



## Net Neutrality, Slippery Slopes & High-Tech Mutually Assured Destruction

by Berin Szoka & Adam Thierer

Ten years ago, Nobel Prize-winning economist Milton Friedman lamented the “[Business Community’s Suicidal Impulse](#),” the persistent propensity to persecute one’s competitors through regulation or the threat thereof. Friedman asked: “Is it really in the self-interest of Silicon Valley to set the government on Microsoft?”<sup>1</sup> After yesterday’s [FCC vote’s to open a formal “Net Neutrality” rule-making](#), we must ask whether the high-tech industry—or consumers—will benefit from inviting government regulation of the Internet under the mantra of “neutrality.”

The hatred directed at Microsoft in the 1990s has more recently been focused on the industry that has brought broadband to Americans’ homes (Internet Service Providers) and the company that has done more than any other to make the web useful (Google). Both have been attacked for exercising supposed “gatekeeper” control over the Internet in one fashion or another. They are now turning their guns on each other—the first strikes in what threatens to become an all-out, thermonuclear war in the tech industry over increasingly broad neutrality mandates. Unless we find a way to achieve “Digital Détente,” the consequences of this increasing regulatory brinkmanship will be “mutually assured destruction” (MAD) for industry and consumers.

### New Fronts in the Neutrality Wars

The FCC’s [proposed rules](#) would apply to all broadband providers, including wireless, but not to Google or many other players operating in other layers of the Net who favor such broadband-specific rules.<sup>2</sup> With this rulemaking looming, AT&T came after Google with letters to the FCC [in late September](#) and then [another last week](#) accusing the company of violating neutrality principles in their business practices and arguing that any neutrality rules that apply to ISPs should apply equally to Google’s panoply of popular services. In particular, AT&T accused Google of “search engine bias,” suggesting that only government-enforced neutrality mandates could protect consumers from Google’s supposed “monopolist” control.

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1. Milton Friedman, *The Business Community’s Suicidal Impulse*, Cato Policy Report, March/April 1999, Vol. 21, No. 2, [www.cato.org/pubs/policy\\_report/v21n2/friedman.html](http://www.cato.org/pubs/policy_report/v21n2/friedman.html).

2. *Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, FCC 09-93, Oct. 22, 2009, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-09-93A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.doc).

The promise made yesterday by the FCC—to only apply neutrality principles to the infrastructure layer of the Net—is hollow and will ultimately prove unenforceable. The reality is that regulation *always* spreads. The march of regulation can sometimes be glacial, but it is, sadly, almost inevitable: Regulatory regimes grow but almost never contract. Indeed, in some ways, the [prediction we made](#) just three weeks ago is already coming true: The basic premise of neutrality regulation is already being proposed for other layers of the Internet—and not just by AT&T in retaliation. One need not agree with all of AT&T’s accusations to recognize that, whatever the FCC might say today, any large online intermediary with a popular platform potentially faces the threat of “network neutrality” mandates—because every platform is essentially a “network,” too. We’re not just talking about “search neutrality” (Google as well as Microsoft) but also about “device neutrality” (mobile handsets), “app neutrality” (Apple’s iTunes store, Facebook’s developers and Google’s Android mobile OS) and so on for social networking, email, instant messaging, online advertising, *etc.*

An [open letter](#) sent to FCC Chairman Julius Genachowski this week by 28 founders and CEOs of leading application providers—including Amazon, Google, Facebook, Netflix, Craigslist, Sony and Twitter—speaks generally about the need for the FCC to enforce a “guarantee of neutral, nondiscriminatory access by users.” While many of these signatories may have in mind ISPs as the network “gatekeepers” that need to be reined in by the FCC, the more successful among them are likely to find this letter used against them in the future—perhaps even by co-signatories—to advance a broad conception of what the government must do to ensure “openness” and “access” for platforms at *all* layers of the Internet.

### Dumb Networks, Dumb Devices

The intellectual foundations for this regulatory creep have already been laid by groups like [Free Press](#) and [Public Knowledge](#) and law professors like Columbia’s [Tim Wu](#), Harvard’s [Jonathan Zittrain](#) and Seton Hall’s [Frank Pasquale](#). As [originally conceived](#) by Tim Wu in 2003, “network neutrality” is not [unique to broadband](#) networks: “the basic economic problem found in the network neutrality debate (a form of ‘platform exclusion’ or ‘vertical foreclosure’) can be found in many other markets.” Indeed, Wu’s popular [Net Neutrality FAQ](#) declares:

The promotion of network neutrality is no different than the challenge of promoting fair evolutionary competition in any privately owned environment, whether a telephone network, operating system, or even a retail store. Government regulation in such contexts invariably tries to help ensure that the short-term interests of the owner do not prevent the best products or applications becoming available to end-users.<sup>3</sup>

Zittrain picked up where Wu left off in [The Future of the Internet and How to Stop It](#)—attacking, as the enemies of innovation, not ISPs but the supposedly “closed” platforms of Apple, TiVo and Microsoft’s Xbox. Zittrain warns that:

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3. [http://www.timwu.org/network\\_neutrality.html](http://www.timwu.org/network_neutrality.html).

If there is a present worldwide threat to neutrality in the movement of bits, it comes not from restrictions on traditional Internet access that can be evaded using generative PCs, but from enhancements to traditional and emerging applanicized services that are not open to third-party tinkering.<sup>4</sup>

Zittrain's general solution is "API [Applications Programming Interface] neutrality." If you create a platform (whether hardware or software) and begin allowing third-party contributions ("generativity"), you will lose all control over devices or applications that can run on that platform.

Those who offer open APIs on the Net in an attempt to harness the generative cycle ought to remain application-neutral after their efforts have succeeded, so all those who built on top of their interface can continue to do so on equal terms....  
***[N]etwork neutrality ought to be applied to the new platforms of Web services that, in turn, depend on Internet connectivity to function.***<sup>5</sup>

Clearly, if Zittrain and his allies have their way, the sort of neutrality mandates envisioned by the FCC or [some Congressmen](#) for ISPs *will* eventually cover companies such as Apple, Google, Facebook, Myspace, Twitter and Amazon—all singled out by Zittrain in a [New York Times op-ed](#) in July:

If the market settles into a handful of gated cloud communities whose proprietors control the availability of new code, the time may come to ensure that their platforms do not discriminate. Such a demand could take many forms, from an outright regulatory requirement to a more subtle set of incentives — tax breaks or liability relief — that nudge companies to maintain the kind of openness that earlier allowed them a level playing field on which they could lure users from competing, mighty incumbents.<sup>6</sup>

Frank Pasquale agrees on the need to restrain all "the dominant players at all layers of online life," but [focuses](#) on his demand for a [Federal Search Commission](#) to control supposedly "biased" search results.<sup>7</sup> While the FCC wrings its hands over "managed services" offered by ISPs, search engines are increasingly offering their own value-added services by "blending" algorithmically-derived results with special features like maps, videos, books or [music](#) depending on what the search term suggests the user is interested in. "Artificially" ensuring that these features appear on the first page of search results is clearly non-neutral, and necessarily involves search engines making "managed" decisions as to *whose* features to

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4. Jonathan Zittrain, *The Future of the Internet and How to Stop It* (2008), at 181.

5. *Id.* at 184-185 (emphasis added).

6. Jonathan Zittrain, *Lost in the Cloud*, *New York Times*, July 19, 2009, [www.nytimes.com/2009/07/20/opinion/20zittrain.html](http://www.nytimes.com/2009/07/20/opinion/20zittrain.html).

7. Frank Pasquale, *Internet Nondiscrimination Principles for Competition Policy Online*, Testimony before the Task Force on Competition Policy and Antitrust Laws of the House Committee on the Judiciary, July 15, 2008, at 14, <http://judiciary.house.gov/hearings/pdf/Pasquale080715.pdf>.

include. Yet such features also clearly benefit users—dramatically improving the usefulness of search engines and helping to sustain struggling business models like music retailing.

But one need not resort to the works of “ivory tower” academics to see the slippery slope we’re already tumbling down with the infinitely elastic principle of “neutrality.” The prospect of the FCC gradually transforming into a “[Federal Information Commission](#)” becomes more apparent when one reads the [Wireless Innovation and Investment Notice of Inquiry](#) recently released by the FCC:

As other approaches, such as cloud computing, evolve, will established standards or de facto standards become more important to the applications development process? For example, can a dominant cloud computing position raise the same competitive issues that are now being discussed in the context of network neutrality? Will it be necessary to modify the existing balance between regulatory and market forces to promote further innovation in the development and deployment of new applications and services?<sup>8</sup>

One can imagine how some might use such language to accuse Google of being in “a dominant cloud computing position” such that “the context of network neutrality” will be applied to cloud service (like Google Voice) to “modify the existing balance between regulatory and market forces” through regulation. Indeed, that’s precisely [what AT&T has suggested](#) in recent letters ([September 25<sup>th</sup>](#) and [October 14<sup>th</sup>](#)) to the FCC.

AT&T’s partner Apple has already been the subject of such attacks for its decision to block the Google Voice app earlier this summer. The incident marked the beginning of open warfare between Google and AT&T/Apple. The FCC quickly jumped into the mix, first [questioning](#) how Apple manages its iTunes apps store for the iPhone, then [questioning](#) how Google runs its free Voice application. What legal authority the FCC has over either service is [far from clear](#), but Apple seems to have gotten the message: It recently approved the Spotify music streaming app for the iPhone, which could be a serious competitive threat to the iTunes music store. This small incident highlights how easily regulators can impose their will through informal mechanisms like open-ended investigations even without clear authority to issue rules or bring enforcement actions. Yet none dare call it what it is: regulatory blackmail.

### **The Inevitability of Regulatory Capture**

No doubt, other industry players will cheer on such regulatory harassment of the titans of tech—and maybe even demand more of it. Regulatory creep is driven by more than the self-interests of every bureaucracy to expand its own mission, budget and staff. As the Electronic Frontier Foundation has [noted](#), “Experience shows that the FCC is particularly vulnerable to regulatory capture.” While lobbyists play an important role in defending business from government, all too many businesses naively look at government as a beast that can be tamed, trained, and turned to one’s own advantage, and often try to use the expanding regulatory

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8. *Fostering Innovation and Investment in the Wireless Communications Market*, Notice of Inquiry, GN Docket No. 09-157, GN Docket No. 09-51, GN Docket No. 09-51 (rel Aug. 27, 2009).

apparatus to their own advantage or simply throw their competitors under the bus to save themselves. The result is a Hobbesian regulatory “war of all against all” within industry.

As Professor Alfred E. Kahn explained in his 2-volume opus, *The Economics of Regulation*, all regulation—however high-minded—is inevitably captured by special interests because:

When a commission is responsible for the performance of an industry, it is under never completely escapable pressure to protect the health of the companies it regulates, to assure a desirable performance by relying on those monopolistic chosen instruments and its own controls rather than on the unplanned and unplannable forces of competition. [...] Responsible for the continued provision and improvement of service, [the regulatory commission] comes increasingly and understandably to identify the interest of the public with that of the existing companies on whom it must rely to deliver goods.<sup>9</sup>

If Internet regulation follows the same course as other industries, the FCC and/or lawmakers will eventually indulge calls by *all* sides to bring more providers and technologies “into the regulatory fold.” Clearly, this process has already begun. Even before rules are on the books, the companies that have made America the leader in the Digital Revolution are turning on each other in a dangerous game of brinksmanship, escalating demands for regulation and playing right into the hands of those who want to bring the entire high-tech sector under the thumb of government—under an Orwellian conception of “Internet Freedom” that makes corporations the real Big Brother, and government, our savior.

### **Toward a Less MAD World: Digital Détente**

Sincere defenders of *real Internet Freedom*—that is, freedom *from* government techno-meddling—recognize that there will always be disputes over how companies deal with each other online across all layers of the Internet. The question is not whether we need a technical coordinating mechanism for handling such disputes. Someone *should* mediate conflicts over alleged deviations from abstract neutrality principles. But should that arbitrator be an inherently political body like FCC? Or should we instead look to truly independent, apolitical arbitrators like the [Internet Engineering Task Force](#) or collaborative efforts like the [Network Neutrality Squad](#)? Such alternative dispute resolution mechanisms and fora need not have the power of law to be effective: The weight of their expert opinion, based on careful investigation of the facts, would likely resolve most disputes, because companies have strong reputational incentives to comply with reasoned rulings by truly neutral experts. And the white hot [spotlight of public attention](#) has a way of disciplining marketplace behavior as well.

Government would still have a role to play, of course, in enforcing antitrust laws where anticompetitive harm to consumers can be proven, and in enforcing the promises companies make to consumers. Ultimately, however, certain business models and technologies *require* non-neutral treatment, and the best remedy for concerns about non-neutrality is competition

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9. Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, (Cambridge, MA: The MIT Press, 1971), p. 46.

itself: In the high-tech sector more than any other, disruptive innovation makes it difficult for even the most successful companies to stay on top forever. Competitive entry—or even the threat of new entry—provides a powerful check on the power of so-called “gatekeepers,” but even more important is the prospect that today’s leaders will be tomorrow’s laggards: There’s little reason to think Google (search and advertising), Apple (smart phones and music) and Facebook (social networking) won’t someday find themselves playing catch-up, just as IBM (computers), Microsoft (desktop software and search), Friendster and MySpace (social networking), and Yahoo! and AOL (web portals) have had to do.

“Digital Détente” would require that all parties concede something and work constructively toward a more “peaceful” (*i.e.*, less regulatory) resolution. And yet, no Internet company wants to disarm unilaterally, foreswearing politics as a continuation of competition by other means. Only through multilateral disarmament could they break out of the current cycle of regulatory one-upmanship: If the companies in the Internet ecosystem could form a united front against increased government regulation and in favor of removing existing regulatory obstacles to competition, they could all return to their core competencies of creativity and innovation.

The alternative is a regulatory “nuclear winter”: high-tech titans turning their political fire on each other, catching innocent third parties in the cross-fire and bringing a dark cloud of government regulation over the entire Internet. Such increased regulation would stifle investment and innovation throughout the Internet ecosystem. Thus, it is consumers who will ultimately suffer most from the tech industry’s suicidal impulse, as their choices and digital lives are impoverished. For their sake, we hope all industry players will step back from the brink to avoid such high-tech mutually assured destruction.

### Related PFF Publications

- *The Day Internet Freedom Died*, Progress Snapshot, Adam Thierer & Berin Szoka, Progress Snapshot 5.8, Sept. 2009.
- *‘The Law is Whatever the Nobles Do’: Undue Process at the FCC*, Barbara Esbin & Adam Marcus, CommLaw Conspectus, Summer 2009 Edition, June 2009.
- *Net Neutrality: A Fairness Doctrine for the Internet*, Adam Thierer, Progress Snapshot 3.11, October 2007.
- *A Statement of the DACA Regulatory Framework Working Group*, PFF Joint Project.
- *Net Neutrality or Net Neutering: Should Broadband Internet Services be Regulated?*, Thomas Lenard & Randolph J. May, New York: Springer 2006.

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