

# Net Neutrality 10 Years Later: A Still Unconvinced Commissioner

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“Some men see things as they are and say, ‘Why?’ . . . I dream things that never were and say, ‘Why not?’”

-Robert F. Kennedy, 1966<sup>1</sup>

## I. INTRODUCTION

From the moment I first heard the words “net neutrality,” I marveled at the absolute brilliance of coining such a phrase<sup>2</sup>—one that evokes such a democratic, neutral value proposition, yet threatens disastrous results for our economy. Interestingly, although net neutrality seemingly endorses the free and open nature of the Internet ecosystem,<sup>3</sup> its impact would actually be burdensome and onerous. In fact, this so-called net neutrality goes directly against most American consumers’ values, such as competition, freedom of choice, and less government regulation.

At the end of the FCC’s first and only investigation on the subject, which involved the slowing of BitTorrent traffic by Comcast,<sup>4</sup> I suggested that we change the dialogue to be much more concerned about whether the Internet is “safe and secure.”<sup>5</sup> Those fears have, sadly, come to fruition, as illustrated by recent data breaches afflicting the National Security Agency,<sup>6</sup> the Internal Revenue Service,<sup>7</sup> and the Target Corporation,<sup>8</sup> among many

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1. *CBS News: Edward M. Kennedy’s Eulogy of Sen. Robert F. Kennedy* (CBS television broadcast Aug. 26, 2009), available at <http://www.youtube.com/watch?v=dvo-7YrMoK0> (quoting GEORGE BERNARD SHAW, *BACK TO METHUSELAH* act 1, in GEORGE BERNARD SHAW, *SELECTED PLAYS WITH PREFACES* 7 (1949)).

2. The phrase was popularized by Tim Wu in *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 145 (2003) (defining a “neutral network” as one that does not “favor one application . . . over others”).

3. *Id.*

4. See Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., *Memorandum Opinion and Order*, FCC 08-183, 23 FCC Rcd. 13028, 13031, para. 8 (2008) [hereinafter *Comcast Order*] (“Following [Associated Press] tests, Comcast . . . admitted that it target[ed] peer-to-peer traffic for interference.”), *vacated sub nom.* Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010); see also Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOCIATED PRESS, Oct 19, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html> (describing Comcast’s degradation of certain “uploads of complete files” transferred using the BitTorrent protocol).

5. Deborah Taylor Tate, *A Tangled Web: Moving from “Open and Free” to “Safe and Secure”*, (The Free State Found., Perspectives from FSF Scholars Vol. 5 No. 13, 2010), available at [http://www.freestatefoundation.org/images/A\\_Tangled\\_Web.pdf](http://www.freestatefoundation.org/images/A_Tangled_Web.pdf).

6. David E. Sanger & Eric Schmitt, *Snowden Used Low-Cost Tool to Best N.S.A.*, N.Y. TIMES, Feb. 8, 2014, [http://www.nytimes.com/2014/02/09/us/snowden-used-low-cost-tool-to-best-nsa.html?\\_r=0](http://www.nytimes.com/2014/02/09/us/snowden-used-low-cost-tool-to-best-nsa.html?_r=0) (discussing Edward Snowden gaining access to many highly classified documents from the National Security Agency’s networks).

7. See, e.g., Brian Fung, *The IRS Mistakenly Exposed Thousands of Social Security Numbers*, NAT’L J., July 8, 2013, <http://www.nationaljournal.com/tech/the-irs-mistakenly-exposed-thousands-of-social-security-numbers-20130708>; Jeremy Kirk, *IRS Blamed in Massive South Carolina Data Breach*, PC WORLD (Nov. 21, 2012, 6:01 AM),

others. Nevertheless, net neutrality seems to still hold the attention of policymakers in Washington, D.C.<sup>9</sup>

The FCC in 2005 issued a seemingly benign “Internet policy statement”<sup>10</sup> under former Chairman Kevin Martin. Then, in 2010, the FCC plowed forward with a newly expanded list of “net neutrality principles.”<sup>11</sup> Both forays into regulation of the Internet were held to exceed the legal authority of the FCC by the U.S. Court of Appeals for the D.C. Circuit.<sup>12</sup>

Many scholars have discussed the regulatory and legal history of the latest ruling by the D.C. Circuit in *Verizon v. FCC*.<sup>13</sup> As a former FCC Commissioner, I would be remiss to minimize the longstanding legal principle of *Chevron* deference that the judiciary affords federal expert agencies such as the FCC.<sup>14</sup> At the same time, I believe it is equally

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<http://www.pcworld.com/article/2015543/irs-blamed-in-massive-south-carolina-data-breach.html>.

8. Jia Lynn Yang & Amrita Jayakumar, *Target Says up to 70 Million More Customers Were Hit by December Data Breach*, WASH. POST, Jan. 10, 2014, [http://www.washingtonpost.com/business/economy/target-says-70-million-customers-were-hit-by-dec-data-breach-more-than-first-reported/2014/01/10/Oada1026-79fe-11e3-8963-b4b654bcc9b2\\_story.html](http://www.washingtonpost.com/business/economy/target-says-70-million-customers-were-hit-by-dec-data-breach-more-than-first-reported/2014/01/10/Oada1026-79fe-11e3-8963-b4b654bcc9b2_story.html).

9. See Marguerite Reardon, *New Senate, House Bills Would Restore Net Neutrality*, CNET (Feb. 3, 2014, 3:52 PM), [http://news.cnet.com/8301-13578\\_3-57618273-38/new-senate-house-bills-would-restore-net-neutrality/](http://news.cnet.com/8301-13578_3-57618273-38/new-senate-house-bills-would-restore-net-neutrality/) (following the *Verizon* opinion, Senate and House Democrats introduced legislation to temporarily restore the FCC’s net neutrality rules); *but see* Press Release, Sen. John Thune, Statement on Chairman Wheeler’s Announcement (Feb. 19, 2014), available at [http://www.commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=a7c131bc-afcb-4665-a3ff-d5aad5d28331&ContentType\\_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group\\_id=4b968841-f3e8-49da-a529-7b18e32fd69d&MonthDisplay=2&YearDisplay=2014](http://www.commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=a7c131bc-afcb-4665-a3ff-d5aad5d28331&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=4b968841-f3e8-49da-a529-7b18e32fd69d&MonthDisplay=2&YearDisplay=2014) (criticizing FCC’s planned third attempt to impose net neutrality rules).

10. Appropriate Framework for Broadband Access to the Internet, *Policy Statement*, FCC 05-151, 20 FCC Rcd. 14986, 14987–88, para. 4 (2005) [hereinafter *Broadband Policy Statement*] (adopting four principles regarding broadband practices of Internet service providers).

11. Preserving the Open Internet, *Report and Order*, FCC 10-201, 25 FCC Rcd. 17905, 17906, para. 1 (2010) [hereinafter *2010 Open Internet Order*], *aff’d in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

12. *Verizon*, 740 F.3d at 628; *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

13. See e.g., Christopher S. Yoo, *Some Initial Reflections on the D.C. Circuit’s Verizon v. FCC Net Neutrality Decision*, (The Free State Found., Perspectives from FSF Scholars Vol. 9 No. 5, 2014), available at [http://www.freestatefoundation.org/images/Some\\_Initial\\_Reflections\\_on\\_the\\_D.C.\\_Circuit\\_s\\_Verizon\\_v.\\_FCC\\_Net\\_Neutrality\\_Decision\\_011614.pdf](http://www.freestatefoundation.org/images/Some_Initial_Reflections_on_the_D.C._Circuit_s_Verizon_v._FCC_Net_Neutrality_Decision_011614.pdf); Berin Szoka & Geoffrey Manne, *The Feds Lost on Net Neutrality, But Won Control of the Internet*, WIRED (Jan. 16, 2014, 6:30 AM), <http://www.wired.com/opinion/2014/01/one-talking-comes-net-neutrality/>.

14. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984) (holding that courts should afford considerable deference to a federal agency’s construction of a statutory scheme it is entrusted to administer).

important that the FCC—indeed, any agency or arm of our government—acts completely within its legal authority.<sup>15</sup>

In *Verizon*, the FCC defended its net neutrality rules as a permissible exercise of the Commission’s “ancillary jurisdiction,” which supposedly emerged from a tapestry of other authorities within the broader Communications Act.<sup>16</sup> The FCC also relied on its authority under section 706 of the Telecommunications Act,<sup>17</sup> which tasks the FCC with encouraging the “deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by using, among other tools, “regulating methods that remove barriers to infrastructure investment.”<sup>18</sup> Although the *Verizon* court recognized section 706 as a standalone fount of regulatory authority for the FCC,<sup>19</sup> the court nonetheless vacated the net neutrality rules’ core provisions on the grounds that they impermissibly imposed common carriage status on fixed broadband providers.<sup>20</sup>

Despite its duo of losses, the FCC is now developing a *third* version of net neutrality rules.<sup>21</sup> I cannot imagine it manages to find the authority to promulgate similar rules this time around. As a skeptic of net neutrality regulation, I believe this outcome will be for the best.

## II. TELECOM REGULATION AND THE ROLE OF GOVERNMENT

Whenever the government acts, interestingly, it is often in *reaction* to a real or perceived problem that, if left unattended or unregulated, might

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15. See *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has *no power to act* . . . unless and until Congress confers power upon it.”) (emphasis added); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (“[B]efore a court may grant [*Chevron*] deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue.”).

16. See Brief for Appellee-Respondents at 49, *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014) (No. 11–1355) (arguing the FCC may have “ancillary” authority over “communications matters even where Congress granted ‘no express authority’” to the agency) (citing *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010)).

17. *Id.* at 68 (“[T]he Commission has sufficient authority to adopt [open Internet] rules under Section 706 alone, without relying on any other authority.”).

18. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 1302 (2011)).

19. *Verizon*, 740 F.3d at 635 (“[S]ection 706 of the 1996 Telecommunications Act . . . furnishes the Commission with the requisite affirmative authority to adopt the [open Internet] regulations.”).

20. *Id.* at 655 (“We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has ‘relegated [those providers], *pro tanto*, to common carrier status.’” (alteration in original) (citing *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700–01 (1979))).

21. New Docket Established to Address Open Internet Remand, *Public Notice*, GN Docket No. 14–28 (rel. Feb. 19, 2014), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-14-211A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-14-211A1.pdf).

cause harm.<sup>22</sup> New regulations often emerge after a specific incident, perhaps involving toxic substances, dangerous medications, tainted food, or misleading product advertisements.<sup>23</sup> Where perceived risk exists, government officials worry about political liability of they do nothing; to avert this prospect, they frequently resort to regulation.<sup>24</sup>

The resulting government is far larger than that envisioned by the founding fathers, who established the United States as a constitutionally limited government.<sup>25</sup> Today, the founders would probably struggle to recognize the nation's capital, which houses vast bureaucracies that span the city and sprawl into the surrounding states, and employs millions of federal workers and contractors.<sup>26</sup> As the Chief Justice of the United States recently observed, the “administrative state wields vast power and touches almost every aspect of daily life.”<sup>27</sup> Indeed, the “overreach” of these federal agencies has never been more apparent, as demonstrated by the recent spate of congressional investigations of agencies acting outside their legal authority.<sup>28</sup>

One such agency is the Federal Communications Commission (“FCC”), which Congress tasked with overseeing a sector that accounts for

22. Technology policy researcher Adam Thierer explains this phenomenon as follows: [I]n a public policy setting, the precautionary principle holds that since every technology and technological advance could pose some theoretical danger or risk, public policies should prevent people from using innovations until their developers can prove that they won't cause any harms. In other words, the law should mandate “play it safe” as the default policy toward technological progress.

Adam Thierer, *Technopanics, Threat Inflation, and the Danger of an Information Technology Precautionary Principle*, 14 MINN. J.L. SCI. & TECH. 309, 352–53 (2013) (footnotes omitted).

23. See, e.g., Henry I. Miller & Gregory Conko, *Precaution Without Principle*, 19 NATURE BIOTECHNOLOGY 302, 302 (2001).

24. See AARON WILDAVSKY, SEARCHING FOR SAFETY 38 (1988) (arguing that human progress is unattainable unless some nonzero level of risk is accepted).

25. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (“The Framers could hardly have envisioned today’s vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities.”) (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3156 (2010)); *id.* (“The administrative state with its reams of regulations would leave [the Framers] rubbing their eyes.”) (citing *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)).

26. See Haley Barbour & Ed Rogers, *The Lobbyists’ Lament*, POLITICO MAG. (Dec. 17, 2013), <http://www.politico.com/magazine/story/2013/12/the-lobbyists-lament-101252.html#UyehBJyP110> (discussing how “ever-expanding government and the perpetual nature of bureaucracy” have spurred rapid growth in “the lawyer and lobbyist business”).

27. *City of Arlington*, 133 S. Ct. at 1878 (internal quotation marks omitted).

28. Cf. Molly K. Hooper, *Rep. Darrell Issa’s Agenda in 2014: IRS, Benghazi and Fast and Furious*, THE HILL (Jan. 12, 2014, 6:00 AM), <http://thehill.com/homenews/house/195169-issas-2014-agenda-irs-benghazi-and-fast-and-furious> (chronicling the many congressional probes launched by Rep. Darrell Issa, the Chairman of the U.S. House Committee on Oversight and Government Reform from 2011 to 2014).

approximately one-sixth of nation's economy.<sup>29</sup> Created, in part, as a response to the sinking of the *RMS Titanic*,<sup>30</sup> to coordinate domestic and international radio communications, the FCC eventually took on a broad role in the telecommunications and media sectors.<sup>31</sup> Approving new gadgets—now devices—and negotiating with global players in the satellite sector further broadened the FCC's purview.<sup>32</sup> Yet, in my experience, most citizens have no idea how far the FCC's reach extends. Instead, many Americans think the Commission watches television all day in hopes of keeping “wardrobe malfunctions” and dirty words off the airwaves.

Whenever I speak to a civic club, I often explain the FCC's breadth by depicting a day in the life of an ordinary American. From the moment you turn on the news, open your garage door, use your remote control, switch radio stations, and listen to SiriusXM on your drive to work, you have probably spent more time with the FCC than your family. Much of the FCC's work aims to ensure all of these technologies operate so that consumers have the best possible experience, unimpeded by interference.<sup>33</sup>

To be sure, preconceptions of the FCC's activities are not uncommon. Some people relate to the FCC as the federal overseer of our nation's emergency response systems, such as 911.<sup>34</sup> Others are familiar with the FCC's placement of satellites for global telecommunications.<sup>35</sup>

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29. *Oversight of the Federal Communications Commission: Hearing Before the Subcomm. on Comm'n's and Tech. of the H. Comm. on Energy and Commerce*, 113th Cong. 1 (2013) (statement of Jessica Rosenworcel, Comm'r, FCC), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-324628A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-324628A1.pdf).

30. See John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1097 n.98 (2000).

31. See Kevin Ryan, *Communications Regulation—Ripe for Reform*, 17 COMM'LAW CONSP'CTUS 771, 780 (2009).

32. Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV. 1, 3–4 (2005) (“The FCC was regulating end-user computing devices plugged into the phone network for nearly a decade before the personal computer (‘PC’) was introduced. The FCC began regulating wireless equipment forty years before that, and it did not stop regulating end-user hardware when the PC came along.”) (footnotes omitted); see also John H. Harwood II et al., *Competition in International Telecommunications Services*, 97 COLUM. L. REV. 874, 896 (1997) (discussing FCC regulation of international satellite services).

33. Comm'n Staff Clarifies FCC's Role Regarding Radio Interference Matters & Its Rules Governing Customer Antennas and Other Unlicensed Equip., *Public Notice*, DA 04-1844, 19 FCC Rcd. 11300, 11300 (2004) (“Section 302 [of the Communications Act] has granted the Commission express authority to adopt regulations ‘governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation...in sufficient degree to cause harmful interference to radio communications.’”) (citing 47 U.S.C. § 302a(a)(1) (2011)).

34. See, e.g., *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 80 (D.C. Cir. 2001) (upholding FCC regulation promoting enhanced 911 services for wireless phones by requiring wireless carriers to bear implementation costs).

35. See Harwood II et al., *supra* note 32, at 896.

Some even relate to the Commission's role in national security.<sup>36</sup> And many parents whose children attend public schools have heard of the E-Rate program, which has connected almost every public school and library across this vast nation to the Internet.<sup>37</sup>

I am quite honored to have had the opportunity to serve the American people at the FCC, especially to the extent that our work saved lives and enhanced economic investment in the next dazzling innovation. However, in a few instances during my tenure, the FCC ventured outside of its legal bounds. The issue of net neutrality was—and is—one such instance.

### III. A COMMISSIONER'S EXPERIENCE WITH NET NEUTRALITY

As one of the two original Commissioners to take issue with the entire premise of net neutrality,<sup>38</sup> I could never quite fathom that we were spending countless man-hours at the FCC on it, holding public “hearings” around the country and attempting to create regulations out of whole cloth—all basically because of one lone complaint regarding an ISP that had slowed down some consumers' Internet speeds.<sup>39</sup>

Similarly, in the second complaint—which involved the degradation, rather than the blocking, of Internet traffic<sup>40</sup>—broadband provider Comcast voluntarily resolved the issue and promised the FCC it would not happen again.<sup>41</sup> As my former colleague and FCC Commissioner Robert McDowell argued in his dissent from the *Open Internet Order*, “in the almost nine years since those fears were first sewn, net regulation lobbyists can point to fewer than a handful of cases of alleged misconduct, out of an

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36. See *Homeland Security Policy Council Highlights FCC Actions Promoting Homeland Security*, FCC NEWS (Aug. 4, 2004), [http://transition.fcc.gov/eb/News\\_Releases/DOC-250521A1.html](http://transition.fcc.gov/eb/News_Releases/DOC-250521A1.html).

37. Modernizing the E-Rate Program for Schools & Libraries, *Notice of Proposed Rulemaking*, FCC 13-100, 28 FCC Rcd. 11304, 11308, paras. 7–11 (2013), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-13-100A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-100A1_Rcd.pdf) (proposing E-rate reform to better serve schools and libraries with broadband Internet connectivity).

38. Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., *Memorandum Opinion and Order*, FCC 08-183, 23 FCC Rcd. 13028, 13085 (2008) (Tate, Comm'r, dissenting); see also *id.* at 13088 (McDowell, Comm'r, dissenting).

39. See Madison River Commc'ns, LLC, *Order*, DA 05-543, 20 FCC Rcd. 4295, paras. 3–5 (2005) (FCC Enforcement Bureau entered into consent decree with Madison River Communication, a broadband provider that blocked its customers' ability to use certain VoIP applications). Previously, a “blocking” complaint arose when Verizon Wireless began rejecting text messages sent to its mobile subscribers by a pro-choice organization. Dawn C. Nunziato, *The First Amendment Issue of Our Time*, 29 YALE L. & POL'Y REV. 1, 17 (2010) (citing Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES, (Sept. 27, 2007), <http://www.nytimes.com/2007/09/27/us/27verizon.html>). After receiving intense criticism for its actions, Verizon Wireless soon reversed its decision. *Id.*

40. *Comcast Order*, *supra* note 4, at para. 44.

41. See Julia Boorstin, *Comcast and BitTorrent: Enemies Become “Net-Neutral” Friends*, CNBC (Mar. 27, 2008, 3:21 PM), <http://www.cnbc.com/id/23831261/>.

infinite number of Internet communications. *All* of those cases were resolved in favor of consumers under *current* law.”<sup>42</sup>

Indeed, while the FCC has found that ninety-four percent of households have access to fixed broadband Internet, meeting the Commission’s speed benchmark,<sup>43</sup> the aforementioned formal complaints were the only two filed with the FCC alleging discrimination by a broadband provider. Juxtaposed against those two complaints are the 1.5 million indecency complaints<sup>44</sup>—many of which are still pending<sup>45</sup>—and many other consumer complaints clearly within the legal authority of the Commission, all of which remain unaddressed.

Informally designated “the Children’s Commissioner”<sup>46</sup> during my time at the FCC, I was and continue to be outspoken on issues regarding illegal online activities, such as child pornography and online predatory behavior targeting minors. In addition, as a Music City native, I often speak about the harms caused by online infringement of intellectual property rights. These problems hurt individuals, especially children,<sup>47</sup> and the music industry.<sup>48</sup> However, despite my ardent desire to crack down on these illegal, unethical, and economically harmful online activities, I could not embrace FCC net neutrality regulation, as it clearly exceeded the Commission’s legal authority.

My first question to attorneys and government relations officials who frequented my office on the topic was usually “what is your definition of

42. Preserving the Open Internet Broadband Indus. Practices, *Report and Order*, FCC 10-201, 25 FCC Rcd. 17905, 18055 (2010) [hereinafter *McDowell Dissent*] (dissenting statement of Comm’r Robert M. McDowell), *aff’d in part, vacated and remanded in part sub nom.* Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

43. Inquiry Concerning the Deployment of Advanced Telecomm. Capability to All Americans in a Reasonable & Timely Fashion, *Eighth Broadband Progress Report*, FCC 12-90, 27 FCC Rcd. 10342, 10370, para. 46 (2012), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-12-90A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-90A1_Rcd.pdf).

44. John Eggerton, *Liberman Settles Indecency Complaint with FCC*, MULTICHANNEL NEWS (Nov. 15, 2013, 11:34 AM), <http://www.multichannel.com/policy/liberman-settles-indecency-complaint-fcc/146706>.

45. FCC Reduces Backlog of Broad. Indecency Complaints by 70%, *Public Notice*, DA 13-581, 28 FCC Rcd. 4082 (2013) (“Since September 2012, the Bureau has reduced the backlog [of indecency complaints] by 70% thus far, more than one million complaints . . .”).

46. *Biography of Deborah Taylor Tate*, FCC (Jan. 5, 2009), <http://transition.fcc.gov/commissioners/previous/tate/biography.html> (noting that Commissioner Tate is “[o]ften referred to as the ‘Children’s Commissioner’”).

47. *Cf.* United States v. Williams, 553 U.S. 285, 307 (2008) (“Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet.”).

48. See MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 961 (2005) (Breyer, J., concurring) (“No one disputes that ‘reward to the author or artist serves to induce release to the public of the products of his creative genius.’ And deliberate unlawful copying is no less an unlawful taking of property than garden-variety theft.”) (citing United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)).

net neutrality?” I rarely received the same response. Indeed, net neutrality has been said to be “the most discussed, least understood concept in the world of internet policy.”<sup>49</sup> Under the FCC’s conception of net neutrality, it requires broadband providers to allow their subscribers to (1) “access the lawful Internet content of their choice,” (2) “run applications and use services of their choice, subject to the needs of law enforcement,” and (3) “connect their choice of legal devices that do not harm the network.”<sup>50</sup>

My second question was “what is the basis of the FCC’s legal authority to establish net neutrality regulations?” This question is important for advocates, attorneys, and policymakers, for the government should never reach the definitional question if it has no clear legal authority over the issue at the outset.<sup>51</sup> And, indeed, that is what the D.C. Circuit recently opined—for the second time.<sup>52</sup> Simply put, the court held, the FCC lacks the authority to impose common carriage regulation on broadband providers that are classified as information services under Title I of the Communications Act.<sup>53</sup>

#### IV. NET NEUTRALITY IS NOT A SILVER BULLET

In my work with women’s and minority organizations, I am often asked how a particular proposal, law, or regulation may impact those groups specifically. I applaud the FCC for many of its public hearings and ongoing initiatives, especially as they relate to the low percentage of media ownership by women and minorities.<sup>54</sup> The FCC has a long-established and very active Diversity Committee, which advises the Commission on a variety of issues across all sectors and routinely holds public hearings to examine the impact of or need for a particular rule or regulation which may enhance diversity.<sup>55</sup>

When I am asked about net neutrality, my response is always the same: an Internet with light regulation and less oversight or intrusion by the government is better for *all* of us—including new application builders on

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49. Alexander Reicher, *Redefining Net Neutrality After Comcast v. FCC*, 26 BERKELEY TECH. L.J. 733, 733 (2011).

50. *Broadband Policy Statement*, *supra* note 10, at 14987–88, para. 4.

51. *See* La. Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 374 (1986).

52. *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

53. *Id.* at 630 (noting that the Communications Act “subjects telecommunications carriers, but not information-service providers, to Title II common carrier regulation”) (citing 47 U.S.C. § 153(53) (2011); *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 975–76 (2005)).

54. *See, e.g.*, 2010 Quadrennial Regulatory Review—Review of the Commissions Broad. Ownership Rules, *Notice of Proposed Rulemaking*, FCC 11–186, 26 FCC Rcd. 17489 (2011).

55. *See* Statement of FCC Comm’r Mignon L. Clyburn on the Re-Chartering of the Advisory Comm. on Diversity for Commc’ns in the Digital Age (Mar. 11, 2013), *available at* <http://www.fcc.gov/document/clyburn-statement-re-chartering-diversity-advisory-committee>.

the edge of the ecosystem, women running small businesses from home, and our youngest citizens taking Advanced Placement courses or learning a foreign language that was never before possible in their rural hometown. Allowing infrastructure providers and ISPs to invest in and expand high speed Internet throughout our country helps us all.<sup>56</sup> The Internet's low entry costs and lack of barriers to create, upload, start up, and sell goods and services are especially beneficial to women and minorities with less access to capital than established firms. The underlying reason for the lack of women and minority ownership of radio and television entities is directly related to the high cost of entry and the difficulty of access to large capital or debt. However, since the advent of the Internet, those barriers have decreased greatly; both women and minorities are now unleashing their creativity, developing innovative services, and even producing independent films and videos at record numbers.

Net neutrality proponents need only look to the FCC's media ownership rules to see how a similar scheme might affect women and minorities. The Minority Media and Telecommunications Council ("MMTC"), which has long been an outspoken advocate for minority and women's ownership in the media space, undertook a study regarding the potential impact of similar Internet regulation on their constituencies.<sup>57</sup> The report, entitled *Refocusing Broadband Policy: The New Opportunity Agenda for People of Color*, was co-authored by David Honig, president of MMTC, and Dr. Nicol Turner-Lee, vice president and chief research and policy officer at MMTC.<sup>58</sup> The report explored current trends in minority broadband adoption and assessed the impact of Internet regulation, finding that it is actually diverting attention from important strategies aimed at closing the digital divide.<sup>59</sup>

In a historical review of broadband policies initiated under the leadership of former FCC Chairman William Kennard, Honig and Lee suggest that "innovation has thrived within a minimalist regulatory

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56. FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 19 (Mar. 16, 2010) [hereinafter *National Broadband Plan*], available at <http://www.broadband.gov/download-plan/> ("Broadband is a platform to create today's high-performance America . . . . Due in large part to private investment and market-driven innovation, broadband in America has improved considerably in the last decade. More Americans are online at faster speeds than ever before.").

57. See generally David Honig & Nicol Turner-Lee, MINORITY MEDIA & TELECOMM. COUNCIL, REFOCUSING BROADBAND POLICY: THE NEW OPPORTUNITY AGENDA FOR PEOPLE OF COLOR (2013), available at <http://mmtconline.org/wp-content/uploads/2013/11/Refocusing-Broadband-Policy-112113.pdf>.

58. *Id.*

59. *Id.* According to the report, African Americans and Hispanics are still under-adopting broadband, despite slight increases in minority broadband adoption over the last few years. *Id.* at 7. While the use of mobile broadband has increased, especially through smartphones, limited digital literacy skills and the lack of relevance of the Internet to their daily lives have stalled broadband use for African Americans and Hispanics even though broadband is more readily available at lower price points. *Id.* at 8.

framework facilitating technological advances and opportunities for consumers and entrepreneurs of color.”<sup>60</sup> Recognizing, however, that adoption gaps between African Americans, Hispanics, and Whites still persist, the authors cautioned against “stringent regulation until more of these communities are enabled by the platforms, products, and services that broadband provides.”<sup>61</sup> Honig further emphasized that “more regulation is not always the silver bullet for advancing digital inclusion.”<sup>62</sup>

One need only look at the dismal results from past over regulation in the media ownership space to pause before allowing the same to happen to women and minorities embarking on Internet-based businesses.

## V. THE DEMOCRATIZATION OF COMMERCE

Beyond the opportunities in the media marketplace, women and minorities have also thrived in the e-commerce marketplace. Like mass media, entering this market is affordable and does not require a physical presence—bricks and mortar have been replaced by colorful graphics and product photos.<sup>63</sup> Indeed, retail e-commerce weathered the recent and extended recession quite well, albeit with slower growth than prior to the financial crisis, falling from a high of forty-two percent year over year growth to about eighteen percent growth during the recession.<sup>64</sup> Globally, e-commerce topped \$1 trillion in 2012.<sup>65</sup> All of this is good news for U.S. producers and consumers.

But none of this would have been possible if broadband subscribers were unable to search for and purchase products easily online. Nor would this explosion have occurred if there were providers who were blocking traffic, slowing it down, or otherwise making entrepreneurial entry difficult or expensive. Obviously these potential “what ifs” that net neutrality proponents continue to suggest have not and are not occurring, given that e-commerce is estimated to have a 10 percent global penetration by 2016<sup>66</sup>

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60. MMTc REPORT CALLS FOR TELECOM POLICYMAKERS TO MAKE BROADBAND ADOPTION THEIR TOP PRIORITY, BROADBAND & SOCIAL JUSTICE (Nov. 21, 2013), available at <http://broadbandandsocialjustice.org/2013/11/mmtc-report-calls-for-telecom-policy-makers-to-make-broadband-adoption-their-top-priority/>.

61. *Id.*

62. *Id.*

63. See e.g., Chris G. Christopher, *The Economic Impact of E-Commerce*, SUPPLY CHAIN QUARTERLY, Quarter 2 2011), available at <http://www.supplychainquarterly.com/print/scq201102monetarymatters/>.

64. *Id.*

65. Lauren Indvik, *Study: Global Ecommerce to Hit \$1.2 Trillion This Year, Led by Asia*, MASHABLE (June 27, 2013), <http://mashable.com/2013/06/27/ecommerce-study-china-asia/>.

66. See e.g., SCOTT DEVITT ET AL., MORGAN STANLEY, ECOMMERCE DISRUPTION: A GLOBAL THEME TRANSFORMING TRADITIONAL RETAIL (2013), available at [http://www.rundlemall.com/bm.doc/ecommerce\\_bp0106131.pdf](http://www.rundlemall.com/bm.doc/ecommerce_bp0106131.pdf).

and Facebook would be the third largest nation in the world based on population.<sup>67</sup>

Regulators should be leveling the playing field and opening the gates to competition at every level.<sup>68</sup> In the former world of the old-fashioned telephone service, when there was one local provider in each market, telephone companies—like other utilities—were highly regulated at both the state and federal levels. This regulation encompassed everything from price to the privacy of customer information to 911 emergency services to the “Chinese wall” required between each phone company and the yellow pages.<sup>69</sup> After the break-up of AT&T into Regional Bell Operating Companies, or “baby bells,” the ensuing competition led to a world of choices for voice service on any type of handheld device—which could even be purchased at the local supermarket.<sup>70</sup>

Even when the phone companies were highly regulated, they competed through marketing and advertising products and pricing.<sup>71</sup> “Special access” provided a dedicated, secure line for crucial communications to corporations with hundreds of geographically dispersed retail outlets and hospitals and doctors to share patient information.<sup>72</sup> Thus, even in a highly regulated market, phone companies could negotiate prices for special access and creatively market tools to entice and keep customers.<sup>73</sup> Yet, eighteen years after the passage of the deregulatory 1996 Telecommunications Act,<sup>74</sup> net neutrality proponents advocate turning the clock backwards and re-regulating marketing and pricing of Internet services. They propose a “free and open” Internet that denies broadband providers the freedom to negotiate with content companies to finance the networks of tomorrow.

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67. Rob Williams, *Revealed: The Third Largest ‘Country’ in the World - Facebook Hits One Billion Users*, THE INDEPENDENT, Oct. 4, 2012, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/revealed-the-third-largest-country-in-the-world--facebook-hits-one-billion-users-8197597.html>.

68. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) (describing the goal of the Act as to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”).

69. See, e.g., James Crowe, *Regulation and Free Markets: How to Regulate the Telecommunications Industry in the New Economy*, 2 J. TELECOMM. & HIGH TECH. L. 429 (2003).

70. See Michael T. Burr, *The Transformation Myth*, FORT., June 2011, at 4–5, available at <http://www.fortnightly.com/fortnightly/2011/06/transformation-myth>.

71. *Id.*

72. See Access Charge Reform, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, FCC 99–206, 14 FCC Rcd. 14221, para. 9 (1999).

73. *Id.* at para. 4.

74. Pub. L. No. 104–104, § 301, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

It is widely accepted that broadband penetration and access for all of our citizens is absolutely critical.<sup>75</sup> Nowadays, applying for a job, applying to college, and even making a health care appointment is often done online. Over seventy-five percent of teachers use the Internet for homework.<sup>76</sup> Parents can check on their child's school attendance, test scores, events, and other pertinent educational data—often in real time.<sup>77</sup> Many citizens also seek health care information and even sign up for health insurance online.<sup>78</sup>

All of this requires Internet access—and, in many cases, faster broadband speeds than many Americans currently have. As many groups sought to help with broadband adoption, they found that “cost” was often a reason for lack of uptake even when the service was available to their home.<sup>79</sup> Again, we see that lower cost alternatives—such as a “two-sided market” wherein one or more content companies help broadband providers shoulder the burden of the “last mile”—would be helpful in reaching those last Americans who remain offline.<sup>80</sup>

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75. See LENNARD G. KRUGER & ANGELE A. GILROY, CONG. RESEARCH SERV., RL30719, BROADBAND INTERNET ACCESS AND THE DIGITAL DIVIDE: FEDERAL ASSISTANCE PROGRAMS 12 (2013), available at <https://www.fas.org/sgp/crs/misc/RL30719.pdf>; but see Justin Hurwitz, *Five Faulty Premises in Telecom Debates*, (The Free State Found., Perspectives from FSF Scholars Vol. No. 3, 2014), available at [http://www.freestatefoundation.org/images/Five\\_Faulty\\_Premises\\_in\\_Telecom\\_Policy\\_Debates\\_010814.pdf](http://www.freestatefoundation.org/images/Five_Faulty_Premises_in_Telecom_Policy_Debates_010814.pdf).

76. Tom Wheeler, Chairman, FCC, Prepared Remarks for the National Digital Learning Day at the Library of Congress 2-3 (Feb. 5, 2014), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0205/DOC-325447A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0205/DOC-325447A1.pdf).

77. Cf. John Eggerton, *Survey: Parents, Teachers Believe Broadband Boosts Performance*, BROAD. & CABLE (Sept. 10, 2012, 3:00 PM), <http://www.broadcastingcable.com/news/washington/survey-parents-teachers-believe-broadband-boosts-performance/60580>.

78. See, e.g., News Release, FCC, *FCC Creates Healthcare Connect Fund to Expand Access to Robust Broadband Healthcare Networks* (Dec. 12, 2012), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-317912A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-317912A1.pdf).

79. JOHN B. HARRIGAN, PEW INTERNET & AM. LIFE PROJECT, HOME BROADBAND ADOPTION 2009 7 (2009), available at <http://www.pewinternet.org/files/old-media/Files/Reports/2009/Home-Broadband-Adoption-2009.pdf> (noting that one third of “dial-up users cite price as a barrier” to subscribing to home broadband).

80. See Christopher S. Yoo, *Network Neutrality and the Economies of Congestion*, 94 GEO. L.J. 1847, 1903 (2006) (“[T]here is no reason to expect that network owners will only attempt to engage in price discriminate vis-à-vis end users. In a two-sided market, network owners are just as likely to try to price discriminate with respect to content and applications providers as well.”); but see Edward Wyatt, *New F.C.C. Chief Promises He Will Protect Competition*, N.Y. TIMES, Dec. 3, 2013, available at [http://www.nytimes.com/2013/12/03/technology/tom-wheeler-of-fcc-vows-to-champion-competitiveness.html?\\_r=0](http://www.nytimes.com/2013/12/03/technology/tom-wheeler-of-fcc-vows-to-champion-competitiveness.html?_r=0) (FCC Chairman Tom Wheeler “indicated that he would not oppose some type of usage-based pricing, with Internet service providers charging so-called data hogs different amounts for service depending on how much data they receive and transmit”).

## VI. NET NEUTRALITY'S TENTH ANNIVERSARY

The FCC has signaled it will continue to pursue net neutrality regulations—albeit not in court, for now.<sup>81</sup> I am certain that the FCC's decision not to challenge the D.C. Circuit's decision involved the risk of hearing for the *third* time—and from the U.S. Supreme Court—that its net neutrality rules are illegal.<sup>82</sup> Specifically, as FCC Chairman Tom Wheeler stated:

The D.C. Circuit ruled that the FCC has the legal authority to issue enforceable rules of the road to preserve Internet freedom and openness . . . I intend to accept that invitation by proposing rules that will meet the court's test for preventing improper blocking of and discrimination among Internet traffic, ensuring genuine transparency in how Internet service providers manage traffic, and enhancing competition.<sup>83</sup>

On February 19, 2014, Chairman Wheeler launched a public inquiry aimed at establishing an “updated” set of rules for an “open Internet.”<sup>84</sup> This marks the tenth anniversary of the FCC's original inquiry as to whether and how to regulate the Internet. At the same time, the White House issued a blog post mentioning President Barack Obama's support for net neutrality since his days in the U.S. Senate.<sup>85</sup> It noted specifically that his campaign was “empowered by an open Internet” that allowed millions to interact in an “unprecedented fashion.”<sup>86</sup> We indeed have seen a new interest and rise in the civic engagement of our citizens, whether it involves a specific election or an issue or a cause. The Internet has connected people who care about a subject matter no matter where they are physically located. This connectivity is providing opportunities for us to discuss important issues of the day by returning to the “town square” online or becoming “the town crier” like Paul Revere. And who could forget the text messages and photos we all witnessed during the Arab Spring and other

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81. Jon Brodtkin, *FCC Won't Appeal Verizon Ruling, Will Regulate 'Net on "Case-by-Case Basis"*, ARS TECHNICA (Feb. 19, 2014, 12:44 PM), <http://arstechnica.com/tech-policy/2014/02/fcc-wont-appeal-verizon-ruling-will-regulate-net-on-case-by-case-basis/>.

82. *Id.*

83. Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules (Feb. 19, 2014), *available at* <http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules>.

84. New Docket Established to Address Open Internet Remand, *Public Notice*, GN Docket No. 14–28 (Rel. Feb. 19, 2014), *available at* <http://www.fcc.gov/document/new-docket-established-address-open-internet-remand>.

85. Gene Sperling & Todd Park, *We the People Response: Reaffirming the White House's Commitment to Net Neutrality*, THE WHITE HOUSE BLOG (Feb. 18, 2014, 2:06 PM), <http://www.whitehouse.gov/blog/2014/02/17/we-people-response-reaffirming-white-houses-commitment-net-neutrality>.

86. *Id.*

democratic movements worldwide.<sup>87</sup> As the White House recognized, “[i]ndeed, an open Internet is an engine for freedom around the world.”<sup>88</sup> Later, the White House’s blog post references the Internet as a hotbed for low cost entry and innovation, “building companies, creating jobs, improving vital services and fostering even more innovation along the way.”<sup>89</sup> Crucially, however, all these incredible successes for individuals, companies, civic engagement, and the spread of our democratic ideals, occurred under the *present regime*—one in which there is less government regulation, not more.<sup>90</sup>

## VII. CONCLUSION

The world’s insatiable appetite for more content, faster speeds, and wearable devices is almost unfathomable, especially given that much of this extraordinary innovation occurred in just the past few years. It is predicted that the growth will require more and more bandwidth—and, with it, better technologies to accommodate that growth.<sup>91</sup> Advanced network management to enable the best possible consumer experience will rule the marketplace and consumers will continue to adopt and change with each new service, device, or application.<sup>92</sup> Computer-to-computer communication will impact our homes, our vehicles, our health, and our everyday lives.

But this all depends on the ability of companies, investors, management teams, and brilliant young engineers to move nimbly and quickly to take advantage of each new trend by consumers. Nearly two *trillion* dollars sit on the sidelines, held by multinational companies that are waiting to see whether the United States government regulates the Internet, among other things.<sup>93</sup> Meanwhile, regulatory uncertainty persists, even as other nations evolve—perhaps into global high-tech leaders.

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87. *The Arab Spring’s Online Backlash*, THE ECONOMIST, (Mar. 29, 2012, 9:27 PM), <http://www.economist.com/blogs/newsbook/2012/03/internet-middle-east> (discussing Internet’s role in facilitating dissent in the Arab Spring).

88. Sperling & Park, *supra* note 85.

89. *Id.*

90. See, e.g., CLYDE WAYNE CREWS JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 41–43 (2013), available at <http://cei.org/sites/default/files/Wayne%20Crews%20-%202010,000%20Commandments%202013.pdf> (discussing the rapid growth of federal telecom regulation and its consequences).

91. See Bret Swanson, Op-Ed., *The Coming Exaflood*, WALL ST. J. (Jan. 20, 2007, 12:01 AM), available at <http://online.wsj.com/news/articles/SB116925820512582318>.

92. See Yoo, *supra* note 80, at 1849, 1884.

93. Large, multinational U.S. companies have accumulated nearly \$2 trillion in cash and equivalent assets abroad as of the end of 2013. Richard Rubin, *Cash Abroad Rises \$206 Billion as Apple to IBM Avoid Tax*, BLOOMBERG (Mar. 12, 2014, 2:47 PM), <http://www.bloomberg.com/news/2014-03-12/cash-abroad-rises-206-billion-as-apple-to-ibm-avoid-tax.html>.

As a nation, we face many challenges: ensuring that all children have access to the Internet at speeds and with devices in order to reach their full potential; conducting an unprecedented spectrum auction to ensure the viability and strength of wireless networks; and implementing technology and strategies to make the Internet as safe and secure as possible for every user and to thwart cybersecurity attacks that occur daily throughout the ecosystem. We want to ensure democracy thrives here and around the world and that the Internet remains an open medium for civic engagement everywhere.

However, none of these goals involve or rely upon new net neutrality rules being adopted and enforced by the FCC. Parents, teachers, consumers, entrepreneurs, and investors will choose the winners and losers through online chat, voting with their wallets, and adopting new technologies that have yet to be invented. The best way the FCC can influence the debate is by ending it. If and when a real problem emerges, shine a light on it and look out for the consumer backlash against any instigator or wrongdoer.<sup>94</sup> Odds are the wrongdoers will not need an FCC monetary penalty, as they will be out of business altogether.<sup>95</sup>

All this incredible success was enabled through the *current* framework of a light-touch regulatory process. Any further net neutrality regulation is not only unnecessary, but might also actually derail the Internet's next great expansion. We must refrain from regulation taking aim at shadows in order to continue the very real progress and promise of unleashing the very best America has to offer to our consumers, our creators, our children and indeed, the world.<sup>96</sup>

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94. As Randall Rothenberg put it: "The ability of aggrieved Americans to band together and make noise that is either (depending on your point of view) productive or destructive is a reality that organizations as diverse as the Democratic Party and Dell Computer have learned the hard way." "Listenomics," Advertising Age's critic-at-large Bob Garfield calls this new principle: "The herd will be heard." Randall Rothenberg, Op-Ed., *Facebook's Flop*, WALL ST. J. (Dec. 14, 2007, 12:01 AM), <http://online.wsj.com/news/articles/SB119760316554728877>.

95. Cf. ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994) (chronicling how free people govern themselves through informal rules that emerge organically from the bottom-up).

96. See John Allison & Ron Johnson, Op-Ed., *Regulations Stifle Economic Growth*, POLITICO (Oct. 4, 2011, 9:47 PM), <http://www.politico.com/news/stories/1011/65117.html> ("Regulatory bureaucracies also stifle innovation, which is the key to economic growth but requires defying convention, experimenting, making mistakes and correcting them.").