

## STRANGE BEDFELLOWS: NETWORK NEUTRALITY'S UNIFYING INFLUENCE†

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I want to talk about something called network (or “net”) neutrality. Let me begin, though, with a story involving short codes. For those unfamiliar with what a short code is, recall the voting process on American Idol and the little code that you can punch into your cell phone to vote for your favorite singer.<sup>1</sup> Short codes are not ten digit numbers; rather, they are more like five or six.<sup>2</sup> In theory, anyone can get a short code. Presidential candidates use short codes in their campaigns to communicate with their followers. For instance, a person could have signed up and Barack Obama would have sent them a message through a short code when he chose Joe Biden as his running mate.<sup>3</sup>

A few years ago, an abortion rights group called NARAL Pro-Choice America wanted a short code to communicate with its own followers.<sup>4</sup> NARAL’s goal was not to send “spam”; instead, the short code was directed to people who agreed with their message.<sup>5</sup> Verizon rejected the idea of a short code for this group because, according to Verizon, NARAL was engaged in “controversial” speech. The *New York Times* printed a front page article about this.<sup>6</sup> Many people who read the story wondered if they really needed a permission slip from Verizon, or from anyone else, to communicate about political things that they care about. In response

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<sup>1</sup> Monica Allevan, *Decoding Short Codes*, WIRELESS WK., Apr. 15, 2007, <http://wirelessweek.com/Archives/2007/04/Decoding-Short-Codes/>.

<sup>2</sup> Common Short Code Admin., Frequently Asked Questions, [http://www.usshortcodes.com/csc\\_faq\\_csc.html](http://www.usshortcodes.com/csc_faq_csc.html) (last visited Apr. 14, 2010).

<sup>3</sup> NIELSEN CO., THE SHORT CODE MARKETING OPPORTUNITY 2–3 (2008), [http://yourmarketingarchitect.com/uploads/Short\\_Code\\_Mktg\\_Opportunity.pdf](http://yourmarketingarchitect.com/uploads/Short_Code_Mktg_Opportunity.pdf).

<sup>4</sup> See Adam Liptak, *Verizon Rejects Text Messages from an Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, at A1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

to the public outrage, Verizon essentially said that its employees just made a mistake.<sup>7</sup> It was all a big misunderstanding. No need to worry.

Soon thereafter, the *Washington Post* featured an op-ed by NARAL in favor of freedom of speech; co-signing on the piece was the Christian Coalition.<sup>8</sup> The underlying message was that both sides care about freedom of speech and communicating with their followers; they cared about this right both for their organizations and for people who don't agree with them.<sup>9</sup> Often you will find strange bedfellows on free speech issues who are on opposing sides of another issue—both care about having a fair chance to convince the public that they're right.<sup>10</sup>

That case did not involve network neutrality, but it involved a very similar idea—whether you need permission from each and every phone and cable company to communicate as you choose, about what you choose, with whomever you choose.

In exploring the idea of net neutrality, we can begin with one of the main cases that we handled when I was a lawyer at Free Press. I am now a law professor at the University of Nebraska, where I teach cyberlaw, cyberwarfare law, and domestic and international telecommunications law. At Nebraska's law school, we have a J.D. and a post-J.D. LL.M. program in space and telecommunications law, which is partly inspired by U.S. Strategic Command being down the street in Omaha. Strategic Command has jurisdiction over space warfare and cyberwarfare, and the Air Force sends their Judge Advocate General lawyers who advise the "cyber" war commands to our program to study the laws applying to cyberwar. Others join the program for the private sector aspects of space or cyber, or media, law. But before I became a professor, I was the head lawyer of an amazingly effective organization called Free Press.

Free Press is an advocacy group with 500,000 activists that works on media reform and open Internet issues. It aims to foster a movement

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<sup>7</sup> See Adam Liptak, *In Reversal, Says it Will Allow Group's Texts*, N.Y. TIMES, Sept. 28, 2007, at A20.

<sup>8</sup> Nancy Keenan & Roberta Combs, Op-Ed., *Can You Hear Us Now?*, WASH. POST, Oct. 17, 2007, at A17.

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., Steve Carney, *Air America Flies Back to Southland*, L.A. TIMES, Jan. 20, 2005, at E5 (reporting that Clear Channel Communications, a renowned conservative radio talk-show distributor, agreed to distribute Air America Radio shows—shows that are patently liberal—to Los Angeles after the Air America shows were "unceremoniously yanked off the air"); Nat Hentoff, *Saving Free Speech and Jesus*, VILLAGE VOICE, Apr. 3, 2007, <http://www.villagevoice.com/2007-04-03/news/saving-free-speech-and-jesus/> (stating that conservative legal organizations such as the American Center for Law and Justice and Alliance Defense Fund joined with the American Civil Liberties Union and Feminists for Free Expression in support of a student's fight to unfurl a "Bong Hits 4 Jesus" banner in *Morse v. Frederick*, 551 U.S. 393 (2007)).

around democracy issues by getting the public involved with twenty-first century speech tools like mass media and Internet technologies.<sup>11</sup> The first big case we worked on was in 2002 and 2003 when the Federal Communications Commission (“FCC”), the nation’s communications regulator, was considering relaxing ownership rules over broadcast stations.<sup>12</sup> Previously, there was a rule in place that said a company could not own a TV station and a newspaper in the same town,<sup>13</sup> and we thought that this was a good rule because it promoted diverse ownership of news media in local areas. Because we wanted the public involved, we encouraged hearings across the country.<sup>14</sup> We wanted the FCC to travel the country and talk about these rule changes, and we encouraged the public to file comments in the docket at the FCC.<sup>15</sup> While the FCC did not travel the country, some Commissioners did. Around two million people filed,<sup>16</sup> and alliances formed, the likes of which included the Conference of Catholic Bishops, the United Church of Christ, and the National Rifle Association.<sup>17</sup> There were many groups who all agreed on the same thing—a more diverse media—and fought side-by-side for this issue.<sup>18</sup>

To me, network neutrality has always been a free speech issue.<sup>19</sup> It is important to understand the concept of net neutrality and how it is linked with media power and the rights of individuals to speak. Typically, a person is accustomed to the Internet working in this fashion: after paying a monthly fee, a person uses a phone or cable line to connect to the Internet, where that person can then go to whatever website he or she wants. On the Internet, people can comment on Facebook photos, “tweet,” read their favorite blogs, comment on their least favorite blogs,

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<sup>11</sup> Originating in 2002, Free Press is currently the “largest media reform organization in the United States” and actively “promote[s] diverse and independent media ownership, strong public media, quality journalism, and universal access to communications.” Free Press, Free Press and the Free Press Action Fund, [http://www.freepress.net/about\\_us](http://www.freepress.net/about_us) (last visited Apr. 14, 2010).

<sup>12</sup> Cheryl Leanza & Harold Feld, *More Than “a Toaster with Pictures”*: Defending Media Ownership Limits, 21 COMM. LAW., Fall 2003, at 12, 12.

<sup>13</sup> 47 C.F.R. § 73.860 (2009).

<sup>14</sup> CTR. FOR INT’L MEDIA ACTION, THE MEDIA POLICY ACTION DIRECTORY 3–4 (2003), [http://mediaactioncenter.org/files/directory\\_onscreen.pdf](http://mediaactioncenter.org/files/directory_onscreen.pdf).

<sup>15</sup> See *id.* at 1, 3–4.

<sup>16</sup> Press Release, Fed. Comm’n’s Comm’n., FCC Commissioner Adelstein Dissents from Media Ownership Decision (July 2, 2003), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-236095A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-236095A1.pdf).

<sup>17</sup> CTR. FOR INT’L MEDIA ACTION, *supra* note 14, at 57–60.

<sup>18</sup> See generally Jim Puzanghera, *Bad Reviews Pile Up for FCC Chief’s Plan*, L.A. TIMES, Nov. 19, 2007, at C1 (commenting on the FCC’s failure to overcome opposition to proposed rule changes in 2003).

<sup>19</sup> Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 274–83 (2009).

create their own sites, or invent their own technologies and put them on display or out for sale. People do not need permission from Verizon, AT&T, Comcast, or any other Internet service provider (“ISP”) to do these things on the Internet. This is the historical understanding of the Internet based on long-recognized standards, its creation by the government and the military, and based on certain regulations in place until about 2005.<sup>20</sup>

In 2005, there were some changes in FCC rules that permitted the phone and cable industry to gain market power and then leverage it.<sup>21</sup> Essentially, most Americans can now choose between a phone company or a cable company for local high-speed Internet. This is because the FCC did not apply the old dial-up rules—permitting consumers to choose any independent ISP from AOL to Earthlink or Juno—to higher-speed DSL and cable service.<sup>22</sup> Without these rules, the cable and phone companies can dominate Internet access, and consumers will have nowhere else to turn. At the end of 2005, the CEO of AT&T, Ed Whitacre, spoke about the desire of his company to assert total control over the Internet experience of its consumers. In response to a question regarding new Internet upstarts such as Google and Vonage, Whitacre stated,

How do you think they’re going to get to customers? Through a broadband pipe. Cable companies have them. We have them. Now what they would like to do is use my pipes free, but I ain’t going to let them do that because we have spent this capital and we have to have a return on it. So there’s going to have to be some mechanism for these people who use these pipes to pay for the portion they’re using. Why should they be allowed to use my pipes?

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<sup>20</sup> See Richard S. Whitt & Stephen J. Schultze, *The New “Emergence Economics” of Innovation and Growth, and What It Means for Communications Policy*, 7 J. ON TELECOMM. & HIGH TECH. L. 217, 250–56 (2009). For a more in-depth discussion of the Internet’s regulatory history, see, for example, Robert Cannon, *The Legacy of the Federal Communications Commission’s Computer Inquiries*, 55 FED. COMM. L.J. 167, 204–05 (2003) (providing a brief outline of significant landmarks in Internet history); Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587, 597–600 (2004) (discussing Internet creation and corresponding FCC regulation).

<sup>21</sup> See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1000–03 (2005); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14,853, 14,858, 14,865 (2005).

<sup>22</sup> See *Appropriate Framework for Broadband Access*, 20 F.C.C.R. at 14,872–76; see also Susan Crawford, Op-Ed., *An Internet for Everybody*, N.Y. TIMES, Apr. 11, 2010, at WK12 (describing the change and impact of the FCC’s 2005 classification of Internet access services as “information services”).

The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! . . . or Vonage or anybody to expect to use these pipes [for] free is nuts!<sup>23</sup> AT&T had already been paid along the way—by consumers and backbone ISPs delivering content—but still wanted to be able to charge extra for Vonage and Google. Why Vonage? Vonage is a phone company online that competes with AT&T's phone company offline.<sup>24</sup> Thus, Whitacre's position seemed anticompetitive. A few weeks later, Verizon General Counsel John Thorne said something very similar: "The network builders are spending a fortune constructing and maintaining the networks that Google intends to ride on with nothing but cheap servers . . . [Google] is enjoying a free lunch that should . . . be the lunch of the facilities providers."<sup>25</sup>

These ideas bothered a lot of us at Free Press. We did not like the idea of Verizon, Comcast, or AT&T—or anyone else—being able to interfere with certain websites, or charge extra fees for accessing certain websites. Americans should be free to access sites, to speak, and to listen online, without intermediaries asserting control. Our democracy would benefit from having an Internet where, if a person wanted to go to the Barack Obama website or the John McCain website and join any group he or she wanted online, that person would not need to get permission from anyone. The issue went beyond speech to economic innovation. The major cable and phone companies wanted to be able to determine who would be the winners and losers on the Internet. The nation—especially during the great recession—would benefit from free and vibrant competition driving innovation, where any innovator, from Skype to Vonage, could innovate online and reach an audience.

Network neutrality is the idea that the network shall remain neutral among applications and among different types of speech, rather than be biased by the network owner.<sup>26</sup> Major telecommunication companies, like Verizon and AT&T, should be simply gateways to the Internet rather than gatekeepers. Thus, in 2006 there was a big fight—again, with strange bedfellows—in which the Christian Coalition and

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<sup>23</sup> Matt Stoller, *Bad Faith from AT&T*, Ed Whitacre and Mike McCurry, HUFFINGTON POST, May 2, 2006, [http://www.huffingtonpost.com/matt-stoller/bad-faith-from-att-ed-whi\\_b\\_20237.html](http://www.huffingtonpost.com/matt-stoller/bad-faith-from-att-ed-whi_b_20237.html) (alteration in original).

<sup>24</sup> See BusinessWeek, Vonage Holdings Corp. (VG): Company Description, [http://investing.businessweek.com/research/stocks/snapshot/snapshot\\_article.asp?ticker=VG:US](http://investing.businessweek.com/research/stocks/snapshot/snapshot_article.asp?ticker=VG:US) (last visited Apr. 14, 2010).

<sup>25</sup> Arshad Mohammed, *Verizon Executive Calls for End to Google's 'Free Lunch'*, WASH. POST, Feb. 7, 2006, at D1.

<sup>26</sup> See Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 145–46 (2003); Save the Internet, Frequently Asked Questions, <http://www.savetheinternet.com/faq> (last visited Apr. 14, 2010) [hereinafter Save the Internet, FAQs] (follow "What is Net Neutrality?" hyperlink).

MoveOn.org took out a joint advertisement in the *New York Times* in favor of net neutrality.<sup>27</sup>

At the time, Free Press, along with hundreds of other organizations, created Save the Internet, which aimed to preserve net neutrality in a congressional debate over this issue.<sup>28</sup> The nonlawyers at Free Press created a video to introduce people to the idea:

The way the Internet works today, everyone is connected to each other through the same level playing field. But a handful of phone and cable companies want to change all that. They want to lock down parts of the Web and make sites pay them more money to use it. Everyone else will get the slow lane. How will they do that? By killing one of the Internet's founding principles—net neutrality. . . .

You connect to the Web through pipes owned by telephone and cable companies. But the deal is they're not allowed to mess with what's inside those pipes— whether it's Google or Yahoo, Lonely Girl or Bill O'Reilly, everyday citizens or business tycoons. Everybody's website gets the same speed and quality. That's called net neutrality. . . . The companies want to set up a restricted fast lane on the Internet—but only for their partners and services, only sites who pay them a huge fee would be allowed to use it—making them gatekeepers.<sup>29</sup>

The Internet is not something that Comcast or AT&T create and deliver to you. It consists of interconnected networks. For example, if a person types in “www.stanford.edu” into a browser window, he or she can access information on Stanford's network because that network interconnects with other networks, using the same standards to communicate. Rather than each network being a local network available only locally, networks agree to connect with other networks and be universally available.<sup>30</sup> Phone and cable companies do not create the Internet and have created little of the things you like on the Internet—from Facebook to Google to Twitter to email. They simply provide access to all these other networks.

In enabling all these networks to interconnect, the Internet has been a general purpose network. That is, it can be used for any purpose.

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<sup>27</sup> When it Comes to Protecting Freedom, the Christian Coalition and MoveOn Respectfully Agree, <http://www.moveon.org/r/?r=1868> (last visited Apr. 14, 2010); see also *Keeping a Democratic Web*, Editorial, N.Y. TIMES, May 2, 2006, at A26 (detailing the unity of interest in the net neutrality debate between organizations that are traditionally on opposite sides of issues).

<sup>28</sup> See Save the Internet, Join Us, <http://www.savetheinternet.com/about> (last visited Apr. 14, 2010); Save the Internet, Members, <http://www.savetheinternet.com/members> (last visited Apr. 14, 2010).

<sup>29</sup> Save the Internet, FAQs, *supra* note 26 (follow “What is Net Neutrality?” hyperlink; then play video).

<sup>30</sup> See JOHN R. LEVINE & MARGARET LEVINE YOUNG, THE INTERNET FOR DUMMIES 9–10 (12th ed. 2010).

In that way, it resembles an electricity grid—so long as you can plug in through a common standard. When a person buys a refrigerator, the refrigerator works when you plug it into an electrical outlet. A person does not have to get permission from the electrical company to plug in certain refrigerators, or cut special deals based on the appliance he or she uses. That is a good thing for our economy and our freedom, though it may be a bad thing for a few executives at power companies.

In 2005, the FCC did not adopt a net neutrality principle. As I noted, the FCC reversed some rules for high-speed Internet industry that could have promoted competition.<sup>31</sup> Curiously, the FCC Chairman at the time, Kevin Martin, decided to issue a policy statement stating the goal to protect an open Internet through the preservation of four key principles that affirm the freedom of consumers to (1) access all content, (2) use applications of their choice, (3) attach any device, and (4) obtain useful service plan information.<sup>32</sup> Despite this policy statement, debate broke out immediately—before the end of the year.<sup>33</sup>

Finally, in 2007, the most important net neutrality violation occurred. The largest cable company, Comcast, was caught blocking and degrading BitTorrent, a popular new technology.<sup>34</sup> BitTorrent is used to download movies—sometimes illegally.<sup>35</sup> It is also used by many legal video distributors and start-up businesses; even ABC.com uses this kind of technology.<sup>36</sup> NASA uses BitTorrent for distributing high definition images of the earth, and it has devoted a whole page to describing the technology.<sup>37</sup> Software developers use it to distribute games and open

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<sup>31</sup> Stephen Labaton, *F.C.C. Eases High-Speed Access Rules*, N.Y. TIMES, Aug. 6, 2005, at C1.

<sup>32</sup> Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14,986, 14,988 (2005); Press Release, Fed. Comm'n's Comm'n, FCC Adopts Policy Statement: New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet (Aug. 5, 2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-260435A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf).

<sup>33</sup> Steve Anderson, *The Battle Over Net Neutrality Continues*, in PETER PHILLIPS ET AL., CENSORED 2008: THE TOP 25 CENSORED STORIES OF 2006–2007, at 149, 149–52 (2007).

<sup>34</sup> See Nicholas Carr, *The Price of Free*, N.Y. TIMES, Nov. 15, 2009, § M (Magazine), at 26.

<sup>35</sup> See Andrew Gioia, Note, *FCC Jurisdiction over ISPs in Protocol-Specific Bandwidth Throttling*, 15 MICH. TELECOMM. & TECH. L. REV. 517, 519–21 (2009). *But cf.* Dawn C. Chmielewski & Meg James, *TV May Be Free but Not That Free: As Downloads Increase, Executives Have to Figure Out How to Convince People It's Stealing*, L.A. TIMES, Mar. 1, 2006, at A1 (labeling the download of “free” television shows through BitTorrent as “piracy”).

<sup>36</sup> See Richard Siklos, *Media Frenzy: Can TV's and PC's Live Together Happily Ever After?*, N.Y. TIMES, May 14, 2006, § 3, at 3; Clive Thompson, *The BitTorrent Effect*, WIRED, Jan. 2005, at 151, 152.

<sup>37</sup> Visible Earth: A Catalog of NASA Images and Animations of Our Home Planet, Frequently Asked Questions, <http://visibleearth.nasa.gov/faq.php#bt1> (last visited Apr. 14, 2010). For a catalog of NASA animations and images using BitTorrent technology, see

software like Linux or Mozilla.<sup>38</sup> BitTorrent is also used by software developers who are sharing software remotely and working together. BitTorrent is simply a good technology for transmitting files, so lots of companies, agencies, and individuals use it.

As a result, BitTorrent could, in theory, enable people to watch high-definition television online and cancel their cable subscription or, at least, buy fewer movies on cable on-demand services. Thus, Comcast was secretly blocking this technology. According to the FCC, this blocking was partly because of an anticompetitive incentive.<sup>39</sup>

In a bipartisan order issued in August 2008, after many months of investigating the Free Press complaint against Comcast, the Republican FCC Chairman and two Democrats voted to sanction Comcast and stop them from interfering with the Internet.<sup>40</sup>

So we have evolved. Today, the principle of net neutrality has proceeded from a mere policy statement to something enforced in adjudication against cable giants like Comcast. Net neutrality was included in the stimulus bill. The bill gave \$7.2 billion to companies that are going to extend Internet capability to unserved areas;<sup>41</sup> companies receiving grants are required to extend the network with a nondiscriminatory, net neutrality principle.<sup>42</sup> The FCC has proposed a net neutrality rule that takes the four principles articulated by former Chairmen Michael Powell and Kevin Martin,<sup>43</sup> and applying those rules to both wireless and wireline networks.<sup>44</sup> This proposed application clearly encompasses *any* means of accessing the Internet. Yet the fight continues. Free Press and other network neutrality proponents were

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Visible Earth: A Catalog of NASA Images and Animations of Our Home Planet, <http://visibleearth.nasa.gov/> (last visited Apr. 14, 2010).

<sup>38</sup> See, e.g., MARK G. SOBELL, A PRACTICAL GUIDE TO LINUX COMMANDS, EDITORS, AND SHELL PROGRAMMING 855–58 (2005) (outlining the use of BitTorrent with Linux).

<sup>39</sup> Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., 23 F.C.C.R. 13,028, 13,028–33 (2008); accord Scott Woolley, *Telecom Knockout*, FORBES, Oct. 13, 2008, at 64, 66.

<sup>40</sup> *Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp.*, 23 F.C.C.R. at 13,059–61; Jim Puzanghera, *Comcast Rebuked by FCC: Net Neutrality Backers Cheer the Order to Stop Blocking File Sharing*, L.A. TIMES, Aug. 2, 2008, at C2.

<sup>41</sup> American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, div. A, tits. I–II, 123 Stat. 115, 118, 128.

<sup>42</sup> *Id.* div. B, tit. VI, §§ 6000–01, 123 Stat. at 512–16 (to be codified at 47 U.S.C. § 1305); accord Brad Reed, *Broadband Stimulus Funding Timeline Set by Government*, NETWORK WORLD, Mar. 10, 2009, <http://www.networkworld.com/news/2009/031009-broadband-stimulus-timeline.html>; Brad Reed, *Net Neutrality Debate Spills over to Broadband Stimulus*, PC WORLD, Mar. 24, 2009, [http://www.pcworld.com/businesscenter/article/161844/net\\_neutrality\\_debate\\_spills\\_over\\_tt\\_broadband\\_stimulus.html](http://www.pcworld.com/businesscenter/article/161844/net_neutrality_debate_spills_over_tt_broadband_stimulus.html).

<sup>43</sup> See *supra* note 32 and accompanying text.

<sup>44</sup> *F.C.C. Proposes Rules That Support Net-Neutrality*, N.Y. TIMES, Sept. 22, 2009, at B3.



disappointed with the FCC's proposal, which had some potentially major loopholes.<sup>45</sup> In its Comcast decision, the FCC relied on a certain kind of residual jurisdiction,<sup>46</sup> but the D.C. Circuit recently invalidated that reliance and vacated the FCC's order in our case.<sup>47</sup> But the FCC has signaled it will move forward to address those jurisdictional issues.<sup>48</sup> And we hope they will do so carefully, without adopting loopholes.

Net neutrality is good for America. Net neutrality is not, as some opponents have argued, “the [F]airness [D]octrine for the Internet.”<sup>49</sup> The Fairness Doctrine is the idea that aims to regulate the speech of a few powerful radio or TV companies in order to make their speech balanced or fair.<sup>50</sup> I oppose the Fairness Doctrine, and I encourage people to oppose it as well.<sup>51</sup> Net neutrality is totally different—it is the idea that anyone can speak and have an open platform. There is no regulation for balance; instead, everyone can speak and let the open market choose the winners and losers.

But network neutrality is a regulation, and how can we defend *any* regulation? Some government regulations are good. For example, someone who wakes up at the Westin Hotel, as I did on the morning of the Symposium, can be reasonably assured that the hotel probably complies with the fire code, and if there had been a fire, I would have been properly warned. If I went downstairs and enjoyed a breakfast of eggs and salmon, I could be reasonably assured that the kitchen in which it was prepared could get inspected and that the food was not left out all night. When a driver picked me up after breakfast, I did not have to ask the nice Regent law student if he had a license to drive. I did not need to inspect the car for seatbelts. I was reasonably sure that the car would not have blown up if we had crashed—thanks to regulations. Many people appreciate regulations preventing toxic waste disposal in a drinking water source. Most people approve of child porn regulation.

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<sup>45</sup> Biggest Net Neutrality Boosters Question FCC Proposal, [http://voices.washingtonpost.com/posttech/2009/11/cisco\\_a\\_company\\_that.html](http://voices.washingtonpost.com/posttech/2009/11/cisco_a_company_that.html) (Nov. 2, 2009, 08:00 EST).

<sup>46</sup> See Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., 23 F.C.C.R. 13,028, 13,033–44 (2008); Posting of Marvin Ammori to Balkinization, <http://balkin.blogspot.com/2010/04/how-i-lost-big-one-bigtime.html> (Apr. 7, 2010, 11:51 EST).

<sup>47</sup> Comcast Corp. v. FCC, No. 08-1291, slip op. at 36 (D.C. Cir. Apr. 6, 2010).

<sup>48</sup> Posting of Austin Schlick to Blogbland, <http://blog.broadband.gov/?entryId=356610> (Apr. 7, 2010).

<sup>49</sup> *Contra* Posting of Kim Hart to Hillicon Valley, Blackburn: Net Neutrality is ‘Fairness Doctrine for the Internet’, <http://thehill.com/blogs/hillicon-valley/605-technology/63875-blackburn-net-neutrality-is-ffairness-doctrine-for-the-internetq> (Oct. 20, 2009, 11:07 EST) (quoting Tennessee Congresswoman Marsha Blackburn).

<sup>50</sup> See Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1257–58 (1949).

<sup>51</sup> See Marvin Ammori, *The Fairness Doctrine: A Flawed Means to Attain a Noble Goal*, 60 ADMIN. L. REV. 881, 882–83, 885–89 (2008).

Thus, there are some regulations that are obviously good and pro-consumer.

There are also other types of regulations that are good because they promote competition. Regardless of one's thoughts about regulation, I tend to think competition is a wonderful thing—it helps allocate resources to their highest use, lowers prices, and leads to innovation. Think of places without competition. There is no choice of Internet connections at places like the Westin, which are then able to charge ten dollars a day for an Internet connection. Competitors, however, can lower the price—they can be competitive.<sup>52</sup>

Why do we need regulation for competition in the telecom space? Essentially, the cost structure means that there will be very few networks that will be laid out to compete with one another. The phone and cable networks were built long ago under the protection of state-sanctioned monopoly and guaranteed rates of return.<sup>53</sup> Phone and cable networks could not be built in a competitive environment because of the cost structure. The electricity grid operates the same way—it is very hard to get more and more competitors in.<sup>54</sup>

Net neutrality does not increase competition among networks—that is a nearly impossible task, considering the cost structures. Network neutrality does increase competition among applications riding on top of the Internet. The Carterfone decision, which was created in the 1960s, helps to illustrate the point.<sup>55</sup> In the 1960s, AT&T was the only phone company, and the phone was actually hard-wired into the wall. People rented a phone from AT&T—the same way a person rents a cable modem from his or her cable provider today. Back at that time, there was a recognition that regulation was necessary. Even though we could not have competition among phone companies—there were not dozens of them—we *could* have competition among devices. As a result, the standard phone jack was created, largely through regulation, and suddenly you had phones that were not just the black or the blue ones

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<sup>52</sup> See, e.g., MARVIN AMMORI, FREE PRESS, TV COMPETITION NOWHERE: HOW THE CABLE INDUSTRY IS COLLUDING TO KILL ONLINE TV 2 (2010), <http://www.freepress.net/files/TV-Nowhere.pdf>.

<sup>53</sup> See, e.g., AT&T, A Brief History: The Bell System, <http://www.corp.att.com/history/history3.html> (last visited Apr. 14, 2010) (detailing the history of the AT&T phone company and describing its “function[] as a legally sanctioned, regulated monopoly”).

<sup>54</sup> See ELEC. ENERGY MKT. COMPETITION TASK FORCE, FED. ENERGY REGULATORY COMM’N, DRAFT REPORT OF ELECTRIC ENERGY MARKET COMPETITION TASK FORCE 2 (2006), available at <http://www.ftc.gov/os/2006/06/FERCDocketNoAD05-17-000EEMCTFandFERCNoticeRequestingComments.pdf> (“Federal and several state policymakers generally introduced competition in the electric power industry to overcome the perceived shortcomings of traditional cost-based regulation.”).

<sup>55</sup> Ryan Singel, *Skype, Wireless Companies Fight to Shape Net Neutrality Regs*, WIRED, Jan. 15, 2010, <http://www.wired.com/epicenter/2010/01/skype-ctia-net-neutrality/>.

from AT&T. There was the Mickey Mouse phone, or the hamburger phone we all saw in the movie *Juno*. People could have fax machines and plug in a modem, giving birth to the Internet.<sup>56</sup> Once we got competition where we could, in devices, there was vibrant competition and lots of choice. One of the reasons why the Department of Justice under President Reagan broke up AT&T was to try to get competition where they could find it—in long distance—even if they couldn't at the network level.<sup>57</sup> This is the same model we should have on the Internet: limited competition in networks, if we face facts, but vibrant competition and free choice in applications and content.

Today there's a debate over net neutrality. Congressmen often don't know much about new media or new technology, but many other people do. You young folks, you future leaders, use technology and understand it better than Ted Stevens, who, when he was chairman of the Senate Committee on Commerce, Finance, and Transportation, called the Internet "not a dump . . . truck" but a "series of tubes."<sup>58</sup> To better educate our representatives, your voice should be heard in D.C. during this debate. Congress and the FCC shouldn't hear only from the most powerful, well-paid lobbyists of powerful media and telecom corporations.

Comments are being accepted right now. If want to preserve what you love about the Internet, you should get involved and make your voice heard. A good way to do that is to use the Internet to communicate with the government and to organize support among your friends and acquaintances. In short, you can use the Internet to save the Internet, before it's too late.

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<sup>56</sup> *Id.*

<sup>57</sup> A. Douglas Melamed, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Network Industries and Antitrust, Address Before The Federalist Society, The Eighteenth Annual Symposium on Law and Public Policy: Competition, Free Markets and the Law 8 (Apr. 10, 1999), available at <http://www.justice.gov/atr/public/speeches/2428.pdf>.

<sup>58</sup> Ken Belson, *Senator's Slip of the Tongue Keeps on Truckin' Over the Web*, N.Y. TIMES, July 17, 2006, at C5; YouTube, Series of Tubes, <http://www.youtube.com/watch?v=f99PcP0aFNE> (last visited Apr. 14, 2010) (at two minutes and fifteen seconds into recording).