

---

# Net Neutrality or Government Brutality?

BY ADAM B. SUMMERS

---

Over the past six years or so, network neutrality, or “net neutrality,” has risen from an obscure techie buzz phrase to a bona fide political issue and rallying cry for some strange political bedfellows. The current debate comprises competing views on economics, regulation, free speech, property rights, and even the supposed rights of individuals and businesses to a certain Internet experience. Would a net-neutrality mandate protect the rights of some or merely trample the fundamental rights of others and stifle competition and innovation?

Much of the perplexity surrounding net neutrality stems from ambiguity and confusion over the very definition of the term. The concept concerns how information is transmitted over the Internet. Data are moved in “packets” through networks of computers and routers. Currently, these data are processed with little regard to what kind of information they are—be they important medical data, streaming video, or spam.

Generally speaking, net neutrality is the notion that all content, applications, and services should be treated the same by Internet service providers (ISPs). Net-neutrality proponents fear that network operators might someday discriminate against certain types of information by charging fees to particular content providers in exchange for guarantees of higher-quality service or by blocking some content completely.

Such a proposal may sound innocuous enough, but the problem is that the proliferation of things like

streaming video and online gaming are taking up increasingly large amounts of bandwidth and are sensitive to delay. This Internet congestion can lead to the degradation of service for all Internet users. Slight delays may hardly be noticeable in e-mail or web-browser applications, but can be more serious for video-content providers or Voice over Internet Protocol (VoIP), which allows people to make phone calls over the Internet.

Then there is the question whether the government has any right to tell ISPs how to manage their own networks and pricing structures, which will be discussed in some detail below.

Adding to the confusion is the fact that net-neutrality advocates disagree over just how much control network operators should be allowed to maintain. Some believe that neutrality means data packets must be handled on a first-come-first-served basis without exception, while others would permit the existence of differing quality-of-service levels as long as there are no

special fees (no price discrimination) for higher service levels. Still others would allow prioritization of data and differing quality levels (along with tiered pricing), provided that there were no exclusivity in service contracts. Or, in the words of Sir Tim Berners-Lee, developer of the World Wide Web, “We pay for connection to the Net as though it were a cloud which magi-

---

Generally speaking, net neutrality is the notion that all content, applications, and services should be treated the same by Internet service providers (ISPs).

---

---

*Adam B. Summers (asummers1@reason.org) is a policy analyst at the Reason Foundation.*

cally delivers our packets. We may pay for a higher or a lower quality of service. We may pay for a service which has the characteristics of being good for video, or quality audio. But we each pay to connect to the Net, but no one can pay for exclusive access to me.”

Since the most restrictive definition is the one that is typically embodied in legislation and that raises the most serious issues, it is the one on which this article will focus.

### The Birth of “Net Neutrality”

The idea of network neutrality originated during the late 1990s as some feared potential threats to the “end-to-end” nature of the Internet, although some trace the concept back to the age of the telegram, when Congress passed the Pacific Telegraph Act of 1860. The act subsidized a transcontinental telegraph line and stated that “messages received from any individual, company, or corporation, or from any telegraph lines connecting with this line at either of its termini, shall be impartially transmitted in the order of their reception, excepting that the dispatches of the government shall have priority.” The term “network neutrality” was coined by Columbia Law School professor Tim Wu in his 2002 paper, “Network Neutrality, Broadband Discrimination,” in which he promotes a “network anti-discrimination regime.”

There have been several efforts to pass net-neutrality laws at the federal and state levels, but they have thus far been rebuffed. That may change, however, particularly if Senator Barack Obama wins the presidential election in November. He has expressed support for net neutrality, dating back to a 2006 bill (S 2817). The prospect of imposing government regulation on what is essentially a free market might lead one to believe that Democrats are more likely to support net-neutrality mandates than Republicans (notwithstanding the fact that the GOP frequently acts in contradiction to its pro-market rhetoric), and, indeed, there is some truth to this.

Generally speaking, most members of the political left have tended to favor net-neutrality legislation

and most on the right have tended to oppose it, but there are notable exceptions. Organizations like MoveOn.org, the American Civil Liberties Union, and a number of liberal bloggers have come out in favor of such legislation, for example, but former Clinton White House press secretary Mike McCurry is co-chairman of the Hands Off the Internet Coalition, which opposes it. On the other hand, most Republicans oppose net neutrality, but conservative groups such as the Christian Coalition and Gun Owners of America support it.

Even the most important innovators of the Internet are divided on the issue. Vinton Cerf, a co-inventor of the Internet Protocol (IP) and vice president and “Chief Internet Evangelist” for Google, is for it. Bob Kahn, inventor of the Transmission Control Protocol (TCP), which provides reliable delivery of a stream of bytes over the Internet, and David Farber, a computer science and public-policy professor at Carnegie Mellon University who is known as the “grandfather of the Internet,” are against it.

And then there are the corporate interests. Large web-content providers such as Google, Yahoo!, eBay, and YouTube support net-neutrality mandates because they fear the prospect of having to pay higher prices to ensure the quality of their content, while cable and telecommunications companies such as AT&T, Verizon, Comcast, and Cox Cable oppose it because they feel they should have the freedom to operate their own networks and set their own prices without interference from the government.

In 2004 then-Federal Communications Commission (FCC) Chairman Michael Powell outlined a set of nondiscrimination principles. Powell argued that the broadband industry should offer consumers freedom to access content, run applications, attach devices, and obtain service-plan information.

When AT&T and BellSouth merged in 2006, the FCC attached a net-neutrality provision as condition of its approval. Under the measure the company agreed “not to provide or to sell to Internet content,



Dr. Vinton Cerf playing Spacewar! on the Computer History Museum's PDP-1 computer.  
Joi Ito, licensed under Creative Commons Attribution 2.0

application, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination." AT&T agreed to the concession in order to break a 2-2 deadlock among the commissioners that had held up the merger for several months. The provision was narrowly tailored to AT&T, however, and included a 30-month expiration date. Moreover, current FCC chairman Kevin Martin and fellow Republican commissioner Deborah Taylor Tate warned that the measure "does not mean that the commission has adopted an additional Net neutrality principle. We continue to believe such a requirement is not necessary and may impede infrastructure deployment," they wrote in a statement. Martin and Tate added, "Thus, although AT&T may make a voluntary business decision, it cannot dictate or bind government policy."

### Proposed Legislative "Solutions"

S<sup>2817</sup> was just one of many attempts to codify net-neutrality regulations in recent years. An attempt to attach a neutrality provision to the purportedly landmark 2006 telecommunications bill (S 2686) failed on an 11-11 committee vote, and S 2686 ended up failing in the Senate anyway. The Communications Opportunity, Promotion and Enhancement (COPE) Act of 2006 (HR 5252) contained neutrality provisions, which were stripped out before the bill ultimately died, as did the Internet Non-Discrimination Act of 2006 (S 2360) and the Internet Freedom and Nondiscrimination Act of 2006 (HR 5417). The Network Neutrality Act of 2006 (HR 5273) was defeated in committee. The Internet Freedom Preservation Act of 2008 (HR 5353), which would enforce the principles of the FCC's AT&T-BellSouth merger deal on all broadband providers, is now pending, as are some older bills that have been reintroduced.

As with the neutrality debate in general, there are divisions over policy within the federal government.

While Congress and perhaps the FCC seem to be moving toward increased government regulation, the Federal Trade Commission (FTC) has opposed new regulation. As far back as 2002 the FTC noted the rapidly evolving nature of the high-speed Internet service market and argued that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market." More recently, a 2007 FTC report reiterated its position and asserted that since no "significant market failure or demonstrated consumer harm from conduct by broadband providers" could be found, net-neutrality regulations "may well have adverse effects on consumer welfare, despite the good intentions of their proponents."

The FTC's conclusion is critical because one of the main justifications of net-neutrality laws is to prevent harm to consumers. That no harm has been found has led neutrality critics to dub the notion a "solution in search of a problem."

---

That no harm has been found has led neutrality critics to dub the notion a "solution in search of a problem."

---

To date, only a couple of cases of what could be called net-neutrality incidents have occurred. Madison River Communications blocked a web-based application when it prevented customers from using Vonage's VoIP service. The FCC stepped in and ordered Madison River to stop

the blocking and make a \$15,000 payment to the federal government. In another case, America Online was accused of blocking e-mail to the website dearAOL.com, which was established to protest an AOL plan to charge users a higher price for a feature to block e-mail from unauthorized senders. AOL maintained that the blocking was unintentional and assured that access was restored after customers complained. No government involvement was necessary. Finally, there was an allegation that Comcast was blocking Internet traffic to certain peer-to-peer (file-sharing) websites that were consuming large amounts of bandwidth, but it was later revealed that Comcast was merely slowing down certain peer-to-peer uploads by reducing the number of simultaneous connections that users could have to the site.

Net-neutrality proponents contend that they want to use regulation to increase competition and innovation, but their remedies would have the opposite effect. The growth in demand for bandwidth-intensive applications, such as streaming video, multi-player online gaming, and telemedicine, will require vast capital investments. Broadband providers will not invest in such projects, however, if there is not a good chance they will be able to recoup their costs and turn a profit. This is not unlike how cable companies currently rely on richer customers paying for premium services so that they can invest in less-profitable ventures, such as providing infrastructure for services to rural areas. As Randolph J. May, president of the Free State Foundation, explained in testimony before the New York City Committee on Technology in Government on a proposed net-neutrality resolution,

If broadband providers are not allowed to differentiate their services because of regulatory straightjackets, their ability to compete in the marketplace will be compromised. Lacking the flexibility to find innovative new ways to respond to customer demand, they will lack incentives to invest in new network facilities and improve applications. This lack of new investment, in turn, will have the perverse effect of dampening competition among existing and potential broadband operators.

Net-neutrality advocates also tend to underestimate the amount of competition that already exists in the market for high-speed Internet services. There are multiple companies providing these services using multiple technologies, including wireline, cable, terrestrial wireless, and satellite. Wireless broadband services, in particular, have come to provide a strong source of competition. Recent FCC data show that wireless has gone from having no subscribers in the beginning of 2005 to 35 million subscribers and a 35 percent share of the market for high-speed lines by June 2007. Moreover, as of June 2006 there were two

or more broadband providers in 92 percent of the nation's zip codes, and four or more providers in 87 percent of the nation's zip codes. With all of this competition, it simply would not be in the companies' interests to degrade services to consumers because doing so would cause them to lose business to their more innovative rivals.

The costs of stifling competition and innovation through net-neutrality regulations would be significant. A May 2007 American Consumer Institute study estimated that regulation would cost consumers \$69 billion over ten years. According to study author Stephen Pociask, "Despite proponents' best intentions, net neutrality proposals would be a twofold problem for consumers. Innovations that require a guaranteed level of service won't come to market, and consumers would have to pay more for the services they receive."

---

Net-neutrality proponents contend that they want to use regulation to increase competition and innovation, but their remedies would have the opposite effect.

---

### The Usefulness of Price Discrimination

Price discrimination is another concern of neutrality advocates. Despite the negative connotation associated with the word "discrimination," price discrimination is a common and efficient way of allocating scarce resources and satisfying consumer demand. Children and seniors get discounted ticket prices at movie theaters; people pay different prices for different seats at concerts and sporting events; and some toll roads charge different prices depending on the time of day and the resulting levels of traffic congestion. In response to an FCC Notice of Inquiry regarding broadband practices, the Department of Justice's Antitrust Division (of all things!) heralded the value of price discrimination in a September 2007 statement, noting the example of the U.S. Postal Service: "The U.S. Postal Service, for example, allows consumers to send packages with a variety of different delivery guarantees and speeds, from bulk mail to overnight delivery. These differentiated services respond to market demand and expand consumer choice." The Department concluded, "Whether or not the same type of differentiated

products and services will develop on the Internet should be determined by market forces, not regulatory intervention.”

In other words, the government should simply get out of the way and allow the market to work. Government should not try to pick winners and losers.

When neutrality proponents say that people have a right to “neutral” provision of information over the Internet, they are really saying that the public has some sort of right over the private property of the companies that provide the access to that information. Some have tried to justify this argument by claiming that the Internet was designed to be neutral, but it is the freedom from government restrictions that has encouraged innovation and allowed the Internet to flourish. Or as my Reason Foundation colleague Steven Titch has put it,

The legislated mandate for neutrality . . . is based on the supposition that neutrality was a founding doctrine of the Internet. That couldn't be more wrong. The Internet and its commercial component, the World Wide Web, are what they are today due to the simple principle of free exchange through voluntary agreement. Engineering concepts such as “network neutrality” or meaningless slogans like “information should be free” had nothing to do with it.

Broadband providers have invested large sums of money in their networks and should be free to manage them as they see fit. Customers who feel their needs are not being met are free to switch to other providers. This freedom of contract and voluntary exchange are the cornerstones of a free-market economy. Supporters of net neutrality fear that without regulation, a relatively small number of companies will become the “gatekeepers” of the Internet, but the alternative is far worse: a monopolistic government gatekeeper whose incentives are to cater to political power, not consumer desires.

In addition to violating free-market ideals, net neutrality might also violate constitutional rights, specifi-

cally, the Takings Clause of the Fifth Amendment. As the Free State Foundation's May explains,

[T]he *de facto* imposition of common carrier regulation through net neutrality mandates raises serious Fifth Amendment property rights issues under the Takings Clause. This is because the mandate to carry traffic that ISPs might otherwise choose not to carry, or to carry traffic at faster speeds than the service providers otherwise might prefer, or to refrain from charging more to those who impose greater capacity demands, is not costless. . . . Government mandates that impose such costs, but which, at the same time, restrict ISPs' freedom to recover such costs, implicate the ISP's property rights.

Net neutrality also brings up First Amendment concerns on both sides of the debate. Some grassroots groups, such as the Christian Coalition and Gun Owners of America, fear that broadband providers might someday decide to block access to their web content for ideological reasons. This, they argue, would constitute a violation of their free-speech rights.

This analysis is erroneous for a couple of reasons. First, the Constitution prohibits the *government* from restricting one's speech, not other private parties. As Brian Costin of the Heartland Institute writes, “[F]ree speech rights for an individual or group end where another's property rights begin.” Second, a government regulation such as net neutrality that forced a private party to provide access to forms of speech with which it disagrees would violate the free-speech rights of the *broadband provider*. As noted previously, ISPs have an economic incentive *not* to block access to content, but they would be within their rights to do so if they saw fit.

### The Right Tool for the Job

While network-neutrality advocates claim to want to ensure fairness and competition, the govern-

---

It is the freedom from government restrictions that has encouraged innovation and allowed the Internet to flourish.

---

ment regulation they propose will result in anything but those things. In the free market, competition ensures that customers receive the services they demand. Government control, by contrast, ensures that they receive whatever services the politicians and bureaucrats in power at the time deem appropriate (not to mention the inevitable and endless litigation about who could offer what services when and for how much).

The concept of the “tiered” Internet is not something to be feared. On the contrary, it could be a means of enhancing services to broadband customers, provid-

ing revenue for ISPs to invest in accommodating increasing demand for bandwidth-intensive and delay-sensitive applications and making further improvements to data delivery, and of increasing fairness by ensuring that content providers responsible for the most Internet congestion pay the higher costs of assuring a high quality of service for Internet users. Choking off this potential revenue stream through net-neutrality mandates will only ensure that instead of an Internet with regular lanes and “fast lanes,” all consumers will be stuck in the slow lane. 

## *“At age 57, I ran away from Home”*

Writer Jim Payne (*The Culture of Spending, Overcoming Welfare*, etc.) follows the waterways of America, living a Tom Sawyer life, getting scared, soaked, and bailed out of trouble by Samaritans he discovers along the way. His escapades span the country, from the Hudson River to the Columbia, from the Mississippi to the Florida Keys.

As Payne’s adventures unfold, you never know what’s around the next bend. He’s entrapped by security guards at Mount Vernon, loses his rudder off the Florida Keys, and sleeps in Franklin Roosevelt’s bed. Across 1,600 miles, this middle-aged runaway often loses his sense of direction, but never his sense of humor.

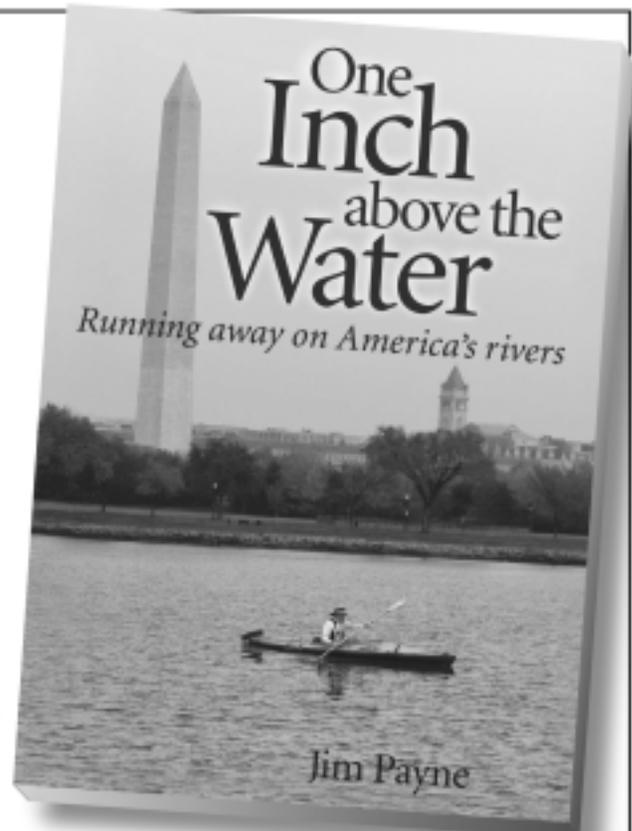
Available from booksellers or directly from the publisher

Send \$14.95 (shipping is included) to:

**Lytton Publishing Company**

Box 1212

Sandpoint, ID 83864



Visit [www.OneInchAboveTheWater.com](http://www.OneInchAboveTheWater.com)