatory authority. Still, the Commission maintains that the two provisions, like all provisions of the Communications Act, set forth "statutorily mandated responsibilities" that can anchor the exercise of ancillary authority. . . .

In support of its reliance on congressional statements of policy, the Commission points out that in both *Southwestern Cable* and *Midwest Video I* the Supreme Court linked the challenged Commission actions to the furtherance of various congressional "goals," "objectives," and "policies." . . .

We read *Southwestern Cable* and *Midwest Video I* quite differently. In those cases, the Supreme Court relied on policy statements not because, standing alone, they set out "statutorily mandated responsibilities," but rather because they did so in conjunction with an express delegation of authority to the Commission, i.e., Title III's authority to regulate broadcasting. In *Southwestern Cable*, the Commission argued that restricting the geographic reach of cable television was necessary to fulfill its Title III responsibility to foster local broadcast service. The Court agreed, explaining that "Congress has imposed upon the Commission the 'obligation of providing a widely dispersed radio and television service,' with a 'fair, efficient, and equitable distribution' of service among the 'several States and communities.' The Commission has, for this and other purposes, been granted authority to allocate broadcasting zones or areas, and to provide regulations 'as it may deem necessary' to prevent interference among the various stations." The Court concluded that "the Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems." Nonetheless, the Court "emphasize[d] that the authority which we recognize today . . . is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the *regulation of television broadcasting*."

In *Midwest Video I*, the Court again made clear that it was sustaining the challenged regulation—requiring cable companies to originate their own programming—only because of its connection to the Commission's Title III authority over broadcasting. A four-Justice plurality agreed with the Commission that the challenged rule would "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 Because the regulation "preserve[d] and enhance[d] the integrity of broadcast signals" it satisfied *Southwestern Cable*, i.e., it was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the *regulation of television broadcasting."*. . .

The teaching of *Southwestern Cable* [and] *Midwest Video I* . . . —that policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority—derives from the "axiomatic" principle that "administrative agencies may [act] only pursuant to authority delegated to them by Congress." Policy statements are just that—statements of policy. They are not delegations of regulatory authority. . . .

B.

This brings us to the second category of statutory provisions the Commission relies on to support its exercise of ancillary authority. Unlike section 230(b) and section 1, each of these provisions could at least arguably be read to delegate regulatory authority to the Commission. [The Court, nonetheless, ruled that none of the statutory provisions

cited by the FCC in fact gave it the authority to regulate internet service directly.]

V.

It is true that "Congress gave the [Commission] broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies." It is also true that "[t]he Internet is such a technology," indeed, "arguably the most important innovation in communications in a generation." Yet notwithstanding the "difficult regulatory problem of rapid technological change" posed by the communications industry, "the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer . . . Commission authority." Because the Commission has failed to tie its assertion of ancillary authority over Comcast's Internet service to any "statutorily mandated responsibility," we grant the petition for review and vacate the *Order*.

So ordered.