

Speech, Democratic Engagement, and the Open Internet

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Thank you for inviting me to participate in this conversation about the Internet and the importance of free speech. The FCC's proposed rulemaking on network neutrality identified four principal issues that frame the debate over this potential policy: (1) promoting investment and innovation, (2) preserving competition and market forces, (3) promoting speech and civic participation, and (4) dealing with network congestion.¹ In light of the focus of today's panel, I will address the third issue involving questions of free expression, although not to offer a constitutional analysis of any particular proposal. My purpose is to offer a few observations about the relationship between the First Amendment and regulatory policy, particularly in light of the historic constitutional treatment of new communications technologies. At the outset I want to make clear that the views I express are mine alone based on my experiences as a student of the First Amendment, as a practitioner in the field of constitutional law, and as a former FCC staff member.

Sitting here today, it almost is difficult to remember a time when the Internet did not exist. It reminds me of the story of the father driving in the car with his son, who is preoccupied the entire time sending text messages to his friends. When the dad chides him about it, and says he doesn't understand the constant texting, the son replies, "C'mon, Dad – it's just like email was for you when you were a kid." Email has become a ubiquitous part of our daily lives, as

¹ *In the Matter of Preserving the Open Internet*, FCC 09-93 (released Oct. 22, 2009) at ¶¶ 60-80.

have the other attributes of the global Internet, including the ability for individuals to communicate instantly around the world. This technology that permits us to post information as text, audio, or video, to engage in social networking, to get involved in political dialogue, and to conduct commercial transactions more efficiently has enhanced the ability of individuals to express themselves as never before.

But the series of revolutionary developments that brought us to where we are today changed not just the nature of human communication. It also has transformed the law, specifically the way in which American courts view new technologies under the First Amendment. This always has been an uneasy relationship. Even though the Framers of the Constitution consciously sought to protect the only mass communication technology of their day – the printing press – from government interference, courts historically were reluctant to extend the same constitutional immunities to other innovations as they were developed. From cinema to broadcasting and from cable TV to satellites, courts were slow to recognize the application of traditional First Amendment principles to new media. Legislators and regulatory agencies created different categories and classifications for communications technologies as they emerged, and courts established different levels of constitutional protection based on those categories.²

Some of us have always believed that this jurisprudential approach never made sense. But to whatever extent it once did, it is entirely untenable in the age of media convergence. In some cases, we have made great progress in extending First Amendment protections to new

² I have attached to this statement a concise overview of this issue that is available at the website of the Freedom Forum's First Amendment Center. For more comprehensive discussions, see Zuckman, Corn-Revere, Frieden, and Kennedy, *MODERN COMMUNICATIONS LAW* 177-281 (West Group 1999) (chapter on First Amendment Traditions and New Communication Technology); Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 *COMM./ENT. L.J.* 247 (1994).

media, while in other cases, we are still working at it. But the Internet is the first communications technology that courts found to be fully protected from the outset. In *Reno v. ACLU*, the Supreme Court could find “no basis for qualifying the level of First Amendment scrutiny that should be applied” to online communication because “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox,” and “[t]hrough the use of Web pages, mail exploders and newsgroups, the same individual can become a pamphleteer.”³

In response to the inevitable government efforts to restrict and regulate Internet speech, courts uniformly treated this unique and wholly new medium of worldwide human communication as the embodiment of the First Amendment in its natural state. More than a decade ago the *Reno* Court found the information available on the Internet to be as “diverse as human thought” with the capability of providing instant access on topics ranging from “the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls.” It compared the World Wide Web to “both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.”⁴ District Judge Stuart Dalzell described the Internet as “a never-ending worldwide conversation” and “the most participatory form of mass speech yet developed.”⁵ He added that “[t]he Internet is a far more speech-enhancing medium than print, the village green, or the mails.”⁶ District Judge Lowell Reed similarly wrote that in “the medium of cyberspace . . . anyone can build a soap box out of web

³ *Reno v. ACLU*, 521 U.S. 844, 851 (1997) (“*Reno I*”).

⁴ *Id.*

⁵ *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J.), *aff’d*, 521 U.S. 844 (1997).

⁶ *Id.* at 882-883.

pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined.”⁷ Another district court, noting that “[i]t is probably safe to say that more ideas and information are shared on the Internet than in any other medium,” suggested that it may be only a slight overstatement to conclude that “the Internet represents a brave new world of free speech.”⁸

Proponents of network neutrality rules argue that the purpose of the regulations would be to preserve the attributes of the Internet that resulted in these historic First Amendment rulings. The paradox, of course, is in arguing that it is necessary to exert federal control over this network of networks in order to keep it free. Just as it sometimes is hard to remember what the world was like before the Internet, it also is difficult for some to appreciate that the greatest threat to Internet freedom following the emergence of the World Wide Web was from federal and state efforts to restrict online speech. After the Supreme Court invalidated the Communications Decency Act in 1997, Congress adopted the Child Online Protection Act, which it defended in court for over a decade, until earlier this year, when the Supreme Court denied final review.⁹ A number of states followed in the federal government’s footsteps, adopting “mini-CDA’s,” all of which likewise were struck down.¹⁰

⁷ *ACLU v. Reno*, 31 F Supp 2d 473, 476 (E.D. Pa. 1999).

⁸ *Blumenthal v. Drudge*, 992 F Supp 44, 48, n. 7 (D.D.C. 1998).

⁹ *ACLU v. Reno*, 31 F Supp 2d 473 (E.D. Pa. 1999), *aff’d*, 217 F3d 162 (3d Cir. 2000), *rev’d and remanded sub nom. Ashcroft v. ACLU*, 535 U.S. 564 (2002), *aff’d on remand*, 322 F.3d 240 (3d Cir. 2003), *aff’d and remanded*, 542 U.S. 656 (2004), *on remand*, 478 F. Supp. 2d 775 (E.D. Pa. 2005), *aff’d sub nom. ACLU v. Mukasey*, 534 F.3d 181, 203-04 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

¹⁰ *See PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003); *Cyberspace Comm’ns, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *ACLU v. Napolitano*, Civ. 00-505 (D. Ariz. Feb. 21, 2002); *Am. Bookseller’s Found. v. Strickland*, 512 F.Supp.2d 1082 (S.D. Ohio

Ironically, at the same time Congress was trying to censor the Internet, it also recognized the unregulated benefits that convinced reviewing courts to strike down the restrictions.¹¹ In adopting Section 230 of the Communications Act, Congress found that “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity” and that these attributes “have flourished, to the benefit of all Americans, with a minimum of government regulation.”¹² Accordingly, Congress adopted as “the policy of the United States” preserving “the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”¹³

As if these ironies of the Internet’s regulatory background are insufficient, some now argue that freedom of speech on the Internet is imperiled unless the federal government exerts more expansive regulatory jurisdiction over broadband access. But we have been down this road before with almost every other electronic communications medium. Regulatory authority is imposed – often in the name of free speech values – and in most cases with changes in First Amendment doctrine that increase government control over expression. Arguments supporting

Sept. 24, 2007); *Southeast Bookseller’s Ass’n. v. McMaster*, 371 F. Supp. 2d 773 (D.S.C. 2005); *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004); *Am. Libraries Ass’n. v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

¹¹ The amendment that ultimately was codified as Section 230 of the Communications Act was introduced originally as an alternative to the censorial provisions of the CDA. The amendment included the “Good Samaritan” provision, codified at 47 U.S.C. § 230(c), which encouraged Internet service providers to act “voluntarily and in good faith” to restrict access to objectionable content “whether or not such material is constitutionally protected.” It barred liability for such decisions and provided that service providers shall not be treated as the publisher or speaker of information provided by third parties. Congress chose to enact both Section 230 and the content restrictions of the CDA.

¹² 47 U.S.C. §§ 230(a)(3)-(4).

¹³ *Id.* § 230(b)(2).

the creation of prescriptive network neutrality rules are reminiscent of claims that the First Amendment is at risk for broadcasting unless the FCC enforces a fairness doctrine. While it might be true that proponents of that discredited doctrine were motivated by a desire to institutionalize good journalistic practices, the process of having a government agency enforce such rules is entirely incompatible with traditional First Amendment principles.

There is an inherent tension between the First Amendment and regulatory policies designed to ensure “fairness” of communications, such as measures intended to regulate traffic for a medium that neither Congress nor the Commission envisioned in the first place. The Internet is a haven for free expression precisely because it caught the government entirely unawares. To be sure, the FCC in its Notice of Proposed Rulemaking cites a number of its prior policies that helped to serve as building blocks for more competitive telecommunications, including the *Carterphone* line of decisions and the Commission’s *Computer Inquiries*.¹⁴ But it is also not difficult to find counter-examples in the FCC’s regulatory history that suggest less of an ability to predict the future course of network competition. For many years FCC rules and the Cable Act prohibited telephone companies from providing cable television service on the theory that allowing telcos into the video market would undermine competition.¹⁵ Likewise, the Modification of Final Judgment to the AT&T Consent Decree barred the telephone company from engaging in electronic publishing.¹⁶

¹⁴ *Preserving the Open Internet* at ¶¶ 24-27.

¹⁵ See generally *C&P Tel. Co. of Va. v. United States*, 42 F.3d 181, 186 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) (discussing early history of cable television regulation).

¹⁶ See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

The rationale underlying both the cable-telco cross-ownership ban and the MFJ restriction on electronic publishing was much the same as the argument being made today for network neutrality rules. The government claimed that the telephone companies had the incentive and ability to restrict potential competitors, and that they might exercise that power in the future to limit free speech. However, telephone companies began to challenge these restrictions in the early 1990s, and the Fourth and Ninth Circuits, as well as several U.S. district courts, held that the cross-ownership restrictions violated the First Amendment rights of telephone carriers.¹⁷ Supreme Court review of the decisions was cut off when Congress repealed the cross-ownership ban with passage of the Telecommunications Act of 1996.¹⁸ Since that change in policy, telecommunications companies have become vital competitors in providing video and broadband services.¹⁹

There are at least a couple of ways to interpret this example. On one hand, it demonstrates an enlightened move by Congress to adjust regulation in the name of enhancing competition. On the other, it highlights the need for caution in giving the government too much authority in the first place to regulate networks on the basis of the mere potential for anticompetitive acts. Correcting such policy missteps generally takes decades. Can you imagine what would have been the result if the government had sought to “invent” the Internet? Had it

¹⁷ See *C&P Tel. Co. of Va.*, 42 F.3d at 202-203; *U.S. West v. United States*, 48 F.3d 1092-1106 (9th Cir. 1994), *cert. granted, judgment vacated*, 516 U.S. 1155 (1996); *Ameritech Corp. v. U.S.* 867 F. Supp. 721, 736 (N.D. Ill. 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Nynex Corp. v. United States*, 1994 WL 779761 (D. Me. 1994); *Southwestern Bell v. United States*, 1995 WL 444414 (N.D. Tex. 1995).

¹⁸ Pub. L. 104-10, § 302, 110 Stat. 56,118 (1996), *codified as amended at* 47 U.S.C. § 571.

¹⁹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, 604-606 (2009) (“*Thirteenth Annual Video Competition Report*”).

been the subject of notice and comment rulemaking at the FCC, we would still be waiting for a Report and Order, which would come with a veritable encyclopedia of rules. And we may well see a similar result if the Commission implements the network neutrality rules it has proposed. Subjecting network management decisions to case-by-case review to determine what is “reasonable,” or to submit to FCC review what should be considered “broadband Internet service” as distinguished from “managed or specialized services” will add a layer of bureaucracy that is unlikely to enhance the capacity for innovation.

I mean no disrespect to the Commission or its staff when I say this. The four years I worked at the FCC with Commissioner and then Chairman Jim Quello were a high point in my career. I collaborated with members of the Commission staff who were dedicated professionals and that I consider to be among the best and the brightest among those with whom I have been privileged to work. Nor do I question the good intentions of those who believe the public interest requires a more regulatory approach. But I do believe that the Commission’s track record in trying to manage communications platforms and to predict the ultimate effect of its regulations calls for a great deal of caution before embarking on such efforts.

Compared to the Internet, which arose without a centralized design or government-imposed rules, FCC and congressional efforts to create new platforms to foster neutral access by independent programmers have been less than inspiring. Both Video Dial Tone and Open Video Systems were regulatory constructs crafted by legislators and regulators with the goal of ensuring an open platform for unaffiliated content providers, and both were concepts in search of a business model. As a consequence, they have been relegated largely to the dustbin of

regulatory history.²⁰ Such examples are not a particularly persuasive argument for increasing the FCC's jurisdiction over broadband network management.²¹

Ultimately, everyone participating in today's workshop is seeking the same ultimate goal – the preservation of an open and dynamic medium that fosters unprecedented innovation and public participation. It is the medium that the Supreme Court sought to protect in *ACLU v. Reno*, a decision that the great First Amendment advocate Bruce Ennis described as a “constitutional birth certificate for the Internet.” But the path toward this goal forks in different directions that will require policymakers to engage in a risk assessment.

Proponents of prescriptive network neutrality rules are concerned about the risk that “broadband Internet access service providers could make the Internet less useful for some users or applications by differentiating traffic based on the user, the application provider, or the type of traffic.”²² Although the examples driving this concern have tended to be limited and episodic, advocates of net neutrality rules argue that network operators generally have a financial incentive to adopt pricing policies and network management practices that could adversely affect independent speakers and innovators. They also are concerned that broadband providers “could block, slow, or redirect access to websites espousing public policy positions that the broadband Internet access provider considers contrary to its interests, or controversial content to which the

²⁰ See *Thirteenth Annual Video Competition Report*, 24 FCC Rcd. at 606-607. See also Robert Corn-Revere, *The Public Interest, the First Amendment and a Horse's Ass*, 2000 L. REV. MICH. ST. U.-DET. COLL. L. 165 (Spring 2000).

²¹ See Kenneth Robinson, *The FCC and Forecasting*, TELECOMMUNICATIONS POLICY REVIEW, Nov. 29, 2009 at 7-11 (former FCC official lists examples in which communications policymakers have been notoriously bad at predicting how technologies will be used, or in adopting policies that do not undermine development and innovation).

²² *Preserving to Open Internet* at ¶ 60.

service provider wants to avoid any connection.”²³ They believe that such behavior will become a significant concern if a sufficient number of network operators behave as hypothesized, if competition or adverse consumer reactions fail to exert a disciplining effect, and if more general laws such as antitrust cannot be brought to bear when there is abuse of market power.

The other side of the risk assessment asks whether there is a threat to free expression if the government is given too much power to regulate broadband networks. There is, of course, the threshold question of whether imposing neutrality requirements on network operators violates the First Amendment.²⁴ But the concern about such a regulatory approach and its impact on the First Amendment and new technology runs much deeper. It should not be forgotten that the federal government’s initial impulse was to censor the Internet and to subject it to a far lower level of First Amendment protection. It pursued this agenda for more than a decade but was blocked by a series of First Amendment rulings. Those of us who opposed those laws argued – and the courts agreed – that the open Internet would be at great risk if the government is allowed to exercise such power.

For some, such concerns may seem unrelated to a network neutrality regime, which is expressly predicated on promoting free speech. But the government simultaneously pursues many interests, of which an “open Internet” is only one. The Commission itself described its network neutrality rulemaking as seeking to “preserve the open, safe, and secure Internet.”²⁵ Once regulatory jurisdiction is established, it inevitably will be applied for various purposes. In this regard, it is worth noting that the Commission currently is investigating whether it has

²³ *Id.* at ¶ 75.

²⁴ *See Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F Supp 2d 685 (S.D. Fla. 2000). *See also* cases cited at note 17.

²⁵ *Preserving to Open Internet* at ¶ 50.

statutory or constitutional authority to impose some form of content regulations across all communications platforms, including the Internet.²⁶ This is analogous to the broad public interest authority the FCC historically has employed to regulate media with less robust First Amendment protection. In supporting broadcast rules, for example, the U.S. Supreme Court described the FCC’s role as that of a “traffic cop.” But the FCC’s role was found to include regulating broadcast content as well, for as the Court said in extending the analogy, the Commission has the burden “of determining the composition of that traffic.”²⁷

This broad approach toward regulatory jurisdiction is part of a well-established history whereby Congress and the Commission have leveraged rules designed to promote speech and civic participation to serve an interest in content regulation. For example, under the Cable Act of 1984, franchised cable operators are required to set aside capacity for public, educational, and governmental access channels, as well as for commercial leased access. Cable operators generally are prohibited from exerting editorial control over those channels. However, in the 1992 Cable Act, Congress ceded back a measure of control and required that operators block and segregate indecent programming if they permitted such material on access channels.²⁸ The Supreme Court, however, held that certain of the requirements violated the First Amendment.²⁹

²⁶ See *Empowering Parents and Protecting Children in an Evolving Media Landscape*, FCC 09-94 (rel. Oct. 23, 2009). See also *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, 24 FCC Rcd. 11413 (2009).

²⁷ *NBC v. United States*, 319 U.S. 190, 215-216 (1943).

²⁸ Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1486, §§ 10(a), 10(b), and 10(c), codified at 47 U.S.C. §§ 532(h), (j).

²⁹ *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

Whether or not Internet content regulations are adopted concurrently with any initial network neutrality rules, the political incentive to extend regulation to include “the composition of the traffic” will likely become irresistible once the Commission’s assertion of jurisdiction is secure. But even if such rules are not adopted in the near term, it is not uncommon for an agency’s implementation of neutral management policies to be overtaken by regulatory mission creep.³⁰ To put this in terms familiar to advocates of network neutrality rules, the government has both the incentive and ability to misbehave.

Department of Commerce oversight of its contract with the Internet Corporation for Assigned Names and Numbers (“ICANN”) provides a telling example of this. Although ICANN’s management of the domain name system is intended to be a technical function that is both transparent and insulated from national politics, the process was coopted by U.S. political pressures in its consideration of a sponsored .xxx domain. The ICANN Board voted in 2005 to approve the proposed domain and instructed its staff to begin negotiating the contract. But final approval was delayed after a behind-the-scenes campaign with the White House by socially conservative groups resulted in threats by the U.S. government to block the domain by refusing to put it in the root server even if ICANN approved it. Ultimately, the ICANN Board voted in 2007 to reject the .xxx domain. Despite the fact the domain was proposed as a parental empowerment tool to facilitate voluntary filtering of adult content, it was opposed as supposedly

³⁰ Prescriptive rules governing network management would raise significant policy and First Amendment questions even if the regulatory power were not abused. For example, it may be difficult to reconcile such rules with Section 230’s “Good Samaritan” protections that allow service providers to reject content they consider objectionable. Section 230 immunity has been a critical factor in the Internet’s growth because it has enabled Internet Service Providers to exercise editorial discretion and to enforce terms of use without the threat of private lawsuits. It is difficult to see how it could be maintained in the face of rigid neutrality requirements. *See Preserving to Open Internet* at ¶ 137 (“Nor would we consider the singling out of any particular content (*i.e.*, viewpoint) for blocking or deprioritization to be reasonable, in the absence of evidence that such traffic or content was harmful.”).

providing an official stamp of approval on sexually-oriented material. ICANN's decision currently is under review by an arbitration panel. But the episode provides an example of how political pressures based on Internet content may inevitably subvert neutral management decisionmaking.³¹

Finally, it is important to acknowledge that some parties engaged in the debate over network neutrality consider the prospect of heightened governmental control over the Internet (and media in general) not as a threat, but as an opportunity. A new regulatory regime would provide the vehicle for advancing new First Amendment theories for media regulation to replace shopworn notions of spectrum scarcity and "pervasive" media that have been stretched past the breaking point in their traditional applications, and that have never been accepted for the Internet. Simply put, some theorists call for a fundamental rethinking of First Amendment doctrine in which safeguarding of freedom of speech increasingly will fall to "legislatures, administrative agencies, and technologists."³²

This suggests that the constitutional ramifications of the network neutrality debate extend far beyond the question of whether the FCC should or should not adopt a given set of rules. On a

³¹ See, e.g., Milton Mueller, *.XXX Puzzle Pieces Start to Come Together: And the Picture is Ugly*, Circle ID (Aug. 17, 2005) (http://www.circleid.com/posts/print/xxx_puzzle_pieces_start_to_come_together_and_the_picture_is_ugly/); Michael Palage and Avri Doria, *Please, Keep the Core Neutral*, Circle ID (March 25, 2007) (http://www.circleid.com/posts/please_keep_the_core_neutral/).

³² Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 6 (April 2004). See also Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 277 (March 2009) ("[t]he widely shared and deeply held assumptions about content analysis" underlying virtually all First Amendment jurisprudence "are wrong."); Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 134 (Winter 2009) ("the current state of the Internet as a platform for expression and democratic engagement calls for significantly more, and not less, proactive government intervention").

doctrinal level the question is whether technological convergence should also lead to regulatory convergence, where the least common denominator of First Amendment protection becomes the governing rule. At issue is whether we are prepared to relive the 20th Century's failed experiment with media regulation.

Given the stakes involved, some proponents of network neutrality rules should be careful what they wish for. It is exceedingly unlikely that proponents of neutrality requirements will be satisfied just with regulation of broadband networks. Indeed, one advocate of revising First Amendment jurisprudence to permit more robust regulation has called on Congress to prohibit “dominant search engines” from “manipulating search results on an individualized basis and to require them to provide political candidates with meaningful, uncensored access to forums for communicating with the public.”³³ Along the same lines, another academic writer has called for the creation of a “Federal Search Commission” to police “biased” search results.³⁴

Beyond the potential regulation of Internet search functions, neutrality principles probably will be brought to bear on other new applications.³⁵ As Berin Szoka and Adam Thierer of the Progress and Freedom Foundation have observed, “[t]he reality is that regulation *always* spreads.”³⁶ This is not a long-shot prediction. As the Commission asked in its *Notice of Inquiry*

³³ Dawn C. Nunziato, *VIRTUAL FREEDOM* 151 (Stanford University Press 2009).

³⁴ 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>).

³⁵ See Randolph J. May, *Google's Discriminating Goggles*, <http://freestatefoundation.blogspot.com/> (Dec. 9, 2009). See also Jessica E. Vacellaro, *Google Rolls Out New Tools as it Battles Rival*, *WALL STREET JOURNAL*, Dec. 8, 2009.

³⁶ See Berin Szoka and Adam Thierer, *Net Neutrality, Slippery Slopes & High Tech Mutually Assured Destruction* (Oct. 2009) (emphasis in original).

on wireless innovation last summer, “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?”³⁷

Whatever may be the answers to those questions, it is clear that the network neutrality proceeding lies at the heart of an important debate about the future of the FCC and of the First Amendment.

³⁷ *Fostering Innovation and Investment in the Wireless Communications Market*, GN Docket No. 09-51 (rel. Aug. 27, 2009).