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Net Neutrality and the Battle for the Open Internet

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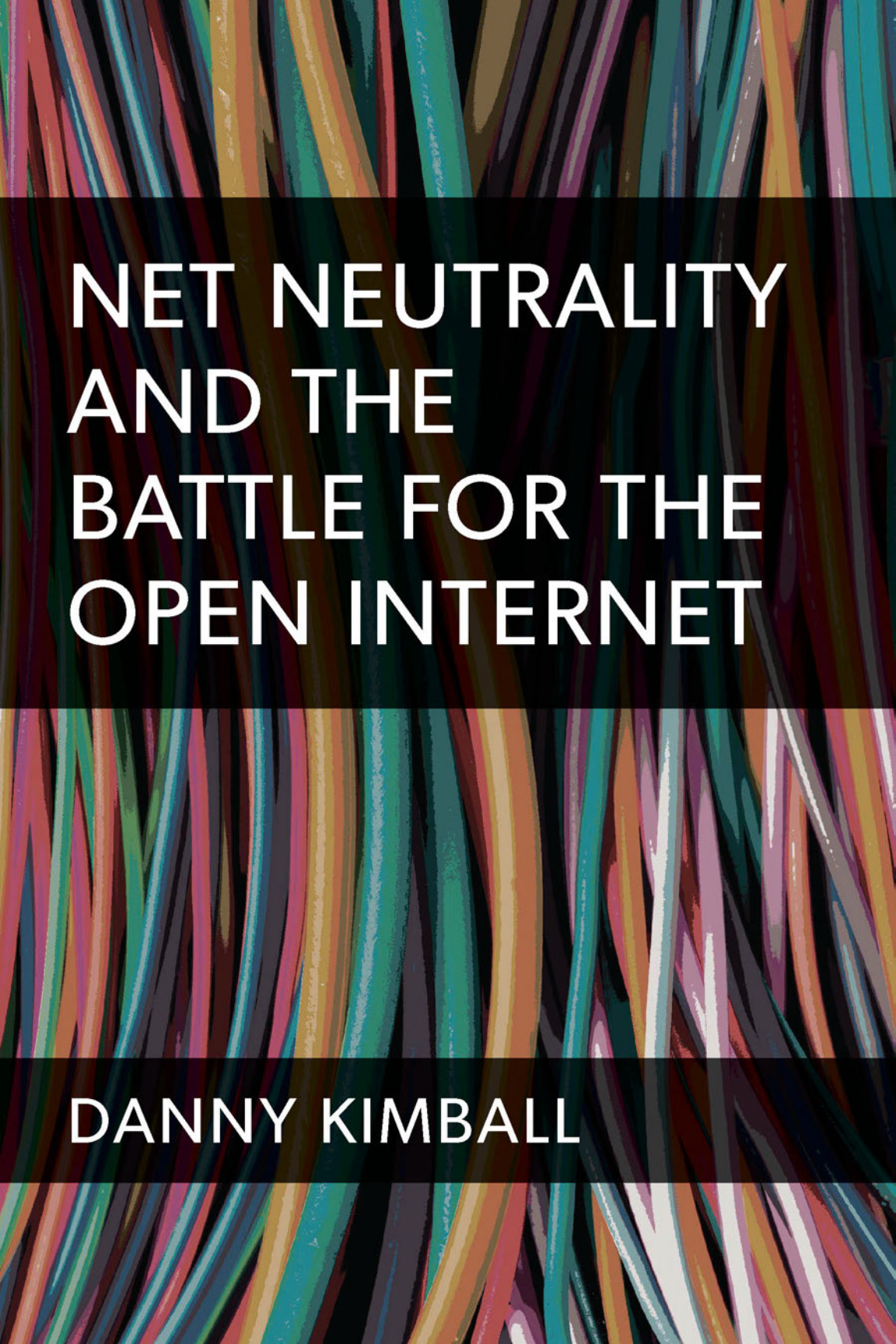
NET NEUTRALITY
AND THE
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Illustrations

Introduction

The Broadband Battle

The line of police faces the crowd of protesters. Armed with military-grade weapons, body armor, and shields, the SWAT team advances on the mass of young people of color in the streets, step-by-step, boxing them in. Suddenly there is tear gas in the air, dispersed by police into the crowd without warning. As the scene erupts into chaos, police shoot rubber bullets at the scrambling protesters. You are watching it all happen live, thanks to people with a connection to the open internet.

Mustafa Hussein was live streaming from the streets of Ferguson, Missouri, in late summer 2014, documenting the uprising sparked by the police murder of Mike Brown, and the militarized police response, which became a defining moment in the rise of the Movement for Black Lives and a new generation of racial justice activism. Hussein was just a graduate student in the area who became the reason many across the country were aware of what was happening in Ferguson, when the mainstream media was nowhere to be found. The night he was hit by a rubber bullet while fleeing tear gas, he kept streaming while 1.2 million people watched it all live, equaling a good prime-time rating for CNN. Days of police suppression of dissent in Ferguson went ignored by major publications and news networks until citizen journalists reached the nation through online media. When professional reporters did show up, police hounded, threatened, and even arrested them. Roadblocks had kept satellite television trucks from getting close to the action, leaving everyday people's internet live streams the only way to see events unfolding on the ground at this early stage.[1]

Everyday people like Mustafa Hussein were able to raise alarm about injustice, without the mainstream media, because there were conditions in place for democratic communications. There was a technological system—not only the mobile devices and cameras in their hands but also the unseen electromagnetic waves, fiber-optic cables, switches, and servers—equipping anyone to transmit openly to anyone else. The companies that control access to this infrastructure did not interfere with the traffic to and from the internet: Verizon did not throttle Hussein's 4G signal, Comcast did not block its users from watching it, AT&T did not have a paid partnership to prioritize live streams from Facebook over Lifestream, the small start-up app that Hussein was using. He and the other regular people who showed Ferguson to the world expected that when they connected to the internet, what they streamed, tweeted, posted, and uploaded would reach those on the other side of the network. As of about six months prior, though, they no longer had legal protection for these affordances. Policy prohibiting discrimination on broadband internet had been struck down by a federal court, leaving all of these enabling supports fragile.

The internet has been praised for democratic possibilities, but it is not natural, coincidental, or inevitable for the internet to be open. It was a choice for an internet connection to not privilege one way of using it over another, and it is a choice people collectively face whether the open internet will continue or not. Internet traffic flows fairly and equitably only if those governing the network abide by the principle that they should not discriminate. The internet is free and open because of net neutrality. This book is about the fight from 2002 to 2017 over whether net neutrality will remain in the United States.

"Net neutrality," a dry but crucial standard of openness in network access, escalated from a technical principle informing obscure regulatory debates to become the flashpoint for an all-out political battle for the future of communications. As the fight over net neutrality spilled out from cloistered boardrooms and arcane regulatory files and into the public arenas of political struggle—online, in the media, and in the streets—it became a rallying cry with surprising and consequential effects for the shape of media industries, digital culture, and the public sphere. At stake in the struggle over net neutrality have been two very different visions of the digital future: Should the internet be a public resource for anyone to use to connect without structural advantages, or should it be a private delivery system for the services of big corporations? Since 2005, people in the United States have demanded that broadband providers not interfere

with online content and services and that access to the internet remain open, without favor or discrimination, while powerful broadband providers fought to consolidate and exploit their control over internet access. After a decade-long political battle, in 2015 the US government implemented strong net neutrality regulations, but in 2017 these rules were undone and the struggle began anew.

This book traces a critical cultural history of net neutrality. In it I examine the policy and politics of net neutrality in the United States from 2002 to 2017 in order to ask what the net neutrality debates reveal about media regulation, industries, and advocacy in the internet age. This analysis is limited in scope to the United States, focused on the debates in and around the Federal Communications Commission (FCC) in its Open Internet rulemaking proceeding and the cultural, economic, and political implications.

Through critical analyses of texts from policy proceedings and popular culture alike, along with interviews with participants, this book shows how media activists and everyday people were able to challenge the power of the telecommunications industry that historically dominates such policymaking, as well as the compromised tech corporations that sought to coopt the issue, to win a significant victory for media democracy (although its final resolution remains on hold). Enabled by the same open networked structures that they sought to protect, media democracy advocates mobilized millions of people through creative online/offline, insider/outsider organizing techniques and discourses of equality and justice to push net neutrality forward despite operating on a playing field steeply tilted by corporate power and influence.

Net neutrality enjoyed a moment in the spotlight beginning in 2014, garnering much attention in political circles, media coverage, and popular culture, in addition to a great deal of academic research. And yet, with many larger issues running underneath these events, there remains much yet to be explored.[2] Studies and academic discussions of net neutrality have been dominated by traditional legal, economic, and technical perspectives, but humanities-based critical theoretical approaches to net neutrality remain underdeveloped. Full book-length treatments of net neutrality remain rare and tend to represent legal, economic, or technical points in the debate rather than books about the debate itself.[3] This book offers an in-depth and theoretically grounded history in order to record this important moment and make sense of what has happened through a critical lens. The net neutrality story told in this book is meaningful not just because of the monumental significance of the specific policy outcome but also because of what

was revealed along the way about how media industries, policies, and activism work in the digital age. These lessons will remain instructive regardless of what ultimately becomes of net neutrality policy in the suddenly even more volatile and unforeseeable near future.

The original research in this book seeks to contribute to the field of communication and media studies.[4] In this way, the book seeks to help advance critical insights into the complex and contradictory forces shaping the structures of communication in the digital age, from neoliberalism and populism to corporate dominance and technological openness, and the work that people can do to effect change on these fronts. Beyond the interest in net neutrality itself, then, this book also serves as an extended case study of important institutions, processes, and practices in media and how power operates in and through them, which will remain relevant whatever happens following this moment.

The battle for net neutrality has been fundamentally about sustaining public values over private interests—a fight for democracy in communications. Net neutrality is a struggle in the politics of policy and infrastructure. As general material resources that enable and constrain what actions and practices are possible, media infrastructures like broadband shape the conditions and possibilities of communication that depend on them and, consistent with social democratic political commitments, ought to operate as a public good available to all on an equitable basis, without favoring who can use it or for what. Policy-making is the central means through which such decisions about access to resources are made, and for regulation to serve democracy it is necessary that policy-making processes represent the interests of the people, which it will not do unless people demand that their voices be heard.

Net Neutrality and the Infrastructure of Internet Access

> The internet is not something that you just dump something on. It's not a big truck. It's a series of tubes.
>
> —Sen. Ted Stevens (R-Alaska), June 28, 2006[5]

The net neutrality debate is a struggle to shape internet infrastructure.[6] Net neutrality articulates a particular vision of the internet and its purpose that conflicts with that of the corporations that control the means of physical access to the internet. People need broadband to connect to the internet; these high-capacity internet access networks carry traffic back

and forth at the speeds necessary for contemporary online content and services.[7] The WiFi in your house is not the internet—your laptop needs the cable going out of your wall to get there. Your phone does not function by magic—the invisible waves it shoots in the air end up at a cell tower hooked up to plenty of wires. In between you and anything you want to do on the internet is this material infrastructure, which is overwhelmingly controlled by a telecommunications industry that owns the rights to wire into your house and beam into your airwaves. This infrastructure is run by a small number of big cable companies, especially Comcast and Charter, and phone companies, especially Verizon and AT&T.[8] Net neutrality says that this connection to the internet should remain open, treating anything that goes in or out equitably and not giving unfair advantage to some things over others. Big broadband providers disagree.

The cable and phone companies that occupy this "last mile" network aim to leverage their bottleneck position into gatekeeper control over the internet—a fundamental reshaping of an open, general-purpose communications infrastructure. A necessarily simplified yet roughly illustrative model of how the material infrastructure and institutional arrangements of internet access have traditionally worked is shown in figure 1.

When a person (the "end user" of the internet) clicks on something on the internet (content like a website, Google search, or Netflix video, or communication with another user like a tweet, email, or Instagram photo), they request data from the servers on the network where it is stored (likely a large data center run by an online platform like Facebook, streaming service like Netflix, or web servers hosted by Amazon). That data is then passed from content providers' servers to the internet backbone (large content providers often own their own "transit" lines to the internet). Then the large-scale telecommunications companies that operate the backbone of the internet (including Verizon and AT&T) transmit the data through their networks to the broadband provider that provides the end user with internet access. Finally, the end user's internet access provider (a consumer broadband provider like Comcast, AT&T, Verizon, or Charter) connects that data to the end user's device. Within this traditional arrangement, content providers pay into the operation of internet access infrastructure in one of two ways: either subscribing to an access provider (just like any user of the internet, except with much higher capacity) or investing in their own infrastructure by building their own network to connect themselves to the internet.

This traditional arrangement for internet traffic is what broadband providers like Comcast, Verizon, and AT&T are trying to change. These

internet access providers are more interested in being content distributors than what the industry calls "dumb pipes" that do nothing more than pass traffic from point A to point B. They want a piece of the new revenues being generated by video streaming and online platforms, especially given that the legacy business models of the large cable and phone companies that dominate the broadband market are threatened by competing services that go "over the top" of the internet (e.g., watching Netflix instead of cable TV). Their desired model is what economists call a "two-sided market" and what most people would call double dipping—or collecting protection money.[9]

The Whitacre Tax

> How do you think they're going to get to customers? Through a broadband pipe . . . Now what they would like to do is use my pipes for free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it . . . Why should they be allowed to use my pipes? The internet can't be free in that sense . . . For a Google or Yahoo! or Vonage or anybody to expect to use these pipes free is nuts!
>
> —Ed Whitacre, AT&T CEO, October 31, 2005[10]

Without net neutrality protections, broadband providers can institute pay-to-play arrangements, as described above by then AT&T CEO Ed Whitacre. In what we could call a "Whitacre tax," an end user's broadband provider can impose various charges on content providers (shown in figure 2). This is typically in exchange for some sort of preferential treatment, such as a prioritized "fast lane" to users or a "zero-rated" plan, where such traffic is not counted against a user's data cap, or simply a toll to pass through the pipes on the way to a user. Either way, it effectively becomes a tax collected by internet access providers to allow the content provider to reach its users.[11] This has already become a standard practice in many places around the world. It is problematic not only because it adds to the amount content providers already pay for access to the internet, raising costs that will ultimately be passed along to users, but also because the large content providers who can afford this payola exercise an unfair advantage over smaller start-ups, independent and nonprofit organizations, and everyday users.[12]

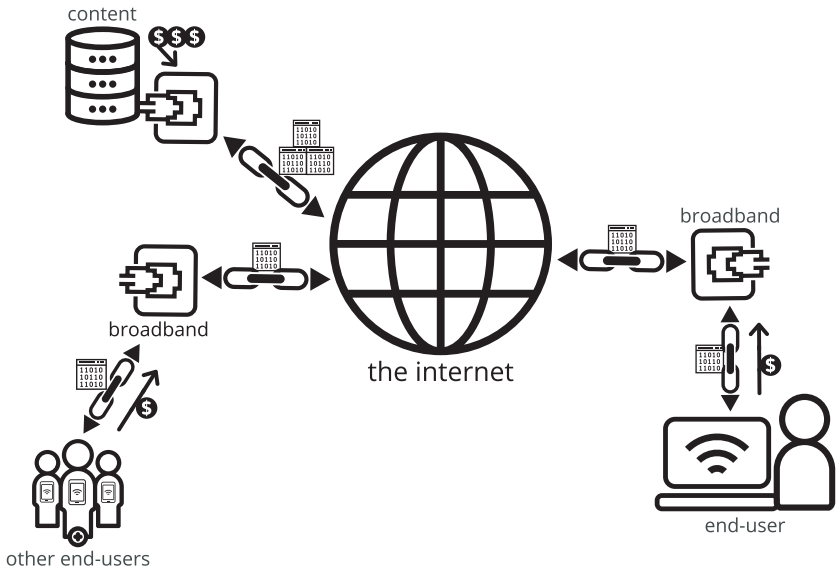

Fig. 1. Traditional internet access infrastructure (diagram by author).

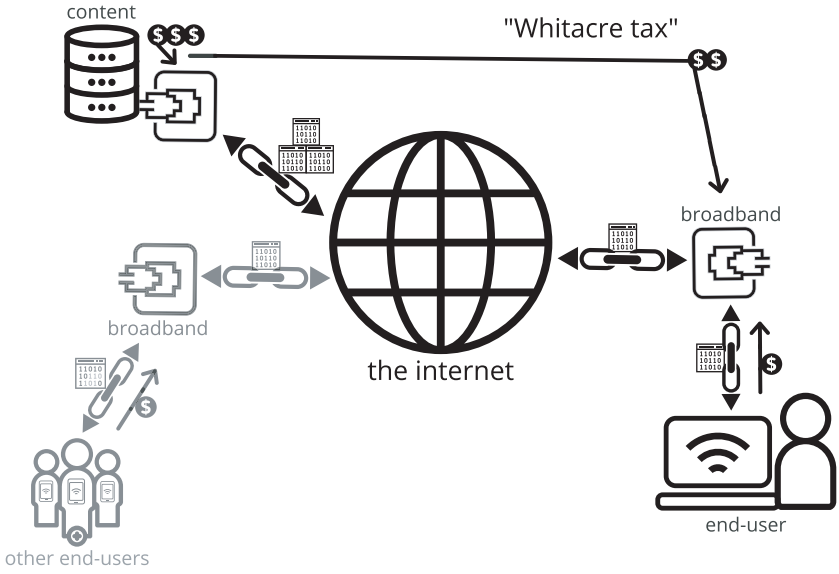

Fig. 2. Internet access infrastructure with a "Whitacre tax" for content to reach users (diagram by author).

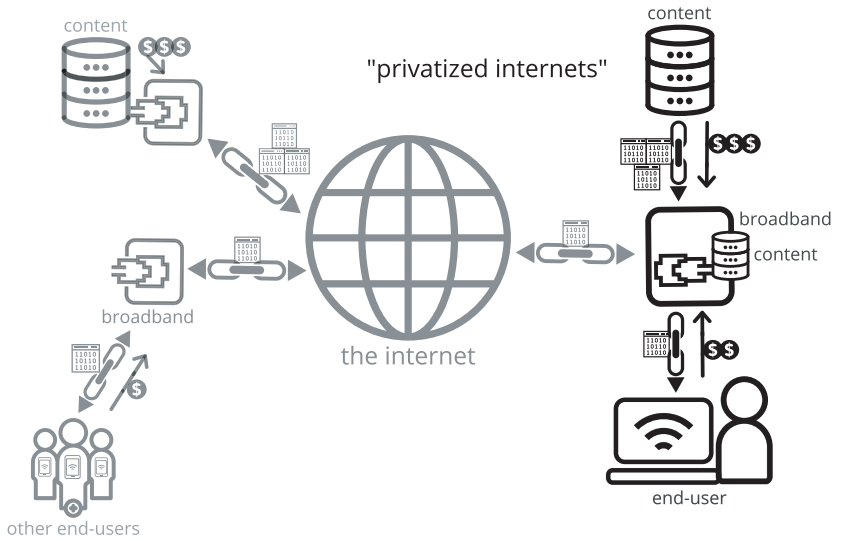

Fig. 3. Internet access infrastructure as "private internets" (diagram by author).

Private Internets

As shown in figure 3, specialized services involve running private networks ostensibly distinct from "the public internet." These differentiated fast lanes on broadband pipes have been commonly used for the internet access providers' own broadband-based TV and telephone services, but many deals involving other content and applications are in the works. This is troubling because it splits a formerly unified internet into multiple "internets" that are separate and unequal. In what is often referred to as the "dirt road scenario," broadband providers and the corporations that can afford to pay them for uncongested priority distribution travel smoothly on their own toll road, providing incentives for investment and innovation only on the private internets, while smaller users are confined to a crowded parallel "dirt road," effectively squeezing out the public internet and marginalizing public participation in online media creation and circulation.

A Brief History of Net Neutrality in the United States

This book provides a historical record of the US net neutrality debates. The pages that follow zoom in on specific events to develop a detailed investigation of key moments organized thematically. To lay a clear foundation for

the analysis that follows, a high-level, chronological telling of this story is in order at this point. More details on each of the events recounted in this section are taken up in the chapters below.

The term "network neutrality" was first introduced in a policy memo written by law scholar Tim Wu in 2002 and fleshed out in a law journal article a year later, proposing rules to the Federal Communications Commission to prohibit blocking and discrimination on internet access networks.[13] As internet access was moving from dial-up networks over phone lines to broadband networks over cable, the FCC under the George W. Bush administration had to choose how to define the new technology and how to regulate it. Under pressure from the cable industry, in 2002 the FCC chose to treat broadband more like cable television than telephone lines, removing the public utility–style regulatory framework that applies to phones to connect all equally. This kicked off the decade-and-a-half-long fight for net neutrality.

Despite some tendency to treat it as such, network neutrality was not a new concept sprung forth fully formed from the mind of Wu in 2002. He was not so much introducing a new concept as putting a name to the principle of openness and nondiscrimination by which the internet had been governed since its inception. Net neutrality comes out of two traditions—one technological, one regulatory—that enabled the open architecture and equitable access that once characterized the internet. The technological tradition (which informed computer networking since the 1960s) is the "end-to-end argument" for network design, which enables control by the "end user" rather than centralized management by the network operator.[14] The regulatory tradition (governing communications for centuries) is "common carriage," the equal treatment requirement on public utility telecommunications infrastructure, including dial-up internet access, that the FCC declined to extend to broadband.

The equitable access that Wu referred to as "network neutrality" was once a built-in consequence of the end-to-end architecture of the early internet and was backed up in policy by common carriage. Early proponents emphasized how on an open internet anyone could invent something new and share it with the world, including new apps that would change how the whole network was used; as Tim Berners-Lee put it, "When I invented the Web, I didn't have to ask anyone's permission."[15] However, changes to the technical and institutional structures of the internet around the turn of the millennium brought with them more incentive and ability for network operators to discriminate among internet uses. With the FCC

decision to remove common carriage from internet access, there was little regulatory protection against such practices. As the term "network neutrality" became "net neutrality," narrowly technocratic matters gave way to broader social, political, and economic concerns.

Steps Forward, and Backward, for Net Neutrality

A major court battle and increasing advocacy raised net neutrality to prominence in the policy sphere. In 2005 the US Supreme Court upheld the Bush FCC's decision to deregulate broadband by removing the public utility framework, heating up the debate among lawyers, economists, and technologists over net neutrality policy to fill the void. The Bush FCC issued a set of guidelines for net neutrality in 2005 (and, later, conditions on a telecom industry merger and some wireless spectrum licenses) but put no binding policy on the books. Calls to formalize the net neutrality rules grew, including from then fledgling tech companies like Google and Amazon, lobbying for net neutrality policy as necessary to avoid being squeezed by broadband providers. Media advocacy groups, led by the media reform organization Free Press, took up the issue for its importance to democracy and in 2006 began organizing the broad coalition that would grow to become the strong activist base for net neutrality. In 2006 the Save the Internet campaign defeated proposed legislation that would have cemented the FCC's deregulation, and net neutrality became officially recognized as a potent activist issue.

From the outset, net neutrality had vehement opposition from the telecommunications industry that controls broadband. Comcast, Verizon, AT&T, other cable and phone companies, and their industry-funded think tanks, consistently resisted such regulation, arguing that it would stifle investment and innovation in broadband. Emphasizing the private property status of the networks, telecom companies see government intervention into the operation of their business as fundamentally illegitimate.

Mainstream media began to pay attention to net neutrality in the mid-2000s, with several conspicuous examples of broadband discrimination and policy-making considerations. Incidents such as the phone company Madison River blocking access to the internet phone service Vonage, Canadian internet access provider Telus blocking access to their workers' union website during a lockout, AT&T CEO Ed Whitacre's quickly notorious interview in which he said that he "ain't going to let them use my pipes for free," and Verizon executives complaining of Google's "free lunch" were

picked up by the press and major blogs, bringing visibility to net neutrality. The big net neutrality bombshell hit in 2007 and 2008: Comcast was caught blocking access to the file-sharing service BitTorrent, and the Bush FCC issued a major ruling against the cable giant for violating net neutrality guidelines. Several net neutrality bills were proposed in Congress, and supporters were now paying close attention to these events in the policy sphere, culminating most prominently in the viral video of Sen. Ted Stevens's declaration that the internet "is a series of tubes" during a congressional committee debate.

Net neutrality was not originally a divisive political issue, but it became polarized especially after the 2008 election of President Barack Obama. The initial coalition of support for net neutrality included everyone from bloggers and librarians, to organized labor and feminists, to gun owners and evangelicals. The issue was understood as a fundamental protection for free speech and civic participation, no matter for whom or what. Net neutrality lost support from conservatives once it was an Obama campaign promise; the rise of the Tea Party movement shortly after he took office brought with it blanket right-wing opposition to and obstruction of anything the Obama administration or congressional Democrats attempted. Net neutrality was therefore treated by the right as creeping "socialism" enabling a "government takeover of the internet."

Weak Net Neutrality Won and Undone

The Obama FCC passed net neutrality policy in 2010 in an industry-driven process that ended up complicated by a federal court case. FCC chair Julius Genachowski proposed "Open Internet" rules in 2009 that called for specific binding net neutrality regulations. In semiofficial fashion, Verizon, Google, and others from the telecom and tech industries began negotiating a compromise on a limited set of rules that did not apply to mobile broadband or so-called private internets. Six months into making these rules for broadband, however, the DC Circuit Court handed down a decision finding that the FCC had practically no authority to regulate broadband. The FCC ruling against Comcast in 2008 for net neutrality violations was based in nonbinding guidelines from 2005 that the court found gave the agency no meaningful enforcement authority. Net neutrality advocates pushed hard for stronger rules, based in a change back to a public utility ("Title II") framework, which was briefly considered by the FCC but received tremendous backlash from the telecom industry. Instead,

Genachowski pressed ahead with a set of compromise net neutrality rules prohibiting blocking and unreasonable discrimination but filled with loopholes and built on unsure ground for regulatory authority ("Title I"). In December 2010 the Democratic majority at the FCC passed the agency's first binding net neutrality policy in the Open Internet rules.

The 2010 Open Internet rules stood until 2014, were not very effective against some abuses not included in the policy, and were undone in court. Broadband providers got around the rules and exempted some traffic from the limits on users' data plans. For AT&T and other mobile providers, it was partners paying for the privilege; for Comcast it was its own broadband TV service. Most notably, Comcast throttled Netflix streams for nearly a year, until the streamer paid a toll to reach its viewers. Verizon, who had a lead role in writing the rules, had sued to eliminate them, and in the case that followed, the DC Circuit struck down the policy in 2014 because the FCC did not have the authority it needed based on its lack of regulatory authority. The court ruled that net neutrality is just updated common carriage, so enforcing net neutrality needed a public utility framework for its authority, which the Bush FCC had eliminated. This kicked off the fight for a new set of net neutrality rules, with a stronger foundation this time.

Public-Powered Win for Strong Net Neutrality

Tom Wheeler, the new Obama administration FCC chair, began a roller-coaster process to make new Open Internet rules in 2014. A leaked version of the proposed rules, which included provisions endorsing paid fast lanes for internet traffic, kicked off a backlash from net neutrality supporters, who protested online and at the FCC. Building on the progressive energy that had built since the Great Recession of 2008–2009 and Black Lives Matter since 2013, an inclusive advocacy coalition framed net neutrality as a necessary part of economic equality and racial justice and pushed for the internet to be a public utility that enables equitable participation and the means of self-representation for the marginalized. Net neutrality took on a markedly more anticorporate tone, with advocacy focused on a regulatory check on the power of cable and phone companies in order to prevent Comcast, Verizon, and AT&T from being gatekeepers building "fast lanes for the few" and a "separate and unequal" internet. Net neutrality by this time had burst out of the realm of policy wonks to become a mainstream political issue, discussed by prominent politicians and regularly covered in

major news outlets, but the most prominent media coverage came from a comedian, John Oliver, on HBO's *Last Week Tonight*.

Net neutrality advocates organized a campaign of public participation during 2014 that created great pressure on the FCC to enact rules with a strong regulatory foundation. A unified and diverse coalition of media democracy and racial justice activists, legal and technologist advocates, and online creators and start-ups organized under the banner "Battle for the Net," pushing for strong net neutrality in both the policy sphere and the public sphere. Net neutrality advocates fought back against the telecom industry and the lobbyists, think tanks, and conservative commentators who deeply opposed the idea of public utility regulation, which they had successfully framed as "the nuclear option." No longer start-ups, tech giants like Google, Amazon, and Facebook largely stayed out of the fight, while smaller tech companies stepped in to support, but the push for net neutrality was decidedly led by advocates, organizers, and regular people. Protests and demonstrations engaged both online, like the Internet Slowdown Day on tens of thousands of websites, and offline, like occupations of the FCC building and even Chairman Wheeler's driveway. These actions drove millions of people to contact the FCC and their congressional representatives, resulting in a record-breaking 4 million public comments to the Open Internet rule-making process, crashing the FCC's servers twice. This powerful popular force in support of net neutrality made good policy into good politics.

Chairman Wheeler backed away from his initial weak proposal and briefly began to consider another compromise approach before it was met with another wave of protests, public outcry, and one particularly strong voice calling for a change: President Obama. Following the 2014 midterm elections, where Republicans gained unified control of Congress with their largest majority in a century, President Obama fully pivoted toward executive action his administration could take on its own, including more aggressive FCC net neutrality regulation. He publicly called for the strongest net neutrality rules possible and for it to be accomplished by changing to a public utility framework. It was a highly unusual, and controversial, move for a sitting president to directly call for specific policy from an independent agency like the FCC. Attempting to head off forceful regulation, congressional Republicans proposed a compromise on a net neutrality law, with serious rules but removing the FCC's ability to meaningfully enforce them. With an activist base pushing them, Democrats stood firm in support of strong FCC rules. The activism and advocacy had paid off, making

net neutrality a winning political issue and shifting the momentum toward bold policy action.

In 2015 the FCC passed net neutrality policy again, this time with stronger rules based on a more stable regulatory foundation. Chairman Wheeler's proposed new set of Open Internet rules were right in line with what advocates and President Obama had called for. The Democratic majority at the FCC passed clear rules against blocking, throttling, and fast lanes and included a change back to a public utility regulatory framework. The telecom industry again sued the FCC to overturn the rules, but this time the policy survived in federal court in 2016: by changing to a public utility regulatory foundation, the FCC did have the authority it needed and net neutrality policy stood. Net neutrality advocates celebrated what was hailed as the biggest public interest victory in media policy in decades and the most successful progressive activist campaign in years.

Net Neutrality Trumped

As with so many other things, net neutrality was turned upside down when Donald Trump was elected president in 2016. President Trump came into office with a stated goal to "dismantle the regulatory state" and a preoccupation with undoing anything accomplished by President Obama. Consistent with this, President Trump elevated the most outspoken critic of net neutrality at the FCC, Ajit Pai, from commissioner to chair, and the FCC immediately set about removing the Open Internet rules and their public utility authority in the name of "Restoring Internet Freedom." The plan was met with more mass resistance as activists organized online demonstrations and protests at seven hundred Verizon stores across the country. Net neutrality was now a major political issue with overwhelming support across the political spectrum in public opinion. Big tech companies did step up to oppose the plan and, in touting the importance of net neutrality, the telecom industry actually agreed: broadband providers publicly professed their support for net neutrality in principle but said they would regulate themselves on it. They did not have to do much to bring the Trump FCC along their way to deregulate—Republicans at the agency were staunchly committed.

In 2017 the Trump FCC eliminated net neutrality policy and utility broadband regulation in a suspicious and turbulent process. Public comments in the 2017 policy-making proceeding smashed the old record, with 22 million submissions, but that only muddied the waters of popular

participation; most submissions were fraudulent comments from automated bots. The vicious and deceptive style of the right-wing "dirty tricks" activism of the Trump presidential campaign carried over to the campaign against net neutrality, so FCC policy-making now came with disinformation, stolen identities, a stonewalled legal investigation, and a faked server hack. Chairman Pai pushed forward amid the chaos, and the Republican majority at the FCC passed the net neutrality repeal in 2017. A bipartisan effort in Congress to reverse the reversal fell short, and the repeal also survived a federal court challenge in 2019, in a ruling that the agency had the authority to change its mind again. That court ruling, however, opened the door to states being able to pass their own net neutrality laws, which several did, including rules in California that were even stronger than the FCC's.

Net neutrality advocates did not give up, and with wide popular support and an engaged activist base with them, they believe the battle will still be won. Fighting state-by-state for net neutrality protections was one of the fronts of the battle, but that only served to pressure the federal government to sort out the hodgepodge of different rules in different places. The whiplash of different FCC policies coming from the swings of polarized Democratic and Republican administrations brought the focus even more to Congress, where putting net neutrality into law would solidify the matter. Since taking the majority in the House in 2018 and the Senate in 2020, Democrats only haltingly advanced legislation to protect net neutrality. The defeat of Donald Trump by Joe Biden in the contentious 2020 presidential election officially put net neutrality back on the political agenda in Washington. By 2021 net neutrality policy was poised for a return in the United States, but whether, where, and how new rules would be put in place remains to be seen as of this writing.

Outline of the Book

The first chapter lays out the *theoretical foundation* for the book. Here I explain the integrated model of policy studies through which I approach net neutrality, seeing it in policy, discourse, advocacy, and infrastructure. Looking at the history of "net neutrality" as a discourse, I trace its mutations as articulated to different interests and ideologies. I forward an understanding of net neutrality as democratic communications infrastructure, functioning as a conceptual resource supporting structures of fair and equitable conditions for communication, especially as the regulatory tradition of common

carriage aligns with an affirmative free speech policy. The chapter closes by situating my work within critical media policy studies and introducing the concepts of *privatized regulation* and *wonkish populism*, through which I understand the opposing advocacy strategies in the net neutrality battle.

The second chapter digs deeper into the *language* of broadband policy to uncover the power relations sedimented in the terminology of FCC regulations. Focused on particular "terms of art" in the policy sphere as what I refer to as *terms of power*, this chapter demonstrates the influence of the act of definition in media policy, through a close reading of the competing terms used to define and classify broadband in FCC policy—"information" and "telecommunications"—and how their usage in key legislation, policy documents, and judicial decisions channeled and constructed differing forces of control over time. Through analysis of these cases and the tradition of common carriage, this chapter concentrates on the discursive power operative through the acts of naming, defining, and classifying; how it accumulates to privileged players in the policy sphere—namely, the large corporations who shape the discourse there—and the sorts of rhetorical interventions that can be made in this process.

The subject of the third chapter is the relations of the two *industries* most affected by and involved in the net neutrality debates: the telecom and tech industries. While broadband providers from the telecom industries and the new media of the tech industry have conflicting interests over net neutrality, their relations developed a new wrinkle as time went on. This chapter focuses on two case studies of companies from these opposing industries cooperating for particular reasons: Verizon with Google and Comcast with Netflix. The conflicted and compromising relations between these companies is revealing of the dynamic of privatized regulation in communications policy and its implications.

In the fourth chapter I investigate the process of making the *first net neutrality policy* at the FCC, from 2009 to 2010. Looking at the public participation organized by net neutrality advocates, as well as their opposition, I analyze the strategy and tactics of what I call wonkish populism and its possibilities and limitations. I conclude with a close look at the FCC's first consideration of reclassifying internet access under common carriage and why it was treated as "the nuclear option."

The fifth chapter examines the process through which advocates pushed for the *second net neutrality policy*, from 2014 to 2015, when the FCC reclassified broadband as a Title II "telecommunications service," the decision that enabled strong net neutrality rules. This chapter shows how the

wonkish populist discursive tactics of advocates and publics were able to overcome the power dynamics of privatized regulation to redefine broadband within a regulatory framework consistent with net neutrality. These points are made through a critical review of key events leading up to the broadband reclassification, such as the public backlash to the internet fast lanes allowed in the FCC's initially Title I–based 2014 proposal, the viral success of John Oliver's call for strong net neutrality policy on *Last Week Tonight*, and the statement issued by President Obama calling for rules based in Title II.

The sixth chapter looks at the role of *media advocacy and activism* in organizing and mobilizing people to engage with the issue of net neutrality and influence FCC Open Internet policy, based on interviews with key advocacy participants to understand the strategies, tactics, and practices of the net neutrality campaigns organized by media advocacy groups. Media democracy activists were able to get from the FCC nearly everything they were fighting for, despite facing fierce opposition from the telecom industry, scant help or undermining concessions from the largest purported allies in the tech industry, and an FCC eager for compromise. At the heart of this "David and Goliath" story is the lesson of how mass people power can overcome concentrated corporate power. The millions of voices mobilized by the media reform movement became a force that could no longer be ignored and pushed the FCC to meet their demands for strong net neutrality. It had always been good policy, but activism made it good politics too. These campaigns also proved to be more than just empty "clicktivism," as much online activism is dismissed, as rhetoric and demonstrations on social media, websites, memes, and videos also turned into filed comments, phone calls, marches, protests, and occupations in order to effect meaningful policy change.

In the conclusion, I update the net neutrality story after the 2015 victory with the story of the 2017 repeal by the Trump administration, lay out some of the takeaway points from the book, and reflect on why and how net neutrality is "boring" and with what consequences.

CHAPTER 1

Democratic Communications Infrastructure, Discourse, Policy, and Advocacy

From citizen journalists in the streets documenting injustice to independent creators connecting with an audience for their videos and music, from the groups of friends on their couches podcasting engaging political discussions to the teenagers in their bedrooms inventing the latest dance craze, the internet is full of everyday people with a voice.[1] The reason that people can have this voice, and the reason that we have the chance to hear it, is not due to an abstract right to free speech nor the technologies of the internet being inherently democratic. Net neutrality is the reason why. How net neutrality enables the equitable means to speak and be heard on the internet is a matter of policy, but it is also a matter of technology, business, and culture.

Net neutrality is a key principle underlying communications in the internet age, through discourse, infrastructure, politics, and policy. Taking net neutrality as a case study, this book looks at policy critically and expansively. I bring an integrated approach to net neutrality, analyzing the language of its policy texts, the practices of its construction, its meanings in cultural discourse, and its affordances in technological infrastructure. This model for critical policy studies can fill in a fuller picture of an issue by looking at policy not only as it is contained in the words of laws, policies, and regulations but also on a wider scale: the advocacy, activism, and lobbying of organizations, corporations, and publics; its representation, framing, and interpretations in journalism, popular culture, and everyday people's discussions; and the design, management, and materiality of the

technological systems implicated. This approach is loosely adapted from Julie D'Acci's integrated model of media studies, which follows an object of study in its text, production, reception, and social historical context.[2]

Applying this influential model from media and cultural studies to the typical domain of political economy of communication is part of an attempt at a complementary fusion of the two: the issues looked at here are of political economy, but the ways I look at them are more cultural. The subject here is not just the "hard" structures of political economy—capitalism, government regulation, and infrastructure—but also the "softer" structures of culture—language, stories, and symbols. I am interested not only in how much cable industry money is spent lobbying the FCC but also in how regular people talk about media policy. And I am as interested in how television comedians and social media posters talk about media policy as I am in how federal judges and network engineers talk about it. All of this occurs within capitalist structures of oppression, but discourse channels power within—and, in certain ways, separable from—structures of material domination.[3] Uniting critical cultural and political economic approaches brings a core focus on relations of power: how hegemonic power structures communications and how we can hegemonically build power to act toward more just and equitable structures of media. In service of that political goal, this book analyzes communications policy in an integrated fashion, as an expansive site where power is constituted and directed and where work can be done to more fully realize the possibilities of democratic communications.

The Discourse of "Net Neutrality"

> I kind of agree it's boring; there's some power in sounding boring . . . Ultimately you judge a phrase not by whether it sounds great the first time you hear it, but whether it seems to stick around. And like it or not, net neutrality has stuck around.
>
> —Tim Wu, 2014[4]

Use the word "neutral" and the first thing that is likely to pop into someone's head is either Switzerland or a beige-painted wall—not really inspiring stuff. "Neutral" is defined by what it lacks: not taking sides, without having strongly marked or positive features, no conflicts of interest, nonaligned, impartial, unbiased, disengaged, not beneficial, not harmful.[5] Neutrality is often denounced as refusing to take a stand. Yet neutrality also

comes with egalitarian connotations and implies an affirmative choice to act impartially—not necessarily lacking a position or being indifferent but making an active commitment to be fair. Neutrality can be articulated in a way that is consistent with justice and equity. But part of its power is in its lack—a discursive emptiness that, in the case of the discourse of "net neutrality," was filled by advocates for their purposes.

"Net neutrality" is a discursive formation that will not seem to die, even as those advocates who pushed it most at times wished it would. One net neutrality organizer described to me her first encounters with the term this way: "What are we talking about when we say 'net neutrality?' Because that doesn't sound like an intuitively understandable concept. It also is not a very sexy concept. Who wants to be neutral on anything? It just didn't seem like it was something that would resonate with people."[6] There have been many attempts at a rebrand, from media figures, politicians, and advocates, proposing everything from "the First Amendment of the Internet" to the awkward acronym FAIR (Freedom Against Internet Restrictions) to comedian John Oliver's infamous "Preventing Cable Company Fuckery." As we will see, "Open Internet Protections" and "Internet Freedom" have a foothold in official policy discourse, but those mostly stay there. Yet "net neutrality" remains. Advocates inherited the name from the policy wonks and were shocked at how quickly it was taken up organically by online communities rallying behind the issue even before they could commission a communications consultant to come up with something better.[7]

"Net neutrality" is an inexact and limited way to talk about the issue, but it nonetheless has done important discursive work. Most obviously, there is no such thing as true neutrality, with no bias whatsoever, and it is no different for internet access; even network management practices understood as consistent with net neutrality ultimately cannot avoid favoring some uses of the network over others in certain capacities.[8] In deploying rhetorical shorthand along these lines, net neutrality discourse can perpetuate notions of a "level playing field" in ways that are problematic.[9] Also, net neutrality in many ways is just a shiny new gloss on a dusty old principle; as we will see, net neutrality is just a revival of common carriage regulation.[10] Further, too many arguments for net neutrality still fall back on the openness of historical internet architecture as proof enough that it should be that way in the future as well, which can lean too heavily on appeals to tradition.[11] Even with all of these points taken, though, "net neutrality," as it functions discursively, holds power relatively autonomous from the con-

ditions of its material reality. What matters is that "net neutrality" has been taken up by people in ways that have facilitated legitimate progress toward the democratic conditions for communications that it means to describe, and, even if not yet realized, it represents a vehicle on which to proceed. As Thomas Streeter has put it, "Net neutrality *as a discourse* has some unique potentials. As an abstract concept . . . it may not be all that new, but as political poetry, it is new; it has teeth."[12] Regardless of whether there is actually existing net neutrality, "net neutrality" resonates in a way that has promise to help get there.

"Net neutrality" became articulated to neoliberal, liberal democratic, libertarian, and social democratic discourses, bringing together a discursive alliance of technical, business, legal, and political interests that were able to marshal an unlikely campaign of mass public support for net neutrality policy. This articulation process was aided in the way net neutrality exhibited a kind of discursive neutrality. Net neutrality is boring, and, counterintuitively, that helped people get behind it. An opaque term from the world of policy wonks, the phrase "net neutrality" came to public discourse with no significant meaning but unobjectionable connotations, making net neutrality a uniquely suited discursive vehicle on which to attach a wide range of values and interests to bring people together. "Net neutrality" functions as an "empty signifier," carrying little meaning solely on its own but acquiring meaning through its association with the particular values of those who came together to fight for and against it.[13] This discourse has been both cause and effect of the political power-building that made net neutrality policy possible.

For an illustrative glimpse at the different articulations of net neutrality discourse, we can look at two different arguments for net neutrality made by Tim Wu, the man who coined the term. The first is from the influential 2003 law journal article where, as a young professor, Wu developed the concept of "network neutrality":

> The argument for network neutrality must be understood as a concrete expression of . . . the innovation process as a survival-of-the-fittest competition among the developers of new technologies . . . A communications network like the Internet can be seen as a platform for a competition among application developers . . . It is therefore important that the platform be neutral to ensure the competition remains meritocratic.[14]

The second argument is from a 2014 essay by Wu, by this point a public intellectual at the heart of a roiling political debate, published in *The New Yorker:*

> Net neutrality has seized the moment because it is standing in for a national conversation about deeper values [such as] the ideal of equality in the public sphere . . . The prospect [of] a "fast lane" for some . . . has ignited the argument that private inequality must have its limits, and that some public spaces must remain open to all . . . Calling something a public good or utility is to declare that there are some services that are not mere luxuries, but essentials—goods that . . . form part of the country itself and which shape what it offers its citizens . . . The Internet isn't as essential as electricity, but it has become almost as necessary to contemporary life . . . One [question] is whether the government, which created the Internet in the first place, is bound to stay away from it. Policy wonks can puzzle over the distortions caused by "termination monopolies." The bottom line is this: the debate over net neutrality is only nominally about packets and bits, and more accurately about what kind of country we want to live in.[15]

Wu introduced a technical idea in terms of Darwinian competition, innovation, and technological meritocracy. About a decade later, following the lead of the activists who had taken up the banner, Wu was arguing about not a technocratic issue but values of inclusion and equality and the government obligations to check plutocracy and guarantee public goods. We can see this as a brief tour of the journey of net neutrality discourse over the course of the debate—from neoliberalism, against libertarianism, through liberal democracy, to social democracy.

The Shifting Discourses of Net Neutrality

"Network neutrality" began as a technocratic principle, emerging first from technical and policy discussions of broadband, conceptualized in terms of innovation, competition, and consumer choice.[16] This initial network neutrality discourse was shaped by the dominant discourse of neoliberalism among the technologists, lawyers, economists, and tech companies that initiated the debate. Network neutrality in this view allowed for innovation

in new technologies, lowered barriers to marketplace entry, and ensured consumers their choice of what services to use online. Arriving in the midst of the deregulation and privatization of the early 2000s, at the hands of Ivy League legal scholars and Silicon Valley technologists, the net neutrality debates began on the terrain of neoliberalism; the discourse would not remain there, but this was where it came from.[17]

Net neutrality took on a new articulation, becoming linked to liberal democratic values of fairness, equality, free speech, and civic participation by the mid-2000s. Here it appealed to seemingly unobjectionable and unassailable American values. This came from expanding analyses from legal academics but largely as it was taken up by liberal activists and commentators making arguments on moral grounds. This strain of discourse linked net neutrality to foundational liberal democratic goals by framing the issue as one of antidiscrimination, prohibiting preferential treatment, providing equal opportunity, and enabling diversity in a marketplace of ideas, while invoking rights, including freedoms of expression, information, exchange, assembly, and the press.

From the beginning, net neutrality had limited but strong opposition, and the themes of the discourse against it remained consistent within libertarian discourse. This opposition was largely based in the supremacy of private property rights for telecom companies, which own the physical infrastructures of broadband. From the corporate libertarian perspective, the issue was primarily defined by an ideological aversion to government intervention, seen as stifling not only investment and innovation but also freedom and liberty. Some of this opposition shared commonalities with neoliberal discourse that agreed on principles of innovation, competition, and consumer choice but disagreed with whether net neutrality would achieve those goals. The libertarian view was concerned with innovation but saw it less a result of marketplace competition in online services and more from investment from dominant incumbent telecommunications corporations. There was also some overlap on liberal democratic grounds, such as seeing net neutrality as a free speech issue, but for infringing the First Amendment rights of broadband providers, not internet users.

As the net neutrality fight roared on and grew more political from 2014 forward, the discourse grew beyond the technocratic neoliberal and liberal democratic articulations while providing a meaningful alternative to the corporate libertarian opposition. This discursive expansion came as net neutrality took on new links to social democratic discourse, in the form

of articulations to political goals of economic and social justice. Through deliberate strategic efforts from progressive activists, and picked up in popular media representations and publics, the push for net neutrality came to be seen as a racial justice issue and through a lens of progressive populism. Understanding net neutrality as part of a larger fight against corporate control and structural racism made broadband gatekeepers and fast lanes into manifestations of marginalization, inequality, and oppression more broadly. Advocates also defined the issue as more explicitly anticorporate, as opposition to the cable industry in particular, drawing on and contributing to deep unpopularity and distrust of big broadband providers. Beyond what it stood against, though, advocates painted a bolder and more ambitious vision of net neutrality as public utility regulation, invoking the interests of the people broadly but the most vulnerable in particular.

An important part of media advocacy and activism (and critical studies of media policy) is dispelling the myth of policy-making as a detached, disinterested, rational process, so it would seem that taking up the banner of "neutrality" would be the last thing needed. Yet it is within net neutrality advocacy that a powerful democratic challenge to technocratic neutrality arose. The irony is that "neutrality," in this case, is not for objectivity, but subjectivity—the political subjectivity of a people, building and exercising their collective power. Indeed, "net neutrality" represents a unique site of instability within media policy discourse that presents political opportunities. Neutrality, which in media policy-making was previously limited to associations with objective technocratic expertise, has taken on a new life with the discourse of net neutrality.

Discursive struggles are important political work because power not only flows from material economic position but is a fluid multidimensional political dynamic as well, which is at least partially open to change through effective cultural practice. Understanding media policy discursively can expose those moments where dominant discourse—the hegemonic "common sense" of a matter—has become unstable and is therefore vulnerable to rearticulation in the service of meaningful political change. Streeter has asserted that net neutrality is one of the most important current points of such intervention.[18] The net neutrality debate has cracked open previously hardened frames of media policy discourse with the introduction of a new set of tropes regarding fairness and equality that has proven to vitalize engagement and has enabled progress toward more democratic structures of media.

Net Neutrality as Democratic Communications Infrastructure

Net neutrality discourse articulates a vision of democratic communications. Net neutrality further sees fairness and equality built into the technological, industrial, and regulatory structures of communications, the whole sociotechnical system of the internet. Net neutrality can be understood as *democratic communications infrastructure*. Net neutrality also acts as a foundational conceptual resource that—through discourse, technology, industry, and policy—supports the open digitally networked structures that make possible more democratic communications.

Meaningfully democratic communications must be equitable in access and participation and, to the extent that contemporary public discourse is structured by the affordances of digitally networked communications technologies, a free and open internet is a necessary—though, critically, not sufficient—precondition for democratic communications. There are many things that keep online communications from being truly democratic, from digital divides in internet access, online misinformation, and the toxic culture of social media to the surveillance capitalism, data colonialism, and algorithmic oppression of online platforms and giant tech monopolists.[19] Net neutrality will not solve these problems, but it affords a basic foundation upon which more democratic communications are at least possible. It is not just the existence of net neutrality, the condition of fair and equal treatment of all uses of the network, that makes democratic communications possible (although not guaranteed), but also "net neutrality," the principle itself that informs this condition. It is the latter, "net neutrality" as a discourse, that is the beginning point for a path toward securing the former—net neutrality as a description of material reality on the internet––the outcome of which remains uncertain. This conception of net neutrality requires a look at how it is infrastructure and how that infrastructure supports democratic communications.

Net Neutrality and/as Infrastructure

Net neutrality facilitates conditions for democratic communications through open technical structures for the internet; complementary arrangements of telecommunications, media, and technology institutions; cultural norms of equality online; and government regulation to enforce these conditions. Such a web of relational elements is what Tarleton Gillespie calls

a "sociotechnical ensemble," made up of technological systems, industrial arrangements, legal policy, and cultural discourse.[20] In this way, network neutrality is itself networked, connecting these pieces together to function as a "regime of alignment" that affords democratic communications.[21]

As these elements have become disconnected, though, the political battle recorded in this book has been about bringing them back together. The internet was built as a distributed, decentralized, end-to-end system, but technologies for network operators' snooping, prioritizing, and filtering traffic are now commonplace. What was once a competitive market for internet access was monopolized by major cable and phone companies, who have vertically integrated with media companies for content to provide over their own networks. The policy of common carriage that once regulated the infrastructure of the internet to protect democratic communications was rolled back, reinstated through the net neutrality fight, only to be thrown out again in a larger political upheaval. The cultural element of this ensemble, the discourse of net neutrality, through which the freedom and openness of the internet is an expectation and norm, has only gained strength as people have joined the fight to protect what has been threatened.

It is as a discourse that net neutrality has accumulated the most power, and it is through this cultural dimension that advocates have worked, through popular organizing, to deliberately influence policy to govern industrial and technical practices back into alignment. It is this discourse and activism that, while the policy battle drags on, has been able to keep telecom companies (barely) in check to not yet act on the technological and industrial capacity they have for a full-scale restructuring of the internet. Instructive precedents from media history include radio and cable in their early years. They took shape as emerging media through policy changes that enabled concentrated corporate dominance, aided by a shift from utopian hopes to cultural delegitimization of open public access for amateurs, which expanded consumer access but ended equitable participation.[22]

Net neutrality sits within the romanticized cyber-utopian discourse that has been so influential in shaping the internet. The idea that networked personal computers can be a democratizing force, while troublingly linked to libertarian and neoliberal ideologies, has nonetheless played a large role in the design and development of the internet along lines that had been actually more democratic than previous technological structures of communication.[23] The internet is a relatively open system, not because of anything inherent in the technologies themselves but because open and demo-

cratic practices came to be articulated to those technologies via discourses of openness like net neutrality. Streeter puts it well:

> One of the most powerful forces maintaining the internet's open, anarchic character, in sum, is our memory of all the romantic stories about the internet; those stories taught us to expect the internet to be liberating and unpredictable, and that expectation helps keep it that way. The internet is open, not because of the technology itself or some uniquely democratic potential hidden inside the technology, but because we have narrated it as open and, as a consequence, have embraced and constructed it as open.[24]

From this perspective, we can see net neutrality discourse as politically valuable because it plays a strong role in carrying the narrative that the internet is democratic, which—even if that is a partial story—can be an important part of the work of making it as much that way as possible.

Continuing to articulate a vision of net neutrality and sustain it as a principle to inform the policies and practices of internet regulation is discursive construction that can be used in the service of more fair and equitable structures of communications and media. As net neutrality in technical and industrial practice has been eroded—risking dissolution of net neutrality as a shared norm and expectation among internet users—it is clear that policy is the crucial site for intervention. Using the power of policy discourse to shape the technologies it defines and regulates is essential to achieving meaningful net neutrality protections. As a recognition and enlistment of the power of regulation of and through technology, net neutrality policy can also be a means through which to legally build into the infrastructure of the internet the public values of fairness and equality that can enable more democratic structures of access to and participation in communications and media.

Net neutrality acts on and as infrastructure for democratic communications; it influences the shape of the material infrastructure of the internet and itself serves as a discursive infrastructure for the internet. Net neutrality is a principle for the management of internet infrastructure, which has become an essential public utility for modern society, like electricity and roads.[25] But net neutrality is also itself a kind of infrastructure: a foundational conceptual resource. This follows the expansive definition from science and technology studies that sees infrastructure as "pervasive enabling resources in network form."[26] Net neutrality as a principle serves as a dis-

cursive resource, a standard and norm that underlies the internet as a sociotechnical system. Net neutrality is infrastructure that enables the internet to be infrastructure in that it works to maintain the network's existence as a common shared public resource, not a specialized, privatized mechanism for commercial content delivery.[27] This works only if policy is able to inscribe these conditions into technical and industrial structures—so regulation is necessary for democratic communications.

Democratic Communications and Common Carriage

Net neutrality is an affirmative promise to enable and protect democratic communications. Net neutrality principles arise from what law scholar Dawn Nunziato has called the "affirmative conception of the First Amendment."[28] Isaiah Berlin distinguished negative freedom, meaning a lack of constraints on action, from positive freedom, or an actual capability to act.[29] Similarly, affirmative free speech requires not an absence of government intervention but democratically providing the public resources necessary to support communication. Free speech is meaningless in practice without an infrastructure for democratic communications, affording people equitable capabilities to speak, be heard, and hear each other.[30] To facilitate democratic communications, though, means limitations for private owners of the essential infrastructure, placing the collective free speech rights of publics ahead of the private property rights of network operators, which they have fought tooth-and-nail. The influence of the affirmative tradition of free speech during the first half of the twentieth century in the United States has been overwhelmed by the postwar rise of "corporate libertarianism" traced by Victor Pickard.[31] Media democracy advocates working since the 2000s have tapped into this dormant affirmative free speech tradition to push for equitable access to the resources necessary for democratic communications—such as diverse and independent media ownership, quality local journalism, digital privacy, and universal internet access—that have been eroded after decades of privatization, deregulation, and corporate consolidation.[32]

Net neutrality draws from the affirmative free speech tradition through its basis in common carriage, the policy of openness and equal treatment that has long governed general-purpose network infrastructure, from trains and ships to mail and telephone lines. Common carriers must serve all comers equally, connecting anyone to anyone or anything else, without favor, no matter who wants to use the network or for what. (We will

discuss the common carriage tradition in telecommunications further in chapter 2.) While the First Amendment simply protects against censorship by the government, common carriage protects against private censorship and discrimination, by ensuring that what people can say or do is not controlled by those providing them the mediated means to do it. Net neutrality, as protection for open and equal access to the internet as the essential communications infrastructure of our time, is simply common carriage updated for the internet age. Broadband network operators own the "last mile" between people and the internet, and that bottleneck position affords them gatekeeper power to determine what people can do online—unless net neutrality regulations require them to commonly carry whatever people want to do.

The internet is a public infrastructure that became privatized. The design and development of the internet from the 1960s to the 1980s was the result of US government research commissions and funding. The open source network protocols were made freely available, and public investment built out the backbone of the internet.[33] In 1995, though, the backbone networks of the internet were handed over to five telecom companies, for free, and the internet was fully commercialized.[34] The broadband networks that connect people to the internet today function through the public authority of franchise agreements and licenses and are built using exclusive access to public land and airwaves, utility poles, rights-of-way, and easements through permits and eminent domain. However, they are privately owned and operated to generate huge profits for the regional monopolies of the cable and phone companies that control them. For reasons we will see in the following chapter, broadband infrastructure was consolidated under private control in the early 2000s and developed without traditional public utility regulations. From the lack of access for those who cannot afford it to favoring traffic that pays up, operating broadband networks with the profit-maximizing imperative of return on investment has created exclusions and inequality.

Common carriage is one solution to the problem of private power over public resources. Communications and media are vital to a democratic society, but when such essential public functions are operated through the private market, they serve the profit motive over the public interest.[35] For this reason, communications infrastructure is traditionally provided as a public utility, either directly through public service or licensed to private providers operating with public interest regulations.[36] Common carriage has been the heart of communications regulation for centuries.[37] The com-

mon carriage tradition, alongside the related obligation of universal and affordable service for all people, is based on the understanding that the importance to a democratic society of communications and media is too great to leave up to purely private interests, so when the responsibility for this infrastructure is held in private hands, it must come with a guarantee of inclusive and equal treatment.

Net neutrality policy first emerged as an alternative to another variation on common carriage regulation: the "open access" regulations in place for dial-up internet access before regulators removed their oversight in the shift to high-speed broadband.[38] Open access regulation separated network operation from service provision—the phone companies that provided early internet access were required to open up their infrastructure to allow internet service providers to sell access to the network. This sought to break up the bottleneck in getting onto the internet and to introduce competition into an otherwise "natural monopoly" of only those who already owned a giant telecom network going into everyone's house. This competition incentivized internet service providers to play fair through the "market discipline" of users having many other choices, but it did not directly enforce fair and equal access—common carriage rules were necessary for that. When common carriage and open access were both eliminated from internet access regulations in the move to broadband, "network neutrality" was proposed as policy to replace them.[39]

Net neutrality policy stops short of infrastructural separation and does not address the monopolization of regional markets for broadband access, but it is more direct and has a straightforward set of rules spelling out protections for nondiscriminatory access. Rather than ensuring equal treatment in connecting to the internet as necessary in and of itself, falling back on arguments about competition can take the cause sideways. A focus on a more competitive market as a solution for broadband constrains the possibilities for democratic communications because it accepts the merits of the market structure itself. A greater number of local independent broadband providers would be an improvement, but competition among private companies will not be enough, because the profit-based logic of the private market ultimately conflicts with the public interest. Aggressive public utility regulation like common carriage is necessary no matter the state of competition, because the issue is not the number or size of private interests but what follows from being private.

Rather than putting public service obligations on private companies, direct public ownership and operation can ensure universal and equitable

access. A "public option" on the otherwise private market for broadband offers an alternative service operated without the need to turn a profit. Broadband could also be decommodified by removing it from the market altogether and providing internet access to all. Municipal broadband networks, built and run by local government authorities as public service utilities, are already providing the fastest, most reliable, and most affordable service anywhere in the United States.[40] We could also go further to nationalize the network, returning the internet to public ownership and operating it under democratic public control.[41] Instituting these structures for public ownership and control offers the most direct and sustainable means through which to implement and enforce the conditions of fairness and equality in internet access that net neutrality envisions; a democratically controlled public internet would serve as a means to and an end for democratic communications. Going beyond the model of common carriage regulation on its own, toward direct public ownership and operation of broadband networks is the next step.[42] The Trump FCC's undoing strong Open Internet policy in 2017 was a devastating setback for democratic communications, demonstrating not only the fragility of such regulation in a time of larger political upheaval but also the importance of fighting for net neutrality as only one front within a deeper restructuring of the political economy of communications that will continue into the 2020s.

The ultimate goal is technical, industrial, and policy structures of communications that serve people over profit, and net neutrality is one element of that project of democratization of communications. Based in common carriage, net neutrality is affirmative free speech policy, using regulation to turn abstract free speech rights into concrete affordances to communicate equitably with specific prohibitions on discrimination. Net neutrality policy represents great progress, but on its own it is simply harm reduction within the larger context of privatization—such public service regulation is better reinforced with public ownership structures. The discourse of net neutrality, though, has been taken up as an inspiring vision of fairness and equality online, a critical conceptual resource that advocates have used to engage and mobilize the kind of collective action that can drive progress toward that larger goal. Articulating net neutrality closer to a social democratic discursive foundation has brought the immediate goal of binding and enforceable net neutrality policy closer in line with a larger-scale vision of the internet as a "public good": provided to all on an equal basis, outside of profit incentives, serving media democracy and justice. This is a fight that needs the power of policy, but policy requires power.

Private and Populist Politics of Policy

Communications policy is made across a series of interconnected sites of power in and around the US government, involving all three federal government branches, regulated companies, interest groups, and publics. Congress creates legislation that outlines policy and delegates authority to administrative agencies that implement that policy, all of which is reviewed by federal courts that interpret the legality of the policy. The Communications Act of 1934, which was amended in the Telecommunications Act of 1996, is the cornerstone of communications policy in the United States, with the goal to "make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[43]

The Communications Act created the Federal Communications Commission to execute and enforce this general policy goal by regulating "communication by wire and radio."[44] The FCC is an independent executive agency, with leadership appointed by the president (two commissioners from each major political party, appointed to staggered five-year terms, and a chairperson from the president's party) but operating outside the direction of the White House. Designed as an expert agency, the FCC is to make policy insulated from political considerations, but there are some limited mechanisms for public participation and democratic accountability in the commission's policy-making. FCC rule-making operates on a "notice and comment" process: the agency releases public notice of proposed new rules or rule changes (a Notice of Proposed Rulemaking) and solicits two rounds of public comments. Legally, the public comment record must be considered in developing the final rules, but the FCC has been historically dismissive of comments without data or analysis to support them, as it needs to provide "reasonable" evidence for its decisions. The rule-making procedures also allow meetings, presentations, and documents before the commission by involved companies or interest groups (ex parte filings), but these must be disclosed on the public record as well. The FCC also occasionally holds public hearings or meetings and takes feedback on social media and online platforms. After the allotted timeline for the rule-making procedure, the FCC releases the final rules in an order. FCC processes and regulations are overseen by Congress in order to stay in line with legislative intent and accountability to elected officials; relevant House and Sen-

ate oversight committees can investigate, hold hearings, issue reports, pass legislation, and even directly overturn specific regulations.

Executive agencies like the FCC are also subject to judicial review in order to keep regulations in line with relevant statutes and the Constitution. FCC rules can be challenged in federal court, usually the US Court of Appeals for the District of Columbia Circuit, and decisions there can be appealed to the US Supreme Court. The Communications Act and the First Amendment are the primary legal bases for court decisions on communications policy, but the Administrative Procedures Act, which directs the authority and processes of regulatory agencies, also comes in. Courts can uphold or strike down policy based on interpretations and applications of these laws, but, due to crucial Supreme Court precedent, courts cannot decide the content of regulations. They can only rule on specific cases whether the agency acted reasonably within the authority granted to it by Congress and must otherwise defer to the judgment of expert agencies.

However it looks in this textbook version of the process, though, policy-making is not a neutral, rational system of defining problems and formulating solutions but rather a messy struggle for power within larger social structures of inequality. The scholarly movement of critical policy studies has rightfully placed policy-making within a larger political context, revealing and assessing the interests and values that operate within the language and actions of stakeholders in the policy-making process.[45] I join critical policy scholars in "rejecting the prevailing model of elitist, technocratic liberal democracy . . . [to] offer support for projects designed to further processes of democratization."[46] Critical policy scholars have pushed for greater public participation in policy-making across fields and issues, to break through the "technical mystique . . . enveloping experts with a misleading aura of objective rationality."[47] This is not to undermine expertise itself but rather to recognize how the elitist structures of policy-making processes privilege traditional experts, such as lawyers, technologists, and think tank analysts, and push to empower the personal and collective counter-expertise of public interest advocates, social movements, and publics to challenge embedded power relations.

Critical policy scholars such as Thomas Streeter, Des Freedman, Victor Pickard, and Allison Perlman have fruitfully developed an approach to the "politics of policy" in communications and media with critiques of elite power structures, calls for more public participation in policy-making processes, and a focus on advocacy and activist work.[48] As part of critical media policy studies, this book offers a critique of the telecommunications

and technology industries' influence on communications policy-making and its consequences for democratic communications. It also illuminates advocacy practices that develop productive links between public participation and expertise in policy-making processes. The aim is to make room for publics in the policy sphere, cultivate the literacies necessary for everyday people to make meaningful contributions to technical decisions, and legitimize more antagonistic intervention on behalf of populist interests. Media policy is a specific site where power is constituted and channeled and, therefore, where work can be done to democratize communications in particular and society in general.

There are two particular political logics in policy-making revealed in the case of net neutrality, one related to industrial relations and lobbying and the other related to public interest advocacy and activism. The first is the arrangements of telecom and tech companies aiming to privatize public regulatory power to entrench their control over communications and media. The second is the advocacy strategy of media reform activists, and the publics they organize, of infiltrating the technocratic policy sphere with more democratic participation, seeking to use public regulatory power to build more just and equitable structures of communications and media. In the case of net neutrality, we can see examples of these opposing logics in action and how both have had successes and failures. These two positions reflect a fundamental political conflict of our time, between the privatization or democratization of public power.

Privatized Regulation

While typically understood as "deregulation," the policy goal sought by big business is not really the removal of rules as much as a shift in who makes and enforces the rules, and for whom—from government to corporations. There is not really such a thing as "deregulation" in a meaningful sense, just as there is no "free market." Government regulation underlies and enables capitalist economic activity, creating markets, shaping industries, and enforcing and delineating private arrangements like contracts, property rights, and limited liability for corporations. Dominant corporations do not mind government regulations they get to write or enforce themselves or that they can benefit from at the expense of rivals coming up or in other industries. Some form of regulation of people's and institutions' actions also occurs even in the absence of government regulation; corporations exert their own regulatory control, especially if not kept in

check by government regulation. "Deregulation" is a useful shorthand, but what it often refers to is actually just regulation shifting power to corporations.

What the telecom and tech industries are aiming for is *privatized regulation*. Dominant industries seek to privatize public power to serve their interests and use that power to exert their own control.[49] Rather than diminish or escape public regulatory power, we will see in chapter 3 how the telecom and tech industries rely on but absorb power from the public sector, using it to justify and enable amassing private power. The first binding net neutrality rules were essentially written together by Verizon and Google, proposing to put regulatory power over broadband not with the government regulator of communications and media, the FCC. Instead they asked Congress to grant enforcement authority to a private third-party group with ambiguous independence from the industries themselves. Without net neutrality policy, Comcast has exercised private regulatory control over the uses of broadband infrastructure, restricting access to Netflix to extract tolls and induce a partnership.

Dynamics of private control of public regulation are evident throughout the history of communications policy-making—from NBC and CBS managing the FCC's television licensing "freeze" from 1948 to 1952 to cement their dominance, to the media industry negotiations that have served as the legislative process for copyright law since the 1970s, to the media industry lobbying that led to rolling back media ownership rules in the 2000s.[50] Heavy corporate influence on regulatory agencies like the FCC is common, through pressure from politicians who count the regulated industries among their donors, the close proximity of armies of lobbyists to lend their "expertise," and the "revolving door" of the corporations being regulated and the agencies doing the regulating, that puts former lobbyists in charge of overseeing their old employers or former regulators lobbying their old agencies.[51] The ultimate end of this is "regulatory capture," where the agency serves the industry being regulated, not the people; oligopoly industries like communications and media have often been able to essentially write rules for themselves.[52] This is an arrangement that has worked satisfactorily for the telecom industry, but the case of net neutrality shows the industry's next goal is for government regulation to be privately outsourced or (perhaps learning from the growing power of the tech industry) for the legitimization of their own private regulation. Privatized regulation is related to this long-standing private influence over public policy-making, as well as a more recent move of public regulation to

the private sector and private regulation of what ought to be public goods, but it is a different iteration with some important distinctions.

Privatized regulation is distinct from the types of public-private partnerships often seen in communications policy-making. In a system of "co-regulation," the prevalent model of internet policy in the European Union, including net neutrality policy, the state delegates responsibility for developing and implementing rules to the industry that are overseen and enforced by government regulators.[53] "Multi-stakeholder governance" has government, corporate, civil society, and technical groups come together to form the norms and principles that inform policy and practice, such as the processes that set and coordinate the global standards for critical internet resources.[54] The privatized regulation sought by the telecom industry is not to work together with government (and certainly not civil society) to make policy and submit to public oversight on it but to use the state only to confer regulatory authority on the industry to both make policy and enforce it on itself.

Privatized regulation is also different from purely private regulation with public consequences. Industry "self-regulation," such as codes of conduct set and enforced by trade groups, in the United States typically comes as a preemptive move to avoid government regulation, such as the Production Code in the film industry of the 1930s–1960s.[55] "Private governance" is an emerging form of regulation operating through the private control of public activities on private infrastructure, seen especially on online platforms and their content moderation decisions.[56] Facebook provides an example of both, with its Oversight Board as preemptive self-regulation of its private governance.[57] Social media facilitate and shape public discourse, but these platforms are fully private infrastructures that, in the absence of government regulation, give their owners full control over what can be said and done there. Broadband networks, while privately owned, emerged out of public utility telecommunications infrastructure, so for network operators to establish private regulatory control like that of online platforms takes a privatization of former public infrastructure—this is what the fight over reclassification is about. The goal of the cable and phone companies that own the pipes and towers that connect people to the internet is to privatize formerly public power in order to not only regulate themselves but to also exert regulatory power over online platforms and other new media businesses in the tech industry and the activities of internet users. Controlling who has access to communication resources and what they can do with them is tremendous power over the public sphere. Without

net neutrality and meaningful online platform regulation, telecom and tech companies—increasingly working together—are the real regulators of communication in the United States.[58]

Privatized regulation is a neoliberal logic of communications policy—privatizing regulation to create private regulatory power. Countering this is an opposing logic of intervention into policy-making processes based instead on a strategy and vision of democratization. The goal here is legitimizing and strengthening public power.

Wonkish Populism

Advocacy work in the net neutrality debates has operated at the intersection of policy insiders and political outsiders. This is what I call *wonkish populism*, an advocacy strategy that links elements of technocratic and democratic discourse and practice.[59] It is wonkish in the spaces in which it facilitates intervention, like policy-making proceedings at the FCC, and the language it deploys, like technical jargon and specific policy details. It is populist in organization, by connecting with everyday people in/as publics, and in orientation, by posing demands as in the interest of common people.

Wonkish populism differs from more straightforward forms of protest, where public demonstrations communicate disapproval to decision-makers in means that maximize the clarity and scale of demands. Although the collective action logic of mobilizing people at the grassroots level remains, wonkish populist advocates ask something different of publics: engaging in the language and spaces typically dominated by experts, developing and deploying skills and literacies meaningful to affect the change they demand. Wonkishness involves a particularity and detail-focused emphasis on understanding the policy under discussion, or at least a sufficient appearance of fluency. However, the attention is not purely on making the right argument, in the right words, to the right people; part of the political force still comes from the sheer numbers of participants and their collective organization and expression. The trick for advocacy campaigns employing this strategy is to formulate collective demands that connect the values and interests of publics to rhetoric that carries weight in the policy sphere; it is an articulation of typically disparate discursive elements.

Wonkish populism is a particular mode of participation, a means through which public engagement with policy-making processes is shaped. The populist element has been present in many influential post-millennium left movements in the United States, such as Occupy Wall Street and the

Bernie Sanders presidential campaigns, but bringing this political energy together with attention to wonkish ways of engaging is the difference—ways to bring everyday people into policy processes that typically exclude them, discursively and materially. The advocacy work being done here is building the rhetorical and organizational scaffolding for people to use in their engagement. This discourse does not come from "the people" in some idealized authentic way, but neither is it entirely top-down. Rather it is an intermediate-level intervention and mediation between positions. It serves as a way of legitimizing popular demands, both in terms of collective action and in going beyond sheer numbers to rational argumentation.

"Wonkish" refers to the obsessive attention to minute details associated with "policy wonks." Although the term's use was initially accompanied by a disparaging tone connoting preoccupation with the esoteric, similar to "geek," "wonk" has been embraced as a badge of honor by some, as associated with intelligence, expertise, and passion.[60] As its use has grown more common in this context, "wonkish" discourse is found not just in policy but also in technology and economics.

The use of tedious legal jargon is an integral part of the "Beltway interpretive community" of regulatory administration, an exclusionary function that contributes to the construction of policy-making processes as "boring" to publics.[61] Shared language, assumptions, and norms within the policy sphere include a rationalized insistence on empiricism and evidence-based reasoning. Understanding of this language, as well as the processes, principles, and institutions that it operates within, is not distributed widely, especially with regard to the administrative agencies that often escape the view of even many political activists and politics junkies. Wonkish close attention to the use of language and concern with the politics of expertise are related to long-standing motivations behind critical policy studies and its founding concern with a problematic capitulation to elitist, antidemocratic technocracy. It also aligns with Becky Lentz's calls for "media policy literacy" as a foundation for effective media advocacy, echoed in what Allison Perlman refers to as the "informational literacies necessary to be credible stakeholders" in policy-making processes.[62] Wonkishness signals a commitment to a rigorous and sophisticated understanding and discussion of an issue but does not necessarily assume that such contributions must be limited to only elite, established experts—infused with a more populist orientation, it can be a more inclusive tool.

"Populism" is understood here not through the typical definition as "support for the concerns of ordinary people" but rather through concepts

developed by Ernesto Laclau and Chantal Mouffe.[63] Laclau theorizes populism in terms of "radical democracy" to reclaim it from a denigrated status rooted in fears of "mob mentality" and "mass hysteria"—as well as demagogues' manipulations of base tendencies—and challenges the antidemocratic inclinations underlying suspicions of populist politics.[64] Laclau's conception of populism differs from its mainstream understanding primarily in that he defines it not through content but through form: populism for Laclau is not a political ideology but a political logic. In this sense, populism brings diverse groups together by emphasizing their shared struggles against an institutionalized other; it is a hegemonic process that discursively constructs a political identity of "the people" by articulating heterogeneous demands in antagonism to existing power structures.

There are two necessary parts of this populist process for Laclau. First is the definition of a common enemy—discursively constructing a collective identity of "us" in opposition to "them." Second is popular unification around blanket terms that can crystallize disparate demands—"empty signifiers" (such as "freedom" or "openness") that can mean enough different things to different people to get them to agree to it together.[65] As a description of political interests, populism is incoherent, but as political strategy this imprecision is necessary.

As a formal logic challenging establishment politics but independent of a specific political ideology, populism is employed on both the radical left and the radical right. Since the late 2000s, US politics has seen a resurgence of populism, most clearly in the Tea Party movement on the right and the Occupy movement on the left, which brought momentum to the 2016 and 2020 presidential campaigns of Donald Trump and Bernie Sanders, respectively.[66] In this dynamic we can see how populism is a powerful discursive resource for social movement building, to mobilize collective action for political change, but the very indeterminacy it depends on makes its rhetoric especially susceptible to incorporation into rival hegemonic political projects.

The dynamics of wonkish populism described here are not new or unique to the net neutrality debates; rather, they build on many longstanding strategies and tactics in advocacy and activism and articulate them together in new ways. As Perlman reminds us, media advocacy is a cumulative process, taking constant work, growth, and development in a series of campaigns to make social change.[67] Indeed, in her history of US broadcasting advocacy campaigns, Perlman shows how public participation in media policy-making processes throughout the twentieth century

depended on the distribution of "informational capital" to show supporters the consequences of unfamiliar policy issues on them.[68] This was instigated and driven by information and training through tool kits, newsletters, and websites, teaching about citizens' rights and how media issues affect them. What is different about wonkish populism is how it more fully brings non-experts into previously expert-driven processes.

The most relevant historical precedent of populist engagement with wonkish media policy is the media ownership debates of 2002–2007. Resistance to the FCC's push to relax media ownership caps starting in 2002 was a formative moment for the contemporary US media reform movement, which succeeded in getting everyday citizens to understand, pay attention to, and engage in crucial but otherwise obscured bureaucratic battles and grew into a populist social movement.[69] Think tanks and public interest advocates had long fought around media policy inside the Beltway, but advocacy groups that developed during this era—including Free Press, which plays a leading role in the story of net neutrality here—positioned themselves as go-betweens for organizing citizens at the grassroots level while also working insider angles with policy-makers.

The specific tactic of mobilizing people to submit comments to FCC rule-making proceedings—especially through templates, form letters, and mass filings facilitated online—resulted in millions of voices overwhelming the FCC's public comment record in the media ownership proceedings of 2003 and 2007. Nonetheless, these voices were largely ignored, and the FCC ultimately deregulated media ownership over the objections of millions—the result of friction in the modes of populism and policy wonks. Public participation is a basic tactic of grassroots political organizing; large numbers of people visibly supporting a cause is the most powerful weapon advocates have in the face of concentrated material resources in opposition, demonstrably expressing popular will that cannot be ignored. The independent expert-based policy sphere of media regulation is not a democratic system, though, and such populism can backfire if not sufficiently wonkish. The valuing of technocratic expertise in the policy sphere meant media ownership regulatory processes structured in ways that were exclusionary to regular citizens and a definition of the issue in economic terms limiting to public participation.[70] Most notably, public comments were largely dismissed as outside the bounds of objective evidence-based regulatory discourse the policy sphere demands.[71] Despite eventual deregulation in the media ownership case, media reform advocates established mass public participation as a viable strategy for pressuring the FCC. Facilitating pub-

lic comments was a key tactic for (and against) net neutrality, but, responding to the limitations of purely populist participation in an administrative policy space, advocates sought to rhetorically ground it in understanding of policy details—a valuable lesson that played into the advocacy traced in this book.

The wonkish variety of populism operates by making claims on behalf of "the people" but doing it in terms and processes typically not for "the people," channeling wonkishness to show the populist stakes of obscure policy battles. Contrasting popular demands against those of a common enemy—like corporations, the rich, or government—brings in everyone else who is not directly aligned or implicated with powerful elites, an effective way to hail the many. It is not enough, however, to rely on a pure numbers game, because to intervene in policy-making takes advocates helping publics make an argument in the rationalist terms that move forward in such a space. Wonkish terminology may be necessary, but advocates infusing this with populist sensibility can connect public values and personal experiences (empty signifiers like "freedom" and "openness") alongside more opaque jargon (like "Title II reclassification").

Wonkish and populist discourses were articulated together in the net neutrality case to form an unlikely but ultimately powerful rhetorical fusion. Lofty ideals of freedom at stake with net neutrality were fought for in the weeds of regulatory technicalities, and public participation in the policy-making process often invoked an air of vernacular wonkish expertise on technology, economics, and policy. This did not arise naturally, though, but was the result of the rhetorical strategy of net neutrality activists. Advocates' labor shaped the anger and frustration of publics into texts and practices that carried weight in the policy sphere, where it needed to go to be effective. Before getting to the people, net neutrality was for the wonks—the policy discourse is the battleground—but digging into the language shows how the politics was already in the policy.

CHAPTER 2

Defining Broadband

Does internet access offer you information? Or does internet access offer you telecommunications? The answer to both of these questions is, of course, yes. When was the last time you got on the internet and did not both read or watch something online *and* send and receive messages of some kind? Clearly the internet is a resource for both information and telecommunications, based on nearly any possible understanding of those two terms. How to draw a line between these two services and which of these labels gets applied to internet access is not a merely semantic exercise, though; it is an act of great political power with serious consequences. Under the US communications policy regime, regulators must put internet access in one of these categories or the other, either information or telecommunications. Facing this regulatory quandary as new broadband networks emerged to become the primary means to access the internet in the United States around the turn of the millennium, the FCC chose to classify broadband internet access services as "information services."

The decision to classify broadband as an information service in 2002 could be seen as a minor administrative formality, but it had tremendous consequences for the structure of the internet and kicked off the fight over net neutrality that followed for over fifteen years afterward. The definition of broadband as either "information" or "telecommunications" brought with it several particular dynamics explored in this book, but this chapter focuses on how these terms worked in shaping the structures of broadband networks. In the immediate sense, this legal discourse jeopardized the ability of the FCC to enforce net neutrality obligations and, over the longer term, precipitated a rollback of public interest obligations on net-

work operators that came from regulating them more like publishers and less like common carriers.

The term "net neutrality" grew out of a variety of interests and venues, but the application of specific policy-related terminology intersecting with "net neutrality" discourse—particularly the terms "information" and "telecommunications"—worked to shape the legal structures of broadband policy in ways that empowered network operators. The focus here is on how particular keywords like these carry power in the policy sphere such that the ways in which these terms are applied within regulatory discourse have great consequences for the infrastructures they define and for the actions and practices shaped by them. They might seem like small technicalities, but these choices define the terrain on which the political battles over infrastructure are fought.

Regulatory definitions serve as *terms of power*—words that in their use within spheres of power like policy-making construct and channel influence over material and institutional arrangements. This is a discursive power accumulated in particular to those with privileged positions within this sphere—namely, the monopolistic corporations who have the lobbyists, lawyers, and economists who can put their corporate interest in language that matter-of-factly becomes the natural state. These definitions are not inevitable; they are not merely factual depictions of objective reality. Rather, to borrow the words of Thomas Streeter, the "discourse thus helped shape an institution it failed to describe."[1]

This ideological process represents the telecom industry's partial interest—describing a technology that they control in a way that requires less government oversight and privatization of regulation—as just the way things are: naturalizing and normalizing arrangements with them in control as the way it has to be, with no alternative. Operating from these definitions as base principles makes all policy built on that foundation favorable to those who dominated the discourse in the first place: economic power put them in a position to exercise discursive power, and that discursive power enables their further accumulation of material power. The terms *of* power set the terms *for* power. Policy definitions create a framework within which subsequent actions and practices must operate. The framework delimits the possibilities through a structure that enables some actions and constrains others, thereby creating boundaries, limits, and conditions under which action can be taken. If we want to change policy, then we have to change the terms. This chapter shows how those terms are set and how they

delimited what changes could be made to the way that internet infrastructure is regulated.

Raymond Williams's analysis of "keywords" as terms that contain cultural and political struggles over meaning and value can be shifted from the context of popular culture and the public sphere generally to the domain of the policy sphere specifically, where the terminology is less socially prominent but more directly influential.[2] Such terms typically carry more power within the policy sphere, where their arcane specialist definitions conflict with other meanings but ultimately tend to hold more sway. However, it is because these debates over the minutiae of media regulation are too often obscured from public view that shedding light on them is all the more important.[3] Further, the terminology that is used in these decisions often serves to foreclose debate. The specialized language in legal and technical discourse depends a great deal on "terms of art" with field-specific meanings that are used as unambiguous and efficient shorthand. In addition to limiting access to this discourse to elites who can decode the jargon in the intended way, taking terms of art as given also serves to foreclose debate about their meaning and the things they are applied to. Digging into the usage of specific specialist language can serve to pry open preemptively settled discursive struggles.[4]

Although it settled into a specific official classification, "broadband" has contested meanings in technological, industrial, cultural, and political senses, and the struggle to define it, and redefine it, in official FCC discourse was in many ways the most consequential front in the net neutrality battle.[5] Here we will see how the FCC arrived at the initial definition of broadband, how this process was influenced by the telecommunications industry, and the challenges this presented for the possibilities of equitable and nondiscriminatory access to the internet.[6] We will see later on, particularly in chapter 5, how net neutrality advocates were able to shift this discourse and then shift the policy.

I am particularly concerned here with media policy discourse defining and classifying media technologies and the consequences that have followed from this in the context of net neutrality policy. A major part of Michel Foucault's classic discourse analyses theorized how classifying phenomena is an exercise of great power; this power is further exacerbated when those classifications are established in formal legal rules.[7] For emerging media, defining a technology establishes the range of possible actions with it and delimits the options of what they can be made to do, especially at the level of embedded infrastructures.

The struggle over the structure of broadband networks, as it played out between 2002 and 2014 in the use of the terms "information" and "telecommunications" in FCC proceedings and three consequential federal court cases overseeing them, involved the particular power to structure the technologies these terms were used to describe. The FCC holds the discursive power over emergent media to name, make knowable, and, therefore, controllable—power that is backed by the disciplinary power to enforce this definition. Its classification of a medium works to determine how much public oversight may be applied through which appropriate structures—namely, private control or public interest.

"Information" and "Telecommunications"

The definitions of "information" and "telecommunications" services originate in the Communications Act of 1934, as amended by the Telecommunications Act of 1996.[8] The Communications Act created the FCC and remains the basic legislation that the agency is tasked with implementing, for the purpose of "regulating all interstate and foreign communication by wire or radio so as to make available, so far as possible, to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service, with adequate facilities at reasonable charges."[9] Beyond this general authorization to regulate communication services, the Communications Act delegates to the FCC different regulatory authority over different types of services. To serve this purpose, the act is broken up into several titles that cover particular types of communications services and into which the FCC is responsible for classifying specific media. The two relevant classifications for internet access are "telecommunications services," covered under Title II of the act, and "information services," covered under Title I.

"Telecommunications" services as defined in the Communications Act carry users' messages from one end of a network to the other without interference—essentially providing pure transmissions over neutral conduits. "Telecommunication service" is defined as an "offering of telecommunications for a fee directly to the public . . . regardless of the facilities used."[10] "Telecommunications" is then defined as "the transmissions, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[11] Title II of the act spells out specific regulatory obligations

for the FCC to enforce on telecommunications services as "common carriers." The common carriage tradition that Title II applies to telecommunications services considers essential networks of two-way communications as public utilities that should be offered to all on an open, universal, and nondiscriminatory basis. The archetypical example of a Title II telecommunications service is telephone service.

"Information" services, on the other hand, use telecommunications services to distribute various kinds of data to users—essentially providing content over a network. "Information service" is defined in the Communications Act as an "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[12] Information services are not given their own section in the act but are covered under Title I, which extends to the FCC authority over activities that are "reasonably ancillary" to the effective performance of the commission's various responsibilities.[13] Therefore, the act gives the FCC only very limited authority over information services, which are considered as publishers of content with First Amendment rights to publicize only what they choose, with editorial control to reject content they do not wish to provide, and free from any dictates of government-compelled speech. The quintessential publishers that the FCC is severely restricted in regulating are newspapers and cable television channels.

The way these definitions have been employed in US communications regulation has had a great impact on the infrastructures of digital networking since its inception. The US government funded and oversaw the computer networks that would grow together into the internet since they were first developed in the 1960s, and FCC regulations encouraged (rather than stifled) the growth and innovation of digital networked technologies.[14] A series of FCC reports and orders from 1966 to 1986 known as the "Computer Inquiries" played a pivotal role in shaping the open structure of the internet.[15] The primary concern of the Computer Inquiries was to design a new regulatory framework for communications networks that would protect the promising innovation evident in computer networking by the late 1960s from the stifling telecom monopoly power of AT&T.

The key influence of the Computer Inquiries was mandating open access to the network infrastructures on top of which the internet was built.[16] This was achieved by separating carriage from content on the network through a distinction between "basic" and "enhanced" services—the distinction upon which the Communications Act's definitions of "telecommunications" and "information" are respectively based. The Second Com-

puter Inquiry introduced this differentiation between "basic services" and "enhanced services" with a built-in guarantee that the latter may use the services of the former for whatever purposes.[17] In the Computer Inquiries, the FCC defined AT&T's Bell monopoly telephone network as a "basic service" that could be used as a common carriage resource for any "enhanced service." Free from gatekeeper control by entrenched network operators, enhanced services subsequently took root in this open structure and germinated into a tremendous diversity of online services and applications.[18]

Congress helped spur the first generation of publicly available internet access services by extending the differentiation between carriage and content to the 1996 Telecommunications Act's addition of the definitions of "telecommunications" and "information" services to communications legislation.[19] Dial-up modem technology—the original form of internet access—was able to be developed only because open access to telecommunications lines was guaranteed. The first generation of internet service providers were able to provide dial-up internet access over local telephone networks because these facilities were designated "telecommunications services" over which internet access providers could offer their "information services." A new and highly competitive market of nearly ten thousand independent ISPs sprang up across the United States in the 1990s, because these regulations enabled them to lease wholesale access to physical telecommunications infrastructures and sell retail access to the internet, thus opening up for "non-facilities-based" ISPs what would have otherwise been a natural monopoly for "facilities-based" network operators.[20] Underlying this definition of telecommunications as a basic service open to any use is the principle of common carriage.

The Common Carriage Tradition

Common carriage principles have governed basic general-purpose communications infrastructures in the United States for over 150 years, but the tradition goes back centuries—perhaps even to the Roman Empire—as the basis for equal treatment in the transport of people, goods, and messages.[21] The roots of modern common carriage regulation lie in fifteenth-century English common law, where general transportation and communications services—even if provided by private actors such as ship owners, innkeepers, and messengers—were considered to come with "public callings" that brought with them certain rights and responsibilities.[22] The historical duties of common carriers are to serve all comers on an equal basis and

to protect the goods they carry. In exchange, common carriers typically enjoy privileges granted by the state, including license to operate a sole or dominant carriage service, use of public rights-of-way to aid deployment, and immunity with regard to the goods they carry.[23]

The provision of common carriage that most directly informs net neutrality principles is the first duty: the equal treatment of all. The source most commonly cited as the origin for the articulation of this nondiscrimination principle is a treatise on franchise law from English jurist Matthew Hale. In 1670 Hale described ports, bridges, ferries, and similar providers of general transport services as private businesses that are "affected with the public interest" and therefore must "grant access to their property on equal terms without discriminating among applicants."[24] This formulation follows from the understanding that the state provides for essential social resources, but when the people are dependent on private entities to provide such services, it has an obligation to ensure equal access. Common carriers, as private actors with public duties, stand in for the state in their performance of these basic functions. The common carriage tradition can be understood as the state outsourcing key duties to businesses, but any exclusive rights granted to carriers come with specific responsibilities to open, nondiscriminatory access, a trade-off that ensures that their private property functions as a public good.

Common carriage principles migrated across the pond to the American legal system, and nondiscrimination protections have since been the central core of US communications policy.[25] In addition to applications to private transportation providers such as ships, stagecoaches, and inns, the federal government established the US Postal Service as a publicly owned common carrier and has operated it on an open and nondiscriminatory basis ever since. Communication used to be coterminous with physical transportation in a way that electric communications decoupled, subsequently further separated by electronic and digital communications. But because both the transport of goods and messages depend on wide-reaching material networks that function best when operated as an open commons, common carriage came to be fruitfully applied to communications infrastructure. The federal regulation of interstate railroad systems in the mid-nineteenth century served as the precedent for the formation of common carriage policy for telegraph operators beginning in the 1880s and extending to telephone services in the Mann-Elkins Act of 1910.[26] A comprehensive regime of common carriage established in the Communications Act of 1934 and

overseen by the newly created FCC set up telecommunications services as transparent conduits to carry the public's information and expression. Duties to serve all equally and on reasonable terms were given to these communications services independent of any liability or market power, thus recognizing nondiscrimination as the central obligation for common carriers and establishing openness for a basic general-purpose communications network as a necessity for democratic participation.[27]

As part of the wave of "deregulation" that especially took hold in the 1980s in the United States, the core nondiscrimination provisions of common carriage have been removed from communications policy as public interest principles have been steadily replaced with measures to supposedly promote marketplace competition. Although common carriers are often dominant in the marketplace, whether via government-granted franchise or "natural monopoly" status, market power was never historically a prerequisite to common carriage regulation of communications networks.[28] Nonetheless, President Ronald Reagan's FCC asserted in the early 1980s that the rationale for nondiscrimination rules was based only in protection against abuse of monopoly position. This was a major shift in the interpretation of common carriage doctrine, in essence purporting that equality in access to communications networks was not important in and of itself due to the "public calling" of these services and their essential role in society, but important only in that discrimination can be used anticompetitively in the marketplace. As a result, the presumption was established in communications policy that unreasonable discrimination is problematic only if undertaken by a monopolist and, therefore, that competition in the market is itself a satisfactory remedy to discrimination.[29] This meant that when the Bell monopoly breakup went into effect in 1984, telephone services immediately became drastically deregulated, ushering in the new "competition" regime of communications policy that was the basis for the 1996 Telecommunications Act.

The consequences of broadband's definition as an information service insulated internet access providers from common carriage regulation. It also favored a role for them as content publishers over a position as a conduit for others' content, privileging their autonomy as private property owners over public access to infrastructure for democratic communications. The FCC's broadband classifications were put on trial, three times, and we will trace this terminological fight now.

Making Meaning of Broadband

The key turning point for these definitions and their implications for the structure of the internet came with the development of broadband internet access services in the late 1990s.[30] With faster speeds, higher bandwidth, and always-on real-time connections, these broadband services—including phone companies' direct subscriber line (DSL) services but dominated by technically superior cable modem services—became the primary means of internet access by the 2000s.[31] Cable broadband especially represented a significant departure from the prior model of internet access: whereas with narrowband internet access facilities-based ISPs were rare, cable modem service is provided exclusively by cable network operators themselves. Essentially, cable operators combine telecommunications services from their own network infrastructures with information services to connect users to the internet.

This vertical integration of telecommunications and information services within cable modem service is not a technologically necessary arrangement nor inevitable in any way. It was set up this way at the beginning of the broadband era because cable networks (unlike telephone networks) were not labeled "telecommunications services" in the US policy sphere.[32] Cable networks traditionally provided consumers with one-way access to video programming preselected by the network operator, which in the 1976 *Midwest Video II* case the US Supreme Court found ought to allow them to control network content and avoid common carriage regulation.[33] By escaping this common carriage oversight in any form for the first decade and a half after the turn of the millennium, cable operators were able to leverage their ownership of network infrastructure into control over both content and carriage. Without the open access mandates that come with a "telecommunications" classification, cable operators were allowed to be the sole providers of information services—including internet access—over the cable networks they operate and have obvious economic incentives to keep that market to themselves.[34] Despite the fact that the internet access service these cable operators provide necessarily involves carrying two-way traffic from users to other users—the hallmark of telecommunications that requires common carriage protection—the "information service" classification stood until the broadband reclassification battle of 2015. The collapse of the distinction between carriage and content at the beginning of the broadband era allowed cable network operators the same control over users' communications as any other information on the network.

"Inextricably Linked"

All it took for cable operators to avoid common carriage regulations and keep close control of the uses of cable networks was for them to call their internet access services "information services." Internet access service has always involved both telecommunications and information components. The only difference is that with dial-up, access to carriage and access to content were typically provided by two separate entities, but with broadband they are typically both provided by the same company. Indeed, information services include a telecommunications component by definition, literally: the 1996 Telecommunications Act's definition of "information service" is an "offering of a capability . . . *via telecommunications*."[35] Further, the FCC found that this telecommunications piece does not somehow disappear once it is used by an information service and can be considered separate.[36] However, cable broadband operators maintained that they offered a single integrated service; they promised that the telecommunications and information service components of their broadband service were "inextricably linked."[37] Network operators called this whole package of broadband access an "information service," making it virtually untouchable by regulators under the regulatory scheme in place around the turn of the millennium. After all, cable companies argued, internet access had been regulated as an "information service" since the dial-up days.

However, dial-up was so lightly regulated because it was provided separately by independent ISPs and the underlying telecommunications component was protected by common carriage. When President Bill Clinton's FCC initially classified dial-up internet access as an "information service" in 1998, it clearly based this light-touch regulation on the presumption that internet access services would be offered by independent ISPs and (although less emphatic on this point) ultimately found facilities-based internet access providers too different from dial-up ISPs to be similarly classified as "information services." What became known as the "Stevens Report" first made the classification and explained, "Internet access providers, typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers."[38] Further, the report acknowledged the underlying telecommunications component of facilities-based ISPs' internet access services in saying that it needed to "reexamine" how such services were classified: "One could argue that in such a case the Internet

service provider is furnishing raw transmission capacity to itself . . . This is not inconsistent with our conclusion . . . In every case, some entity must provide telecommunications to the information service provider. When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications."[39]

2002 Cable Modem Order

But in 2002 the FCC and the Supreme Court, working within exactly the terms set by the cable companies, found to the contrary that broadband internet access was solely a nearly unregulated "information service." In a reversal of prior internet access policy, the Bush administration FCC's Cable Modem Order of 2002 classified cable broadband as an "information service" because it found no "separable offering" of telecommunications service directly to the public.[40] This not only contradicted previous distinctions, but it also overturned the Ninth Circuit Court of Appeals' 2000 ruling in cable broadband's first substantial policy consideration, which separated out the pipeline from the services provided over it and found that the operation of broadband lines should be subject to common carriage obligations.[41]

All this is to say that cable operators did not voluntarily offer users common carriage, and the FCC would not force them to. Cable presided over a union of telecommunications and information, and what the broadband gods had joined apparently no regulator could separate. The finding is a bit tautological: the FCC said that with cable broadband there was no "separate telecommunications offering" to regulate, but there was no "separate telecommunications offering" because they had not regulated to separate it. Put another way, if cable operators did not provide users pure transmissions without interference, then they could avoid regulations requiring them to provide pure transmissions without interference. The FCC operated within the cable companies' terms, but it also showed its hand in acknowledging its own ideological devotion to deregulation tout court: the Cable Modem Order states that it expressly sought to remove rules on internet access because of its belief that "broadband service should exist in a minimal regulatory environment" that it assumed would "[promote] investment and innovation in a competitive environment."[42]

Brand X v. FCC

In its 2005 *Brand X v. FCC* decision, the Supreme Court upheld the FCC's classification. The Court ruled that whether broadband should be defined as entirely an information service, or as having a separable telecommunications service within it, remained "ambiguous" and therefore the Court must defer to the judgment of the FCC, as the "expert agency" on communications policy, as long as the commission's finding was "reasonable."[43] Such deference to "expert agencies" is based on the precedent known as the *Chevron* doctrine, which holds that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in a reasonable fashion."[44] Under the *Chevron* doctrine, if a court rules that the law in question is "ambiguous" and the relevant agency was "reasonable" in implementing regulations based on it, that court must accept the ruling made by the agency, regardless of whether it agrees with the interpretation.

In particular, the *Brand X* case turned on the ambiguity of the word "offer." It was unclear to the Court whether, in "offering" users a combined telecommunications and information service, broadband providers "offer" them both telecommunications and information. It seems clear on its face that if telecommunications is a part of a combined "offering," it is indeed being "offered." But the Court ruled that the FCC's interpretation was "reasonable" because the telecommunications service was "offered" only as an integrated package; it did not exist on a "stand-alone basis" and therefore could not itself be regulated.[45] The surprising dissent from Justice Antonin Scalia laid bare the silliness of denying the telecommunications component of broadband service through a marvel of analogical reasoning that is worth recounting here (if for nothing else than some amusement):

> There are instances in which it is ridiculous to deny that one part of a joint offering is being offered merely because it is not offered on a "stand-alone basis." If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage" would prevent them from answering: "No, we do not offer delivery—but if you order a pizza from us, we'll bake it for you and bring it to your house." The logical response to this would be something on the order of, "so you *do* offer delivery." But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: "No, even though we bring the pizza to

> your house, we are not actually 'offering' you delivery, because the delivery that we offer our end-users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral to its other capabilities.'" Any reasonable customer would conclude at that point that his interlocutor was either crazy or following some too-clever-by-half legal advice.[46]

Information All the Way Down

The *Brand X* decision sealed the complete subsumption of telecommunications into information within broadband in 2005, on exactly the cable companies' terms. (After its cable broadband classification passed muster at the Supreme Court, the FCC reclassified DSL to follow cable as a solely "information service" in 2005.[47]) It was really a pretty simple move: combine carriage and content on their networks, say "pay no attention to the telecommunications service behind the curtain," and then use the magic words "information service." By refusing to acknowledge the existence of telecommunications as a service category and calling everything "information," these broadband providers "effectively deregulated themselves."[48] The logical end of this was that there was almost complete denial of the existence of anything that could be called "telecommunications services" from 2005 to 2015, as the internet swallowed more and more forms of communication. Next-generation broadband providers followed the steps laid out by cable and DSL broadband services, so mobile broadband networks were also defined as "information services," and early fiber-to-the-home broadband networks also avoided any telecommunications service regulation.[49]

The disappearance of telecommunications left not only the nonsensical situation of everything being content with apparently nothing carrying it but also the complete lack of any infrastructure that could be counted on as a universal communications utility. If network operators got to define themselves under the classifications, of course they would choose to forgo the public interest obligations. And by following this definition, the Bush FCC forfeited its authority over any user protections or competition safeguards, leaving no say for the nation's supposed communications watchdogs over access to its most essential communications network. The first attempts at protecting net neutrality came at this point in response to the consequences of this cable company control.

Fake Packets and Hollow Authority

Robb Topolski was spending a lot of time at home in bed while recovering from a long-term illness in early 2007. A software engineer and fan of vintage barbershop quartet music, Topolski passed the time trading barbershop recordings on peer-to-peer (P2P) file-sharing networks. By enabling the circulation of hard-to-find, out-of-copyright songs with no mainstream distribution, these P2P networks, such as BitTorrent, were crucial to the active fandom practices of Topolski and others like him. That is, until one day he noticed that his uploads to BitTorrent had stopped working. What Topolski did next exposed previously hidden exercises of control over internet users and put him at the center of the case for enforcing net neutrality. Topolski, although a right-leaning libertarian, and despite the health problems he was fighting through, was an unlikely crusader for FCC intervention, but soon he was on the front lines of the net neutrality fight.[50]

Topolski ran some tests and discovered that Comcast, his broadband provider, was interfering with his connection to BitTorrent and other file-sharing services. He posted the results of the tests he had run to an online discussion board, where he explained that Comcast was injecting fake packets and causing the P2P connection to fail.[51] The post drew the attention of a reporter from the Associated Press (AP) and the digital rights advocacy group the Electronic Frontier Foundation (EFF). Each ran its own tests and confirmed Topolski's findings: regardless of whether the files were copyrighted or not, regardless of whether the network was congested or not, Comcast was blocking the use of BitTorrent and other P2P services.[52] This was consistent with the experiences of many other users who were having similar problems with Comcast.[53]

The AP story, published in October 2007, was a bombshell.[54] The article called Comcast's blocking practices "the most drastic example yet of data discrimination by a US Internet service provider" and explicitly framed them as violations of net neutrality.[55] It highlighted the difference between the well-established expectation that all internet traffic would be treated equally and the very real examples of interference with users' online activities, which shed a prominent light on the issue for a mainstream audience. Somewhat presciently, though, it pointed out that net neutrality "is not enshrined in law," which, as we will see later, became perhaps the bigger issue.[56] Comcast, for its part, quickly issued a blanket

denial, disclaiming any responsibility for its users' problems with P2P file sharing.[57] That is, until the evidence mounted up; then Comcast owned up to "managing" P2P traffic over certain levels of local congestion.[58] That is, until further extensive testing by Topolski and others contradicted those claims; then Comcast changed its story again and admitted that its P2P management occurred regardless of network congestion.[59] At that point it seemed that Comcast's blocking P2P file sharing had less to do with managing its network and more to do with protecting its core cable television business from the disruptive threat of online video distribution like that done on BitTorrent.

The widely reported Comcast blocking revelations shook up internet users and ignited protests and condemnations from media advocacy groups and scholars. Net neutrality advocates thought they had avoided disaster after AT&T's and Verizon's publicly discussed plans around 2005–2006 for new tolls and fast lanes online never materialized, but only a few years later they found that the "nightmare scenario" was already there. As Marvin Ammori, then general counsel for Free Press, put it, "Then suddenly, out of nowhere, Comcast is doing exactly what we most feared . . . secretly degrading an application. We didn't expect the first violation to be so blatant."[60] More than prioritizing some traffic or imposing new charges, Comcast was surreptitiously blocking the use of specific services on its network.

2005 Internet Policy Statement

The conditions that enabled this sort of control by Comcast were not just technological or economic; the technical means to execute this sort of blocking and the economic incentives to do so had been there for years. It also came from a legal framework for internet access where the cable company knew it could get away with it. The FCC's definition of broadband as an information service had empowered network operators like Comcast to exercise control over what its users did on the internet, and acting on that opened up the Pandora's box of the net neutrality debate.

The FCC's first official forays into network neutrality policy came under the George W. Bush administration: the Internet Freedom guidelines and the Internet Policy Statement of 2005. In 2004 FCC chairman Michael Powell introduced what he called (echoing President Franklin D. Roosevelt's "Four Freedoms") the four "Internet Freedoms": the "freedom" to access content, run applications, attach devices, and obtain service plan information.[61] In 2005 Powell's successor, Kevin Martin, adapted

these "Internet Freedoms" into the Internet Policy Statement (IPS), with a notable translation from citizen to consumer and an important caveat: here "consumers" were "entitled" to the content, applications, and devices of their choice, along with competition in the marketplace, all subject to "reasonable network management practices."[62] Despite the lofty rhetorical allusions, what was ostensibly protecting net neutrality at this point was a speech and a short list of guidelines.

The IPS was issued in the midst of advocacy groups' concerns about early 2000s mergers in the telecom industry and exactly the lack of regulatory oversight resulting from the FCC's reclassification of internet access that we are looking at here. Issuing this statement was the agency's way to appease net neutrality supporters and divert attention from its actual deregulation of the internet access market. The IPS was released in the aftermath of the Supreme Court's 2005 *Brand X* decision, upholding the FCC's 2002 decision to classify cable broadband as a Title I information service. Essentially, the nonbinding openness guidelines of the IPS were adopted as a sop to net neutrality advocates concerned by the removal of actual nondiscrimination protections that went away with the Title I classification decisions. This meant that the ability of the FCC to enforce those net neutrality principles was far from certain at that point, even though Chairman Martin insisted to Congress that the commission had all the legal authority for broadband regulation that it needed under Title I and actively resisted the passage of net neutrality legislation.[63]

Complaining about Comcast, Officially

Broadband providers persisted in using their power over internet infrastructure, making the consequences of the information service classification clear rather quickly. The way Comcast was undertaking the blocking revealed by Topolski made it even more egregious. According to extensive technical testing done by the EFF, Comcast was stopping the transmission of P2P uploads, or severely degrading them to the point of effectively blocking them, by forging "reset packets" that suspend the connection between host and client computers.[64] In describing how Comcast was using against its own customers the same "techniques used by malicious hackers," the EFF explained that Comcast's traffic blocking via packet forgery was the equivalent of "a telephone operator that interrupts a phone conversation, impersonating the voice of each party to tell the other that 'this call is over, I'm hanging up.'"[65] On top of its blatant blocking, then, Comcast's

deception was problematic because it disguised its interference as an issue on the users' end, leaving no way to address it with the operator. Comcast's blocking of P2P file sharing was a very clear example of network operators' attempts to assert control of the uses of their network under the guise of dealing with "data hogs"—a disciplining of the user-led circulation of content with troubling consequences not just for its own customers but also for the circulation of traffic across the internet and the emergence of new cultural practices. The exposure of Comcast's P2P traffic blocking was the first single event to significantly galvanize strong support for the legal enforcement of net neutrality.

Based on this evidence of Comcast's secret blocking of P2P traffic, the media advocacy groups Free Press and Public Knowledge filed a formal complaint with the FCC in November 2007.[66] The groups' case was based on the net neutrality guidelines adopted by the FCC in the Internet Policy Statement: that consumers are entitled to use the content and applications of their choice online.[67] The net neutrality advocates claimed that Comcast was denying its customers the use of the content and applications of their choice, a violation of those principles. Comcast challenged that with the argument that it was not technically blocking traffic, merely delaying it, and that its techniques were "reasonable network management" allowed under the IPS.[68]

The FCC then opened an investigation into Comcast's blocking activities. Over twenty thousand complaints and around sixty-five hundred public comments came in.[69] The commission convened two field hearings on the issue in early 2008 that included panels of technical and legal specialists from industry and academia, along with testimony from members of the public, including Topolski. The first hearing, held at Harvard Law School, was accompanied by public demonstrations outside and a packed house inside. For all the fervor among those in attendance, spilling out into overflow rooms, there was something curious about many in the main hall: Comcast had paid seat-fillers to prevent others from getting in, denying them the opportunity to testify, and many of them just slept through the hearing.[70] Attendees who were awake were able to hear Comcast executive David Cohen double down on the company line: "I'm going to say again, on the record in front of this Commission, Comcast does *not* block any Web site, application, or Web protocol, including peer to peer services. Period. Doesn't happen."[71] Cohen's statements described Comcast's activities as a "limited form of network management" in response to "excessive" bandwidth consumption.[72] His explanation of the situation maintained

Comcast's stance that it was a targeted response to congestion at particular times and in particular places, which shortly afterward was proven to be untrue.[73] Regardless, as Tim Wu put it during the hearing, "There is a single fact here that [Comcast] cannot deny . . . Users of the Internet sought to use an application a certain way, and they were blocked . . . Now [Cohen is] saying that they weren't using the Internet in the 'right way.' They weren't using these applications in the 'right way.' Well the whole problem is that Comcast shouldn't be telling people how they're supposed to use applications."[74] Comcast, which had only recently shifted the focus of its business from cable television to primarily featuring broadband provision, was a company used to total control over the content it chose to transmit, and it was beginning to run into trouble for attempting to exert that power over the use of the internet.

2008 Comcast Order

The FCC released an order in 2008 ruling that Comcast's blocking of BitTorrent and other P2P file-sharing applications violated the guidelines of the IPS and that the company had lied about its actions, schemed to prevent agency oversight, confused users, and threatened innovation and the flow of communication throughout the internet.[75] Far from "reasonable network management," the commission found that Comcast's practices were invasive, outright discriminatory, and based in a conflict of interest with its own competing video-on-demand service.[76] Indeed, the fact that there are much more effective and much less discriminatory forms of managing a network to actually alleviate the congestion issues that Comcast claimed was its goal in employing its methods suggests that Comcast's motives were not actually as it stated.[77] The Comcast Order was rather unique as FCC orders go in addressing the public directly: in an early acknowledgment of the growth of net neutrality as a cause that had captured wider popular concern than most agency proceedings and the implications of its actions for ordinary people, the order drew explicitly from evidence provided by individual internet users and actually called on the people to remain engaged with the issue and be vigilant in watching out for broadband providers' abuses.

The Comcast Order was taken as a major victory by the media advocacy community that initiated it. Gigi Sohn, the founder of Public Knowledge, called it the first "proactive victory" for the public interest in communications that she could recall in her twenty-year career.[78] Sohn went on:

"Playing offense is a lot more fun than playing defense and industry and policymakers should expect more of the former in the near future."[79] Public Knowledge and Free Press did, indeed, go on offense as the most persistent force for strong net neutrality regulation from that point on and, as we will see, gained an even greater proactive victory for the public interest with the strong net neutrality rules the FCC implemented in 2015—only to find themselves back on defense as it was undone in 2017. However, the momentary elation of this first big win in the net neutrality fight was made all the more ironic because, rather than being gained ground from which the front would be advanced, the Comcast Order turned out to be the basis for the devastating loss to come when the rotten foundation it was built upon was revealed.

For as harsh as the text of the Comcast Order was on the company, the practical result was nothing more than a public scolding for its bad behavior. Indeed, rather than serve as a useful precedent for the enforcement of openness regulations, the legacy of the FCC's investigation of Comcast's blocking can actually be seen as complicit in further restrictions from broadband providers in the form of data caps. While the FCC did not fine Comcast for its violations, it did order the company to stop its blocking and publicly explain its practices. However, Comcast had already voluntarily changed its network management techniques. Before the order came down, Comcast had announced it was abandoning any form of traffic differentiation based on application or service and would be moving to "protocol agnostic" forms of network management.[80] What this meant was that, since addressing network congestion by blocking or degrading particular flows of traffic was met with pushback by users and the FCC, Comcast would just restrict all traffic equally: Comcast became the first major wired broadband provider to introduce caps on the amount of data its customers could use in a month. In initiating these data caps as a more transparent replacement for more aggressive discriminatory traffic interference, Comcast was able to make the unpopular move more palatable to users and the FCC. The Comcast Order, then, may have been an early high-water mark for the enforcement of net neutrality protections, but it also marked, in a way, the beginning of the end for unlimited access to the open internet.

Comcast v. FCC

The Comcast Order set in motion the first real test for the legal standing of net neutrality policy at the FCC—a test that the FCC failed tre-

mendously, leaving broadband regulation of all kinds in disarray for years afterward. The year after its release, Comcast appealed the FCC's decision, leading to the *Comcast v. FCC* case heard by the DC Circuit Court of Appeals in 2009.[81] Its argument against the FCC was pretty direct: "For the FCC to conclude that an entity has acted in violation of federal law and to take enforcement action for such a violation, there must have been 'law' to violate. Here, no such law existed."[82] Comcast's case boiled down to the fact that the FCC ruled that Comcast was in violation of the guidelines of the Internet Policy Statement, but rather than legally binding regulations, the Internet Policy Statement was just that—a statement, filled with guidelines but not enforceable rules. At oral argument, Helgi Walker, the attorney representing Comcast, told the court that the IPS was just "a piece of paper" that "quite simply lacks any legal force or effect."[83] This was the same argument forwarded by Republican FCC commissioner Robert McDowell, one of the most prominent deregulatory voices in the policy sphere, in his dissent from adopting the Comcast Order, where he predicted that the issue was sure to "doom this order on appeal."[84] Indeed, even the text of the IPS itself suggested it was merely a set of recommendations for broadband providers and not legally enforceable on its own.[85] Further, the fact that at the time the *Comcast* case was in court at the DC Circuit the FCC, under the Obama administration, was simultaneously working on the first Open Internet proceeding in 2009, designed to put binding net neutrality regulations on the books, made it pretty clear that the commission understood that the IPS was not itself binding regulations.

It was a slam-dunk case for Comcast. At oral arguments, the three-judge panel that was to decide the case made clear just how much the decision was already a foregone conclusion. At one point chief judge David Tatel asked FCC lawyer Austin Schlick, "How would you prefer to lose?" before forcing him to take his choice of the most reasonable of the many strong arguments against the commission.[86] After taking his whipping from the judges, Schlick was left to simply beg for a ruling that would leave the FCC some room to move forward with the pending Open Internet rules it was working on at the time: "If I'm going to lose I would like to lose more narrowly . . . But above all, we want guidance from this Court so that when we do this rule-making . . . we know what we need to do to establish jurisdiction."[87] Implying just how much the decision was already wrapped up, and just how bad it would be for the FCC, Tatel responded, "The impact of our decision will be perfectly clear."[88]

The impact certainly was clear; after the DC Circuit issued the *Com-*

cast decision in April 2010, the FCC's authority to regulate broadband was shown as nearly nonexistent.[89] The court flat-out rejected the FCC's argument that although it did not have direct statutory authority to regulate broadband internet access services, it did have "ancillary authority" over broadband. As discussed earlier, the FCC's ability to regulate comes from authorization in the Communications Act, and if the commission is not given direct authority in the statute over a service, it can only regulate it to the extent that it is "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[90] The DC Circuit ruled that the FCC could not regulate Comcast's network management practices, because the commission did not have direct authority to regulate broadband and did not present any specific delegation of authority to which it would be reasonably ancillary.[91] The sections of the Communications Act that the FCC pointed to for its statutory authority over broadband all came from Title I, which only grants the commission's general jurisdiction over communication by wire and radio and, as discussed earlier, only authorizes very limited regulation over information services. The commission relied for its ancillary authority primarily on Section 230 from Title I of the Communications Act, which sets out the broad policy goal to "promote the continued development of the Internet [and] to encourage the development of technologies which maximize user control."[92] The DC Circuit ruled that such vague "policy statements" are not enough to authorize the FCC's specific regulation of broadband, as that would leave the FCC's regulatory abilities unmoored and potentially endless.[93]

The First Net Neutrality Failure

This was the moment that the seeds of the FCC's early deregulation of internet access produced their bitter fruit. The commission's decisions classifying broadband as an information service starting in 2002, backed up by the Supreme Court's *Brand X* decision in 2005, left little ground under Title I on which the FCC could pass any kind of rules in 2009. In the *Comcast* case, then, it became crystal clear that, with that definition of broadband, the FCC had thrown away its ability to ensure openness and nondiscrimination on the internet. The immediate effect of this was that Comcast—the corporation that had just been proven to be abusing its bottleneck position as a last-mile network operator to exert strong-arm control over what users could do on the internet, the corporation that already dominated the cable television market and had just become the largest

broadband provider in the country—would be left with unrestrained power. Indeed, when the DC Circuit decision was handed down in 2010, Comcast was awaiting the eventual approval for it to buy out NBC Universal—combining the country's dominant cable and broadband operator with the most prestigious owner of film and television content, thus cementing its position as the single most powerful media corporation in world.[94] Beyond that, though, the FCC had its ability to have any oversight over the most essential basic communications infrastructure of the twenty-first century thrown into serious doubt. At the time the Comcast ruling was issued, the Obama FCC's Open Internet rule-making proceeding was ongoing, not to mention its wide-reaching National Broadband Plan that was under way at the behest of Congress. All of this was turned upside down by the revelation that the FCC did not have authority to proceed on the basis of its understanding of its authority under the Communications Act.

Some media advocacy groups had already been calling for the FCC to reclassify broadband to a Title II telecommunications service since immediately after the *Brand X* decision in 2005 that solidified the Title I definition, but after the *Comcast* decision made plain the full extent of its consequences, reclassification became a cause célèbre in communications policy circles.[95] Even though it had insisted on its authority to proceed with limited openness regulation of broadband providers under an ancillary authority understanding of Title I during the Bush administration, the FCC under President Obama began hinting at reclassification in the wake of the *Comcast* ruling.[96] The *Comcast* decision came at a crucial moment in the negotiations over the first Open Internet rules in 2010 and pushed the FCC's proceeding in a new direction. The new wrinkle provided by the DC Circuit forced the FCC's hand by making its existing plan to regulate broadband via Title I unrealistic but also left it an ace in the hole based on its clear ability to simply reclassify broadband to a Title II service. Indeed, this was an important subtext to the closed-door negotiations convened by the commission between broadband and new media companies, which is covered in chapter 3: although broadband providers were resistant to any rules, the FCC laid a compromise over the Open Internet rules on the table as desirable compared to the common carriage regulations in the drawer.

As we will see in subsequent chapters, defining broadband providers as telecommunications services, classified under Title II and subject to common carriage regulation, was the most effective path forward for the FCC to protect the openness of the internet. Indeed, the classification of broadband and its attendant definition as either information or telecommuni-

cations was the ultimate ground on which the net neutrality battle was decided; it was a choice between the common carriage tradition of democratic communications or the publishers' rights model of editorial control of communications. This first came to the fore in the *Comcast* case in 2010, but it was the FCC's next court battle with a broadband provider over net neutrality that demonstrated just how crucial this classification issue was.

The Telecom Test

As people were filing out of the packed courtroom of the DC Circuit Court of Appeals after the verdict in the *Comcast v. FCC* case in 2010, a court staffer uttered, "See y'all in a couple of years." He was right. A little over three years later, the same court would decide a very similar case, with the same judge writing the majority opinion and the same lawyer representing the broadband provider (this time Verizon instead of Comcast), concerning the same issue of the FCC's authority to regulate broadband and enforce net neutrality. That case—*Verizon v. FCC*, decided in early 2014—came down to the same terms and largely the same result: "information" and "telecommunications" sank the FCC again.

2010 Open Internet Rules

To fill the void of net neutrality policy left by the *Comcast* case, Obama's FCC passed Open Internet rules in 2010, putting into binding regulations prohibitions on blocking or unreasonably discriminating among content, services, applications, and devices.[97] The 2010 Open Internet rules set the stage for a consequential legal challenge coming right on their heels—a discursive showdown on the terms of power between network operators and the FCC coming since the commission's very first definition of broadband. After the roller coaster of the *Comcast* case—the victory for the people over the egregious abuses of Comcast, followed by the emphatic statement that the ability of the FCC to enact such protections was a mirage and the new realization that any new net neutrality enforcement under the existing framework was virtually impossible—the FCC was forced to confront the reality that it may have deregulated itself out of existence.

While attempting to deliver on the Obama campaign promise of a net neutrality policy, FCC chairman Julius Genachowski inherited the consequences of the decisions of the commission's Bush administration leadership of chairmen Powell and Martin. As we will see in chapter 4, Gena-

chowski was ultimately left to stop short on the 2010 Open Internet rules in the face of the firefight the commission was threatened with if it was going to take on reclassification. Even in the face of strong doubts over its statutory authority to regulate broadband, the FCC nonetheless went ahead with implementing the 2010 Open Internet rules within the Title I legal framework. To the surprise of no one, the commission was sued to overturn the Open Internet rules in 2011; to the surprise of perhaps some, that legal challenge came from the company that helped write the rules: Verizon.

Verizon v. FCC

We will see in chapter 3 how Verizon was perhaps the strongest influence on the text of the 2010 rules as adopted, yet the telecom giant was quite ardent to see the FCC's Open Internet policy done away with. It was not the rules themselves that Verizon took issue with; it was the fact that the FCC dared pass them. The rules that Verizon wrote (in collaboration with Google) were intended to be a legislative framework, and when they were implemented by the FCC without the intervention of Congress, Verizon worried that they could become the basis of new authority for the commission over broadband providers.[98] When the possibility of reclassifying broadband under Title II arose, Verizon argued to the FCC that doing so would be unnecessary because Title I still allowed the commission enough authority to enforce openness rules even in the wake of the *Comcast* decision and that the Open Internet rules as written were the better alternative because they were not common carriage regulation.[99] Once the Open Internet rules were put in place, though, Verizon promptly sued on the basis that the FCC lacked the authority it needed under Title I and that the Open Internet rules veered too far into the common carriage territory reserved for Title II.

The case that Verizon made against the Open Internet rules before the DC Circuit Court of Appeals proceeded primarily on three fronts, and all three came back to those contested terms of power we have followed throughout: "information" and "telecommunications." The first argument, following the winning strategy of Comcast, challenged the FCC's legal authority to regulate broadband providers at all. The second argument asserted that the Open Internet rules were essentially dressed-up common carriage rules of exactly the sort that information services, including broadband, according to the FCC's definitions of the time, were statuto-

rily exempt from. The third argument was that the Open Internet rules were unconstitutional violations of broadband providers' First and Fifth Amendment rights.

Section 706

Verizon first argued that the FCC did not have the statutory authority to implement regulations on broadband providers. After the FCC was utterly decimated on this point in the *Comcast* decision in 2010, which came from the same court hearing the *Verizon* case in 2014, coming back to it seemed to be beating a dead horse, with the commission as the horse. However, the FCC took a slightly different tack this time around. With the *Comcast* case leaving no room to proceed on the grounds of ancillary authority over broadband, the commission argued that it actually had direct authority given to it by Congress.[100] The FCC had conceded in 2010 during the *Comcast* case that it did not have any direct authority over broadband, a fact that Verizon was not about to let the agency forget. But all of a sudden the commission had found several provisions in the statute that it at that point in 2014 was inclined to see as explicit grants of authority.[101]

The FCC presented a hodgepodge of individual sections of Title I to the court as justification for its broadband regulation and explained that it had not presented these in its defense during the *Comcast* case because things had changed and as a result it had changed its reading of the statute. The provision that the FCC pointed to as the core of its mandate to regulate broadband was in Section 706 of the Telecommunications Act, which covers encouraging investment in broadband infrastructure.[102] To explain how rules protecting equality and nondiscrimination online were relevant to infrastructure deployment and improvement, and therefore authorized under Section 706, the FCC reached quite a bit. Based on its view of what the Open Internet Order referred to as the "virtuous cycle of innovation," the commission argued that rules ensuring openness drive creation and innovation in content, services, and applications, which encourages demand for broadband, which provides incentives for broadband investment.[103]

Verizon picked the same fight that Comcast did regarding regulatory authority, with much reason to be confident that the FCC would lose on this point just as badly as it did before—and with the same lawyer making essentially the same argument before some of the same judges. Although the FCC forwarded a slightly different argument for its authority in response to Verizon's challenge, it was clear after the *Comcast* verdict

that the FCC had painted itself into a deregulatory corner by classifying broadband as an information service and then insisting on relying on the very limited authority that came with that classification under Title I. This meant that however different the argument it was taking for a test drive this time around, the commission had a hard road ahead of it by choosing to stay on the same route. The audacity of this strategy was not lost on the DC Circuit; the majority opinion wrote, "even a federal agency is entitled to a little pride," in what comes as close as a federal appeals court gets to a zinger.[104]

Amazingly, however, the FCC scored an unlikely victory on the question of regulatory authority. In its brief before the court, Verizon likened the FCC's borderline-convoluted defense to a "triple-cushion shot," but the DC Circuit pointed out that in billiards it does not matter how much of a stretch a shot is if the player actually makes it.[105] And the court found that the FCC actually made its shot: the majority ruled that the FCC does, in fact, have authority to regulate broadband inasmuch as it relates to the encouragement of investment in broadband infrastructure.[106] Two out of the three judges on the DC Circuit panel bought wholesale the argument the commission was selling and were in full agreement with the FCC's view of the "virtuous cycle of innovation" and its relation to regulation of network management practices.[107] Rather than further stomping on the remaining tiny bits of its authority, as many legal observers had expected, the DC Circuit handed over to the FCC a shiny new gift of broadband authority under Section 706 of Title I. The court seemed to show some recognition of the consequences of its prior *Comcast* decision for the future of the internet, and it acknowledged the importance of FCC oversight for broadband. Indeed, the majority went out of its way to affirm the necessity of regulations to curb abuses of power by broadband providers and make clear that it was not ruling against net neutrality.[108] The court found that the 2010 Open Internet rules were sound and legitimate but nonetheless struck them down, on the basis of the regulatory terminology used.

Common Carriage and Common Sense

The DC Circuit's decision came down to Verizon's second point regarding common carriage. Verizon argued that in requiring universal and nondiscriminatory access to all the content on the network, the Open Internet rules treated broadband providers as common carriers. This would be in direct violation of the Communications Act because the FCC can only

enforce common carriage on services classified under Title II of the act and, as discussed above, broadband services had been classified under Title I since 2002. Verizon pointed out how the Open Internet rules' provisions against blocking or discriminating compelled broadband providers to carry the traffic of all users and at a mandated price of zero—a regulatory regime essentially identical to common carriage.[109] Title I of the Communications Act, however, establishes rights for information services to exclusive control of the content they make available and thus explicitly forbids common carriage for any service defined that way.[110] In making this argument, Verizon relied on the precedent set in the *Midwest Video II* Supreme Court decision, which invalidated public access requirements on cable television operators on the same grounds of requiring common carriage of services not defined as common carriers at the commission.[111]

Verizon's point was an important one: net neutrality essentially is common carriage. However, following its disastrous 2000s classification decisions, the FCC could not treat broadband providers as common carriers, leaving net neutrality regulations untenable on that legal foundation. That net neutrality is little more than an internet update to common carriage featured prominently in arguments from both advocates of and detractors to net neutrality, albeit with differing value judgments. Even Tim Wu, the inventor of the phrase in the first place, said that was his intention all along.[112] That the FCC had to go to court and make the hollow argument that the 2010 Open Internet rules were not actually like common carriage was a perverse consequence of the underlying regulatory terminology it foolishly insisted on maintaining—or, perhaps, a recognition that the 2010 Open Internet rules never amounted to real net neutrality in the first place. The decision of the FCC to not change its definition of broadband to a telecommunications service forced it into an internally contradictory position where it had to say out of one side of its mouth that the Open Internet rules would protect net neutrality but out of the other side that the Open Internet rules were not actually net neutrality, because that would put it too close to untouchable common carriage.[113]

Free Speech and Private Property

The third front on which Verizon argued against Open Internet policy was constitutional: Verizon attempted to make the case that the FCC's regulations violated the broadband provider's First Amendment free speech and Fifth Amendment property rights. The DC Circuit did not address any

of Verizon's constitutional points in its decision (avoiding what would be a dangerous precedent to cement in communications policy), but these arguments about rights and freedoms are revealing of the discourse lying underneath the net neutrality debates and how it shapes power in the public and policy spheres. Verizon's argument in this case demonstrated just how much network operators' understanding of net neutrality has been shaped by the negative conception of freedom.

As shown clearly from the constitutional arguments made by Verizon, from the perspective of broadband providers, net neutrality is not protection of free speech but a violation of free speech and is not about the maintenance of public infrastructure but the seizure of private property. Verizon set itself up in its comments as a gatekeeper of public communications, not just in a technical or industrial sense in recognition of its bottleneck position in providing access to the network but in a legal sense, claiming and constructing rights for itself to control what happens on the internet. This discourse draws from and operates on the terms of power traced here; exerting influence on the flows of internet traffic, and abilities for people to communicate, was a legal power accrued to network operators through the regulatory definition of broadband as an information service. Classified under Title I, broadband providers were treated as "publishers" of the internet, with "editorial discretion" over the information made available on the network. This flies in the face of crucial public values and the role of the internet as a basic infrastructure for democratic communications, but, frighteningly, with the depth of influence that the negative discourse of free speech has over current interpretations of the law, Verizon had a legitimate case to make.

This is the terms of power setting the discursive terrain for the struggle: whether broadband comes with an affirmative guarantee for all citizens to speak and be heard or a negative lack of government interference with privately operated networks came down to the definition of broadband as telecommunications or information. While network operators want to use their networks for controlled delivery of content, free speech depends on network operators acting as conduits, not content, and the common carriage tradition is what assures networks remain conduits. So, regardless of the rules put into policy and their intentions, without a definition of internet access as a basic infrastructure for communications among citizens—a Title II telecommunications service—there would be no meaningful net neutrality. A classification of broadband as an information service accepts a discourse based on a negative conception of free speech that erases all man-

ner of public values and duties that broadband providers should uphold. The free speech implications of these classifications did not, however, play out in the DC Circuit's decision but would have to wait for the discursive battle that played out in the advocacy campaigns that are explored in chapters 4 and 5.

The Second Net Neutrality Failure

In the *Verizon* verdict it handed down in January 2014, the DC Circuit struck down the 2010 Open Internet Order's no-blocking and nondiscrimination rules.[114] The DC Circuit found that the FCC had the authority to make rules for broadband and even that it had the authority to make net neutrality rules for broadband—the commission just could not do it without getting its definitions right. Although the *Verizon* case surprisingly proceeded in a very different way from the *Comcast* case, the practical effect ended up the same—the dissolution of enforceable net neutrality. And the underlying reason for it remained the same—the FCC's choice to define broadband as information and not telecommunications. The court made clear that net neutrality policy is imperative for the FCC but that it just had to implement it under Title II.[115]

The *Verizon* decision was a crushing blow against net neutrality, but the DC Circuit was right in its ruling; as important as the 2010 Open Internet rules were, the FCC chose to build them on legal quicksand, and the court was just the one to point it out. The first Open Internet rules being thrown out was yet another consequence of the FCC's fateful choice to classify broadband as an information service, a decision shaped by cable operators in the early 2000s and blessed by the Supreme Court in the *Brand X* case in 2005. This was a circumstance where the power of discourse in the policy sphere, and the power to dominate discourse there, could not be plainer. The FCC refused to reclassify broadband as a telecommunications service, where it could base net neutrality policy on the sustainable basis of the common carriage tradition, because of the pressure it received from the telecom industry and its allies in Washington. The FCC just had to use different words to define broadband. The policy really was that simple; it was the politics that was hard. It was hard but not impossible. As we will see in chapter 5, with pressure from advocates and publics, shortly after the *Verizon* verdict the FCC actually changed its definitions.

From the critical perspective on media policy, it is obvious that concentrated economic power unduly influences policy-making. Yet it

remains far less obvious just how this economic power actually translates into political power; the case here provides an example of how this power is smuggled in through discourse. In particular, the power of language is especially acute in policy-making, where language is action in an even more direct sense. It is important to map how this actually works in specific examples, because it is not as simple as the powerful just buying their way to get what they want. Money does not translate immediately into favorable policy; the power of money must be exchanged into the currency of discursive power by influencing the language and ideas in the policy arena. This recognition is important for political interventions because it means that changing language and ideas is something the people can do. It also highlights how, even when trying to change the way that policy operates, if the struggle still operates on the foundation built in corporate interests, it constrains what can change and how much. In this way, the bounds of policy language delimit the bounds of political possibilities. We will see in the campaigns toward these policy processes how net neutrality advocates took on these conditions directly and successfully shifted the discourse and then the policy.

To examine the power of language, we must examine the language of power—in this case, the specialist vocabulary of policy-makers and those who seek to influence them. Although these "terms of art" are used unquestioningly, they remain complex and contradictory. Important work exists in seeing how they crystallized, prying them back open, and pulling them over to the side you need them on. These terms *of* power set the terms *for* power, and the influence and control they concentrate or distribute set the conditions for how things operate. Rather than trivial, changing the choices of words could hardly be more important.

CHAPTER 3

Clash of Titans or the Best of Frenemies?

Google battling Verizon, Netflix fighting with Comcast—the "tech titans" versus the "cable gods"—this was the imagery of many media accounts of net neutrality, especially early in the fight.[1] This chapter counters the "clash of titans" narrative of two opposed powerful industries dominating the struggle of net neutrality, which not only leaves out the leadership of activists and publics on the issue but also ignores that the corporate behemoths purportedly on opposing sides increasingly work with, rather than against, each other. Throughout the net neutrality battles, backroom deals between frenemies in the tech and telecom industries have influenced federal regulations, industrial arrangements, and technical network management, with little transparency or accountability. Here I examine negotiations between dominant new media and broadband corporations on net neutrality policy going back to 2009 to reveal how the interests of online content platforms and broadband networks actually align with each other.

The battle lines on net neutrality are not between tech and telecom but between those with power and those without. The monopolists of these two industries have worked to shift net neutrality discourse and regulations in their favor at the expense of smaller and newer competitors, activists, and publics. Two case studies are used here to represent these dynamics: first, the Google-Verizon compromise that formed the basis for the FCC's failed 2010 Open Internet rules and, second, the Comcast-Netflix agreements on traffic delivery and broadband television from 2014 to 2016.

Googizon: The Proposal of "Evil"

In the summer of 2010, the FCC held six weeks of talks at its offices in Washington, DC, to discuss the future of net neutrality regulation. The invitation list for these negotiations was short and conspicuously made up of the largest corporations on either side of the issue: representatives from Verizon, AT&T, and the National Cable and Telecommunications Association, or NCTA (now known as the Internet and Television Association), for the anti–net neutrality side; Google, Skype, and the Open Internet Coalition (OIC, an issue-lobbying group led by online content providers) for the pro–net neutrality side.[2] Citizens—or any groups representing the public interest—were not invited.[3] FCC chief of staff Edward Lazarus, at the behest of Chairman Julius Genachowski, convened the meetings as negotiations toward a workable inter-industry compromise on Open Internet rules, involving only the corporate players who were seen by the chairman as necessary to please and excluding the public, whose interest the commission is meant to protect.

This privatized approach to regulation, which permits the corporations being regulated to work out among themselves regulations they can all live with, is nothing new to media policy nor to administrative policy generally, but this meeting was a particularly blatant case. Genachowski embraced this strategy with special fervor due in large part to the precarious position the FCC had been left in after the *Comcast* decision was handed down that spring.[4] As discussed in chapter 2, the DC Circuit's decision in the *Comcast* case eroded the commission's regulatory authority over broadband, hamstringing its plans to enact Open Internet rules for the service. For the purposes of this chapter, we need only consider the constrained position Genachowski was in at that point: stuck between the rock of limited ability to move forward with net neutrality policy on existing ground following *Comcast* and the hard place of massive broadband operator pushback to any plans to shift to Open Internet rules based on the more stringent Title II classification. Later on we will cover at length the issues underlying the Title II reclassification fight that followed the *Comcast* decision, but suffice it to say at this point that Genachowski saw no way to get the broadband industry to agree to the regulations the FCC sought—unless the industry just wrote it themselves.

These closed-door meetings flew in the face of the "transparency and accountability" widely promised by FCC reforms and the Obama adminis-

tration generally.[5] The talks quickly became infamous in the tech industry trade press and were loudly decried by media reform advocates as "backroom" dealings where the future of the internet would be decided, out of view and out of reach from the public.[6] While the meetings were not quite as "secret" as they were portrayed in many accounts, they were not considered part of the Open Internet rule-making proceeding, so the matters discussed were kept from the official public record.[7] For all the vaunted public participation and engagement of the FCC's first Open Internet proceedings, it was these off-the-record meetings that had the most impact on the 2010 policy.

These meetings were contentious and not particularly fruitful—unsurprising, given the deeply committed positions of each side and the differing priorities of each party within each camp. The two biggest points of contention in the negotiations were the same sticking points that had divided the parties throughout the process: the applicability of openness rules to "specialized services" (emerging data-intensive services made available over broadband connections but separate from the internet) and exemptions for wireless broadband services.[8] Cable companies like Comcast—represented in the negotiations by the NCTA—were primarily concerned with holding specialized services at arm's length from any openness regulation. The cable industry's dominance of the wired broadband market was firmly established by 2010, which positioned it well for offering prioritized access to exclusive content over specialized services like Internet Protocol television, or IPTV (pay television service offered over broadband infrastructure), and cable companies focused their future business models on control of this emerging sector.[9] The top priority for the phone companies, though, was keeping regulators away from mobile services. While AT&T and Verizon have a stake in both wired and wireless broadband, their realization by 2010 that DSL services could not keep up with cable modem services, along with the huge growth potential of mobile broadband, led them to shift their focus (and investment) almost entirely to wireless.[10] The online content companies—initially led by Google—had long pushed for openness rules on phone and cable companies to ensure that in their capacity as broadband providers, either wired or wireless, they do not act as gatekeepers in seeking payment for favored status in content distribution and extracting tolls to reach users.

Genachowski's goal in these talks, meanwhile, was to work out some action amenable to the corporations involved in order for the FCC to main-

tain some authority to oversee the broadband market post-*Comcast*, without the need to overhaul its regulatory framework and risk the years of litigation threatened by the broadband industry.[11] In his view, this task would require getting the broadband providers and online content providers to hash out some sort of unofficial compromise on net neutrality that would pave a simpler path toward implementation as official FCC policy—or, easier still, have the deal taken directly to Congress so that the chairman could just wash his hands of the whole mess. Even though Chairman Genachowski had support for stronger Open Internet rules from the other two Democratic commissioners, Michael Copps and Mignon Clyburn—and, therefore, the three-out-of-five vote necessary to pass the regulations—he held out for the classic Democratic compromise of attempting to please all of the most powerful stakeholders.[12] The plan abdicated the commission's public responsibility to the private corporations—not so much to regulate the involved industries but to facilitate and formalize privatized regulation. The process was designed for rules to make those at the table happy. It appeared that as far as Genachowski was concerned, no matter how weak the rules actually were, he would have "net neutrality" rules on the books to point to, thus fulfilling the mission he was tasked to deliver on President Obama's campaign promise and sufficiently appeasing a public that supposedly would not know any better. This all played right into phone and cable companies' strategy. The broadband operators came to the table to negotiate with online content providers because they knew they could drag out the process and slip in exemptions that would swallow any rules that did result.[13]

The Open Internet policy-making process took a turn for the dramatic in August 2010 when the closed-door talks were abruptly dissolved. The FCC called off the meetings after hearing leaked news that came as a shock to nearly all: Google and Verizon had split off and cut a net neutrality deal themselves. Initial reports suggested that the agreement was a business arrangement between the two that would see Verizon prioritizing Google traffic.[14] As described by law scholar James Boyle, however, "This was no mere deal by Google to buy preferred access for its own services on Verizon's networks, an individual violation of the principle of network neutrality by one of its most ardent prior proponents. It was a proposal that would legislatively gut that principle in general for everyone. The newspaper accounts thought too small."[15]

Google, Verizon, and the Open Internet Truce

On August 9, 2010, Google CEO Eric Schmidt and Verizon CEO Ivan Seidenberg announced what they referred to as a "Legislative Framework Proposal" for open internet protections.[16] Two of the most vicious combatants in the net neutrality battle had called a truce. The plan that they agreed to was a compromise where Google met Verizon much further than halfway: Verizon agreed to a basic prohibition on blocking, but in exchange Google conceded to a whole gamut of loopholes.

From the moment the rumors first began to swirl, the notion of Google turning its back on net neutrality caused quite a splash. It was a huge story in the tech blogosphere and across the progressive "netroots," but beyond those already following the Open Internet proceedings, it even garnered coverage in mainstream venues like *The Daily Show with Jon Stewart* and the opinion pages of major newspapers.[17] Google flip-flopping on net neutrality caught national attention because it had been the loudest supporter of the principle since it came to prominence in 2006. Indeed, Schmidt's blog post in 2006 urging users to take action to protect net neutrality was key to raising public awareness on the issue.[18] Further, those who were involved in such action for net neutrality considered Google their primary corporate ally in the fight, leaving them feeling betrayed. As the most powerful force pushing for net neutrality throughout the debate, Google was often viewed by the trade press and even some media reformers as a proxy for internet users in the net neutrality debates, simply because they were calling for the same policies.[19] Of course, the coinciding interests of the people and Google in the early years of the net neutrality debates should not have been mistaken for Google actually representing the people, and no one should ever be surprised by a corporation looking out for any interest other than that of its own profits and shareholders. Once the interests of the people and Google no longer overlapped on the issue of strong net neutrality protections, Google and the people parted ways on the issue.

Coming forward with Verizon to commit to a flimsy version of net neutrality was seen as a direct violation of Google's "Don't Be Evil" mantra. Many upset people spoke out online, hundreds of thousands signed a petition against it, and there were even protests organized by the Save the Internet campaign that took place at Google's Mountain View, California, offices.[20] Indicative of that sentiment, one self-described "disappointed fanboy" described the situation through an extended metaphor of finding out his partner had been cheating on him.[21] One could easily decry

such a perspective as naïve faith in a private capitalist enterprise, necessarily accompanied by a much-needed wake-up call, but the fault is not fully with the Google fanboys and cash-strapped activists who counted on Google to look out for them. Google worked hard to inspire exactly this sort of righteous devotion and was actually quite distinct in successfully cultivating an image as the exception to the rule of vile multinational corporations. Siva Vaidhyanathan discusses how Google's stated objective—"to organize the world's information and make it universally accessible and useful"—is presented more like a magnanimous public service mission than a profit-seeking business plan.[22] Further, Google's "Don't Be Evil" motto in particular invited us to not worry about how big and powerful the company is, as long as we trust that they use that power for good—inviting us to accept Google as our dictator online if we believe it is at least a benevolent dictator.

Even without buying into the "good guy Google" discourse, we still have to ask why Google would turn its back on net neutrality and become, in one of the more colorful accounts of the situation, a "Carrier-Humping, Net Neutrality Surrender Monkey."[23] Google's alignment with Verizon cut against the former's historical reliance on the open internet for its business model. Google's meteoric rise from fledgling start-up to dominance online was made possible by net neutrality. With no preferential treatment for previous incumbents in the search market, like Yahoo! and ISPs unable to act like gatekeepers, Google had lowered barriers to entry, and relatively fair competition saw their superior search engine succeed. As it loved to play up this freewheeling start-up image that no longer fit the reality of the massive corporation it had already become as it leveraged the success of its search engine into adjacent markets across the web and astronomical revenue in online advertising, Google volunteered to be the poster child for net neutrality success stories. Allowing for "the next Google" was one of the most common tropes found in early calls for protecting net neutrality, using the company's founders Sergey Brin and Larry Page as representatives for all the mythical "guys in the garage" surely working on the next "disruptive innovation."[24] Beyond this romanticized image of Google as the start-up that conquered the world thanks to net neutrality, Google the corporate behemoth still depended on the open internet to bring in cash hand over fist. The major reason behind Google's early push for Open Internet rules was because free and universal access to content and services across the internet means free and universal access to lots of Google content and services. The more people do online, the more they do with You-

Tube, Gmail, Google Search, Google Maps, Google Docs, Google Drive, Google News, Google Books—and, of course, the more they see the company's targeted ads all over the web. As Vaidhyanathan explains, activities that generate revenue for Google are so deeply rooted in the web—Google had enough dominance of the open internet already—that for the most part, what was good for the internet was good for Google.[25]

At least that was consistently the case until Google shifted from an innovative young company into just another incumbent seeking to shore up its dominance. It may have once looked out for the little guys shortly after it became one of them, but the move with Verizon marked Google's full transition into enjoying the clout to establish the conditions necessary for the maintenance of its control at the expense of innovative newcomers like its previous self. By 2010 Google was more interested in protecting its turf and ensuring a status quo where its current business model remained dominant; to use the lingo Silicon Valley favors, Google was no longer the "disrupter" but was seeking protection from being "disrupted." By throwing its weight behind such a watered-down definition of "net neutrality," Google opened the door to a world where preferential treatment for those with the deepest pockets would be the new normal online, a world where it would be one of the exclusive few able to survive. Google took advantage of net neutrality to make it big and then traded the principle away in exchange for its own interest, taking the elite "I built this" path of climbing to the top with a ladder of public goods and then pulling that ladder up behind it.

When Google was seen embracing Verizon, the public displays of corporate affection caught many off guard; however, by the time they came forward with their net neutrality compromise, Google and Verizon had been frenemies for years. The two were an odd couple in many ways, with conflicting business models and previously very visibly taking opposite sides of the net neutrality issue. Like any relationship between providers of content and providers of carriage, though, the logic shows in how each depends on the other: Google needs Verizon to reach its users, and Verizon needs Google content on its networks.

Their relationship began rocky, but they came together before the Open Internet process. At an FCC wireless spectrum auction in 2007, Google bid up the price to trigger openness requirements on the winner Verizon, forcing the carrier's eventual 4G LTE (fourth-generation long-term evolution) mobile broadband network to connect any device, with

no content blocking.[26] This was a net neutrality breakthrough, opening up the previously tight control by carriers of mobile networks, but, not coincidentally, it was also instrumental in allowing Google's Android mobile operating system to break into an early smartphone market previously dominated by Apple's iPhone exclusively available through AT&T. By 2009, however, Google had partnered with Verizon to make the Droid X smartphone a Verizon exclusive.

It was not long before the two grew closer on policy issues. Schmidt coauthored a blog post and a *Wall Street Journal* op-ed with the CEOs of Verizon and its wireless subsidiary pointing to their "common ground" on net neutrality and a shared call for "minimal government involvement" with the internet, which was echoed in a joint filing to the 2009 Open Internet proceeding.[27] By the time the FCC began the closed-door talks over the Open Internet rules, Google and Verizon were well positioned to take the lead in finding a compromise. That the two of them worked out a side deal to the side of the original side deal, though, was surprising to the involved parties and unsettling to Genachowski, who saw Google and Verizon as undermining his process and his hopes for a wide "consensus," or privatized regulation, with which to move forward.[28]

When the "Googizon" deal was first leaked, there was a large public outcry that left the two companies struggling to spin their agreement in the best way possible. In a press conference call, joint blog post, and *Washington Post* op-ed from Schmidt and Seidenberg that announced their Legislative Framework Proposal, Google and Verizon sold it as a compromise necessary to move past the stalemate and closer to some form of enforceable net neutrality.[29] The two sides maintained that the deal was a fair way to protect the open internet while providing network operators with necessary flexibility, but it was clear that Google had conceded much.

Suggesting just how far Google had shifted toward a negotiated position on net neutrality, Schmidt positioned his company between network operators on the one hand and net neutrality advocates on the other. The Google CEO told reporters, "We've been talking to Verizon for a long time about trying to get an agreement on what the definition of Net neutrality is . . . We're trying to find solutions that bridge between the sort of 'hard-core Net neutrality or else' and the historic telecom view of no such agreement."[30] Not only does this speak to Google's presumption to be the rightful arbiter of net neutrality, but it also demonstrates the company's willingness to distance itself from the public interest representa-

tives it once aligned with so as to frame itself in some reasonable middle ground between two overzealous extremes. This is consonant with how net neutrality came to be represented in the policy-making discourse of this time as a radical position—treating equality as just as intolerable as corporate control—showing the sacrifice of some of the most crucial elements of open internet governance as nothing more than the give-and-take of sensible pragmatism.[31] Leaving it up to two corporations to define the issue made the public interest a foil to be left aside as the scope of practical possibilities became limited to between only one profit-maximizing interest or the other.

Google predictably took the brunt of the public criticism and moved quickly into damage control mode. For instance, in a blog post published shortly after the proposal was released, Google public policy executive Richard Whitt laid out the company's version of the "facts" as separate from the "myths" surrounding its dealings with Verizon:

> MYTH: Google has "sold out" on network neutrality.
>
> FACT: Google has been the leading corporate voice on the issue of network neutrality over the last five years. No other company is working as tirelessly for an open Internet.
>
> But given political realities, this particular issue has been intractable in Washington for several years now. At this time there are no enforceable protections . . . against even the worst forms of carrier discrimination against Internet traffic.
>
> With that in mind, we decided to partner with a major broadband provider on the best policy solution we could devise together. We're not saying this solution is perfect, but we believe that a proposal that locks in key enforceable protections for consumers is preferable to no protections at all.[32]

This post further demonstrates not only how Google portrayed itself as representing the interests of users but also how it presents what is best for itself as the same as what is best for the people. Google gave up on a truly open internet as too difficult to achieve, because the phone and cable companies who shaped the policy-making debate would not accept actual net neutrality. Google was not about to make the perfect the enemy of the good. Whitt was correct that there were no enforceable net neutrality protections before their proposal, but would the Googizon rules have been much better?

The Google-Verizon Legislative Framework Proposal

The Open Internet Legislative Framework Proposal from Google and Verizon is a deceptively simple document.[33] It is just two short pages with no legal force behind it, and much of it simply reiterated the largely uncontroversial basics of net neutrality. It was pivotal in making progress toward the enactment of Open Internet rules. Just to get to that point, however, Google dealt away to Verizon much of what would actually protect net neutrality: the proposal was riddled with loopholes, left little room for meaningful regulatory oversight, and set a troubling precedent for the definition of net neutrality.

The basics of net neutrality were protected by Googizon. Just as with the rules proposed by the FCC at the beginning of the Open Internet rulemaking process in 2009, the heart of the Googizon proposal came from the commission's 2005 Internet Policy Statement: broadband providers cannot block content, services, applications, and devices.[34] Also following from the FCC Open Internet proposal, Googizon added to these central elements a requirement for transparency in network management practices. Although a prohibition on prioritizing and throttling traffic was a point of contention at various times in the Open Internet policy-making process, Googizon did propose a nondiscrimination rule, albeit a weak one.[35] While calling for formalized protection of the net neutrality basics, Googizon brought to the forefront three particularly problematic provisions for the Open Internet rules.

The first problem with Googizon was its endorsement of prioritization of "differentiated online services," specialized services that use broadband infrastructure but are separate from the internet (e.g., IPTV service like Verizon's ultra-fast fiber optic system, Fios, or, discussed below, Comcast's Xfinity).[36] During the press conference call that first announced the Googizon plan, reporters began to use the phrase "private internet" as a shorthand for specialized services. Although Schmidt and Seidenberg strained to avoid its mention, Schmidt at one point said that, despite differentiated services, Google still preferred "the public internet."[37] From there it stuck, as "public vs. private internets" became a common way to explain the proposal in the media, raising concerns about the internet fracturing off into tiers for only those who pay more to deliver or access content.[38] Network operators have incentives to develop and deploy private networks to the detriment of the open internet. Demand for application-optimized, higher-bandwidth, quality-assured networks

increases with a lack of capacity and dependability on the open internet. New revenue streams for dominant broadband providers could come from both online service providers paying to deliver their traffic via private networks and users paying to subscribe to these exclusive service packages, giving network operators (and big content providers) reason to concentrate their investment and innovation where the money is and not where net neutrality restricts such practices. With specialized services as the focus, "private internets" could squeeze out "the public internet." Verizon was willing to trade some limited rules on current services for free rein over high-growth services of the future. Google was okay accepting openness protections only for "the public internet," where the status quo was already Google dominance. A few months after decrying to the FCC specialized services' detriment to the public interest, Whitt was parsing differences between public and private internets and why the latter would surely not "cannibalize" the former.[39]

The second disturbing aspect of the Googizon agreement was its exemption of wireless broadband services from nearly all of the proposed rules besides transparency.[40] This proposal came as a surprise, as until then the net neutrality debate had largely operated without distinctions between wired and wireless internet access.[41] Verizon was clearly willing to trade some rules on its wired network for a virtually regulation-free future for its growing, big-profit wireless subsidiary. Google claimed that it was not selling out the wireless openness it had been key to progressing but, with a "spirit of compromise," was making a measured concession necessary to the negotiations.[42] The company did not have anything to gain from wireless net neutrality by then; Android was already leading in smartphone market share by 2010, so a requirement to connect all devices only stood to benefit its smaller competitors.[43] Google argued, just as mobile carriers did, that wireless was just too different to be regulated as much as wired broadband, with a more competitive market for providers ("more than just two providers to choose from"), spectrum scarcity necessitating tighter network management, and still emerging technologies that would be squashed by regulation.[44] Mobile broadband was the only means of accessing the internet for many, especially low-income communities of color, due to the lower relative cost of mobile devices and data plans.[45] Protections for these most vulnerable populations was what Google was compromising away.

The third worrisome part of the Googizon proposal was enforcement only on a case-by-case basis, with no rule-making authority over broadband. The FCC would have "authority to *oversee* broadband" but "would not be

permitted to *regulate* broadband."[46] Verizon and the rest of the telecom industry was counterintuitively afraid of a powerless FCC, because a total lack of broadband authority following the *Comcast* case made reclassification seem much more possible. The prospect of Title II regulation terrified Verizon enough to put forward basic net neutrality rules as long as it could deny the FCC authority to truly enforce them. Verizon did not want to meaningfully empower the FCC, but it could not accept a total regulatory power void either; corporations ultimately need some process for resolving disputes with other corporations and some outside venue through which to exercise and legitimize their industrial dominance. The plan was to essentially outsource government regulation to an independent nongovernmental body, possibly along the lines of the "co-regulatory" collaboration of state and private governance, or possibly just an industry trade group only superficially separate from the companies themselves—but, either way, privatizing regulation in a particularly conspicuous fashion.[47]

The Googizon proposal was not intended to actually be implemented by the FCC; the companies envisioned their agreement serving as the blueprint for Congress to codify the rules and authorize the FCC to enforce them and nothing more. Although the proposal put the FCC in a strictly circumscribed position that greatly concerned the agency, Googizon was actually consistent with Genachowski's desire to kick the can over to Congress. The goal of the FCC's closed-door talks, after all, was to deliver a deal to Congress and not have to do the hard part. It had not, however, counted on not having any part.

The Googizon proposal, and the process that led to it, represents a collapse of government policy as locus of regulatory force and the attendant erasure of the public interest from regulation. For all of its corruptions and failures in practice, government communications policy-making, at least in theory, has its power legitimized by a deliberative, participatory process and is held accountable to the people. Corporations writing their own rules shifts the act of regulation to institutions beholden to profit-making alone. Government policy-making in the United States typically falls short of its democratic principles, no doubt. Making better policy, though, takes engaging, rather than dismissing, the politics of policy. It means holding policy-makers' acts to the principles they speak of. The reality is that, even in an increasingly global digital age, state regulation remains a powerful force in shaping technological, institutional, and social structures, a force with which it is necessary to engage in order to intervene in making these structures more equitable. Media policy-making is neither irrelevant nor

irretrievable; it is not a mess to wash our hands of but a broken system to be reformed or changed.

Both Google and Verizon have their particular corporate cultures and interests that orient them toward privatized regulation in surprisingly complementary ways. Google, the archetypical technocratic engineer-run Silicon Valley firm, looks at a dysfunctional policy-making process and sees an error to route around. On top of that, as Vaidhyanathan has explained, Google loves stepping into power vacuums left by "state failure" to fulfill public functions, whether running the world's largest library or negotiating with China about human rights issues.[48] If it wanted some Open Internet rules but worried that the FCC would never get it done, Google figured it would just do it itself. Despite Google's proclivity to do the state's work, intervening in policy-making to this degree was a new trick for Google. Meanwhile, writing its own rules and passing them off to the FCC was old hat for Verizon. Since its roots in the Bell monopoly, Verizon has thrived on regulation; that is how it ensures it gets what it wants. In negotiating the Googizon agreement, then, Google was playing Verizon's game, and, as Boyle points out, it showed in the final result.[49]

All of this explicates the danger in counting on corporations to represent the public. The interests of Google and those of citizens temporarily overlapped early on in the net neutrality debate, a boon to net neutrality advocates at that point. But it put the company in the position of serving as the presumptive voice of the people. In the negotiations that ultimately paved the way for the 2010 Open Internet rules, citizens had no seat at the table and were left counting on Google to speak for them. But once its interests diverged and Google revealed that it was looking out only for its own profit-maximizing interests—just as any corporation would do—the people were left out.

The Aftermath of Googizon

In the wake of Google's and Verizon's agreement, the net neutrality debate took a turn for the weird. As the Googizon framework set the standard terms on which Open Internet policy was discussed and the new de facto definition of "net neutrality" for the moment, suddenly network operators were lining up behind the new proposed regulation while media reform groups rejected it and online content providers equivocated.[50] Although the bilateral agreement between Google and Verizon dashed Genachows-

ki's hopes for an all-encompassing grand bargain, Googizon ultimately delivered the compromised basis for regulations that he was looking for. In framing Googizon as the pragmatic solution to ending the bitter battle over net neutrality, rhetoric in the policy sphere came to be increasingly about rejecting the "extremes" on either side of the issue, including what former FCC chair Michael Powell referred to as a "religious" commitment to net neutrality.[51] From this perspective, those who pointed out that the Googizon framework represented net neutrality in name only were accused of holding back the important progress that had been made. Suddenly, defense of actual net neutrality principles was declared a fringe position and Verizon was deemed to be acting as a sensible moderate. Genachowski was particularly fond of using media reform groups as foils against which to compare his self-styled virtuous centrism, based on a false equivalence between Free Press's calls for "real net neutrality" in rules free of loopholes and the truly radical vision of an internet tightly controlled by broadband providers.[52] Like Google and Genachowski, other so-called supporters of net neutrality accepted the premise that it was necessary to give up on crucial aspects of a free and open internet in order to ensure any measure of protection at all and began to back away from the progressive media reform activists who called for strong Open Internet rules.[53]

Ironically, once the Googizon framework sufficiently watered it down, the network operators became the biggest fans of Open Internet rules, and their greatest obstacle may have been of their own creation. Seeing that the Googizon framework provided them the best opportunity to end up with sufficiently defanged net neutrality rules, broadband operators lobbied Congress to enact it in fall 2010, but their attempt to pass the legislation then was futile. November midterm elections were a matter of months away, and a Republican wave was looming on the horizon, fueled by the emergence of the Tea Party. A libertarian, racially charged, antigovernment backlash to President Obama, the Tea Party appeared to be an outpouring of reactionary energy expressed in a genuine populist movement, but the Tea Party was also a product of exploitation of this energy in the service of a corporate agenda seeking to dismantle regulatory structures.[54] The Open Internet rules are an example of how the Tea Party became a sort of Frankenstein's monster: once it snowballed into a widespread social movement, the corporations that sought to wrap their deregulatory interests in grassroots political outrage could no longer control the people who actually believed the hard-edged libertarianism of Tea Party discourse, which was

ultimately at odds with their benefactors' corporate interests. The rhetoric that government regulation is tyranny became problematic for the corporations that stirred up Tea Party fervor once government regulation could benefit them. The Tea Party was at the height of its influence leading up to the 2010 elections and, with this pressure, Congress avoided regulation of any kind, even if the telecom corporations wanted it.[55] The Tea Party saw net neutrality as a government takeover of the internet and aligned Open Internet regulation with a "socialist" Obama agenda. Republican members of Congress who might have reliably taken corporate marching orders were quick to reject any attempt at Open Internet rules.[56]

After the failure of the Democratic House bill resembling the Googizon framework and the Tea Party wave of November 2010, the FCC saw its window of opportunity to deliver some kind of net neutrality rules slamming shut.[57] In a rush to pass regulations before the new Republican majority would be sworn in with the new year, in December 2010 Chairman Genachowski abruptly dropped the possibility of reclassifying to Title II authority (discussed in chapter 4) and, after convincing Democratic commissioners Copps and Clyburn to support the compromise rules, pushed through Open Internet rules established on a baseline of the Googizon framework on a 3–2 party line vote.[58]

The biggest difference between the Googizon framework and the actual 2010 Open Internet rules was the fact that they were adopted by the FCC and not Congress—a seemingly small but ultimately pivotal distinction for the eventual viability of the policy. Unsurprisingly, as soon as the Open Internet rules passed, the FCC was sued to overturn the regulations. Ironically, though, it was Verizon that took the FCC to court; even though the telecom giant essentially wrote the rules that the FCC adopted, the company appealed them once they were actually put in place.[59] Why? Because having the FCC make Open Internet rules on its own was not a part of Verizon's plan. It sought to minimize the authority and regulatory role of the agency, and, even if it got what it wanted in the watered-down substance of the rules, the way it got there was troubling enough to Verizon to take the FCC to court. Verizon's concern was that if the FCC enacted Open Internet rules on its existing authority, that might be enough to enable it to further regulate broadband, and the corporation would not stand for that. We saw in the previous chapter how this turned out: the FCC lost the *Verizon* case because it had not reclassified to Title II authority, so the battle began anew. By the next round of the fight, it was a different set of tech and telecom combatants that came together: Netflix and Comcast.

Netflixfinity: Conflict to Complicity to Collaboration

As Netflix grew from a quirky DVD-by-mail service to the dominant player in online video streaming, taking up to one-third of all downstream internet traffic in North America at peak times, it was on a collision course with Comcast, both the largest cable TV operator and the largest broadband internet provider.[60] The competition between the two—opposing interests from new media and old media, content and distribution, beloved and hated by their customers—made for a juicy media narrative in net neutrality stories, especially as the heads of the two companies publicly butted heads. Netflix became the most outspoken major corporation in favor of net neutrality while the FCC was considering a new set of rules in 2014–2015, trashing a cable industry merger and shifting the definition of net neutrality itself to include "interconnection" agreements, helping bring to popular attention the issues of tolls and fast lanes that became prominent images in the fight. By the end of the story, though, Netflix was not just cutting deals to pay extortionate fees to telecom giants to reach their customers but happily working alongside Comcast and effectively abandoning the fight for the open internet. As the rest of this book shows, this industry drama is far from the whole story, but it is an important part—not so much for the Netflix case itself but for what it represents for the power that broadband providers have over content providers and the power that larger content providers have over smaller ones. The story is not two corporate behemoths on opposite sides of a fight; rather, it is how the growth of the new media industry, enabled by net neutrality, let companies get big enough that their interests became more aligned with the broadband industry.

X(Box) Marks the Zero (Rating)

As a vertically integrated conglomerate that owns both the content and the pipeline used to deliver that content (Comcast is the nation's largest internet access provider and the owner of NBC Universal's large stable of film and television programming), Comcast has strong incentives to favor its own content over others it carries, and it does just that. Comcast customers who subscribe to both its broadband internet and cable television offerings are given access to its Xfinity online video service over their internet connection.

First, Comcast broadband and television subscribers can watch Xfinity on particular third-party devices or services, from companies that have partnered with the cable giant, and it does not count toward their total

data usage for the month. Microsoft cut a deal with Comcast to allow Xbox Live members to watch Xfinity on the Xbox 360 starting in 2012, the first such arrangement to raise major net neutrality concerns.[61] Netflix CEO Reed Hastings called out Comcast for not "following network neutrality principles."[62] Writing on Facebook, Hastings recounted how he supposedly spent his weekend:

> I spent the weekend enjoying four good internet video apps on my Xbox: Netflix, HBO GO, Xfinity, and Hulu. When I watch video on my Xbox from three of these four apps, it counts against my Comcast internet cap. When I watch through Comcast's Xfinity app, however, it does not count against my Comcast internet cap. For example, if I watch last night's SNL [*Saturday Night Live*] episode on my Xbox through the Hulu app, it eats up about a gigabyte of my cap, but if I watch that same episode through the Xfinity Xbox app, it doesn't use up my cap at all. The same device, the same IP address, the same wifi, the same internet connection, but totally different cap treatment. In what way is this neutral?[63]

Through the use of a "zero-rated" data cap exemption scheme, Comcast gives unfair preferential treatment to its own online video service, at the expense of competitors. This is certainly a violation of net neutrality principles and such preferential treatment for Comcast's own services over others is a textbook case of anticompetitive business practices. As the one company that happens to own a high-speed connection into a given user's home, Comcast has been leveraging its monopoly in the broadband market into an unfair advantage in the adjacent online video market.[64]

Such data cap exemptions, also including AT&T's Sponsored Data plan and T-Mobile's Binge On deal, are used by companies like Comcast to protect their legacy business model at the expense of smaller and independent creators.[65] Cable companies like Comcast fear the disruption represented by the growing numbers of "cord-cutters" who leave behind the traditional cable bundle (or the "cord-nevers" who did not have them to begin with) in favor of a collection of "over-the-top" online streaming services and à la carte TV subscriptions.[66] They further realized that operating their broadband networks on an open basis only helps facilitate growing competition from online video services like Netflix that undermine their core business.[67] Comcast, then, has incentives to discourage users from ditching cable television and was acting on those, especially in

its discriminatory use of data caps. Films and TV programs eat up a great deal of data, making them especially vulnerable to data caps. Comcast began targeting cord cutters by using data cap overages to make up for lost cable subscription revenues and seeking to avoid losing television subscribers in the first place by making it more expensive and difficult to substitute cable TV for online video.

Additionally, there is evidence suggesting that Comcast prioritized traffic to the Xfinity Xbox app over the rest of the data flowing on its network. While the details of Comcast's network management practices are left opaque and there are conflicting accounts of the technical infrastructure in question, it appears that Comcast was speeding up its Xfinity traffic through a "fast lane" on its broadband network to the Xbox.[68] This goes even beyond competition concerns, as such discrimination has serious concrete impact on the flow of all other traffic on the network: bandwidth capacity is a zero-sum game, so prioritization for some traffic means degradation for all the rest.[69] According to tests run by outside networking specialists, Comcast's fast lane for Xfinity traffic was operated over the same broadband infrastructure as the rest of the internet traffic Comcast carries and worked by marking the relevant packets with different "quality of service" (QoS) values in order to be moved to the front of the line ahead of the other packets.[70] Comcast had publicly admitted to prioritizing traffic from its broadband telephone service and that Xfinity packets carry similar QoS markings (namely, "DiffServ" or DSCP, "differentiated services code point"), but it claimed they were not being used for prioritization.[71]

Comcast addressed the Xfinity prioritization issue on its corporate blog with what could not have been a more emphatic denial:

> There's also been some chatter that we might be prioritizing our Xfinity TV content on the Xbox. **It's really important to us that we make crystal clear that, in contrast to some other providers, we are not prioritizing our transmission of Xfinity TV content to the Xbox (as some have speculated). While DSCP markings can be used to assign traffic different priority levels, that is not their only application—and that is not what they are being used for here** [bold and underlined emphasis in the original].[72]

Despite the evidence uncovered to the contrary, Comcast insisted that the Xfinity Xbox app worked just like a cable service and a set-top box: as an additional flow of traffic that does not interfere with the other bandwidth

on the network.[73] In other words, Comcast claimed that it was not prioritizing Xfinity over other internet traffic, because it is on its own dedicated piece of the pipe, separate from the internet logically if not physically. In this Comcast relied on a minute technicality in broadband infrastructure to justify its discriminatory actions, just like we saw the company do in chapter 2 with not "blocking" BitTorrent but just throttling it to the point of being effectively unusable.[74] Regardless of the details of how it gets there, however, Xfinity consistently performs better than competing streaming video apps on the Xbox and does not count against users' data caps.[75]

While such network discrimination definitely violates the principle of net neutrality, whether it actually violated the FCC's Open Internet rules at that point was ambiguous at best, which speaks to just how ineffective the first rules on the books from 2010 to 2014 were in actually protecting net neutrality. Even though the 2010 Open Internet rules were eventually struck down in the 2014 *Verizon* case, they remained specifically relevant to Comcast because the corporation was subject to them until 2018 as a merger condition of its acquisition of NBC Universal in 2011.[76] The main reason why Comcast has been able to evade net neutrality enforcement with regard to its data cap exemptions and traffic prioritization, though, is because the FCC's Open Internet policy only considered internet traffic, which leaves broadband operators like Comcast able to discriminate as much as they want on any network traffic that they separate from the internet. Yet again, network operators are able to avoid regulations by controlling the operative definitions of their technical practices: applying the DiffServ code point to an Xfinity video packet amounts to labeling those bits "not the internet," discursively, at the level of code, constructing that traffic as out of bounds from net neutrality policy.

FCC Open Internet protections did not apply to "specialized services," which, as we saw above, share bandwidth on broadband networks with internet traffic but are considered separate from the internet.[77] Comcast's Xfinity is a prominent example of an existing specialized service (as are other telecom companies' broadband-based TV and telephone services) that, as devoted to specific types of private traffic separate from the internet, has been the main focus of network operators' development of next-generation network infrastructure. That this is happening simultaneously with economic incentives and past practices pointing toward continued underinvestment in network capacity expansion means that these specialized services will be competing for bandwidth on a narrow pipe—a situation not likely to go well for the less profitable open internet.

The discourse surrounding the specialized service issue is particularly revealing of broadband providers' troubling vision of the future of the internet—or, rather, "the internets." Just like the Googizon proposal seen earlier, Comcast's explanation of why it does not count Xfinity Xbox traffic on its data caps also raised the specter of "public and private internets." The following could be found on Comcast's Frequently Asked Questions (FAQ) page for its Xfinity Xbox app in 2012:

> Q: Will XFINITY On Demand content a customer views via the Xbox 360 go against their bandwidth cap?
> A: No, since the content is being delivered over our private IP network and not the public Internet, it does not count against a customer's bandwidth cap.[78]

Later, Comcast quietly changed this answer on the FAQ page from this "private network versus public internet" explanation to one comparing the Xbox to a cable television set-top box.[79] In Comcast's description of its differentiation of Xfinity traffic from internet traffic, the implication was that, although each gets its own track of broadband pipe, neither one is a "fast lane."[80] Just like familiar claims of "separate but equal," however, this structure is not equal at all; even if we generously give Comcast the benefit of the doubt that it does not use prioritization labels on Xfinity packets to actually prioritize, the separation of its own traffic still results in preferential treatment. Just take a look at "the public internet" and Comcast's "private network:" one has congestion from other growing traffic on the network, the other is unencumbered; one had rules of the road for the protection of users, the other is unregulated; one has restrictions on the amount of data that can be used, the other is subsidized to the user; one has dwindling investment in expansion, the other has strong incentives for growth.

This separate but unequal future of the internet has been described in terms of what net neutrality advocates have called "the dirt road scenario": with incentives to underinvest in network capacity, the size of the pipe overall is likely to remain the same, and with more profit coming to network operators from managing networks that content providers have to pay to gain priority access to, broadband providers have reason to devote ever more capacity to the private portion of the pipe as a fast lane, squeezing out the public internet in the process.[81] Those in the slow lane could still reach end users, but without being affiliated with a large media conglomerate or

paying for access to the fast lane, they would be disadvantaged and pushed to the margins as more lanes are devoted to specialized services.

Specialized services represent a way of building inequality into the network infrastructure itself. The concern here ultimately goes beyond Netflix or any other online service that is disadvantaged by network discrimination; the battle over net neutrality is too often reduced to a matter of how fast a streaming video loads. The more important issue is the splintering of the internet into public and private networks and how broadband providers can create two classes of internet users in the process. The divide-and-conquer attitude and disciplining of the open circulation of uploading and downloading on users' own terms makes it more difficult to create and share new things for the people.

The Shakedown

It was January 2014 and, just like so many untold millions that night, a husband and wife were lying in bed watching Netflix. Also just like a conspicuously large number of Netflix viewers that winter, their stream slowed to a halt. Unlike anyone else watching Netflix that night, though, when the husband complained to his wife about it, she said to him, "Well, you're the Chairman of the FCC. Why is this happening?"[82] What that man, Tom Wheeler, would go on to do over the course of that year—drastically shifting from a deeply compromised and unsustainable vision of net neutrality to the sort of bold, aggressive regulatory solution that would truly protect the free and open internet—was about much more, in cause and consequence, than how annoying it can be to watch a buffering stream. The story involves much beyond the influence of Netflix as a major corporation and as a service beloved by even Beltway elites. It was not a frustrating "Netflix and chill" with his wife that night that led Tom Wheeler to save net neutrality, but it certainly could not have hurt.

Despite the tendency to portray Netflix as the protagonist in the net neutrality story being so simplistic and misguided, the online video giant was perhaps one of the biggest winners from the passage of the FCC's 2015 Open Internet rules. Not only did online content providers in general see their ability to reach their users without favor, discrimination, or fees protected, but Netflix in particular succeeded in its crusade to expand the definition of net neutrality itself under the Open Internet rules, to include not just traffic between broadband providers and users but also the traffic between content providers and broadband providers, through what

is known as "interconnection." It was disputes over interconnection that were at the heart of the slow Netflix streams that Wheeler and a substantial portion of Netflix users were experiencing in 2013 and 2014 and what turned the cold war between Netflix and Comcast hot. When Netflix sat down under duress to cut a deal, Comcast won the battle; when the FCC implemented the 2015 Open Internet rules to regulate Comcast and other broadband providers as common carriers, Netflix had won the war. This spat between Comcast and Netflix was not how net neutrality was won, but it is a substantial part of the story, illustrative of shifting industrial power relations and the competing and, eventually, aligning interests of tech and telecom companies.

Beginning in fall 2013, for months Comcast broadband subscribers watching Netflix were experiencing slow, buffering, and low-quality streams.[83] Speeds dropped by more than 25 percent, with frequent interruptions and delays.[84] By the time fall gave way to the cold winter months and people were hunkering down inside to binge *House of Cards* and other hot new shows on Netflix, the streaming slowdown had reached a breaking point. Those cozied up with their families over the holidays to watch Netflix shows and movies found VHS-quality picture resolution and loading delays that made the service "unusable."[85] Especially during the prime TV-watching months, it was too precipitous a speed drop-off and too suspicious timing to be an accident, yet there was no available evidence at the time of Comcast's deliberately throttling Netflix traffic going into users' homes.[86]

As revealed later in court filings and subsequent technical investigations, the streaming problems were not so much a deliberate slowdown by Comcast as a refusal to keep up with Netflix users' needs.[87] As Netflix shifted to online video and exploded in popularity by 2013, its number of users and the data traffic they used watching high-definition (HD) video streams increased rapidly. The growing demand for Netflix streaming meant that broadband providers like Comcast had more and more traffic it had to deliver from Netflix to its users who depend on that network for access. As Netflix traffic grew, rather than undertake the typical investment in infrastructure necessary to handle the data demands of its broadband users, Comcast did not upgrade the capacity of the "interconnection" lines going to Netflix. Like many major online content providers, Netflix was delivering its traffic to Comcast through third-party middlemen that operate in the internet backbone known as "transit providers," who had a typical "peering" arrangement with Comcast that passed off this traffic with no money changing hands either way.[88]

As it became clear that getting its content to its users through Comcast's constrained interconnection points was untenable, after any attempt Netflix made to get through Netflix was met with the same demand from Comcast: pay up.[89] Comcast did not dispute that congestion on its interconnection lines was to blame for Netflix's slow traffic, but the company blamed Netflix for sending them too much traffic. This came despite the fact that it is literally Comcast's job to deliver to its paying subscribers what they want from the internet, as quickly and reliably as possible. If people want a whole lot of Netflix, then Comcast needs to give them a whole lot of Netflix; if that's more Netflix than Comcast can handle without the lines getting clogged up, then Comcast has to get more. That is what internet service providers are in the business of doing: serving the internet. Rather than accept this long-standing role for ISPs, part of which is keeping their networks able to serve people what they are paying Comcast to access on the internet, Comcast said Netflix ought to pay for the upgrades necessary to carry all the traffic it was asking Comcast to deliver.[90]

In February 2014, at the height of this standoff, Reed Hastings, CEO of Netflix, sat down with Brian Roberts, CEO of Comcast, at the Consumer Electronics Show in Las Vegas.[91] At that meeting, the two discussed how the interconnection congestion issue would be resolved—the sort of thing that the engineers from these companies would typically negotiate, definitely not the CEOs. This alone represented a turning point in how the internet operates. The internet had long been commercialized, but the decisions determining how the network functioned at such a fundamental level as interconnection were still made on technical grounds, not the profit-maximizing logic of corporate executives.

At this meeting, Netflix agreed to pay Comcast for a direct connection to its network, getting around the congested interconnection lines.[92] The deal Netflix cut with Comcast, an online content provider paying a broadband provider to reach its own customers, was reported in the *Wall Street Journal* as a being "landmark agreement" and called a "milestone in the history of the Internet" by the *New York Times*.[93] The deal was quickly repeated, though, as Netflix reached similar arrangements with Verizon, AT&T, and Time Warner Cable shortly thereafter.[94] The outcome was felt immediately, as within a week Netflix's speed jumped by 65 percent.[95]

Net neutrality opponents celebrated this whole situation as two companies finding common ground and working out a simple business transaction that kept the internet running smoothly, not only an example of the free market succeeding but also obviating the need for government

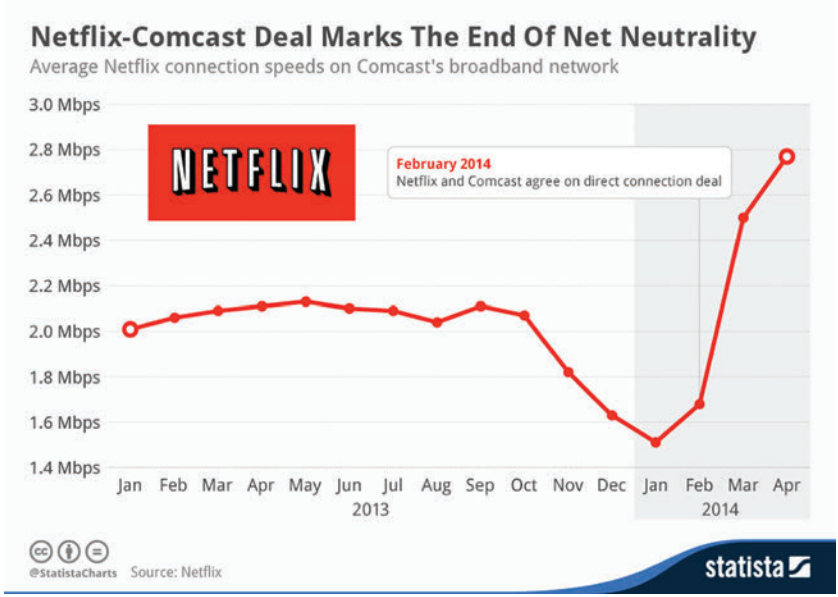

Fig. 4. Average Netflix connection speeds on Comcast's broadband network (Netflix, 2014). (Created by Statista, CC BY-ND 4.0.)

regulation.[96] Viewed outside a neoliberal lens where the private control of public infrastructure is celebrated and where we ought to cheer corporate executives coming together behind closed doors to determine how many millions of dollars it takes to get content through the network, this was a pretty stark look at the gatekeeping power of big broadband providers like Comcast and the leverage they have as what economists call "termination monopolies."

Netflix's agreement with Comcast appears like a classic extortion scheme, or protection racket: Comcast coerced payment from Netflix in exchange for alleviating a traffic problem for which Comcast was responsible.[97] In typical shakedown fashion, Comcast framed its payment demands as guaranteeing protection for Netflix's content when in reality the harm that Netflix had to be protected from was Comcast itself. Netflix came to the negotiating table under duress and agreed to pay Comcast for no particular service other than not messing up its traffic. Comcast controls resources that Netflix needs to do its business—namely, exclusive access to reach the largest base of broadband subscribers in the country—so Comcast was in position to extract unfair payment for its essential services.

Comcast allowed congestion on its network to mount until Netflix was squeezed enough to pay to get around it; Netflix had little choice but to capitulate, because it had to get through Comcast to reach its customers. Netflix did not receive any preferential treatment—it was not paying for a "fast lane" or any sort of prioritization—it was simply paying for the ability to connect to Comcast's network at all. By some reporting, Netflix and Comcast engineers had been negotiating interconnection arrangements for nearly two years, but all of a sudden an agreement was reached after not just four crucial months of brutal traffic congestion but also coming only ten days after Comcast announced its intention to buy Time Warner Cable (TWC).[98] The acquisition by the largest cable broadband operator of the second-largest cable broadband operator would have allowed Comcast to even further consolidate its control over internet access, with even more power to impose its will on those who rely on its infrastructure for their operations, the kind of looming concentrated power that could have been the tipping point in getting Netflix to cave in.[99]

A joint announcement from both companies described the deal as "mutually beneficial."[100] Netflix explained that the "degradation in quality . . . led to a rise in complaints and cancellations" so that it "just couldn't ignore it anymore."[101] Comcast held Netflix's audience hostage and demanded ransom to reach them, knowing that hurting their mutual users would reflect upon Netflix more. When something goes wrong with streaming online, it is usually unclear whether it is the fault of the broadband provider or the online service. They may be more likely (typically, correctly) to blame the broadband provider, but there is less they can do about it: because most households have only one or possibly two options for truly high-speed internet access, there is not much choice but learn to live with bad service. Although the market for online video is not exactly competitive, it is certainly more competitive than the monopolistic control of Comcast and the other cable and phone companies with which it splits up territories. If Netflix absorbed the blame for poor service, users would be more able to switch providers to spend their subscription dollars elsewhere. Comcast had a "captive audience" and could afford to deliberately give them inferior service if it gave them the leverage they wanted. Netflix capitulated out of fear of slowing growth and losing subscribers.[102] Whatever happy face Netflix put on to announce this deal, shortly afterward it began representing Comcast as leaving no choice but for Netflix to open up its wallet as a new cost of doing business with the largest broadband provider standing between Netflix and its customers.[103]

Why did Netflix surrender its strongly asserted position on net neutrality to make a "deal with the devil"?[104] Netflix was seen as a martyr for net neutrality, suffering at the hands of a corrupt monopolist. As we will see below, especially following the Comcast deal, Netflix set itself up as a major champion of net neutrality, yet, with the deal, Netflix had clearly abandoned what it presented as a deeply held belief in the open internet. There is some truth to the idea that Netflix was unfairly hurt due to a lack of robust net neutrality regulations and used the attention it garnered to help rally support for stronger Open Internet rules, but Netflix was not an innocent victim either. Netflix clearly did what it had to do to look out for its bottom line at the expense of the supposedly larger objective of net neutrality. Hastings described it as a case of doing what it needed to do to protect its customers, even if at the expense of the principles of a free and open internet: "Netflix believes strong net neutrality is critical, but in the near term we will in cases pay the toll to the powerful ISPs to protect our consumer experience."[105] Of course, this is what any corporation would do, because they exist fundamentally to deliver growing returns to shareholders. But this is precisely the severe limitation of ever relying on corporate interests to represent the public interest, whatever temporary alignment may appear between the two. Netflix had occasion to push against Comcast and the broadband industry in the policy arena, but it was never about principled net neutrality or even consumer protection, let alone freedom, equality, or justice. Netflix cut a deal when it served the company to get out of a jam and then pushed for rules that would prevent these sorts of jams, and their associated expenses, from happening again. Either way, whether greasing the wheels of broadband when it needed to or leaning on federal regulators when that suited it, Netflix's actions are better understood as seeking competitive advantage in the growing sector of online video services than any kind of principled stand for an open internet. Nonetheless, Netflix did play into some of the unexpected twists that followed in defining net neutrality and Comcast's attempt to take over TWC: Netflix was there until all of a sudden it was not.

Which Side Is the Gate On?

The month after cutting a deal with Comcast to ensure the unrestricted flow of its content, Netflix stepped out front to present itself as what one publication called "the new face of net neutrality."[106] In March 2014 Netflix CEO Reed Hastings wrote a post on Netflix's website blasting the arrange-

ments it had just agreed to as "internet tolls" and making a case for "strong net neutrality."[107] Hastings used pointed language to frame it as a problem not just for Netflix but for the health of the whole internet: "To ensure the Internet remains humanity's most important platform for progress, network neutrality must be defended and strengthened."[108] It was not so much about the money, Hastings insisted, but the principle. Netflix could afford to pay the tolls, he said, but was "philosophically" opposed to it. The post takes pains to present a broader case than just its narrow interest in keeping away new operating costs for distributing their service. In Hastings's view, Netflix was looking out not for itself but really for the little guy: "If this kind of leverage is effective against Netflix, which is pretty large, imagine the plight of smaller services today and in the future."[109] It was here that Netflix firmly positioned itself as magnanimous corporate steward of the open internet, keeper of the flame of net neutrality principles.

Hastings asserted that broadband providers have an obligation, which ought to be enforced by regulation, to provide "sufficient access to their network without charge" for content providers and their transit middlemen to be able to reach their users.[110] In the absence of such regulation, Hastings argued, monopolistic broadband providers like Comcast were able to demand charges that padded their profits but made things more expensive for everyone else. Hastings was explicit in calling for rules that protect net neutrality to avoid just such situations and directly pushed for more than what the FCC had done in 2010: "The traditional form of net neutrality which was recently overturned by a Verizon lawsuit is important, but insufficient. This weak net neutrality isn't enough to protect an open, competitive Internet; a stronger form of net neutrality is required."[111] Hastings's post caught a great deal of attention in the media and online—it became the third-most-linked-to net neutrality story of 2014—and immediately became a touchstone of the net neutrality debate.[112]

The only trouble with this was that, according to not only the weak 2010 Open Internet rules but even net neutrality advocates' explanations, what Comcast did was not, in fact, a violation of net neutrality, strictly defined. When Hastings referred to "a stronger form of net neutrality" he meant, in particular, an expansive definition of the principle that includes not just the "last mile" broadband networks that connect to users but also the transit networks in the "backbone" that connect to those broadband networks. What on its face appeared to be a quintessential case of what net neutrality advocates had feared all along—a straight-up gatekeeper toll for access to get through the network at all—was not included in the tra-

ditional definition of the principle, because it took place on the wrong side of the broadband connection. Netflix's deal with Comcast was for direct interconnection to the broadband lines, not priority travel on those lines. Nonetheless, as the *Washington Post* put it, "It's hard to see a practical difference between this deal and the kind of tiered access that network neutrality advocates have long feared."[113] Blatant gatekeeping was happening, but the gate was hidden deeper into internet infrastructure, where even fewer people are able to understand what is going on and not by accident. Interconnection agreements within the internet backbone are notoriously opaque, with no transparency requirements to disclose anything about them and an environment previously characterized by good faith technical problem-solving that was exploited to make way for business dealings.

Netflix both benefited from and contributed to an extension of net neutrality discourse. Its self-styled noble suffering motivated its fight for all that is good and right with the internet, with the nifty side effect of securing favorable business dealings for Netflix. But it also worked deliberately to expand the definition of net neutrality in the minds of publics and policymakers, moving it beyond the traditional concern of the connection between a broadband provider and an end user, moving into the internet back end to consider how that traffic got to the broadband network and how that affects the whole internet. The Netflix toll quickly became a go-to case of what a net neutrality violation looks like. Most prominently, Comcast's shakedown of Netflix was the primary example of "cable company fuckery," a term used by John Oliver in his viral segment on net neutrality (discussed in chapter 5). Being cited repeatedly in the media, and in the public comments to the FCC's website driven by Oliver, certainly helped Netflix's case that, even though about interconnection, this was fundamentally a net neutrality issue.[114]

A month after Hastings's post, one of Netflix's top technical executives laid out the case for expanding the definition of net neutrality into the back end.[115] While Comcast and other broadband providers argued that their charges were rightfully making Netflix pay for the capacity necessary to handle all the traffic it brings onto their networks, the nub of Netflix's argument was that they were double dipping.[116] Comcast's broadband subscribers pay Comcast to deliver what they want from the internet, so by also charging Netflix on the other side to deliver this same content, Comcast can get paid twice for the same job.[117] Netflix showed this as being even more blatantly unfair when the charge is collected on the transit side, because, unlike the middlemen that Netflix used to pay to

connect to broadband, Comcast is not offering any actual transit service. Netflix did not pay for Comcast to actually carry its traffic anywhere, just for the privilege of making a connection to its network, already on its physical premises.

Everyday internet users were caught in the middle of this conflict, and Netflix was well positioned to harness their frustrations against their foes in the broadband industry, to make sure the finger of blame got pointed in the right direction. It was around this time that Netflix began its public shaming program of maintaining a regularly updated ranking of the performance of streams on various broadband networks, providing concrete data for aggravated viewers to hold on to.[118] In a clever bit of rhetorical framing of the problem, anytime a stream would buffer, the screen would show an error message reading, "The Comcast network is crowded right now." Netflix at various points explicitly encouraged its users to hold their broadband providers accountable: "Encourage our members to demand the open Internet they are paying their ISP to deliver."[119] Comcast was already a villain in most minds (consistently ranked among the most, if not *the* most, hated companies in America), so all Netflix had to do was prime their users to this existing frame to keep the heat on. Netflix was shrewd in how it kept people's hatred of Comcast front of mind as this fight went on—especially as that hatred of cable is a main part of the sales pitch for Netflix, that people can avoid the pain of cable TV with the internet—but this case in particular revealed how much people remain dependent on cable companies, just now for internet.

Netflix brought the fight directly to the FCC. In meetings, filings, and lobbying FCC officials—"screaming their heads off," in one FCC staffer's account—Netflix pushed for expansive net neutrality regulation.[120] When FCC chairman Wheeler's initial proposal was released in July 2014, prompting swift outcry from net neutrality advocates for enabling "fast lanes" (which we will see in chapter 5), Netflix joined the dog pile, issuing a statement saying, "No rules would be better than rules legalizing discrimination on the internet."[121] As the rule-making process went on, Netflix joined the rising chorus of net neutrality supporters calling for reclassification, saying in a filing in the Open Internet proceeding, "Title II provides a solid basis to adopt prohibitions on blocking and unreasonable discrimination by ISPs. Opposition to Title II is largely political, not legal."[122] However, they also cautioned against going too far with "overreaching regulation" and focused most expressly on interconnection oversight. Netflix also brought net neutrality concerns to the center of the FCC's consideration

of Comcast's attempted acquisition of TWC. In its detailed accounts of Comcast's shakedown and persuasive arguments that further consolidating its power in the broadband market would only make matters worse—especially for smaller services—Netflix's lobbying was credited as key to the unexpected denial of the Comcast-TWC merger.[123]

Less than a year later, the FCC ended up expanding its definition of net neutrality to include interconnection issues.[124] The 2015 Open Internet Order said that it would consider on a case-by-case basis interconnection complaints relying on a "reasonable network management" standard.[125] The discourse of gatekeepers, tolls, and termination monopolies had successfully been extended to interconnection; what Chairman Wheeler had once described as a "cousin, maybe a sibling" of net neutrality had been brought into the discourse.[126] This reframing of the debate in Washington had some calling Netflix "the biggest winner from the FCC's net neutrality rules," but for as much as some in the media seemingly cannot resist a corporate intrigue angle, most on the inside saw the influence of tech companies like Netflix as less than was perceived from the outside.[127] According to Gigi Sohn, in her new capacity as special adviser to Chairman Wheeler, when it came to the final decision to reclassify broadband to Title II, it was not pressure from the tech industry (or the White House) that changed his mind as much as a deepened grasp of the legal technicalities seen in chapter 2 and the broad public support seen in chapters 5 and 6.[128] Sohn did mention that there were some other "external developments" that influenced Wheeler's thinking too, including the sputtering Netflix service in his bedroom, presumably accompanied by an error saying to blame Comcast.[129]

Netflixfinity Realized

So how did Netflix respond to the big win over Comcast with the 2015 Open Internet rules? By praising the FCC's new interconnection oversight and also expressing regret that the FCC had regulated the broadband industry so heavily. When the FCC moved to implement new Open Internet rules by reclassifying broadband, and when it later went into effect, Netflix conspicuously lauded the interconnection piece specifically, directly connecting it to their own peering plight, and stopped short of commending much else.[130] Speaking at an industry conference after the rules were passed, one Netflix executive said, "Were we pleased it pushed to Title II? Probably not. We were hoping there would be a non-regulated solution."[131] The company shortly afterward walked back the comments, with

a representative stating, "Netflix supports the FCC's action," and "There has been zero change in our very well-documented position in support of strong net neutrality rules."[132] It is worth remembering that what Netflix had meant all along by the "strong net neutrality" it was pushing for was the regulation of interconnection agreements, not the Title II reclassification that net neutrality advocates typically meant by that phrase.[133]

Such comments represent Netflix's commitment to net neutrality only when it narrowly supported its interests, reflected also in the company's actions as it grew. After helping to sink Comcast's merger with TWC in 2014, Netflix supported Charter's acquiring TWC in 2015, because the combined company promised to not charge interconnection fees.[134] Coming full circle, although it went after Comcast for zero-rating Xfinity on Xbox in 2012, by 2016 Netflix itself had zero-rated traffic with a number of internet access providers, including T-Mobile's Binge On program.[135] Unconcerned for the general net neutrality principles against unfair advantage, the company explained, "We won't put our service or our members at a disadvantage."[136] Netflix's support for net neutrality was seen as disingenuous, going along only when it aligned with its interest in pressuring broadband providers to concede free connections to their networks.[137]

If all of this were not enough to call into question the net neutrality martyr image it projected during this fight, Netflix's expanded dealings with its supposed enemy made clear that it was not just an innocent victim giving in to a monopolist's demands; when Netflix began to be featured on Comcast's X1 cable platform, it went from complicit to full-on collaboration. The Netflix-on-X1 deal was a major shift since the two companies had fought over interconnection, specialized services, and zero-rating; they went from each accusing the other of "extortion" to Comcast calling Netflix "a great partner."[138]

The two companies began cooperating in 2016, when they announced Netflix's inclusion on Comcast's X1 set-top box, providing "seamless access" to the streaming service alongside traditional cable TV channels.[139] After working with Apple, Google, and a number of smart TV and streaming device manufacturers to include its app for easy viewer access, Netflix began dealing with smaller cable operators in the United States and larger ones around the world to do the same on their cable boxes. This was followed in 2018 by even tighter integration between the two, when Netflix came to be packaged as a regular TV channel in Xfinity cable bundles even though it still required viewers to have both cable and broadband subscriptions.[140] The terms of the deal remained opaque, but Netflix agreed to

pay Comcast as a distribution partner and received revenue from Comcast because of Netflix subscription fees being packaged in with the Xfinity monthly charges collected by Comcast. One important detail is that Netflix traffic was not exempt from Comcast's data caps; Netflix counted toward the monthly allotment of data, even when viewers watched it like a regular TV channel on their cable box, while Xfinity did not count against broadband data caps.[141] Because Netflix data was not zero-rated, the deal did not represent a net neutrality violation, although the payments to Comcast for being a featured app on the platform presented Netflix centrally compared to other smaller competitors.[142] Comcast defended this in the same language it used regarding zero-rating its own traffic on the Xbox: Netflix traffic counts against data caps where Xfinity does not because the former travels on "the public internet," a distinction that is functionally meaningless to a viewer who is seamlessly switching from one service to the other on the same device.[143]

Given their consequential war over net neutrality, it was quite significant for Netflix and Comcast to begin working together to this degree, but it would come as a surprise only to those who bought at face value Netflix's high-minded rhetoric in opposing Comcast's power. In 2014 Hastings had admitted about Netflix and the broadband industry, "Our economic interests are pretty co-aligned."[144] The context was a call to investors following the overturning of the first Open Internet rules, with Hastings saying not to worry about how Netflix would fare without net neutrality regulations, but we can see the implication: Netflix could benefit from cooperating with Comcast and its ilk. On one level, the two do have opposing interests. They compete against each other in selling access to moving images on screens, fighting for the limited dollars people are able to spend every month on entertainment. At a deeper level, though, their businesses depend on each other, and they have a significant mutual interest: Netflix needs access to the wires that go into peoples' houses to get its popular content to them, and Comcast needs popular content flowing over those wires to keep people paying up.

Netflix knows that its subscribers expect to be able to get their service from their broadband provider and have threatened to sic their customers on them if not. There is precedent for this in the fights over retransmission consent with broadcasters and cable operators. There, popular cable channels regularly demand high payments and run ad campaigns blaming cable companies; in some cases, cable channels even blackout access to content when they do not get the price they want. Content has the leverage there

and can extract tribute in the form of carriage and retransmission fees. Netflix may hope for a future where they get paid by Comcast and block their own content from Netflix's networks if they do not get it.[145]

Netflix and Comcast being so cozy with each other, then, is actually a reflection of not just Comcast's gatekeeping power—that Netflix needs Comcast so much that it will pay to get on its network—but also of Netflix's clout in the crowded field of popular media content; Comcast felt the need to cooperate rather than kill. Comcast is vertically integrated, as it operates as both a content provider and a distributor, so it has the ability and incentive to favor its own content on its own infrastructure, but it is not economically feasible for it to completely exclude content in which it does not have an ownership stake (there are still a couple of other media conglomerates out there to contend with). This comes from a recognition that with the increased competition from online streaming services like Netflix, Comcast can no longer count on cable subscription fees coming in to sustain that side of its business, so cutting a deal that requires viewers to have both cable and internet subscriptions to get Netflix easily on their TVs seeks to keep people hooked. In a way, Comcast is capitulating to its competitor ("if you can't beat 'em, join 'em"): Netflix is popular, and if Comcast wants to keep people paying monthly cable bills, it is good to have popular programming, even if it is from a disruptive competitor that represents an existential threat to Comcast's traditional service. Making access to Netflix easier on cable TV sows the seeds of cable's own destruction by allowing seamless access to the viable alternative, but it also represents how the set-top box remains an important point of access and how closely controlled it is by cable operators. Even with the proliferation of streaming devices and over-the-top services, there is still a need for streamers like Netflix to get their content in as frictionless a way as possible onto TV screens, a bottleneck that is controlled by monopolistic cable operators.[146]

For all of its earlier stated concern about its competitors, Netflix had no problem negotiating a privileged position for itself on the platform of the largest cable TV and internet access company in the country, a deal that any smaller streamer would be unable to broker.[147] An online environment without net neutrality protections and dependent on brokering the right deals with broadband providers is a space where big new media companies like Netflix and Google can dominate. For as much as losing net neutrality protections hurts Netflix, the company certainly has much less to lose than any newer, smaller, independent, or nonprofit service. Among video

providers, Netflix and Google's YouTube have the largest and most loyal viewer bases, a stable of original programming, and the cultural cachet to set the pop culture agenda, especially for millennials and Gen Z—all of this not even mentioning that it has money coming in to be able to pay for a privileged place with dominant distributors like Comcast. Simply put, Netflix does not need net neutrality; in fact, it and the other giants of Silicon Valley can actually further cement their dominance in the new media field if there are not net neutrality regulations.

Netflix, Google, and the other big tech companies did not put up much of a fight when Trump administration FCC chairman Ajit Pai moved to repeal the Open Internet rules in 2017. The strong regulations that Netflix had loudly fought for with lofty rhetoric were about to be ripped up, and Hastings said plainly that he was "not too worried."[148] While Netflix badgered the FCC with lobbying during the 2015 rule-making, with disclosure filings noting more than a dozen meetings and phone calls in the months leading up to the vote, the 2017 process saw two official filings from Netflix and zero visits.[149] The Internet Association (the trade group that represents the tech industry) opposed the net neutrality repeal in statements and white papers, but it departed from the aggressive lobbying and user awareness-raising of prior years, and individual members, including Netflix and Google, were nearly silent on the issue.[150] Netflix remained publicly supportive of net neutrality, tweeting its opposition to the Open Internet repeal, but this represented little other than maintaining the public image of a benevolent corporate giant that cared about the people, especially scoring public relations points with its subscribers and employees, which was particularly rewarded during the wave of corporate liberal opposition to the Trump administration.

Netflix could have just let this silence speak for itself, but its CEO has a way of putting things pretty directly. Hastings readily admitted that the company really cared about net neutrality only when it was in the company's immediate business interest. Onstage at a tech industry conference in May 2017, Hastings said, "We think net neutrality is incredibly important [but it is] not narrowly important to us because we're big enough to get the deals we want."[151] In remarkably candid language, this statement lays bare exactly what the interest of tech companies in net neutrality was and why it had fallen away: notwithstanding the high-flying democratic rhetoric, tech companies prefer regulations prohibiting fast lanes or tolls just because they keep their distribution costs low, so if they are big enough to negoti-

ate good distribution deals on their own, they simply do not care about the principles. This should be obvious—that corporations will look out for their bottom line above all else—yet too many people seemed seduced by the supposedly progressive principles of the tech industry.

When tech companies like Google and Netflix were new and small, they needed net neutrality to have a fair shot, but now that they dominate online, they are too big to need net neutrality; in fact, the big tech monopolists are better able to consolidate their power without it. Hastings said net neutrality was important to "the Netflix of 10 years ago," saying, "We had to carry the water when we were growing up and we were small, and now other companies need to be on that leading edge."[152] This is exactly the difference between Netflix the outspoken net neutrality champion and the "not worried" Netflix: over five years the company had accumulated more power. From 2014, when the second Open Internet rule-making began, to the rules' repeal in 2017, Netflix had gone from 35 million to 49 million subscribers, more than doubled its annual revenues to $12 billion, and raised its stock price by about 150 percent.[153] By 2017 the company was no longer an upstart new entrant into video streaming but the dominant player in that space. They had become big and strong, and they could survive in an environment without protections for the small and weak, so they became unconcerned about such rules. Indeed, the absence of such protections puts the biggest content providers like Netflix at an advantage: they are favored in a situation more about who can cut the right deals and not who has the best content, because they have the subscriber base, the leverage, and the power. This, not net neutrality as a principle or protecting the "platform for progress" it had previously espoused, was what Netflix was really after. Hastings said it himself: sure, net neutrality remains "important for society," but by 2017 it was just "not narrowly important" for Netflix. So why would Netflix bother?

Net neutrality is not a story of industry intrigue; it was led by activists, who must not be erased, and the smaller independent companies that left behind the big guys to really push the issue. Without an analysis of power, it is easy to miss who was really on what side of this issue. But looking at who controls what we do online, we need to see the power of big tech companies as much as that of big telecom companies, a recognition that became more widespread after the "techlash" escalated by 2017. We certainly should not count on big tech companies or any corporation to be on the side of the public interest on any issue, including net neutrality—even

if the interests momentarily overlap—that is not sustainable when profit is the reason for their existence. The way they would become even more powerful in a world without net neutrality is actually a new front for advocates who now emphasize antagonism and not alignment with the tech industry. The fight is really about dispersing power online from any larger concentrated force, whether physical infrastructure or online platforms.

CHAPTER 4

Nuclear Net Neutrality

> The problem with Title II isn't legal but political. For more than a decade, the telephone and cable companies have been trying to nullify Title II, not by amendment but by stigma. With some success, they have tried, within the context of Beltway conversation, to establish the idea that anyone invoking Title II authority is a raving heretic who probably ought to be burned at the stake, or at least think twice if they want to get a decent job anywhere.
>
> —Tim Wu[1]

In the wake of the *Verizon* decision striking down net neutrality rules in January 2014, the FCC and those in the surrounding policy sphere became embroiled in a heated debate about how to proceed with these Open Internet regulations. To those who remained committed to implementing enforceable net neutrality policy—and it was unclear who at the FCC was included in this—a consensus had largely been reached: the commission should reclassify broadband as a telecommunications service. For Open Internet regulations to stand up to legal scrutiny, it was necessary for them to be based in the legal framework of Title II. As the DC Circuit made plain in the *Verizon* case, the trouble was not with net neutrality but with the legal inconsistency of net neutrality disconnected from the regulatory tradition of common carriage under Title II. Remedying this problem would take the FCC changing its definition of broadband, applying to it the label "telecommunications" rather than "information." As we saw in chapter 2, that was seemingly simple but not easy.

After the *Comcast* decision in 2010, it became painfully clear that the FCC's entire broadband agenda, and perhaps its relevance in the digital

era altogether, was in jeopardy. The court denied the commission's authority to regulate broadband, a decision that followed from the FCC's earlier decisions to classify broadband under Title I, where the agency has little regulatory oversight. At this point, the FCC found itself a bit like Wile E. Coyote, having run off the cliff long ago but only then realizing it had no ground underneath it. The FCC had been operating under the assumption that its existing legal framework for broadband would be enough to support its Open Internet rules, on which it was finally getting close to reaching agreement. The DC Circuit's ruling came just as the FCC was convening the backroom negotiations that would culminate in the Googizon legislative framework discussed in chapter 3. Just as the FCC thought that the debate over the Open Internet rules might be working toward some sort of conclusion, it came to the realization that the whole thing might be for naught, unless it could find a way to make the underlying legal structure work.

The most obvious answer to the FCC's conundrum was simply to reclassify broadband as a telecommunications service. If the problem at the heart of the *Comcast* case that would haunt any FCC broadband regulation was broadband being slotted into the commission's limited authority under Title I, it makes the most sense to simply slot it in under its more direct authority under Title II. The logic behind this is more than merely an instrumental need for a more sustainable framework for net neutrality policy: as discussed in chapter 3, both the history of the FCC's prior definitions and the technological realities of internet access infrastructures are more consistent with defining broadband as a telecommunications service than as an information service.

This chapter focuses on the debate surrounding the FCC's first Open Internet proceeding from 2009 to 2010, which was seen by net neutrality supporters as a failure for resulting in weak rules that ended up struck down in court but actually laid crucial discursive and organizational groundwork for the 2015 policy, discussed in the following chapters. In particular, I concentrate on public participation in the rule-making process through submissions to the official public comment record and how this was shaped by advocacy groups. I also review the seeds of the reclassification push planted during this process from 2009 to 2010 that would result in Title II net neutrality in 2015.

Here we see the beginning of *wonkish populism* in the net neutrality debates. Specifically, it started in the work of interest groups and publics that participated in the FCC's Open Internet rule-making proceed-

ing beginning in 2009 as they linked the language and processes of policy "insiders" with the values and actions of policy "outsiders." In this way, wonkish populism brought public participation into arcane administrative procedures, with rhetoric that was antagonistic to establishment structures but steeped in policy minutiae. As a discursive tactic in media policy advocacy, wonkish populism has been used by interest groups to stimulate mass participation in bureaucratic processes, like FCC proceedings, with messages and activities that connect collective opposition to concentrated power with regulatory specificity that gains traction in the policy sphere.

Wonkish Populism in the Open Internet Policy-Making Process

The policy-making process surrounding the FCC's Open Internet regulations from 2009 to 2010 served as a crucial antecedent to the activist work that won the public interest victory in 2015. The tactics employed in pushing for net neutrality—and against it too—were built on the model of media ownership activism: mobilize the public to submit comments to the FCC en masse. However, it also worked to meet the official proceeding's requirements of rationalized policy discourse by infusing this populist fire with cold technical jargon.

In addition to this official comment push, two newer dynamics provide important context for how citizens interacted with the FCC in 2009–2010: the rise of online social media and the commission's increased emphasis on public outreach. Social media had come into its own by 2009 and served as an important platform for users to share information about and deliberate on political issues. Notably important to net neutrality was Reddit, the popular social news site and online discussion platform with links and content submitted and ranked by millions of "redditors" through a crowdsourced voting process. In the midst of booming online participatory culture also came moves from the FCC for more openness and public engagement in policy-making processes, part of the "open government" initiatives of the newly inaugurated President Obama but also following pressure from the media reform movement for a more participatory and accountable FCC. To these ends, the FCC experimented hosting on OpenInternet.gov an online discussion platform called IdeaScale, an informal yet official space for citizen comments.[2] This crowdsourced, Reddit-style service was an attempt to meet citizens halfway, not requiring them to wade into the unfamiliar territory of the official electronic comment filing system, but

also not reaching out to where people were already discussing the issue online or doing much to ease the policy-making proceeding's restrictive bounds of official rationalized policy discourse. With Free Press and Americans for Prosperity as two examples, we will look at how net neutrality activism combined populist and wonkish discursive practices to inform and mobilize people to engage with the issue at three particular sites: Reddit, IdeaScale, and the FCC's Electronic Comment Filing System (ECFS).

Reddit and "Explaining It to Your Parents"

On Reddit net neutrality could frequently be found among the top items across the whole site during the FCC's Open Internet proceeding from 2009 to 2010, with many submissions garnering thousands of participants. Many of these discussions among the site's particularly tech-savvy user base took for granted a basic understanding of and support for net neutrality and focused instead on the most effective ways to clarify the technical details to others—"how to explain it to your parents."[3] Prominent among redditors' engagements with the issue during this period was some rather sophisticated vernacular theorizing on the rhetoric and political economy of net neutrality, driven particularly by a lament for how the issue was represented in mainstream discourse.[4]

The most pervasive framing of the net neutrality discussion on Reddit was as an expression of outrage toward corporate dominance. This is perhaps best captured by an exchange that took place in a discussion about some Democrats in Congress not supporting net neutrality in which one user threw in the comment, "Comcast is a bunch of fuckheads. Just wanted to say that somewhere in here," to which another replied, "preaching to the choir."[5] A comment elsewhere in that discussion elaborated on what the user saw as the relationship between such companies, the government, and citizens: "A Corporate Empire has slowly taken over, American politics is just a dog and pony show, and Americans are too dumb to realize it much less do anything about it."[6] This comment succinctly captures the conflicted position of many redditors against corporate power but doubtful of public intervention against it: populist in orientation while disparaging others' capacity to meaningfully engage.

Indeed, redditors exhibited the tension inherent in wonkish populism: a stance against corporations and in the interest of "the people," yet with a technocratic sensibility inclined to see only ignorance in any "people" who

did not side with net neutrality. Reddit discussions were often devoted to refuting anti–net neutrality arguments, most often those of media pundits or political leaders and rehearsed to fellow supporters, but occasionally as actual debates between redditors.[7] One user wrote, "I find it very distressing that even on my Reddit people are still misunderstanding Net Neutrality and swallowing the Republican doublethink of 'don't regulate' as an argument against it. File this under 'basic shit I've explained to my parents many times.' My thanks to those patient enough to clarify such blinkered thinking. We really are in trouble."[8] Another user doubled down on demeaning those opposed to net neutrality to the extent that democracy itself was called into question: "It's comments like these . . . that remind me that democracy is doomed to failure. Even idiots have an opinion and the right to vote."[9] There was a certain wonkish pretension among more technically and politically savvy redditors, expressing the opinion that those who spoke out against net neutrality were simply mindless "sheeple" not "qualified to debate" the issue.[10]

Not all redditors took such a troublingly reductive view of grassroots net neutrality opponents, though. For instance, responding to one user's comment regarding Fox News viewers that "most really are that stupid . . . It's tragic and inescapable," another wrote:

> Not stupid, they're just hearing the wrong things. Americans are smart enough to know that they don't want their internet censored. Unfortunately for those who choose Fox News as their source of news, it's Obama that's doing the censoring. It's mind-searingly frustrating, but if Fox simply had the good conscience not to lie then things would be better. We're supposed to be able to trust our leaders and our media outlets, even though we know they are opinionated, to at the very least tell the truth. I don't think we're dumb, just too trusting.[11]

Captured nicely here is the notion that rather than seeing net neutrality opponents as dupes who do not "get it" and thus marginalize their participation in democratic deliberations, we would do better to take seriously the genuinely held sentiments of such people and consider the larger structural conditions within which the issue is defined and how that shapes the way people's values are applied to net neutrality.

IdeaScale and "Real Net Neutrality"

Activist work tapped into and organized this existing interest in net neutrality as a geeky public interest issue, and one of the places where this happened was the FCC's IdeaScale site. IdeaScale was an informal means of participation in the official comment record and served as a meeting point between popular activism like that organized on Reddit and organized campaigns on both sides, so some of the same patterns of wonkish populist discourse were evident there.[12] Anti-elite antagonism and technical details showed up in the comments of everyday citizens, a wonkish populism that was heavily influenced by interest groups on both sides of the issue. Net neutrality supporters and opponents alike brought together shared antagonisms of "the people" against powerful institutions through language leaning on rationalist legitimations. Falling within the strategies of activists on each side, users in favor of net neutrality saw themselves fighting against corporations, while those who opposed net neutrality aimed their objections against the government.

Arguments for net neutrality on IdeaScale typically posed the issue as an example of government intervention to protect "the people" against dominant corporate power. Representative of this populist sentiment is this comment: "Net Neutrality keeps the internet in the people's hands. Something so powerful should not be given up to corporate America. Bottom line. Net Neutrality = good for the people."[13] Many users discussed the internet as a public resource that they feared would come under private corporate control unless the government intervened to protect equal access.[14] One user showed this perspective and separated it from any notion of government control over the internet in a post titled "Net Neutrality = No one telling you what you can and cannot do on the web": "The only people who would be against net neutral legislation would be those who stand to lose money from it. Don't let anyone tell you this is about the government controlling your internet. This is about companies trying to control your internet. Don't let them."[15] Also common was a defense of affirmative government regulation in the matter, such as in this submission titled "Net Neutrality Can Only Be Ensured Through Government Protection":

> The Federal Government has historical precedence of intervention when equal access to services is threatened. Vital to a democracy

> is the protection of the rights of marginalized and smaller groups. This includes the internet. This is not a question of the FCC governing the internet, but rather one of prevent[ing] a handful of corporations from access to it.[16]

Arguments against net neutrality on IdeaScale—of which there were more than in unofficial spaces like Reddit—almost uniformly framed their opposition in terms of "the people" standing against the government. Opponents were dubious of the populist claims made for net neutrality; for instance, one user even directly called into doubt the authenticity of posts claiming to represent popular will for net neutrality, writing, "The Public? What a Joke!"[17] Representative of this perspective is the post titled "Government takeover of the Internet," where the user wrote, "Those who are supporting 'Open Internet' are either supporting government takeover or are uninformed of what rights they will be loosing [*sic*] should the government takeover [*sic*] the internet. It is obvious the left want to stiffle [*sic*] free speech and opposition to their Socialist agenda!"[18]

Many comments on IdeaScale remained at the level of general principles, but some connected to specific policy proposals. "Freedom of speech" was the most common category for submissions, but it served as a floating signifier whose meaning differed on each side of the issue, showing the importance of connecting popular values to concrete precision within the policy-making process.[19] Some people recognized this, such as the user who wrote, "Obviously we need to come up with a detailed technical language in order for this law to be effective, but the fundamental point remains that neutrality is crucial to the betterment of our access to information."[20]

Such "detailed technical language" did enter into these submissions, but it did not arise spontaneously; the wonkish populism of citizen comments was a result of successful activist discursive intervention on both sides of the issue. The influence of Free Press and Americans for Prosperity (AFP) was prominent. The two top-voted submissions on IdeaScale were from users representing Free Press and AFP, respectively, who helped inject the populist discourse with wonkishness. These groups also spread messaging in media coverage of net neutrality that provided a discursive framework that many other users worked within.

At the early point in the policy-making process that the IdeaScale discussions were most active—before the verdict in the *Comcast v. FCC* case in 2010 made the issue of reclassification especially urgent[21]—Free Press's messaging was focused on explaining to supporters that the FCC's

Open Internet proposal was "fake net neutrality," drawing wonkish attention to the loopholes that weakened the rules while driving many citizens to engage with the official proceeding.[22] Many submissions on IdeaScale reflected the influence of Free Press on the popular discourse of net neutrality in policy-making circles, as the patterns of discourse such as "public interest over corporate power" in the comments paralleled the way the issue was framed in progressive political publications by writers with connections with Free Press.[23] The top IdeaScale post, titled "Stand with the Public. Pass a Strong Network Neutrality Rule," followed these same lines. It was actually a meta-comment on wide public participation in the Open Internet proceeding, basing its argument purely on popular support for net neutrality and against corporate power: "The public demands the strongest Network Neutrality rule possible, without loopholes. Millions of Americans have called for nothing less, and now the FCC must act decisively, putting the public interest first and not giving in to pressure from AT&T, Comcast, Verizon and their lobbyists." This user was Tim Karr, then the net neutrality campaign director at Free Press and coordinator of the Save the Internet coalition.[24]

The second most highly voted post on IdeaScale, titled "Real Internet Freedom, Not Regulation," came from AFP. The text of the submission, which argues that net neutrality supporters are overreaching in an attempt to institute government control of the internet, almost exactly matches that of several other posts on IdeaScale and in official public comments. Most of these posts opened with the phrase "As an Americans for Prosperity activist."[25] This second-place post was submitted by Phil G. Kerpen, at that time vice president of policy at AFP and chairman of the Internet Freedom Coalition.[26] The submission is steeped in the economic policy jargon of competitiveness, efficiency, and investment typical of corporate libertarian Beltway think tanks, yet it also stokes populist fears of "government control" and "government ownership."[27]

The support for such anti–net neutrality posts on IdeaScale, as well as the large quantity of other posts along those lines, did demonstrate the ability of AFP to shape some people's understanding of the issue, especially through the talking points circulated through conservative media and deployed in user comments. Glenn Beck, then at the height of his popularity, brought the "government takeover" discourse of net neutrality to his Fox News television program courtesy of AFP, pointing his viewers to the group's NoInternetTakeover.com website through which to submit comments to the FCC. Beck thanked Kerpen by name on-air

for "alerting" him to the issue.[28] AFP even took on Free Press directly, a focus of Beck's that could be seen in the comments from AFP supporters to the FCC, characterizing Free Press as a "special interest" that did not represent the people's interests and even implying that its popular support was not genuine, Beck specifically attacked Free Press co-founder Robert McChesney as a dangerous Marxist, and this was directly echoed in AFP supporters' comments.[29]

Appealing to specific objective "facts" to "explain what net neutrality really is" was a common wonkish tendency of IdeaScale comments on both sides of the issue. Many net neutrality supporters equated opposition to ignorance (sometimes willful) and took a didactic tone in explaining what the proposed Open Internet rules really said. For instance, a net neutrality supporter characterized an opponent as either "entirely uninformed and ignorant or intentionally trying to mislead people" and spelled out provisions of the proposed policy before saying, "If you know of a SPECIFIC item in proposal [that intrudes on free speech], bring it up here, don't hand wave at it."[30] Other empirical leanings in support of net neutrality presented US regulatory history and the technical workings of the internet, bringing in detailed discussions ranging from democratic theory to network protocols and infrastructures.[31] Many net neutrality opponents, for their part, had their own "factual" explanations of the issue. Some of them pointed to technical underpinnings to present their argument as indisputable, such as the commenter who presented the fundamentally debatable position that "different IP packets, serving different types of services, demand different priorities" as "a technological fact. You can't legislate it away any more than you can vote to round Pi to 3.15 because it makes math easier."[32] Opposition members more frequently couched their explanations in the "laws" of (neoliberal) economics, though, citing market fundamentalist imperatives to limit government intervention. One user summed up this position as such: "It seems most who favor this Net Neutrality idea are lacking in an understanding of economics. What is the fundamental thing we learn in economics once we grok supply and demand? If you mess with the free market, you can only make things worse."[33]

A theme that arose through many comments was that, after digging deeper, the policy the FCC proposed was not what it seemed. For citizens who supported net neutrality, this was invoked primarily by expressing concern over loopholes that would render the policy ineffective in truly protecting the open internet and a desire for "real net neutrality" as described above. Those against net neutrality attempted to expose what they saw as

a government power grab to those they viewed as too "naive" to see it.[34] As one user phrased this sentiment, "While it feels good on the surface the truth behind it is far from the idealistic views being painted by its supporters."[35] Another user, seeing themselves as one step ahead of the others, said, "Open your eyes . . . This is just a ploy for the government to be able to control what is available on the internet. I'm a little too intelligent for this game."[36] For some, these explanations verged closer to conspiracy theories. One user described how they saw the mainstream media controlling people through propaganda and "neuro-linguistic programming" (a theory of mass hypnosis through media, which was then popular on conservative talk radio, blogs, and message boards[37]) and pleading to keep the internet free from "totalitarian" government control that would "shut up the opostition [*sic*]" and "stop people asking questions about Obama's Birth certificate."[38] (Net neutrality regulation does not truly involve government censorship of internet content or centralized control over infrastructure.) Not merely a detachment from reality, such comments are meaningful as a discursive practice articulated to the history of populist distrust of government. With a detail-oriented emphasis on digging in behind the scenes, conspiracy theorizing is a kind of counterfeit wonkishness where deep investigation turns up detailed but entirely false explanations.[39]

ECFS and "Reclassification"

The official public comment record for the 2009–2010 Open Internet proceeding was dominated by Free Press supporters whose comments were filed with the FCC by clicking through an automated submission setup. Many of these comments showed significant correlation with the Free Press post on IdeaScale discussed above, calling on the FCC to "stand with us" and "protect Net Neutrality by enacting strong rules."[40] The wonkish populism of this pro–net neutrality discourse underpinned Free Press's call for stronger nondiscrimination protections and closed loopholes within its initial briefs and comments upon the proposal's release.

Later, following the *Comcast* decision, Free Press's focus shifted to reclassification of broadband as a Title II telecommunications service. In addition to petitions supporting the position signed by nearly two million citizens and hand-delivered by Free Press staffers to FCC offices, the group facilitated the filing of tens of thousands of comments arguing that "real net neutrality" could only come through reclassification.[41] This message had to be carefully crafted, balancing the need to relay grassroots

"demands of the people" with leveraging the wonkish words of Title II of the Communications Act through those people. The thousands of comments submitted via Free Press that focused on reclassification spoke in the first person in opposition to corporate control and connected personal experience to a call for reclassification:

> I rely on the Internet as a public platform for free speech, equal opportunity, economic growth and innovation. Without vital Net Neutrality protections, companies like Verizon and Comcast . . . can decide whether I will have a voice online. These companies should not have the power to determine my fate on the Internet . . . The agency must stand with the public and protect consumer access to the most important communications medium of our time. Please reclassify broadband as a "telecommunications service" and keep the Internet open and free of corporate gatekeepers.[42]

While emphasizing the public resource that internet infrastructure would be under a Title II common carriage model, the public comments that Free Press facilitated carefully avoided the controversial terminology of "public utility," which became a lightning rod for opposition groups like AFP.

AFP used a similar tactic in getting its supporters to submit public comments en masse, crafting language that pitted grassroots support for a "free-market Internet" against government control through a "public utility" model. Some AFP comments followed the same text as the IdeaScale post, striking the balance between outsider populism and insider lingo in an awkward manner.[43] AFP went for specificity, citing a particular paragraph of the Open Internet proposal and calling out a particular letter submitted to the FCC. But in taking aim at the "public utility" model of internet regulation by conjuring frightful imagery of government control of the internet and equating common carriage with socialism, such comments show little depth of understanding what was in the proposed policy.[44] Another set of public comments written by AFP picked a fight with Free Press over who really speaks for "the people":

> The Internet is a remarkable free market success story, and the vast majority of Internet users are NOT clamoring for regulation. Self-styled consumer groups asking for regulation actually represent an extreme left-wing ideology that is hostile to free-market capitalism and puts its trust in government. That is not the position of the

> "grassroots" or most American Internet users. I urge you to reject new regulations and allow the free-market Internet to continue flourishing.[45]

In many ways, AFP's job in riling up and channeling opposition to net neutrality was easier than on the other side, as reductive conceptions of the "free market" and "regulation" translate more easily to popular discourse than does the jargon of "reclassification." Despite this high degree of difficulty, Free Press drove more comments to the FCC, and rather than flat talking points, net neutrality advocates had policy details that both resonated with popular principles and held up to rational scrutiny.

Especially in the wake of the *Comcast* decision when the battleground shifted to the definition of broadband itself, Free Press even more wholeheartedly embraced wonkish populism. The group made a pivot in its public engagement efforts from slogans like "real net neutrality" into education and mobilization efforts based on the specific regulatory details of FCC classifications. With Free Press egging it on, "reclassification" became an unlikely rallying cry of concerned citizens, showing up in online discussions like those on Reddit and in hundreds of thousands of demands issued to the FCC.[46] Free Press recounted and explained the history and terminology behind the FCC's classification decisions to clarify the issue and its importance to net neutrality. *Ars Technica* noted the outcome of this work and the degree of difficulty in this feat: "Debates about Title II of the Communications Act don't often make it into the op-ed pages of the *New York Times*. The fact that they did so in the past several days shows just how invested in arcane regulatory issues the public has become when it comes to the Internet."[47] Even as it acknowledged that it was shifting the public debate onto the rarefied turf of insider regulatory lingo, Free Press pushed on for reclassification as its primary strategy at both the grassroots and insider levels. The Save the Internet coalition addressed FCC chairman Julius Genachowski on behalf of citizens in an open letter it called "Just Do It, Julius," saying:

> Nearly 250,000 people have urg[ed] you to protect the Internet by "reclassifying" broadband under Title II of the Communications Act. And yes, we know what "reclassify" means. But does the FCC know what it means when this many people are speaking out about an incredibly nuanced, seemingly wonky issues [*sic*]? Let me tell you: It means that we care, deeply, about the future of the Internet.[48]

It could be easy to downplay the importance of the people's grasp of the technicalities of media policy-making, but so much of the outcome depended on just that: citizens may not need to understand technical jargon to demand an "open internet" in principle, but they do need to know enough about the nitty-gritty to make an impact at the FCC and to understand whether they have actually had their demands fulfilled or, as was the case in 2010, not.

Democratic/Technocratic

Wonkish populism can be used toward any political project. It brings an important mediating role for advocacy groups. And it is enabled by the affordances of digital media. All of this comes with particular consequences, responsibilities, and conditions.

Wonkish populism, like Laclau's populism generally, is ideologically neutral—in some cases "the people" oppose corporations; in others, government—and this comes with consequences. We can see this in the Americans for Prosperity campaign against net neutrality, which shows it can be easy to misrepresent or outright fabricate technical details about policies that are not readily understood outside circles of relevant expertise. A particular danger of carelessness with or cynical exploitation of this dynamic can be seen in the conspiratorial leanings of many net neutrality opponents, which simply applied a thin gloss of wonkishness to long-standing populist distrust of government. A theme common to both sides' comments was that, upon digging deeper, the proposed policy was not what it seemed, but AFP explained its position as exposing a surreptitious government power grab.

Wonkishness should not be mistaken for the mere appearance of technical expertise or appeal to a false sense of intellectual authority, nor should a linkage with populism shade it toward demagoguery. Advocates' use of wonkish populist discourse, therefore, comes with a special ethical responsibility to faithfully represent the policy matters at hand in their public explanations. There is inevitably a certain amount of simplification that comes with advocates informing non-expert publics on complex policy issues, with the necessity to make it salient to peoples' lives and motivating them to act on it, but this can become stretched even thinner when dealing with the esoteric terminology of policy wonks. Attempting wonkish populism takes a certain mode of engagement—detailed but aimed at everyday people—and just like any advocacy tactic, it can be employed for any side,

for any issue. However, true wonkishness has to be based in actual policy details. We can draw the line at conspiracy theories, which more than anything, ape the look and feel of wonkishness without the rigor or the truth.

There is an important mediating role for advocacy groups in wonkish populism. If asking everyday people to be this engaged with policy details means arguments over what the policy in question "really" is, then advocates' explanations are especially powerful in shaping peoples' understandings. While we ought to encourage greater public participation in policy making, the sheer complexity of issues at hand, especially the technical nature of much media policy, necessitates a certain degree of delegation of decision-making authority from publics to experts. People need to have a certain grasp of the issue and how it plays out in specific provision of the policy, but at the same time they do not necessarily need to know everything about how it works; understanding the basic dynamics of the policy and how to meaningfully express public opinion is the crucial threshold. The particular mechanics of how the policy operates can be reserved for those whose job it is to operate them; there are diminishing returns to the expected level of knowledge for public participation in policy debates.

We should not, however, dismiss the importance of publics' grasp of the technicalities of media policy-making, as we can see in the net neutrality example how a certain depth of understanding was necessary to know if their demands had truly been met. If technical, though, it need not be technocratic; it is not enough to just leave it up to experts to decide what is best, because policy is also political. The net neutrality example demonstrates how part of the value of a deeper level of policy understanding is for publics to be able to know if they are getting what they want. Policymakers can claim that they have delivered protections for internet openness, but to go beyond slogans and get into details makes publics better able to hold them accountable.

Ultimately, the most important role for publics to play is to issue demands that clearly express their values and interests, with advocacy groups to help formulate, organize, and amplify these to reach policymakers. How these values are connected to concrete policy specifics is tricky and takes people who understand both these and the complexities of the technical issues at hand. A certain division of labor is necessary in policy decision-making, but we ought to do it in a way that does not privilege elitist experts at the expense of other voices in the process. By opening up wonkishness to a more populist orientation and arming everyday people with what they need to make contributions at previously obscured levels

of policy decisions, we may allow more peer relations among participants, avoiding shallow arguments from authority but nonetheless leaving existing dangers of falling into the trap of technocratic perspective.

Breaking down barriers that insulate bureaucrats from the people their decisions affect for more shared participation in policy-making processes takes people being able to engage more fully in the technical workings of policy specifics and thus important intervention from advocacy groups. Seeta Gangadaharan's conception of "translation" in media policy-making usefully describes the mediation between advocacy groups and publics: interest groups inform, bring together, and amplify the message of publics, especially relevant for wonkish populism for how these groups put demands in terms that are meaningful in the policy sphere.[49] With wonkish populism, advocates must create understanding of an issue for people, shape the discourse, relay the message, even speak for them—all while not falling into overly rationalized discourse that perpetuates power imbalances—by mobilizing not just better arguments but larger numbers of people making those arguments.

The affordances of digital media and other conditions enable these dynamics. Wonkish populism is not new and has many historical antecedents, but digital networked technologies do make its operations easier. The most obvious of these differences is that information on policy-making proceedings and the ability to submit comments to the public record are made more accessible through agency websites and ECFSs. Digital media also provide greater access to information about policy issues generally and tools for reaching out to and organizing publics, seen in the robust and influential online discussions of net neutrality.[50] However, technological developments alone did not create the conditions for wonkish populism to thrive in the Open Internet proceeding, but rather combined with institutional cultural changes and the fruits of advocate labor to get more people informed and involved in policy-making processes.

By 2009 online social media had become an important platform for political discussions, pressure from the media reform movement for more inclusive and participatory rule-making processes had reached an inflection point, and President Obama had come into office promising a more transparent and accountable federal government. Following from this, the FCC began to move toward more openness and public engagement in rule-making processes, including more social media outreach, dedicated information portals on particular proceedings like OpenInternet.

gov, and experiments with online discussion platforms like IdeaScale that provide informal yet official spaces for public comments. This amounted to attempts to meet publics halfway, not requiring them to wade too far into the unfamiliar territory of the proceeding, like the ECFS, but also not reaching out to where people were already discussing the issue online or doing much to ease the policy-making proceeding's restrictive bounds of official rationalized policy discourse.

As we will see in the following chapters, as the net neutrality campaign developed, the organizing began to operate more at the grassroots—or netroots—level, with more participatory public engagement through hybrid online/offline demonstrations and more direct popular expression that could not be dismissed as mere clicktivism. For instance, the public comment record for the 2014–2015 Open Internet rule-making was remarkable not just for its sheer numbers but also for such an unusually high percentage of original comments as opposed to canned form letters.[51] Net neutrality advocates still facilitated mass comment filings but encouraged people to add to, modify, and rearrange boilerplate comment text or sometimes even a blank box to fill in themselves.[52] This motivated people to put their own voices into the mix and was harder to dismiss by showing people's understanding and substantive arguments.

"The Nuclear Option"

From the moment the *Comcast* decision dropped, the call for "reclassification" was loud and clear from media reform advocates.[53] With the FCC backed into a corner on the authority question, plans for reclassification began to gain some headway. This progress was spurred on by public pressure put on the commission; as we saw above, reclassification became an unlikely rallying cry for public participation, channeled by media advocacy groups like Free Press. Although it was expected to be a contentious issue, a tremendous pushback from the telecom industry was sparked by the mere discussion of reclassification.

With network operators threatening to escalate the net neutrality battle into a legal World War III in the communications policy world, the FCC reclassifying broadband quickly became known in telecom circles as "the nuclear option."[54] This characterization came out of discourse from the phone and cable companies that framed common carriage regulation of broadband as a radical move. An early defining point in this network operators' discourse surrounding the reclassification debate was a letter sent to

the FCC in the Open Internet proceeding signed by AT&T, Verizon, Time Warner Cable, the NCTA (the cable industry trade group), the Cellular Telecommunications Industry Association, or CTIA, and other telecom companies and associations.[55] In the letter the network operators argued against the regulation of broadband providers as common carriers and the feasibility of any attempt to reclassify them as telecommunications carriers that doing so would take. Their argument remained consistent with that of cable operators as traced in chapter 2—namely, that broadband is entirely an information service with no separable telecommunications component to regulate as such.[56] What is most notable about this letter from network operators is its overheated rhetoric, indicative of their upping the ante in the reclassification fight and the continued power of their misrepresentations in policy discourse.

Network operators cast common carriage as old and outdated regulation that was inappropriate to apply to the high-tech networks of today. They decried any attempt to "impose common carrier rules, designed for the monopoly telephone companies of 1934, on the competitive broadband industry of today."[57] Never mind the fact that the broadband market is far from competitive; here let us take issue with the fact that common carriage rules were not designed for monopoly telephone companies. While it is true that common carriage regulation is old, that is more an indication of its long-standing, time-tested nature as a bedrock principle for communications policy. That is, common carriage is a general rule designed for any privately owned public network of transportation or communication that is imbued with public obligations, not just telephone companies and not just those with monopoly control.

Network operators further characterized common carriage as heavy-handed regulation sure to smother broadband services. Trying to contrast Genachowski's stated aim to not overburden broadband providers with a representation of common carriage as investment-killing government intervention, the letter stated, "It is difficult to imagine a proposal more at odds with the Commission's historical commitment to keeping the Internet unregulated, to our national prospects for economic recovery, and to [Genachowski's] own commitment to 'common sense' solutions and to 'private enterprise, the indispensable engine of economic growth.'"[58] The letter reeled off a litany of catastrophes sure to follow the reclassification of broadband. "Indeed, the Commission cannot seriously think that layering a 75-year-old regulatory structure on modern broadband facilities will not harm current and future levels of broadband investment," the letter

read. "This concern is especially acute given that this antiquated regulatory structure would require all providers to divert time and resources from deploying broadband networks so that they can design and implement the myriad systems and processes necessary to comply with a bevy of newly imposed Title II obligations and requirements."[59] Hitting hard on this point as broadband providers did any time reclassification came up was a gross, and surely willful, misunderstanding of the reclassification proposals under debate. Even media reform advocates' plans for reclassification made clear that applying the whole slate of rules that telephone services are subject to is unnecessary and inadvisable.[60] Under a regulatory technique known as "forbearance," the FCC has the ability to apply only those provisions that it sees fit under any given classification, meaning that classifying broadband as a telecommunications service did not require the commission to treat it exactly the same as any other telecommunications service. In other words, reclassification did not bring with it a whole host of burdensome obligations and requirements that were designed for phone service only to be ill fitted to broadband service.

It was into this acrimonious atmosphere that the FCC released a proposal for reclassification; it was a reasonable plan with some promise to address the underlying troubles with enforceable net neutrality policy. In a speech on May 6, 2010, Chairman Genachowski introduced what he called "the Third Way" to approach broadband regulation, invoking the Clintonian triangulation of moderate Democratic politicians since the 1990s.[61] In answering the question of how to proceed following what it referred to as "the *Comcast* dilemma," the plan meant to lay out a moderate middle path. Genachowski's Third Way went between the "Stay the Course" plan of leaving broadband regulation on the shaky foundation of Title I on the one hand and the "Telephone Style Regulation of Broadband" plan of reclassifying broadband with all of the Title II regulations on the other hand.[62] Using forbearance to "narrowly tailor" a common carriage approach to broadband was the core of the Third Way plan: Genachowski proposed separating the transmission component of broadband and classifying it as a telecommunications service, applying a few core common carriage rules to broadband transmissions and forbearing from the rest of Title II.[63]

For as much as it tried to thread a very narrow needle, Genachowski's Third Way plan was a surprisingly reasonable and substantive path forward to address the real issue of net neutrality policy: the classification of broadband transmission as telecommunications and its regulation as common carriage. As a plan for reclassification, it did represent a missed opportunity

for the FCC to go all the way and ensure openness at a built-in infrastructural level. With broadband under Title II, the FCC could choose to once again require open access for internet access providers, going back to the framework that was vital to competition on the early internet and for other countries' superior broadband infrastructure.[64] However, the Third Way would have forborne from requiring those unbundling provisions of Title II.[65] As reclassification was back up for debate, open access was one of the biggest hopes for strong net neutrality advocates and one of the biggest fears for network operators. Even though it could stem the rising tide of consumer subscription costs, provisions authorizing the FCC to directly regulate the rates that broadband providers could charge were also cut out. Rate regulation was generally seen as more applicable to the Bell monopoly era and supporters and opponents of net neutrality alike worried about scaring off investment in broadband infrastructure due to the limited possible returns. Even though the broadband market is severely concentrated, the question of more structural interventions was still too steep a climb. The Third Way courted the impossible goal of pleasing everyone in the policy arena.

The Third Way was proposed as a means to move forward on broadband policy, like the Open Internet rules themselves, but in the most "modest," "carefully balanced," and "least intrusive" way possible.[66] The Third Way—clear enough just from its title's familiar rhetoric of rejecting extremes on both sides and finding a reasonable middle ground—was steeped in an ideology of compromise as a worthy goal in itself. Genachowski spent quite a bit of his time paying tribute to the wonders of communications technologies generally and broadband in particular, along with their importance for democracy, innovation, investment, inclusion, job creation, economic growth, education, and security (and, we can presume, Mom and apple pie as well). In referring to what he assumed was a "broadly supported consensus" on a role for the FCC in broadband oversight—even going so far as to quote network operators' statements on the necessity of basic consumer and competitive protections—the Third Way plan asserted the need for firmly established but "light touch" regulation.[67] In a feat of discursive acrobatics, jumping through two different hoops at the same time, Genachowski characterized his reclassification plan as "merely restor[ing] the longstanding deregulatory—as opposed to 'no-regulatory' or 'over-regulatory' compact."[68]

For all the lengths to which Genachowski went to present reclassification as uncontroversial, network operators nonetheless took it as a dec-

laration of war. The response to the Third Way from network operators was swift, harsh, and largely detached from the facts of what was actually proposed. Mostly building on the characterization of common carriage as outdated and heavy-handed regulation, arguments against the Third Way saw it as just the first step toward the FCC taking control over broadband in a regulatory regime akin to the Bell monopoly days or perhaps even government censorship.[69] This response is, of course, nothing new from media corporations facing a new regulatory regime; the implication that federal regulation amounts to authoritarianism echoes, for instance, the broadcast industry decrying postwar media regulation as communism. Verizon CEO Ivan Seidenberg commented, "We are very concerned that, in attempting to address legitimate issues about access to the Internet, the FCC has proposed basically an unimaginative and overbearing set of rules that essentially tries to retrofit a new industry into an old framework and expand their regulatory reach well beyond what is necessary."[70] NCTA president Kyle McSlarrow said, "It is a massive overreaction to suggest that we should impose decades-old regulatory regimes designed for the days of Ma Bell and a government-sanctioned monopoly on the Internet."[71] Republican FCC commissioner Robert McDowell, a reliable voice for handing power over to corporate control in the name of principled libertarianism, said that reclassifying broadband would mean the United States would be "losing the moral high ground" on the issue of internet freedom and giving comfort to the enemy when it comes to authoritarian governments censoring the internet.[72]

To make these kinds of assertions was to misrepresent what the Third Way proposed in two particular ways. First, it relied on a "slippery slope" argument that willfully ignored forbearance as a regulatory tool. The reclassification plan explicitly proposed removing the vast majority of Title II's regulations to avoid exactly the concern from network operators that they would be subject to onerous monopoly-style regulation.[73] Further, it spelled out strong limitations on the commission's ability to impose these requirements in some dystopian future FCC power grab. Second, the notion that reclassification would lead to government regulation of speech online was downright silly. The Third Way's reclassification plan was first and foremost based on the separation of connectivity from content, for exactly the purpose of regulating the former to ensure the freedom of the latter. While Title II of the Communications Act authorizes the FCC to intervene in the provision of network connectivity, nowhere does it allow for intervention into expression on those networks; indeed, Title II's

requirements of openness in the flow of content would surely bolster the freedom of expression. The reliable bogeyman of government regulation of internet content was unsurprisingly raised in response to the Third Way. However, without a doubt the whole point of reclassification of broadband was to separate and keep open the conduit so that the content can remain untouched by censorial forces, public or private.[74]

Beyond bald-faced fear mongering, the primary argument against reclassification of any kind was based on little other than the old canard that any and all regulation is a deterrent to investment and economic growth.[75] The idea that the mere mention of Title II would be enough to scare off growth in the broadband market was just a continuance of the misrepresentation of government intervention as poison to private enterprise. In fact, infrastructure regulation typically serves to open up otherwise concentrated markets, increasing competition and therefore investment and growth.[76] This was the case with internet infrastructure, which shows that the notion that investment would fall with common carriage regulation is simply inconsistent with history; the era when internet access providers were regulated under Title II saw massive investment, which began to slow in 2002 when these regulations were removed with the Title I broadband classification.[77] Further, while out of one side of their mouths telling policymakers of the sure disaster for investment that reclassification would bring, broadband providers explained the situation quite differently to investors themselves. Speaking at an investor conference, Time Warner Cable executive Landel Hobbs called the Third Way proposal "a light regulatory touch" that he acknowledged would not include rate regulation or any of the other provisions that network operators expressed such concern for.[78] Actually, Hobbs put it quite directly: "[The Third Way proposal] would not crush investment in our sector. That's not at all what we believe. So, I want you to take away as, yes, we will continue to invest."[79] This view was shared by independent investment analysts: a Merrill Lynch report dismissed "fear over the specter of regulation" and said "any Third Way regulation will have no impact on Cable growth."[80]

For their part, media reform advocates threw all of their efforts behind the Third Way. Indeed, Genachowski's plan to reclassify under Title II and use forbearance to tailor appropriate regulation was quite similar to that for which Public Knowledge and Free Press had been calling.[81] The Save the Internet campaign spearheaded by Free Press took up the banner of reclassification and coordinated the submission of tens of thousands of citizen comments to the FCC proceeding that the Third Way initiated. In

doing so, Free Press mostly recounted and explained the history behind the FCC's classification decisions to clarify the issue and its importance to net neutrality. As we have seen, this can be quite a challenging task for a battle playing out in technical terminology.

Lobbying by network operators turned the Third Way into a hot-button political issue inside the Beltway. The FCC had the ability to move forward on reclassification with a simple majority vote of commissioners, which Genachowski had with the support of the other Democratic commissioners and net neutrality supporters, Copps and Clyburn. Although the FCC is an independent agency that does not need input from Congress or the White House to proceed, such pressure certainly has sway over how such decisions are made. The telecom industry's deeply entrenched influence on Capitol Hill meant it was able to quickly whip up fervor to press the FCC: over a hundred lawmakers on both sides of the aisle signed letters strongly expressing concern over reclassification plans (although that figure was cited some places as over three hundred).[82] There were even rumors that the FCC received pressure from inside the White House not to go further on the Third Way, for fear of providing political ammunition for the Tea Party in the run-up to the 2010 elections.[83]

Having a reasonable discussion about the prospect of reclassification was in many ways foreclosed by the degree to which regulatory discourse is dominated by the telecom industry. The common sense of reclassification in the policy sphere was as a radical move, referred to in matter-of-fact fashion as "the nuclear option," the reader will recall. For instance, at a congressional hearing, Genachowski was told by Republican representative Mike Johanns, "You've been handed your hat in the *Comcast* case . . . [and] you can't go to Title II, it'd be like remaking the world."[84] As we have seen, though, it was classifying broadband under Title I that was the truly radical move: Congress created Title II to apply to any network of two-way communication, which the internet most definitely is, but the FCC chose to go a new route based on manipulations of regulatory terminology and resulting in the mess surrounding the Open Internet rules. This was the main point hammered away at by net neutrality advocates: reclassification is, as Wu put it, simple "error correction."[85] Copps, always the most vocal defender of the public interest at the FCC, said, "I want to call telecommunications 'telecommunications' and go back to the openness that has characterized the Net since it was first invented in the laboratories of the Department of Defense. That's not extreme. That's not radical. That's called going back to basics. That's called consumer protection 101."[86]

The most effective response for network operators was simply to threaten to sue. Telecom companies, led by AT&T and Verizon, made clear their intentions to take the Third Way to court—aiming all the overwhelming legal firepower that they command at the FCC and tying up any attempt to reclassify broadband, and therefore any Open Internet rules along with it, in court for years.[87] As a particularly feverish press account put it, network operators would "almost certainly mount a vigorous legal challenge, leading to what could be an epic—and costly—court battle over who's the cyber-boss."[88] When network operators said they believed the FCC did not have the evidence for its proposal to withstand judicial review and made ominous references to all the "legal uncertainty" sure to come while "courts sort through a new generation of mind glazing statutory characterization disputes," it was pretty clear that they intended to suffocate any reclassification proceeding in endless appeals and challenges.[89] That threat of legal action proved enough to quickly scare the FCC away from reclassification.

After a few weeks of this political and legal pressure, Genachowski backed away from the Third Way. Word leaked that Genachowski was beginning to reconsider reclassification, and soon it became clear that the FCC would maintain the classification of broadband as an information service.[90] No formal announcement on it ever occurred, but the commission simply moved forward with the Open Internet proceeding and let the reclassification issue drop.[91] Some insiders doubted that Genachowski ever intended to actually take on reclassification and was merely using it as a bargaining chip in the closed-door negotiations discussed in chapter 3.[92]

The sense in the policy sphere was that Genachowski cared first and foremost about getting some Open Internet rules on the books—being able to say that he delivered on his and President Obama's promise—but not necessarily making sure they would really work.[93] He was not interested in getting dragged into a big ugly fight over it—in other words, what it would take to do it in a sustainable fashion. When it looked like going the Third Way would leave net neutrality policy tied up in court for years, Genachowski caved in to what the telecom industry wanted and negotiated his way to the weak Open Internet rules of 2010. Genachowski avoided the immediate battle but prolonged the war, ending up—after the *Verizon* case that struck down the Open Internet rules—with nothing to show for it anyway.

The FCC was left building the 2010 Open Internet Order on a legal foundation that it admitted was simply unable to support the rules. Austin

Schlick, the commission's top lawyer, made clear in the Third Way legal analysis how relying on limited Title I authority was simply not a viable way of implementing net neutrality policy.[94] Citing Schlick's analysis, Genachowski referred to leaving the classification of broadband as it is—a "protracted, piecemeal approach to defending essential policy initiatives" with "a serious risk of failure in court."[95] As one vivid press analysis put it, "If that's indeed the FCC's plan, it's kinda laughable. It's like switching to a knife in a gun fight you're already losing."[96] When the Open Internet rules were taken to court by Verizon, the FCC did indeed fail in court, for exactly that reason.

There was not much left of the 2010 Open Internet rules following the *Verizon* case in January 2014. The heart of the order—the no-blocking rule and the nondiscrimination rule—was thrown out in court, leaving only the transparency rule, which was necessary but insufficient to enforce net neutrality. The 2010 Open Internet Order was "net neutrality" policy without net neutrality, but it was nonetheless important as a regulatory beachhead. The FCC inquiry into reclassification was never officially closed—in fact, against all odds, it would be reopened in 2014 and become the vehicle through which strong net neutrality was won in 2015.

CHAPTER 5

The Title II Turn

Battle for the Net, the coalition of media advocacy groups that led the campaign for net neutrality policy in 2015, described the debate this way: "They are Team Cable . . . the most hated companies in America . . . If they win, the Internet dies . . . We are Team Internet . . . We believe in the free and open Internet."[1] Presenting the FCC's Open Internet rule-making as a stark, high-stakes "battle" of two opposing teams lines up with the populist rhetoric common to contemporaneous anticorporate social movements. But Battle for the Net elaborated on what the net neutrality advocates of "Team Internet" were fighting for with a far from standard rallying cry: "We stand for 'Title II reclassification.'"[2] This is the terminology of policy wonks, referencing the obscure FCC process that is necessary to mandate nondiscrimination on broadband providers, the crucial change that had to be made for enforceable net neutrality protections. This chapter sheds light on the unlikely amalgam in advocacy language and practice they used in the policy-making process as wonkish populism.

The chapter examines the policy-making process involved in the FCC's reclassification of broadband from a Title I "information service" to a Title II "telecommunications service" in 2015, the decision that enabled strong net neutrality rules to move forward. This shift in FCC policy discourse and structure was broadband providers' greatest fear and net neutrality advocates' greatest hope: the assertion of public obligations on private owners of communications infrastructure to treat all content equally. This chapter shows how the wonkish populist discursive tactics of advocates and publics were able to overcome the neoliberal power dynamics of privatized regulation to redefine broadband within a regulatory framework consistent

with net neutrality. How did they do it? They focused on the particulars of the policy, and made the policy political, popular, and principled—which made it all possible.

The Particulars of the Policy

Net neutrality, while holding some specific meanings in the policy sphere, had to be defined and redefined in the public sphere for publics not necessarily engaged in regulatory minutiae but passionate about the principles the details represented and the material outcomes they delivered. Net neutrality was always going to depend on the particulars of the policy—without rigorous attention to how it would be done, it would be all too easy to repeat "net neutrality" as a specific signifier, invoke its connotations, do little to ensure its effective operation, and move on. Although it took on meaning as a larger political cause, net neutrality began its life growing in the policy weeds and would retain its roots there. Dealing with FCC classifications and congressional committee debates, net neutrality had to be deliberately carried from the policy world to the public. Doing that was tricky, as wading into it at all meant getting into the fine details of the policy debate as it operates in the rarified spheres of regulatory policy-making, which only creates more challenges when it comes to bringing that out to the broader world. The success of net neutrality had to start with getting the policy right. As longtime net neutrality wonk Harold Feld said, "Being right is not enough, but it helps a lot more than people believe."[3]

The proposal that would go on to become the strongest protections for net neutrality in the 2015 Open Internet rules actually began as little more than a thin veneer of net neutrality. Shortly after the *Verizon* decision in early 2014 that gutted the 2010 Open Internet rules, FCC chairman Tom Wheeler loudly proclaimed his commitment to protecting net neutrality, but he quickly got to work making rules under the Open Internet banner that in substance would allow and afford discrimination and came from a regulatory framework that the DC Circuit had just shown as being inconsistent with net neutrality.[4] In the face of a consequential court rebuke, in order for net neutrality advocates to fight against the FCC's attempting to implement net neutrality policy, the focus had to go to the details. Wheeler's initial policy had strained the principle of net neutrality too far, under a definition too thin and brittle to withstand any prodding. The two particulars that net neutrality advocates fought for, and won, in 2015 were paid prioritization and reclassification.

When Wheeler's proposal for new Open Internet rules leaked to the *Wall Street Journal* in April 2014, the backlash was swift and harsh; rather than being seen as new net neutrality rules, Wheeler's plan came to be known as the "fast lane" proposal. Although the crux of the proposal was meant to be its standard no-blocking and no-throttling rules, the focus immediately became that the rules allowed paid prioritization—described in the lede of the *Journal*'s report as allowing broadband providers to "charge companies a premium for access to their fastest lanes."[5]

Wheeler's proposal allowed for paid prioritization by broadband providers as long as the deals were made available to any interested content provider and were deemed "commercially reasonable" by the agency on a case-by-case basis.[6] The plan was a rather slapdash attempt at finding middle-ground compromise between the two sides in the net neutrality debates, but, importantly, it was never treated as a legitimate solution to the net neutrality issue, even in mainstream media reporting. That even the transcriptionists of business conservatism at the *Wall Street Journal* would use the imagery of "fast lanes" in describing prioritization deals was a demonstration of how much the discourse surrounding the issue had been successfully defined by advocates. And that initial report was joined by further major publications describing the FCC's "retreat" and "reversal" on net neutrality policy, such as the *New York Times* reporting that with Wheeler's proposal, the principle of equality of internet traffic was "all but dead."[7] The characterization of the proposal as establishing "fast lanes" on the internet stuck, and that shorthand for the rules was a useful discursive resource in fighting against the policy.

Net neutrality advocates did not take the bait and immediately showed how the rules would be more likely to bury net neutrality than resurrect it. The public intellectuals who had done the most to define the principle of net neutrality thoroughly rejected the "fast lanes" proposal; it was engaged with not as a reasonable pragmatic compromise but as a betrayal. Tim Wu went for the politics, emphasizing the hypocrisy of President Obama campaigning with net neutrality promises and then appointing an FCC chair who proposed to destroy it.[8] Barbara van Schewick dug in on the policy, saying if net neutrality was the goal, that was not the way to do it.[9] Both Free Press and Public Knowledge simply said, "This is not net neutrality," with the former calling it "political cowardice and extreme shortsightedness" and the latter going surprisingly populist with a blog post on building "An Internet for the 1%."[10]

The proposal faced an uphill battle from the start, as the "fast lane"

image followed it everywhere over Wheeler's repeated protestations of serious net neutrality protections.[11] That journalists and advocates looked past the cover to see what the policy would really do meant it never received credulous treatment in media coverage or advocacy messaging, which left it with nothing to stand on. Advocates pivoted to reclassification right away.

The terms of power from chapter 2—"telecommunications" or "information" as the classification for broadband—were the grounds on which the net neutrality battle at the FCC would be won or lost. Knowing these terms, their implications, and how to deploy them would make all the difference. As an advocate, knowing the language and speaking it confidently is one thing, but getting everyday people to speak the jargon of policy elites and not being afraid to engage their turf is a tall order. It would not matter if the FCC delivered what it said was net neutrality; if the policy was not backed by meaningful regulatory authority, it would not stand up to network operator evasion or legal challenge. This regulatory authority would have to be established through discourse, using certain words and not others.

Recognizing this fact, advocates operated on these terms and deliberately worked to articulate the terms and their implications in messaging and engagement with the values and interests they pushed for with net neutrality. After the 2014 *Verizon* decision, Free Press came out immediately pushing for reclassification, responding to the DC Circuit's gutting of the 2010 Open Internet rules on the grounds of policy technicalities, rather than any broader engagement with net neutrality itself, as an invitation from the DC Circuit for the FCC to consider broadband providers as common carriers to do net neutrality right. Demonstrating the initially defensive position net neutrality advocates found themselves in upon pushing for Title II, in a blog post headlined "Reclassification Is Not a Dirty Word," Free Press painted reclassification as imminently reasonable, certainly not new, and definitely not radical; their argument was based on simply correcting the past mistakes the commission had made in classifying internet access to "reinstate the legal framework the internet was built on" and "return the internet to its roots."[12]

While the discourse around Title II had previously been defined by the Beltway and industry common sense of reclassification of broadband as "the nuclear option," following the *Verizon* decision, and with the drumbeat for reclassification going strong, the press and politicians began to matter-of-factly assert that the real issue of net neutrality was about reclassification, and that went on to become the primary focus of the policy debate at the FCC.[13] Initially, the press acknowledged the reclassification issue hanging

over the FCC restarting its Open Internet policy-making—the real policy debate that was being avoided in fear of the larger political war. But as public pressure mounted on the FCC and the issue made it onto politicians' agendas, reclassification came to be treated not as a deferred engagement but as the main event.[14] Indeed, media coverage began to focus further on the eye-glazing procedural details of classifying broadband: Would the FCC fully reclassify broadband internet access service as a telecommunications service, and, if so, what provisions of Title II would it forbear from? Or would it classify upstream connections under Title II service and rely on Section 706 authority for downstream connections?[15] Even for the often fine-grained reporting and analysis of Washington political journalism and industry trade publications, the subject was pretty deep in the weeds.

For those whose home territory *is* the weeds—the lawyers and advocates playing the insider game in the policy arena for the public interest––this was a stand-and-deliver moment. A "policy window" had opened up, through which the passage of policy they had been working on would become possible. But most realized that it was necessary to connect their insider work to those on the outside, who would need to understand it and get behind it to help it to become possible (explored further in chapter 6). No insider in the communications policy world better took up this role of advocate explainer than Harold Feld, vice president of Public Knowledge, whose long-running blog, *Tales of the Sausage Factory*, had been bringing readers along with the inner workings of the FCC gleaned from his decades of experience as a Washington public interest advocate and played a crucial role in spreading understanding of net neutrality since the beginning of the debate.[16] The blog title alone signals to readers right up front what to expect: for those interested in the grisly process of how the policies that affect their digital lives are made, Feld plays the patient, informative, and (considering the dry subject matter) entertaining guide.

Aimed at what he describes as a "201-level," Feld walks readers through the points just past the introductory level where someone has some basic familiarity and interest. His blog is where to go once one knows something and wants to know more about issues like net neutrality; it is for those who are curious to know more than they would glean from the news cycle of the mainstream media coverage or who have some experience with the topic. On the blog, Feld regularly posts three thousand words at a time, diving into the policy nuances with depth and comprehensiveness but in a geeky, snarky style native to the internet and not the Beltway. He translates the wonkish details into the popular idioms of digital culture and adopts a

humorous, irreverent tone that somehow keeps it all breezy enough. For instance, Feld playfully equated Wheeler's initial proposal to teaching the rhythm method in sex education, with net neutrality opponents outraged that anything other than abstinence was being taught.[17]

The blog has a small but influential audience. While it does serve as a kind of clearinghouse for those getting involved in media activism to understand in more depth, it also counts among its regular readers the journalists and political staffers whose jobs are to inform larger or more powerful audiences who are moving beyond entry-level general understanding of specialist issues like net neutrality.[18] Even the insiders of the policy sphere acknowledge that it can get so boring that cutting through such material in a readable popular voice is effective. This allows Feld to bring more cultivated or vicarious expertise and authority to lawmakers and the reading public in order for them to know what is going on in the policy-making process and put that in the frame that is most effective for his own advocacy, in a powerful kind of discursive articulation of these issues. Feld has become a go-to source in articles dealing with net neutrality, and even when he is not quoted directly, his understanding of the issue is spread through lengthy, deep, and yet readable blog posts that journalists often rely on. As a public interest advocate, Feld does not have the lobbyists' budget or access to have the ear of politicians making important decisions, but he does have expertise that staffers and constituents can draw from and channel back to those decision-makers, helping filter in the public interest perspective through a two-step flow of influence.

Not only were net neutrality advocates not scared of all this boring stuff, but they also effectively turned it into rallying cries. It was a jarring sight in 2014 to see hundreds of demonstrators outside the FCC offices, protesting Wheeler's fast lane proposal with signs intermingling the wonkish and the populist: "It's the people's internet, not the capitalist's [*sic*]," "Common carrier is the solution," "1%, don't steal the people's internet," "Protect the People's Internet," "#1 Demand: Reclassify the Net. #RealNetNeutrality."[19] The combination of tactics from the left populist Occupy movement with messaging straight from the Communications Act of 1934 was a curiosity in some media coverage.[20] When a bemused reporter from a media industry trade publication approached the occupiers camped out in front of the FCC offices the week before the vote to proceed with the fast lane proposal to ask what they were doing there, Margaret Flowers from Popular Resistance told him, "We want the vote to include reclassifying the Internet as a common carrier service."[21]

Just like "net neutrality" itself, "Title II" and "reclassification" can be empty enough signifiers that, despite their very specific meanings in the policy sphere, hold such little meaning in the public sphere that they can be used to conjure major values and principles that resonate with the people, attaching populist significance to wonkish signifiers. This is, of course, ironic, considering that "terms of art" carry very specific meanings in policy discourse, fixed and stable enough that everyone can agree and work with them on those terms, but when they are decontextualized into the broader public sphere, they can carry new valences. So, from this perspective, Title II does not have to just refer to a specific section of the Communications Act, carrying with it particular regulatory capacities; rather, Title II was made to refer to fundamental rights and values of equality and justice. This is itself a meaningful political intervention—just going back to foundational principles can be used to remind policy-makers what it is all about anyway.[22]

The fight against what advocates called the "fake net neutrality" of Wheeler's proposal would have never gone anywhere without the sense of what real net neutrality is, which meant understanding the particulars of the policy. Further, arguing for net neutrality on the grounds of its continuation of the common carriage tradition meant not just knowing the history and details of the regulations but also getting them right. We saw in chapter 2 that internet access is telecommunications, understood through a reasonable interpretation of the statute and the technology, despite the industry discourse seeking to change the meaning of the terms in use. This was confirmed by the DC Circuit in 2014 when is said if the FCC wanted to do net neutrality, it had to do Title II. We also saw above how the tradition of regulating telecommunications as common carriage is also the right one when it comes to the internet's public utility role and the necessity to regulate in an affirmative free speech way in order to facilitate real democracy.

Acknowledging the existence of the internet as a public utility was difficult inside the policy sphere, though, due to the discursive dominance of the broadband industry and its incentives to maintain the treatment of the internet as a privatized market-based commodity. Even net neutrality advocates saw making the utility argument as dangerous, with those who were pushing for Title II nonetheless downplaying its roots in public utility regulation. Libertarians had so successfully framed utilities as old, rusty, poorly managed, expensive, crumbling infrastructure that no self-respecting future-oriented technological innovation-minded person would want to be associated with that imagery. Full public utility regulation also

comes with price regulation, mandatory interconnection, open access, and other provisions that were seen as so explosive a suggestion that forbearance from these portions of Title II had to be the line that was drawn by those advocating reclassification, even if net neutrality could be a productive step toward a longer-term goal like that. There would be further options to go beyond net neutrality under Title II, such as nationalization of internet infrastructure with open access and a possible broader vision of a "digital new deal."[23]

Through concerted efforts of policy advocates operating in public interest and academic settings, the Overton window was shifted toward making Title II regulation of broadband acceptable discourse within the policy sphere, even if it was still considered dangerous by the telecommunications industry. Public intellectuals, most prominently Susan Crawford, worked to deliberately shift this conception with a forceful case for broadband having become an essential public utility and the necessity for its regulation in accordance with this reality, including net neutrality.[24] Crawford's understanding of internet infrastructure as an essential public resource with public interest obligations that are being eroded by property-based discourses, and her policy proposals based on a utility model of regulation, were important interventions in the debates surrounding broadband access and net neutrality. Public interest advocates like Feld in particular had been keeping at least a small flame of Title II alive in discussions of broadband regulation since the beginning, seeking to rearticulate the hegemonic discourse that defined reclassification out of bounds despite the clear argument in its favor based on the statutory, technical, and social reality.[25] Public Knowledge and Free Press had reclassification proposals developed and at the ready for when the policy window opened—that is, when the politics became favorable.[26]

All of this work, especially bringing it out into public light, both depends and is dependent on an unflinching embrace of the boring. Part of the gatekeeping mechanism of participating in policy debate is the stomach one has for the tedious and dull. It is an intentionally exclusionary diversion tactic favoring those who have the resources (i.e., lawyers) to cut through it all. The work of policy advocates is to translate these things to people and mobilize them to act on those terms.[27] Doing so must be done with a trust in people and their capacity to deal substantively and meaningfully with difficult and obscure policy issues, see how it impacts their lives, and translate that into how those things operate in the policy sphere. Free Press communications director Tim Karr says that for everyday people,

once the initial hurdle of the complications of the policy issue is overcome, engagement with the complexity can actually be a hook that motivates further commitment, because having expended the effort to understand it creates incentives to act on it and stick to it.[28] This willingness to learn and go beyond lay knowledge and terms complicates the conventional wisdom in activism that says complex policy must be made "user friendly" for everyday people. Karr explains it this way:

> We're always facing that challenge of, How do you make arcane policy issues resonate with the general population to the degree that they'll pick up the phone and call their member of Congress or will comment to the FCC? And, oftentimes, we try to do the communications consultant thing, which is to rebrand, simplify, and put it in terms that will appeal to the lizard brain . . . But one thing we've discovered is that you give people a little bit of the wonk, you allow them to understand the policy as it's written, and that person becomes much more deeply invested. Once they know a little bit about the policy and they can actually speak about Title II, in this instance, or they can speak about Section 706 and other wonky aspects of this, that they become much more deeply invested in the issue. You get someone from being a casual activist to becoming a super activist and a real advocate—and even, in some cases, a spokesperson.[29]

The telecom industry counts on the fog of boring discourse to keep people out of policy-making processes, but Karr sees net neutrality as a case showing how that can be overcome:

> The phone and cable lobby . . . have always benefited from the arcane language of communications policy, because it's a language very few people can speak. Therefore, policy is often made in back rooms, between industry lobbyists and FCC bureaucrats and members of Congress (or, more accurately, the legislative directors of members of Congress). And so, oftentimes, it works to their advantage, but with net neutrality, in some strange way, people really went in and started to understand what "forbearance" actually means and what some of the more nuanced aspects of Title II were.[30]

The key seems to be not just embracing wonk without fear but exposing the popular politics within it and harnessing the energy within it.

Make the Policy Political

While the initial battle had to be waged on the turf of the wonks, picking apart the details of "commercial reasonableness" and "reclassification," net neutrality had to be moved from the narrow concerns of regulatory wrangling to broader matters of politics writ large to get the popular momentum it needed to succeed. Rather than have a strictly rational policy debate, net neutrality had to be rightly "politicized." Of course, it is too often seen as a good thing that issues like these remain relegated to the turf of policy experts and insulated from the hurly-burly of political battle; the typical refrain among those serious about public policy is to *not* politicize issues. In this view, the focus on objective processes to arrive at consensus solutions to problems is a process that is obviously superior to polarized squabbling along ideological lines and deciding based on the exercise of power. But I believe this view is wrong. Issues that are typically understood under the guise of "policy" must be made "political" if they are to serve the public interest. Even as more polarization and partisanship has come to define politics, it is still not enough to keep policy-makers from approaching issues through the bipartisan consensus that the status quo of concentrated power of corporations and wealthy elites is the legitimate result of a properly functioning capitalist system. This status quo is in fact the problem—a problem defined right out of consideration unless the issues in question are "politicized" enough to inject the interests of those excluded and marginalized in these processes. Bipartisan consensus and cooperation in policy-making tends to work on behalf of powerful interests—in this case, the dominant industries just seeking compromise between the biggest corporations involved. The only hope of breaking out of this is to bring these issues out of the technocratic policy-making sphere where the "expertise" that justifies the status quo is rewarded and enters into the realms of politics with democratic participation.

To do this is to show that there is no meaningful distinction between politics and policy—policy is always already political and it cannot be depoliticized. The "political" in this sense is any struggle over the distribution of resources and recognition. Policy decisions like who can control access to information and communication are deeply political. Enabling or constraining the capacity for people to participate in society and culture is deeply political. What an issue like net neutrality shows is how something that might on its face seem to be an issue for rational policy-making can be made political by showing the popular consequences of such a wonkish

issue. It is an issue that goes beyond competition, innovation, and other bipartisan elite goals and actually involves a populist redistribution of resources and recognition: compelled access to the rights and technical capacities from the private owners of telecommunications infrastructure to the everyday people who depend on using that infrastructure. In order to deliver strong and sustainable policy in the public interest, issues like net neutrality have to become polarized; the version that would pass muster as a bipartisan consensus would be far too weak. Both sides are simply not legitimate partners in the debate; basic protections for the public interest cannot be negotiated with runaway reactionary neoliberal capitalism.

Bringing everyday people into the process, putting outsider pressure on insider processes, does not mean not taking the inside game seriously, but it also does not mean that command of policy detail is enough to make it work: it is not enough to be right about the legal interpretation or most effective regulatory framework to actually make it happen. To make it happen, people need to push policy-makers—"nervous liberals" do the right thing only when pressured by mass or militant movements.[31] Issues like net neutrality needed to be seen as more than technocratic tinkering; advocates had to make clear the stakes and where it could be intervened on, defining out of the technocratic and into the democratic. Advocates took the issue out of Washington and to the people, revealing what was behind closed doors and showing its impact on people's lives.

It was a truism, not just among net neutrality advocates but journalists on this beat too, that Title II reclassification was such a heavy lift for the FCC not due to the policy but because of the politics. With matter-of-fact acknowledgment that communications policy-making is dominated by big cable and phone companies, it was taken as obvious, even in the mainstream media, that this meant that Title II retained a dare-not-speak-its-name quality, even though it was historically the primary regulatory mechanism for the FCC and that the *Verizon* decision forced the commission's hand to embrace it if it wanted to be able to do its job in the digital future. The discursive dominance of the telecom industry precluded consideration of full-on reclassification from anyone who wanted to be taken as "serious" within the confines of the Beltway policy debate, meaning even many established net neutrality advocates initially approached with political timidity.[32] The legal matters were not complicated; the FCC simply had to declare broadband internet access a telecommunications service, with the ample economic and public record evidence available to it. It was purely a lack of political will. This was the political reality in 2014 that many were willing to accept but one that many others were willing to change.

Battle for the Net—the net neutrality campaign spearheaded by Free Press, Fight for the Future, and Demand Progress that began in 2014—made explicit its politicized approach in the "Battle" between "Team Internet" (the online communities that made up the base of support for net neutrality advocacy) and "Team Cable" (the cable companies and other big corporations that dominate internet access). The "us versus them" framing—you are either with the internet or against it—specifically polarized the issue but on terms that hailed supporters to the cause and made it difficult to choose the other side. Humorously overdetermined visual rhetoric is one way the campaign sought to accomplish this goal. Battle for the Net's website design prominently featured "condensation symbols" of corporate greed and internet awesomeness, with background images of skyscrapers carrying the corporate logos of Comcast and Time Warner Cable rising out of a pile of cash, and with sinister laser beams glowing from the top of the Comcast building down to zap a computer with an adorable puppy and bunny sitting in front of it.[33]

The written messaging this imagery accompanied was similarly sensational:

> CABLE COMPANIES ARE SPENDING MILLIONS TO GUT NET NEUTRALITY AND SLOW YOUR INTERNET TO A CRAWL. WE CAN'T LET THEM . . . Cable companies are famous for high prices and poor service. Several rank as the most hated companies in America. Now, they're attacking the Internet—their one competitor and our only refuge—with plans to charge websites arbitrary fees and slow (to a crawl) any sites that won't pay up. If they win, the Internet dies.[34]

Striking a populist anticorporate tone and priming people to feel their likely already-existing hatred of their cable company, Battle for the Net named an enemy and drew people in with opposition to the villainy. Michael Khoo, who did communications strategy work on the net neutrality campaign, explained it as a classic "David and Goliath" frame, where once the battle lines were drawn, people saw a clear side for themselves: "Comcast is literally the least popular major corporation in America. Everybody has waited between 12:00 and 6:00 PM for Comcast to not show up . . . That was it: 'Well, this seems to be a war between two parties and this one's clearly bad. So I guess I should just naturally go here.'"[35] Laclau and Mouffe would explain this as successfully drawing the horizon and organizing a "people" against their enemy.[36]

When it came to articulating what Team Internet must do, the message turned markedly more specific, saying they stand for "'Title II reclassification,' the only option that lets the FCC stop Team Cable from breaking the key principles of the Internet that we love."[37] In facilitating comment submissions to the FCC rule-making process, Battle for the Net prompted people to "build on our letter, and be sure to mention Title II reclassification," saying, "ISPs are opposing Title II so that they can destroy the FCC's net neutrality rules in court. This is the same trick they pulled last time. Please, let's not be fooled again. Title II is the strong, legally sound way to enforce net neutrality."[38] This discourse, invoking populist themes but in the service of wonkish policy, showed up in the public participation at the FCC. The public comment record for the 2015 Open Internet rules was not only overwhelmingly in support of net neutrality—the initial round of comments was 99 percent in favor—but two-thirds of the first round of comments specifically called for Title II, and the most frequently made argument among all the unique comments (not based on form letters) was "strong legal ground for Title II."[39]

The mere presence of publics in these processes at this scale was remarkable and powerful, not just in the public comment record but in person too. The FCC did hold some limited field hearings on net neutrality, but the most significant presence for the people was at demonstrations organized by Battle for the Net in over thirty cities across the country and crowds of hundreds in Washington outside the FCC offices and the White House.[40] Activists from Popular Resistance twice interrupted the meeting at which the FCC voted to move forward with the Open Internet proceeding to consider the fast lane proposal, shouting, "This is an illegitimate democracy! The FCC is under the influence of Comcast, not the people!" and unfurling a sign behind the commissioners that read "Reclassify now!"[41] Protesters interrupted a press conference from Ajit Pai, then as a commissioner the FCC's leading net neutrality antagonist and later the FCC chairman who would undo it; heckled President Obama on a fundraising trip to Silicon Valley; and occupied the driveway of Chairman Wheeler, all in the name of Title II.[42]

This public pressure succeeded not just in politicizing the policy but in putting it on the political agenda as well. Not only did supporters flood the FCC with public participation, but they also dragged elected officials into the fray, creating a floor for the issue as something that politicians had to at least take a position on, or for those with or seeking a higher profile, a strong position. A core of a dozen Democratic senators took an early stand against

the fast lanes proposal and further pushed the FCC for reclassification, including 2020 presidential candidates Bernie Sanders, Elizabeth Warren, Cory Booker, and Kirsten Gillibrand; Senate majority and minority leaders Harry Reid and Chuck Schumer; and longtime net neutrality advocates Ed Markey, Ron Wyden, and Al Franken.[43] In the House, three different net neutrality bills based in Title II were introduced in 2014 by representatives Henry Waxman, Anna Eshoo, and Zoe Lofgren, while House Speaker Nancy Pelosi joined calls on the FCC to move toward reclassification, and bicameral legislation was introduced to ban "fast lanes."[44] Meanwhile, congressional Republicans (including then Senate minority leader Mitch McConnell, the entire Senate Republican leadership, and consistent net neutrality critics representatives Marsha Blackburn, Fred Upton, Greg Walden, and Bob Latta) called on the FCC to abandon any attempt to enact net neutrality at all, while presidential contender Sen. Ted Cruz drafted legislation to dismantle the FCC's authority to regulate broadband altogether and then Republican presidential front-runner Jeb Bush called net neutrality "crazy" on the campaign trail.[45]

In the media, net neutrality moved from the business beat to the politics beat. Over the course of the 2014–2015 policy-making process, the media coverage shifted from the frame of two competing industries, tech and telecom, and how the particular new regulations would affect them and their legal wrangling to primarily represent the issue as one affecting the public. Much of this came in the form of the typical team sports–style coverage of politics in the mainstream media—relaying political statements and positions, analyzing the current standing of the issue in the halls of power. But even the coverage of the FCC focused more on political wrestling than on traditional policy debate, including the trials and tribulations of Chairman Wheeler failing to garner support for his proposal and the increasing push for reclassification.[46]

With all of this messy involvement from the people, the "increasing politicization of the FCC" was the subject of some political press handwringing. One report on some "wondering if [the FCC was] politicized beyond repair" quoted Republican former FCC commissioner Robert McDowell lamenting that the agency was "more polarized than I've ever seen it" and "that probably skews the emotion of the moment."[47] The *Washington Post* wrote, "The fight over net neutrality has largely crystallized into an ideological war" between public interest groups seeking common carriage policy and industry groups who are trying to stop regulation, and while "trying to split the difference seems like a natural impulse," the two

sides remained hopelessly divided because "compromise in Washington is dead."[48] Two of the most prominent "serious" academics engaged in the net neutrality policy debate worried about "playing politics with the internet" and sought to separate the FCC's net neutrality policy as "a matter of well-reasoned law and economics" from whether it was made as a "political decision."[49] With all the public pressure aimed at Wheeler in particular, it was no surprise that months into the process and still trying to work out a compromise, according to inside sources, the chairman was getting ground down: "openly hostile," "bit[ing] people's heads off" in meetings, "the dude need[ed] a vacation."[50] He was complaining about how the policy-making process had become "politicized."[51]

Make the Political Popular

It is not enough to make a policy issue political—it helps if it is popular. Net neutrality was made popular in several senses. Net neutrality is popular with people: the concept has supermajority support in public opinion polling and the idea of strong rules to protect it has consistent majority support and an intensity that has motivated mass mobilizations online and at the grass roots.[52] Net neutrality is also popular as a political issue; although it did not emerge of the people, it was carried on by the people, as we saw how politicians and political parties took up the issue only with sustained popular revolt. But net neutrality is popular in the cultural sense as well. In unlikely fashion for such a self-evidently boring matter, intended by design for specialists only, net neutrality proved itself "suited to the taste . . . and means," and even "understanding," "of the general public."[53] Relying not on technocratic legal tinkering alone but also enlisting the democratic legitimacy of public participation to force the issue meant that succeeding with net neutrality necessitated its circulation through popular spaces. Net neutrality was filtered from policy and politics through popular culture and back again.

Seminal work in cultural studies has strongly shown how seriously we must take the politics of popular culture, but this is a lesson not as readily recognized in the policy sphere.[54] Popular culture is a site of struggle, where cultural hegemony is constructed and contested, so the meanings made in and through pop culture are powerful interventions in and of themselves. But the more typical focus of cultural politics on identities and representations of race, gender, and sexuality are not the only struggles contained within popular culture, as recognizable electoral and partisan

politics is increasingly contested in these spaces as well. The politics of policy is more rarely fought out in popular spaces; it has not been traditionally seen to be political and certainly not seen as popular. With more attention this is beginning to change, even leading to what Bill Kirkpatrick calls the "cultural turn in media policy."[55] The FCC's previously most prominent run-in with popular cultural activism was of a very different sort: with almost 4 million public comments submitted, the FCC's 2014 Open Internet proceeding more than doubled the previous record for most comments, a record previously held by the matter of Janet Jackson's "wardrobe malfunction" at the 2004 Super Bowl.[56]

Online culture from the very beginning has been the key site for the popular politics of net neutrality. It is an issue native to those referred to as the "extremely online," for whom the internet has always been a weird mix of culture and politics. In the early days of online participatory culture, on the message boards and blogs of the 2000s, the communities who gathered there embraced net neutrality as important to what they do. The blogosphere and interest group discussion sites were early spaces where talk of net neutrality took root, and from early on, and continuing to be, the issue was a major topic among YouTubers and fandom communities, such as Harry Potter, and on smaller but devoted online communities on Reddit and Tumblr.[57] Independent musicians distributing their music online were some of the earliest and strongest advocates for net neutrality, with organizers surprised to find them writing songs, making videos, and even speaking out while hawking CDs on street corners.[58] The video from the popular Ask a Ninja YouTube series in 2006 was an early moment when the issue broke through from its policy roots and into broader online culture. This was when, as Free Press strategist Tim Karr put it, net neutrality advocates realized the issue was no longer theirs alone but had been taken up by the internet.[59] Online culture even mined the legal debate itself from the very beginning, seen in the viral infamy of Sen. Ted Stevens on the Senate floor in 2006 describing the internet as a "series of tubes."[60]

As both a cause and a reaction to this engagement, net neutrality advocates pitched the issue in popular idioms and representations from these subcultures. There was perhaps no symbol circulated more consistently in online communities than the cute cat, stemming from the popular LOLcats memes from the 2000s, and if net neutrality was to be taken as the premier cause of the internet, then naturally the cat was to be its face. The Internet Defense League, organized by Fight for the Future, took as its symbol the "Cat Signal" to be shown as a beacon calling forth the super-

heroes of digital culture to action when needed, and, as we will see, cats were soon fighting cable executives on the lawn of the FCC and flying over Comcast headquarters on behalf of the internet.[61]

This embrace of online culture as a means for net neutrality activism came from the young activists who had an authentic connection to these communities and their passions with an understanding and defense of the policy infrastructure that enables the culture they have built to thrive. It also helps that it made net neutrality advocacy more fun, something that organizers recognized the overly serious activist left is not always the best at doing. It seemed necessary to keep things as light and fun as possible because it is a rather tedious issue to engage with and because doing so helps keep people's attention, especially for those not regularly around the policy sphere. It could have been seen as tactically savvy to lean exclusively on the seriousness of net neutrality, with its importance for productivity, education, and civic engagement—the internet as, per the meme, "serious business"—but some advocates instead leaned into what could have been seen as frivolity.

The organic embrace of the issue of net neutrality by online communities created a natural base of supporters, and advocates meeting these people where they were within their subcultures helped build power. Popular culture, in fandoms and other interest subcultures that are made from it, have proven to be potent resources in political movements and, rather than diluting or distracting from real politics, should be seen as important entry points, means for sustaining engagement, and discursive resources for activism and advocacy.[62] As trolling, creating memes, and online organizing have become some of the most central grounds on which political campaigns proceed, all the way up to presidential politics, we can see that the particular mode of the popular that has grown up in what was once the margins of online subcultures has become all the more central to politics today.

More mainstream popular media also contributed to not only spreading awareness and understanding of the issue but also helping to translate it into popular modes of address. Especially as it coincided with the height of the "satire TV" era of the mid-2000s to mid-2010s, the emphasis on informative entertainment and entertaining information fit the cause well.[63] Both Jon Stewart and Stephen Colbert took up the issue on their wildly popular Comedy Central television shows, including a prominent early take on *The Daily Show with Jon Stewart* with correspondent John Hodgman from 2006 mocking Senator Stevens's "series of tubes" speech.[64] A

common theme throughout the popular representation of the issue of net neutrality is its status as being so boring yet so important. In fact, especially given the infotainment leanings of the news satire and late-night comedy genres, the dull nature of the subject was taken as something of a challenge: making net neutrality entertaining as particular proof of comedic skill. Further, the news satire genre has proven to be not only influential in helping make average citizens more informed about political issues but also revealing of the true nature of politics. It has exposed how pop culture is political as well as how politics itself is in many ways pop culture, a recognition that finally went from perhaps laughable among any but cultural studies scholars to obvious by the time the United States elected a reality television celebrity president in 2016.

The cultural breakthrough for net neutrality undoubtedly came from John Oliver in 2014. The host of *Last Week Tonight* on HBO devoted a twelve-minute segment of the show to net neutrality that explained the issue in an entertaining and thorough fashion that struck a nerve with the audience. The clip received 13.5 million views on YouTube that year and was credited with driving thousands of public comments to the FCC.[65] Showing up in only the fifth episode of the show, the issue of net neutrality was tailor-made for Oliver to showcase what would go on to become his definitive style of essentially explainer and advocacy journalism punctuated with enough jokes to be credibly framed as comedy.[66] It was also welcomed by net neutrality advocates who benefited from the exposure of the issue, were able to use the clip as a resource for explaining it and the stakes, and could count new supporters from those mobilized by Oliver's passionate calls to action.

In presenting the issue of net neutrality, Oliver focused on the power of the boring and how opposition to that power means making it not boring.[67] Oliver introduced the issue saying, "Net neutrality. The only two words that promise more boredom in the English language are 'featuring Sting.' And hearing people talk about it is somehow even worse." This was followed by a clip of FCC commissioner Michael O'Rielly describing the Open Internet Notice of Proposed Rulemaking (NPRM) being grounded in the regulatory authority of Section 706 of the Telecommunications Act of 1996. Just airing one monotonous jargon-filled sentence from an FCC hearing was punch line enough. Oliver later succinctly articulated the consequences of this, though, saying, "The cable companies have figured out the great truth of America: if you want to do something evil, put it inside something boring." We could be clicking "Agree" to the entire text

of *Mein Kampf* in Apple's terms of service agreement, and we would never know, Oliver joked. Making the boring entertaining, then, is its own kind of political intervention, and on this front Oliver offered his more compelling alternative to "net neutrality" as the terminology for advocates: "Preventing Cable Company Fuckery." Injecting some attention-getting, good old-fashioned premium cable profanity into the policy discourse was not Oliver's only point in introducing this phrase, though.

The anticorporate sentiment expressed by Oliver was also a core part of the appeal of the segment. Oliver railed against fast lanes, called the Netflix-Comcast deal a "mob shakedown," and detailed the monopolistic practices of the industry. He also connected this to political corruption, citing the cable industry's place behind only military contractors in the amount of lobbying money spent in Washington. Chairman Wheeler himself was a potent symbol of this for Oliver: the comedian decried the revolving door of lobbyists and regulators leading to corporations "practically overseeing their own oversight" and noted that Wheeler was once the top lobbyist for both the cable and wireless industries, memorably comparing the situation to hiring a dingo as a babysitter. For all of his engagement in explaining policy wonk terms, Oliver did not present policy-making as a rational process of independent experts working toward optimal solutions but rather as a contentious struggle of opposing interests competing for power in an unequal society. In this view, then, people must fight for their own interests and values, inserting themselves into this process however they can.

Oliver emphasized what his viewers could do to intervene in the policy-making process, albeit in a decidedly popular, if not outright vulgar, register. He drew directly on the place of net neutrality within online subcultures, playing on the rightly earned reputation of the ugliness of much interaction on online platforms like YouTube by referring to the FCC public record soliciting "internet comments" and directly addressing the "monsters" of online comments sections to "channel that anger" and "badly spelled bile" to "focus your indiscriminate rage in a useful direction." At this point in 2014, Oliver's unleashing "[his] lovely trolls" on the FCC, with casual references to fringe right-wing politics, misogynistic attacks on women, and antagonistic fandom cultures, made light of online toxicity in a way that can be seen as troubling with an eye toward what these worst elements of the internet expanded into in a short time. The day after the net neutrality episode aired, the FCC's servers crashed under the volume of public comments submitted.[68] Of all the unique comments submitted during the

proceedings (not submitted through form letters), "profane comments targeting the FCC" was the second most frequent subject.[69]

Make the Political Principled

Politics properly understood must also be principled; it ought to be a struggle for justice within institutions of power. In this understanding, politics must operate on the basis of fundamental values, and from an ethical perspective these values cannot be compromised. How to make the finer-grained policy debates within which these larger-scale values are put into practice work, however, is difficult. The net neutrality case shows how, once politicized, the wonkish policy details can be effectively distilled down to the principles represented. In this case, the operative thing was that net neutrality is about fairness and equality, principles that are instituted in Title II of the Communications Act, so that must be the foundation for net neutrality policy and Title II had to be made synonymous with net neutrality. This made the whole issue about reclassifying or not reclassifying, not just about what was acceptable under the name "net neutrality." No matter what version of net neutrality was agreed upon, without an agency with the means to enforce it on the terms of nondiscrimination, it would be meaningless.

That net neutrality had officially become a partisan political issue was worrying by some pearl-clutching media accounts, but it was a success for advocates seeking strong policy.[70] Early on, net neutrality was not seen as a broadly polarizing issue; before 2014 net neutrality was primarily a depoliticized policy issue insulated to the technocratic spaces under the surface of typical partisan politicking, or it was seen as such a self-evidently good basic protection that it was supported by activists on both the right and the left. With the issue there, the progress on net neutrality had been only toward watered-down and unenforceable regulations with little popular support. Advocates, however, brought the issue to the people and forced a political choice: stand for real net neutrality or stand with the greedy corporations seeking to destroy it. Chairman Wheeler's attempt at compromise and the popular rise against it helped reveal how little middle ground there actually is on net neutrality, at least if the underlying principle is to mean anything. Rep. Anna Eshoo, the top Democrat on the House subcommittee overseeing the FCC, made this lack of middle ground or nuance explicit: "No one ponders over these things . . . You either are for net neutrality, as far as consumers across the country, and if you're not then you're for the bad stuff."[71]

Wheeler succeeded only in enraging both sides. He was brought before a House Communications and Technology Subcommittee hearing to face fierce rebuke from Republicans and Democrats alike, defending his fast lane proposal against attacks for going too far and not going far enough.[72] The grassroots backlash from the left helped solidify net neutrality support from Democratic partisans: although cable and phone companies remained major donors to politicians on both sides of the aisle, there were far fewer Democratic members of Congress who opposed net neutrality in 2014 than there were in 2010.[73] The polarization of net neutrality was aided by the conservative activists and their wealthy elite benefactors who defined the issue for Republican partisans as overbearing and unacceptable government control. Even though the principle remained consistently popular among rank-and-file conservatives, Fox News and most Republican politicians took an ever harder line in opposition to net neutrality.[74] By 2014, it had become clear to politicians, from polling and hearing from their constituents, that net neutrality was something that people cared about.[75] Further, as popular as net neutrality was, it could be a winning issue for Democrats; no politician would take a stand on such a previously obscure issue, especially one with built-in corporate opposition, if it were not clear to them that it would help them win or maintain support. Advocates benefited from politicians' backing, through pressure on the FCC and raising the profile of the issue with their platforms, while the politicians pleased constituents who felt strongly about the issue.

Chapter 6 discusses the opposition to Title II net neutrality from traditional civil rights groups and lawmakers of color, but advocates led by next-generation racial justice organizers successfully won support for net neutrality as a crucial issue of liberation and equity for people of color. Overcoming the telecom industry talking points that had defined the debate as a false choice between closing the digital divide for marginalized communities of color or guaranteeing fast connections for privileged white techies was key. With support for net neutrality rising from young racial justice organizers, including the Movement for Black Lives emerging at that same time, demonstrating at least a split among the civil rights community, lawmakers of color were more willing to take a public stand for strong FCC action. An especially important turning point was when Rep. John Lewis, civil rights movement legend and powerful force in Democratic party politics, spoke out publicly in support of net neutrality, due to advocacy efforts led by Joseph Torres of Free Press. Representative Lewis lent his civil rights movement bona fides to the argument of net neutrality

advocates that the open internet is crucial to activism and organizing: "If we had the internet during the movement, we could have done more, much more, to bring people together from all around the country, to organize and work together to build the beloved community. That is why it is so important for us to protect the Internet. Every voice matters, and we cannot let the interests of profit silence the voices of those pursuing human dignity."[76]

As Wheeler began to succumb to the massive public pressure, coming to favor not just net neutrality in general but the strongest possible net neutrality rules with the backing of Title II, reclassification went from "on the table" to being actively pursued as a very real possibility. By that point the telecom industry and its Republican political allies had come to accept some form of net neutrality policy as long as it was not accompanied by reclassification. Both AT&T and Verizon said they would agree to a ban on fast lanes but threatened to take reclassification to court.[77] Comcast stated that it practiced net neutrality already and welcomed new FCC Open Internet policy but with regulatory authority from Section 706 and not Title II, which it characterized as merely a "technical legal difference."[78] (Comcast already had to abide by net neutrality rules until 2018 as a condition of its acquisition of NBC Universal in 2011; it was also at that point in 2014 still seeking approval from the FCC for the eventually failed merger with Time Warner Cable.) This reveals not only advocates' success, as far as the degree to which even the opposition was operating within the discourse of their advocacy campaigns, but also just how much Title II was the real issue all along. Smartly, advocates did not take the bait on a compromise, recognizing this winning position and pushing for a full victory for the public interest rather than another surface-level win with no real teeth.

Many opportunities to settle for less were presented. After Wheeler's initial proposal, relying on weak Section 706 authority, was roundly rejected, a second proposal was leaked to the *Wall Street Journal* in October 2014 that was based in reclassification but only in part.[79] It became known as the "hybrid" proposal because it would have split internet service into retail (the connection between the broadband provider and the end user) and wholesale (the connection between the broadband provider and the content provider) for the purposes of reclassifying only the wholesale portion under Title II.[80] The proposal was based in approaches developed by three different sets of insider net neutrality advocates, but notable among them was the father of net neutrality himself, Tim Wu.[81] Even seeing Title

II as being the obvious way of regulating net neutrality, but diagnosing the "common sense" of Title II as out of bounds as a result of discursive dominance on the part of the telecom industry and the corresponding lack of political will by policy-makers, and not any meaningful legal complications, Wu and his allies responded by presenting a policy that was nothing if not unnecessarily complicated and politically timid. They were quite pleased with themselves, having found a wonkish way to reach another middle ground, slightly shifted toward popular demands but not fully getting it. Meeting with FCC staff in the chairman's office, Wu told them, "'We have the magic formula and it'll solve all your problems.' Someone banged the table and said, 'Great. Bring it on.'"[82]

The backlash to the leaked hybrid proposal, from both sides, was again overwhelming.[83] Free Press likened the proposal to Frankenstein's monster and argued that settling for such a weak and unworkable compromise policy would squander the political power that had been built.[84] Fight for the Future used what the *Washington Post* referred to as "slightly more colorful language," calling it a "sham proposal" and "a middle finger to the American public."[85] Some insider net neutrality advocates took it seriously, but most rejected it, not only on policy grounds but also as bad politics. Barbara van Schewick argued that the real compromise was Title II reclassification with forbearance from non–common carriage provisions and that the FCC should listen to the people.[86] For their part, because it involved reclassification in any form at all, the telecom industry said it would "feel compelled to challenge any sort of Title II in court."[87] A former FCC official said, "I didn't think it was possible to find a solution that would both accomplish nothing useful and outrage everyone. Yet they seem to have hit that sweet spot."[88] It was a long, hot summer for Chairman Wheeler, who felt the heat from net neutrality advocates and publics, and as the fall went on, he and his staff began to join the other Democratic commissioners in taking full-on reclassification seriously. Title II was shown to be not only the simpler policy approach but, considering the popular uprising and congressional support, perhaps even the most politically feasible as well.

As reclassification gained undeniable political momentum toward the end of 2014, Republicans in Congress suddenly became interested in enshrining net neutrality in legislation—but with a catch. The Republican Commerce Committee chairs in both the House and Senate (and the recipients of more money from the cable industry than almost any other members of Congress), Sen. John Thune and Rep. Fred Upton, went from mum on net neutrality in the case of the former and openly hostile to any

kind of regulation for the latter to putting forward a net neutrality bill and seeking bipartisan support.[89] The bill offered recognizable and legitimate net neutrality rules—banning blocking, throttling, and paid prioritization for both wired and wireless broadband—but explicitly classified broadband as an information service for the FCC and set the agency's authority to enforce the rules within the new bill itself, removing any authority over broadband from Title II or even Section 706.[90]

The strategy for congressional Republicans was to accept some form of net neutrality policy but preempt the FCC's stronger Open Internet rules by inserting its own version and effectively stripping the commission of its oversight or further rule-making capacities. This compromise net neutrality legislation revealed a split within the GOP on the issue along the deeply cracking fault lines between the corporate and activist wings of the Republican Party: the business-serving establishment of the Republican Party followed the lead of the cable and phone companies in accepting some net neutrality policy as inevitable and sought to weaken its enforcement as much as possible, while the far right wing took a more hard-line libertarian stance that no regulation whatsoever would be acceptable. As much as corporations like Comcast, Verizon, and AT&T feel obliged to push back in lobbying and litigation against any rules or oversight, they recognize that regulation will exist and value the ability to contain and angle regulation to their benefit as preferable to the regulatory uncertainty of a total free-for-all. However, conservatives such as then presidential candidates senators Ted Cruz and Rand Paul, egged on by the Tea Party movement and often taking the libertarian rhetoric of the corporations at face value, approached issues like net neutrality with more ideological commitment to full deconstruction of the regulatory state and resisted Republican action to protect net neutrality in any form.[91]

Net neutrality advocates, finally fully including Chairman Wheeler, did not accept the Republican legislation as a legitimate way to deal with the issue and stood firm on strong FCC Open Internet rules backed by Title II.[92] This was a calculated risk, as a real offer to cement net neutrality rules on a bipartisan basis had to be taken seriously as a workable resolution, putting something predictable and more permanent, if not exactly full strength, on the books.[93] Democratic politicians are frequently criticized on the left for seeking bipartisan consensus by shifting toward their rigid ideological opponents rather than aggressively pursuing any political commitments of their own. But net neutrality was a case of Democrats being made to deliver more meaningful structural change by a popular move-

ment. By successfully staking the issue in fundamental principles not to be compromised and embracing the power of polarization for progressive change, net neutrality advocates did not need to give up their high-ground position to meet policy-makers down below but were able to drag them up with them. Activists made clear and specific demands, without pre-compromising to what was considered "politically possible," stood their ground, and kept pushing.

Make the Principled and the Popular Possible

Incrementalist pragmatists see "politics [as] the art of the possible"; if that is true, then activism is the art of making the impossible possible.[94] Standing on principle and making those principles popular is one kind of victory, but that is only a means to an end of actually enacting policy that brings about material change. And principled and popular does not necessarily always or even often translate into things actually happening. The "common sense" dominant discourse operates by self-limiting before ever getting to the point of making things possible. The type of "political reality" analysis this leads to is self-defeating; political engagement does not need to accept limited circumstances but can change them. Political will is needed and can be created. In a corrupt political system, money is a good shortcut to getting favorable results, but because democracy ultimately is about people governing themselves, people-powered movements can win.

On November 10, 2014, one more voice was added to the millions that had already urged the FCC toward real net neutrality, but it was a rather notable one: it came from President Barack Obama.[95] President Obama released a statement and a video calling on the FCC to implement the strongest possible net neutrality regulations in its Open Internet policy. In his statement, Obama laid out in unambiguous terms an Open Internet plan that would deliver pretty much exactly what most net neutrality advocates had been calling for: a clear-cut set of rules against blocking and discrimination that applied to both wired and wireless broadband providers and prohibited paid prioritization fast lane deals with online content providers—all based in the legal authority of Title II of the Communications Act—by fully reclassifying broadband service as a telecommunications service and forbearing from rate regulation and other utility provisions.[96] Yes, the president of the United States got that nerdy in a public address. As soon as it was put out, the Obama net neutrality statement

proved significant for many reasons: how unusual it was for a sitting president to dive so deep into the weeds of communications regulation, the influence it was sure to have on the policy the FCC actually adopted, and just how surprisingly right on the president was in his plan.

Obama's announcement was also a sign of the power built and exercised by the popular campaign for net neutrality. President Obama had felt at least some of the pushback coming from the campaign as he found himself followed by protesters online and at events seeking to hold him to his long-stated commitment to net neutrality.[97] The sustained nearly yearlong pressure campaign specifically targeting the primary decision-maker, Chairman Wheeler, and the man with the most influence over him, President Obama, had paid off.[98] It demonstrated what can happen when 4 million people engage with a wonkish regulatory issue, bringing the debate and its details to main-stage politics and shifting it to political ground where public participation can change the outcome. There was still significant influence from the insiders working behind closed doors, but they came to be enabled and constrained by publics. Engaging in historically corporate-dominated policy-making processes and strategically "boring" regulatory discourses, advocates were able to successfully bring undoubtedly arcane yet crucially political media policy issues to the front and center of the national political stage. Simply put, the president would not have jumped that far into this fight with powerful phone and cable corporations and their allies in the Republican-controlled Congress (and even the FCC chairman he appointed) if it were not for wide public pressure to act boldly on net neutrality.[99] The president's statement and the accompanying YouTube video even incorporated the aesthetics and rhetoric of net neutrality advocates, from the "spinning wheel of death" buffering symbol at the beginning of the video to the populist tone of the language. President Obama invoked a populist spirit as he asked the FCC to "answer the call" of the millions of commenters and deliver "the straightforward obligations necessary to ensure the network works for everyone—not just one or two companies."[100]

This was the completion of net neutrality's move from policy into politics as it became an issue not for the specialists and experts inside the regulatory body but one that a president could push for on the basis of its wide popular support. The timing of President Obama's announcement was telling; it came less than a week after the Democrats' overwhelming defeat in the 2014 midterm elections, where they lost the Senate and Republicans

gained unified control of Congress with their largest majority in nearly a century. Facing the final two years of his presidency with no chance of moving any legislation through the obstructionist Republican majority in Congress, President Obama was looking for legacy-defining progressive policy achievements to close out his presidency that would not require working with Congress at all. Net neutrality had been elevated to the level of a reference in the State of the Union address and year-end list of accomplishments, not the usual status for communications regulation.[101]

Net neutrality had become not just a political issue but a winning political issue. Net neutrality advocates celebrated Obama's plan, turning from pressure mode to reward mode.[102] As the *Washington Post* described it, Obama's statement "galvanized Democrats around a populist technology issue and set up a showdown with congressional Republicans."[103] The establishment Republicans working on the compromise net neutrality legislation outright begged the president and congressional Democrats to work with them on it rather than go forward with the stronger plan.[104] However, the strength of negative partisanship—the right-wing agenda was built around opposing whatever it was Obama was attempting to do—solidified opposition to net neutrality for Republican leaders and activists on the basis of its support from the president, including desperate attempts to get the label "Obamanet" to stick to net neutrality like "Obamacare" stuck to the Affordable Care Act.[105] Obama's statement made it clear, though, that even if the attempt at bipartisan net neutrality legislation did make it out of Congress, it would be vetoed if it did not include Title II.[106]

Beyond merely marking the policy becoming fully political, the Obama statement showed net neutrality on the brink of political victory. A federal agency acting in accordance with the stated preferences of the president who appointed its leadership did not seem too tall an order to carry the issue over the finish line. President Obama's making such a strong and detailed call for net neutrality in general and Title II in particular gave the FCC the political cover it needed to act boldly. With the president translating the popular support into full-on institutional support, the two net neutrality–supporting Democratic commissioners, Mignon Clyburn and Jessica Rosenworcel, could afford to accept nothing less than reclassification and not be seen as rejecting the chance at net neutrality.

Nonetheless, the FCC is an independent body that does not have to answer to the White House, so acting directly as the president recommended actually carried with it a certain appearance of impropriety, and

it was still an open question if the presidential and popular support would be enough to shift the commission's direction in Open Internet rulemaking away from the compromised hybrid approach. But at the least it revealed that this wonkish territory had become central terrain in a major political fight and brought out prominent arguments for what some still considered inscrutable and obscure issues, such as paid prioritization and Title II reclassification. Chairman Wheeler was initially still wary of going with Title II even with all the political support he could get from his own president and congressional leaders, saying in the immediate aftermath of Obama's statement in a meeting with tech company officials that he was still looking for a "more nuanced solution" and that what he still had to "figure out is how to split the baby."[107] The decision would ultimately be the chairman's to make and, as Wheeler memorably put it, "I am an independent agency."[108]

Obama's bold call for strong net neutrality and reclassification surprised nearly everyone, including the FCC. In the weeks and days before the president came out with his proposal, Wheeler and his staff had been convening closed-door meetings with broadband companies, new media companies, lobbyists, and public interest groups to try to build support for the hybrid proposal, only to have these negotiations upended when they found out that White House economic staff had been working on their own stronger alternative.[109] The White House had "blindsided" the FCC with Obama's big announcement: the commission was given notice four days ahead of time that the president was going to weigh in on net neutrality, but they found out the specifics of the plan, including reclassification, when it went up online like everyone else.[110] The White House had been holding meetings where smaller tech companies like Tumblr, Etsy, and Kickstarter, as well as some public interest representatives, pled their case for strong net neutrality rules, while frustrated White House regulars Google CEO Eric Schmidt and Comcast CEO Brian Roberts respectively urged officials to stop short of reclassification and tried unsuccessfully to go over these staffers' heads to stymie the efforts.[111]

The *Wall Street Journal*'s provocative description of this process as "an unusual, secretive effort inside the White House," "acting like a parallel version of the FCC itself," set off a firestorm among Republicans, supposedly scandalized by blurry lines separating the economic staff of the White House and the communications regulators of the FCC.[112] Congressional Republicans seized on the story to use as another example in their counter-

narrative of Obama as an overreaching, big government tyrant.[113] Republican House Oversight Committee chairman Rep. Jason Chaffetz added to his long agenda of baseless stunt hearings and investigations of the Obama administration a probe of the communications between the White House and the FCC for any "improper influence" it may have had, one of three different Republican investigations of the FCC's Open Internet proceeding.[114] It was virtually unprecedented for a president to so explicitly propose what an independent agency should do, something that exists within the executive branch but derives its authority from Congress and does not operate at the direction of the president as executive agencies do. But it was all done out in the open, with public announcements that caught the FCC off guard so as to avoid any inappropriate coordination. Beyond the public statement, the Commerce Department submitted its plan as a comment to the FCC's public record in the Open Internet proceeding just like anyone else.[115]

Chairman Wheeler did succumb and in February 2015 announced in *Wired* magazine the proposed rules he was about to circulate to his fellow commissioners: banning blocking, throttling, and paid prioritization for wired and wireless broadband, based on Title II.[116] The chairman's special counsel (and former head of Public Knowledge), Gigi Sohn, characterized the additional provisions and sources of authority in the chairman's plan as going even further than the president's and emphasized that the chairman arrived at this proposal through his own evolution in thinking. "This Chairman is not a lapdog for the President," she said, characterizing the Obama plan as not so much "forc[ing] the chairman's hand" as "giv[ing] him cover to do something he was already thinking about doing."[117] When Wheeler's proposal came up for a vote as the Open Internet Order of 2015 on February 26, 2015, with an accompanying declaratory ruling reclassifying broadband internet access service as a Title II telecommunications service, the meeting was a cheering, hand-holding, photo-posing moment for the three Democratic commissioners who voted to approve it, in stark contrast to the fly-by-night vote that had brought in the weak 2010 rules.[118]

Net neutrality was a success by 2015. Strong rules with regulatory teeth from Title II came as a result of an agency following the lead of the political movement on the outside and the long-standing policy proposals on the inside that were suddenly considered reasonable. Victory laps were taken by all involved, and the "historic" decision was lauded as both the most important public interest victory in FCC history and the biggest win for liberal activists since Don't Ask, Don't Tell was overturned.[119] Republican

efforts in Congress to repeal the rules did not go anywhere.[120] The 2015 Open Internet rules survived the inevitable court challenges—not one, but two—on the strength of the connection between the common carriage tradition of Title II and net neutrality foreseen by advocates.[121] And yet the 2015 Open Internet rules were short-lived, falling only two years later as a result of what then seemed the least predictable outcome of them all: the 2016 election of Donald Trump as president.

CHAPTER 6

Organizing for Net Neutrality

Each winter the Federal Communications Bar Association hosts a dinner in Washington, DC, affectionately known as "Telecom Prom," where lobbyists, lawyers, regulators, and staffers gather to honor and roast the chair of the FCC. In December 2014, in the bitter cold of winter and the searing heat of the conflict over net neutrality, those inside sharing a laugh together were surrounded by others decidedly not on the invitation list: protesters lined the street outside, accompanied by a giant mobile digital screen.[1] Glaring out to the policy elites inside the hotel ballroom was a looped montage of videos and images of popular support for Title II net neutrality rules, a strong and diverse range of voices from rally speeches and public convening testimonies to talking cat toys, virtual avatars, and YouTubers in their bedrooms.[2] With this action, net neutrality organizers had orchestrated a physical manifestation of the dynamics of their fight: elites inside, the people outside, both physically and digitally, bringing their demands from the margins of society to the center of power.

Two months later, on February 27, 2015, the day that the FCC was voting to reclassify broadband under Title II and adopt strong net neutrality rules, an airplane was flying circles around Comcast corporate headquarters in Philadelphia pulling a two-thousand-square-foot banner of Grumpy Cat, the popular meme standing as an unofficial mascot of the internet, reading: "Comcast: Don't Mess with the Internet #SorryNotSorry #NetNeutrality."[3] Once again the popular voice was brought to the doorstep of the powerful—this time not for struggle but for a mocking victory lap. Comcast, AT&T, and Verizon had been bested by a "modest" "ragtag" coalition

of grassroots activists, legal advocates, and web start-ups.[4] The telecommunications industry has been one of the most entrenched and powerful forces in all of Washington for most of the last century; the groups leading the charge against them had not even existed fifteen years. Phone and cable companies had spent $42 million lobbying in 2014; net neutrality advocates had 4 million people speaking out. The people-powered win was lauded as a seemingly "impossible" "political miracle," one of the biggest successes for grassroots progressive activism of the Obama era, and one of the most important public interest victories in media policy history.[5] What happened? In the words of Malkia Cyril, a pioneer of work on media justice and net neutrality: "The people happened, organizing happened."[6] This chapter, drawing on interviews with these activists, advocates, and organizers, traces how that organizing happened during the successful push for Title II net neutrality in 2014 and 2015.

United/Diverse

There were many people working toward strong net neutrality rules, but here I map the major players of the core coalition of organizations that worked together on coordinated strategic actions. These organizations came to the push for Title II net neutrality from several different angles, as interconnected and sometimes overlapping nodes in a network: legal policy advocates, grassroots (and "netroots") political activists, civil rights and racial justice organizers, and small businesses and start-ups, joined by a "big tent" of organizations focused elsewhere but lending help and a "light infrastructure" of strategic, tactical, coordination, and funding supports.[7]

Nodes of Net Neutrality Coalition Network

Policy advocates
- Center for Democracy and Technology
- Susan Crawford
- Demand Progress
- Electronic Frontier Foundation
- Free Press
- National Hispanic Media Coalition
- Open Technology Institute (New America Foundation)
- Public Knowledge

Nodes of Net Neutrality Coalition Network—*continued*

- Barbara van Schewick, Stanford Center for Internet and Society
- Tim Wu

Grassroots/netroots activists
- Color of Change
- Common Cause
- CREDO
- Demand Progress
- Fight for the Future
- Free Press
- MoveOn
- Popular Resistance

Civil rights/racial justice groups
- 18 Million Rising
- Center for Media Justice (since renamed MediaJustice)
- Color of Change
- National Hispanic Media Coalition
- Presente
- United Church of Christ

Business interests
- Engine Advocacy
- Internet Freedom Business Alliance
- Marvin Ammori, working with Tumblr, Etsy, Kickstarter, Meetup, Vimeo, et al.
- Mozilla
- Tumblr

Big tent organizations
- Access Now
- American Civil Liberties Union
- Consumers Union
- Daily Kos
- Democracy for America
- Harry Potter Alliance
- Faithful Internet
- Future of Music Coalition
- Revolutions Per Minute
- SumOfUs
- Progressive Change Campaign Coalition

Strategic/tactical/coordination supports
- DC Action Lab
- Freedman Consulting
- Media Democracy Fund (funders for Ford Foundation, Open Society Foundations, et al.)
- Media Literacy Project
- Media Mobilizing Project
- Spitfire Strategies

I spoke to some of the key figures in this coalition. As one of the earliest entrants into the net neutrality fight in the policy arena and the catalyst for its shift to being a popular political issue, Free Press was pivotal to a diverse and effective coalition coming together, particularly through the work of strategy directors Timothy Karr and Joseph Torres. Public Knowledge, especially through the legal advocacy work of vice president Harold Feld, did crucial work in shaping the policy vehicles that net neutrality would come into. The stakes of net neutrality as a racial justice issue were articulated early and persuasively by Malkia Cyril, director of the Center for Media Justice, and fought for by civil rights lawyers and organizers like Jessica González, formerly of the National Hispanic Media Coalition and currently at Free Press, and Brandi Collins-Dexter of Color of Change, who brought the issue further. Legal advocate Marvin Ammori was pivotal in enlisting and organizing tech start-ups, venture capitalists, and other business interests into the fight. Grassroots organizers like Fight for the Future campaign director Evan Greer and Free Press field director Mary Alice Crim and campaign director Candace Clement brought creative mobilization and engagement tactics online and in the streets. Critical to sustaining this coalition was funding and coordination from the Media Democracy Fund (MDF), in its partnership with social justice philanthropies including the Ford Foundation and the Open Society Foundations.[8] The MDF created the Open Internet Defense Fund as a sub-fund to serve as the main funding stream for this core net neutrality coalition and helped coordinate the efforts of the advocates working together on the issues.[9]

Conspicuously absent from any meaningful net neutrality advocacy were any of the big Silicon Valley tech companies, most notably Google, which had been more involved in the first iteration of the fight (although the tech start-up trade group Engine Advocacy is funded and heavily influenced by Google). Netflix was the largest engaged tech company, but it

was less invested in the particular goal of reclassification and did not work closely with the core coalition. The tech companies that were involved in the push for Title II net neutrality were smaller, less established, New York City–based firms, such as Tumblr, Etsy, Kickstarter, and Vimeo, as well as Mozilla, which is a nonprofit corporation.

The coalition was diverse in its makeup and united in its goal. Beyond the natural constituencies of media and technology advocates and start-ups, public interest groups and liberal political activists, working closely within the coalition were radical leftists (Popular Resistance) and business conservatives (Internet Freedom Business Alliance), civil rights groups representing African American (Color of Change, United Church of Christ), Latinx (National Hispanic Media Coalition, Presente), and Asian American (18 Million Rising) communities, and groups of musical artists (Future of Music Coalition, Revolutions Per Minute), fandoms (Harry Potter Alliance), and even realtors (National Association of Realtors). They also gained support from women's rights groups, labor unions, and Indigenous communities. At the very outset, the coalition for net neutrality was largely led by white men, but years of organizing by Black and Latinx activists connecting the issue to the concerns of their communities, and efforts at inclusion by core coalition members such as Free Press, made equal partners in the work. Cyril, the founder of the Media Action Grassroots Network and director of its hub organization, the Center for Media Justice (all of which is known now as simply MediaJustice), organized over a hundred local grassroots organizations and pioneered the work of media justice advocacy. Joseph Torres worked with civil rights groups linking issues of media representation and ownership to historical oppression in the media system. This dissolved on its face the myth pushed by the telecom industry that net neutrality was an issue that only white tech nerds cared about. No matter what differences in perspective, background, interest, or tactics each of these groups had, they were united against the telecommunications industry and united for Title II net neutrality rules. This diverse coalition was able to come together around two points: a common enemy and a common goal.

Focusing messaging on their opposition allowed net neutrality advocates to tap in to people's existing hatred for the giant corporations they depend upon for internet access; Comcast, Verizon, AT&T, and Time Warner Cable (which has since been acquired by the also-hated Charter) are each regularly among the very lowest-rated companies in customer service surveys.[10] Free Press's Clement and Crim described the strategic decision

of "villainizing our opponents" this way: "This made it easy to divide the battle into two camps: Team Cable and Team Internet. On one side: the entrenched, wallet-emptying gatekeepers. On the other: everyone else."[11] Defining the issue this way, who would possibly side with the cable guys?

The broader coalition was also able to organize around the demand for Title II that the legal experts among them identified as the only way to truly reach the kind of equality online that they were all seeking. Color of Change's Collins-Dexter referred to the Title II rallying cry as a "complex, yet simple" demand, saying, "Because we all had a specific ask that we all coalesced around, it made it easier to build our respective networks around that."[12] She emphasized the importance of the specificity for the advocacy work; unequivocal support for Title II became the way of knowing who was truly committed to net neutrality not only "in name" but also in who saw it as part of the larger issue of making the internet a public utility "that everybody should have access and rights to."[13] This was what made Title II more than wonkish: this vision of the internet as a public good provided the moral clarity that advocates brought to the issue. Feld, the wonk in the trenches for the longest on net neutrality and an early proponent of reclassification, spoke of this as the "enduring, fundamental values" represented by Title II: "We've taken this with us through every evolution of communications, that what makes us one country and one society is that we believe that everybody needs to have an ability to communicate with each other and that it has to be not just accessible but affordable."[14]

The coalition had a distributed, decentralized network structure; the movement to "save the internet" was built a lot like the internet. This was not a consequence of online organizing techniques or a cyber-utopian devotion to building in the image of the internet, but of simply applying the models advocated for by experienced organizers and funders.[15] There was no central command-and-control planning or hierarchy, but neither was it an ad hoc leaderless movement. The structure was autonomy within a centralized strategy: once the goal was agreed upon, each group was free to do what they chose to work toward it. An important part of the structure was existing working relationships of trust. Most of the groups at the core of the coalition had already been working together for years on net neutrality and were carrying with them into the next round of the fight the momentum of, just a couple years before, defeating the Stop Online Piracy Act (SOPA, aggressive copyright enforcement legislation for a new regime of online content blocking). As there was already an existing informal network, there was some resistance to adding rigidity—as well as yet more

meetings, phone calls, committees, and subcommittees—to advocates' work. But the funders empowered the core organizations to do things their way, and the result was "light infrastructure on what was already an organically well-moving machine," in the form of weekly phone meetings for each node of the network, in-person meetings and retreats at important times, and open lines of communication to share with one another.[16]

Collaboration across a wide-ranging coalition meant that each organization could rely on each other's strengths, from mass mobilizations at the grassroots to constructing persuasive legal arguments. Each group was autonomous to work with its own skill sets to engage its own bases and relevant targeted decision-makers. Greer, campaign director at Fight for the Future, said that each group knew and took responsibility for its role on the team and trusted the others to do the same. It was the opposite, she explained, of a soccer team of five-year-olds all just chasing the ball and trying to score on their own.[17] The diversity of coalition participants translated into a diversity of messages and tactics. To engage and mobilize their own specific constituencies, different groups delivered different messages. Net neutrality contains discursive multitudes, and activists both created and drew from a wide range of themes and frames. Themes of free speech, opportunity, diversity, and innovation were actively pushed by various actors within the coalition, emerging from and being targeted to groups' bases and overcoming framing of free markets and government overreach from the opposition.[18] Different messages were also targeted at the relevant decision-makers. Shoring up the support of Democratic commissioners Mignon Clyburn and Jessica Rosenworcel was part of it, but advocates were largely focused on Chairman Tom Wheeler as the swing vote—especially because his weak proposed rules had been the opening bid—and secondary targeting of those who could influence him, from members of Congress to President Obama. And the coalition, across all of its groups, employed a diversity of tactics, from petitions, comments, calls, and emails; to website slowdowns, protests, demonstrations, and street theater; to sit-ins, occupations, and disruptions. Each group came to the issue a different way—some lobbied the chairman while others occupied his driveway—and even when there were disagreements over the best way to handle things, there was an effective trust in one another.

Several of the organizers I spoke with said the 2015 Title II advocacy they were a part of was a textbook example of how to build and leverage an activist coalition, for reasons along these lines, saying they still cite it as a case study of how such work should be done.[19] However, the organizers

also spoke to tensions within the coalition, along generational and racial lines, as well as strategic disagreement over what incremental steps were acceptable and what bold demands were feasible. And many doubt whether it can be replicated again, due to changes in the political and technological environment during the Trump age.

Inside/Outside

The coalition operated what it called an "outside-in" strategy behind the Title II net neutrality advocacy, a model combining "outsider" popular activism and organizing with "insider" policy expertise and advocacy.[20] This strategy was developed by Free Press during its inaugural campaign against FCC media ownership deregulation in the early 2000s, drawing lessons from the bottom-up work of the historical media reform movement and deliberately applied to the net neutrality fight.[21] The net neutrality coalition employed a field strategy at the grass roots across the country that organized and mobilized millions of people along with a legal strategy inside the Beltway that deployed lawyers and lobbyists with the policy expertise to persuade policy-makers to side with the people. Given its effectiveness, Craig Aaron and Tim Karr, president and chief strategist of Free Press, respectively, were surprised how little this strategy is put to use: "Insiders regularly fail to engage the public on key issues and then wonder why people never seem to care. And popular ideas fail to take root in Washington because there's nobody on the inside making the case—or worse, the appointed insiders are actively working against the interest of the constituents."[22] Yet, when working together symbiotically, this fusion of insiders and outsiders can be a powerful force for change: "You need to strike a balance between the credibility of the policy experts and the creativity of the field."[23]

Net neutrality became a popular political issue as a result of the application of this strategy. Under various names it had been an issue fought over inside telecommunications policy circles since the late 1990s, with the passage of the 1996 Telecommunications Act and the open access debates. In the wake of the FCC's classification of broadband under the lightly regulated Title I in 2002 and 2005, bipartisan efforts in Congress to overhaul the Communications Act in 2006 (the Communications Opportunity, Promotion and Enhancement Act, or COPE Act) looked at codifying the commission's lack of authority over internet access, which would have effectively ended net neutrality in strictly binding legal terms. This

alarmed public interest policy wonks and the emerging tech industry's lawyers but was not on the radar of the general public at all—unsurprisingly, given the combination of arcane policy deliberations and what were then still new and not fully understood technologies. While losing the Capitol Hill lobbying battle badly—public interest advocates getting little traction, ill-equipped lobbyists from Google and other young tech companies unversed in the ways of Washington—Free Press decided to take it to the people.[24] As Karr recounts, Free Press asked, "How do we create a popular campaign to provide the political pressure we needed to kill this legislation [COPE Act]?"[25] The group set about creating messaging and organizing to "make net neutrality a popular concept" and "make killing net neutrality a political third rail."[26] And that is exactly what happened: the grassroots pressure targeted at the senators writing the bill was enough to kill the bill coming out of committee.

This early victory in the net neutrality battle provided a model for insiders and outsiders working together strategically. The heart of the net neutrality coalition was built at this point in 2006—particularly Public Knowledge working the inside game, MoveOn working the outside game, and Free Press working in and connecting both—and for over a decade succeeded in raising awareness, understanding, and support of the cause from publics and leveraging that for policy-making. As Harold Feld put it, "You really need both. You absolutely need people on the inside who are alert to the opportunities and who understand the way things work inside, and you absolutely need a movement outside that is capable of creating the kind of social pressure that is necessary, and they play into each other."[27]

Outsider intervention into policy-making processes is crucial to moving anything forward, but it is the insider legal work that creates what they fight for. The lawyers, lobbyists, and researchers "keep stuff alive and provide focal points" for the activists and organizers.[28] This is how Feld explains it: "It all has to come together. Yes, you need the politics. Yes, you need the grassroots pressure. But if you don't have the legal thing, you can't make it happen. There's no 'there' there."[29] In addition to the eventual rules, insiders worked, with varying levels of success, to attempt a variety of vehicles for net neutrality, from formal complaints against broadband providers, nonbinding policy statements, and merger conditions at the FCC to fighting for legislation that would enshrine it and against legislation that would kill it, so that whatever opportunity was there the most could be made of it. Legal experts developing strong policy proposals and pushing them within whatever policy processes are

available at the time means that when the problem rises up the agenda and the political environment becomes conducive—as a result of activist work—the alignment of these forces opens a "policy window" where real change can occur.[30] It also takes insiders to get concrete things done; legal expertise certainly helps to be persuasive within the policy sphere, and "real lawyering" is often needed to get over the finish line.[31] Thorough research and analysis is needed for persuasive arguments to counter the opposition in the legal and economic terms of the insider debate. Even if decision-makers support your side, you need to tell them why—if nothing else, so that they can defend it with proper support, evidence, and legal reasoning, especially to stand up in court.

With the outside-in model for the net neutrality coalition, the wonks brought the issue to the activists, who then brought it to the people, and, united, they brought it to the policy-makers. Many of the advocates I interviewed described "translation" between policy wonks and publics along much the same lines as Seeta Gangadaharan's theorization of such work of linking and mediating between civil society and publics in communications policy-making.[32] Clement, longtime net neutrality campaign leader at Free Press, said, "A big part of our work is to bring regular people—people who don't spend all of their time wallowing in the details of telecommunications policy—into these conversations, and explaining and translating . . . , organizing and doing public education, around these issues."[33] For it to work, outside-in strategy must connect the work of policy insiders to a wide range of potential ally organizations and then to the people—informing, bringing together, and amplifying the voices of publics. Net neutrality advocates took on a wonkish issue, with major public consequences but opaque and boring discourse, and bringing such an issue from the inside to the outside proved both surprisingly inspiring and, they readily admitted, distinctly challenging.

Net neutrality "doesn't sound like an intuitively understandable concept," as Collins-Dexter put it, but advocates had to do their work on this discursive terrain.[34] Karr described internal deliberations at Free Press on what to do with the language of the issue: "A lot of people really hated the term 'net neutrality' . . . It's not the greatest term in the world. We sort of inherited it. A really interesting thing [that] happened along the way is that we lost control of the message."[35] As they worked to bring the policy machinations inside the Beltway to wider public attention, Free Press saw the banner of "net neutrality" taken up surprisingly quickly—in particular among a natural constituency of online communities, independent artists,

and amateur creators. By the time the philanthropic foundations that were funding public interest advocacy were pursuing communications consultants to come up with a better name in 2006, YouTubers were already making videos about it, musicians were posting songs about it, and it was spreading online, Free Press realized it was too late to attempt a rebrand. As they watched it catch on and begin to spread organically online, before any focus group–tested messaging could be applied, Karr said they realized maybe being stuck with the term was a good problem: "By that time we were like, 'We can't [change the name]. It's already been adopted.' And that's a good thing! It may be a horrible name, but the fact is that people are using it who aren't being told to use it by us."[36] Advocates were able to begin from a strong foundation of support online—with "shock and surprise," "harnessing what was there," according to González—but expanding beyond that base while locked in on the terminology of "net neutrality" posed challenges.[37]

Translating wonkish matters to popular language was a key piece of the work advocates described. Crim, lead field organizer for Free Press, said, "It's very hard to separate net neutrality from the technical aspects. You can translate it, though, in a way that gives people an opening into the conversation where they don't need to have all of this telecom policy knowledge to become part of the fight and to understand why this matters."[38] The discursive strategy of wonkish populism connected the legal and technical issues of broadband network management practices and the agency classification decisions to the concerns of everyday citizens over the concentration of corporate power and demands for equality and justice. Advocates saw a decade of this discursive work paying off when, by the time the 2014 fight was in full swing and onward, the "blank stares" that had previously followed any mention of net neutrality had been replaced by "a real shift in public awareness."[39] Multiple activists brought up their parents as barometers of the issue's salience with everyday people, describing how they went from not understanding what their daughters do to bringing it up as a "kitchen table issue" they could follow in the local newspaper and on which they could form an opinion.[40] This translation work was also a crucial part of building the diverse coalition for net neutrality; the core groups of the coalition raised the profile of the issue to publics and activists over the years while working to "flatten the leadership" and intentionally building a framework where other groups could build out to their communities and "put their own lens on it."[41] Different communities took different ways of talking about the issue and its relevance to their specific concerns—in par-

ticular the ways in which the issue was taken on by communities of color within particular frameworks of civil rights and racial justice.

This translation goes both directions too; such advocacy works not just through making policy issues like net neutrality comprehensible to diverse groups of everyday people but also through helping make the voices of those people meaningful to policy elites. Advocates in legal and lobbying work translate the values and interests of publics into the sort of terminology that channels power within the policy sphere. But, especially as the fight went on, net neutrality advocates worked deliberately to not as much speak for people but let them speak for themselves and to help bring those voices to those with the power to make the decisions. Greer put it simply: "Our job is to transform ambient internet outrage into specific action for social change."[42] They did this not by closely orchestrating communications from publics but by equipping people with the necessary knowledge and then letting them speak their truth to power directly, facilitating direct communication with policy-makers through public record comments, phone calls, and emails to regulators and legislators, as well as elevating the reach of tweets, YouTube videos, and other online communications to decision-makers. Clement explained that once people understand what net neutrality is about, they become excited to fight for it, and her job is to help them do that: "There's just so much potential to harness. I think part of our role at Free Press is figuring out how to amplify those things and get them to the decision-makers so they don't just exist out in the internet ether and they can be applied for good."[43] Aaron and Karr said, "Insiders are often skittish about grassroots efforts—largely because they can't control them," but gathering and passing on to policy-makers the stories of how net neutrality affects everyday people and small businesses of all kinds was crucial.[44] "By letting the grassroots speak for themselves we managed to overcome the reluctance of some Washington, DC, decision-makers, who view the larger, public-interest advocacy groups as just another interested party."[45] Learning lessons from previous outside-in efforts such as media ownership deregulation and the 2010 Open Internet rulemaking, where millions of public voices were dismissed by the FCC in policy-making processes, advocates relied less on automated form letters and petitions and provided more means for publics to put comments and communications in their own words. Both why and how they did that, as we will see, had a lot to do with the internet. Before we look at the dynamics of the coalition's online activism, we must look at net neutrality advocacy's biggest tension and perhaps ultimate turning point: race.

Racial Justice and Net Neutrality

A cornerstone of the coalition for net neutrality was racial justice groups, particularly those that count among their issues "media justice." Malkia Cyril, founder of the Media Action Grassroots Network of over a hundred local grassroots social justice, media, and arts organizations and leader of its organizing and advocacy hub, the Center for Media Justice (later MediaJustice), was a pioneer in media justice and the role of net neutrality within it.[46] As fundamentally about a government guarantee of equal rights and protection from discrimination, net neutrality can be understood well within the traditional mandate of civil rights activism. Net neutrality advocates also drew on the specific history of civil rights media activism around access to and representation and participation in media for marginalized communities of color.[47] This activism was led by Joseph Torres, who began his work on net neutrality as deputy director of the National Association of Hispanic Journalists and now serves as engagement director at Free Press.

For self-identified "next generation" civil rights organizations, exemplified by the African American netroots group Color of Change, net neutrality was about communities of color having opportunities not previously available to them for self-representation. People of color depend on the internet to have their own voice in an increasingly networked public sphere, while still under- and misrepresented in mainstream media. With net neutrality, people of color are no longer dependent on mass media but are able to tell their own stories on their own terms. Net neutrality also represented more equal access to opportunities for small businesses, organizations, and artists. But the possibilities afforded to activists and organizers for racial justice was a particular focus for these groups, especially during the coincident rise of the Movement for Black Lives with the Title II fight. How the open internet expanded the capacity of #BlackLivesMatter to connect and organize supporters and participants in the movement nationwide, as well the capacity to share and shape the narrative of what was happening themselves, without having to rely on the mainstream media was taken as a potent example of the necessity of net neutrality by racial justice organizers.[48] Cyril sees a non-neutral internet as a digital "separate but unequal."[49]

This understanding of the open internet's implications for racial justice was not evident initially. There was a stark and tense divide among civil rights groups on the issue of net neutrality. Organizations representing communities of color, including Color of Change, National Hispanic Media Coalition (NHMC), MediaJustice, Presente, and 18 Million Rising,

have been leaders in the campaign for net neutrality. However, the most prominent civil rights groups stood against net neutrality. The NAACP, the National Urban League (NUL), the League of United Latin American Citizens (LULAC), and the Rainbow/PUSH Coalition all advocated against strong net neutrality, as did most members of the Congressional Black Caucus and Congressional Hispanic Caucus. The Multicultural Media, Telecom, and Internet Council (MMTC)—a legal advocacy group that represents these legacy civil rights groups on media and telecommunications policy issues, led by legendary civil rights lawyer David Honig—lobbied hard against Title II reclassification and earlier against net neutrality policy altogether.[50] (These groups have since largely backed off their determined opposition to net neutrality, with the MMTC lobbying against the Trump administration's repeal of Title II net neutrality.)

Legacy civil rights groups stated support for net neutrality in principle but fought against strong net neutrality rules, with MMTC leading the way in filings, testimony, and lobbying. MMTC filings in the FCC's first Open Internet rule-making questioned if binding regulatory policy was the best way to achieve net neutrality, worrying about the unintended consequences of such regulations that could deter investment in broadband, raising prices and stalling network build-out to close the digital divide and leading to a "permanent digital underclass."[51] By the time the fight had shifted to reclassification, MMTC organized a filing on behalf of forty civil rights groups supporting net neutrality policy but opposing Title II, continuing to cite concerns about investment and adoption.[52] MMTC argued that with no strong net neutrality rules, the extra revenue that broadband providers would bring in through charges to major online content platforms and offerings of zero-rated data plans would translate into lower prices for consumers and would be of particular benefit to low-income communities of color.[53] The arguments of MMTC and other legacy civil rights groups closely aligned with the telecommunications industry's stance and were repeated across filings and testimony from local chapters of the NAACP and NUL.[54]

One dynamic in this divide is apparent: those against net neutrality were establishment civil rights organizations, while those in support of net neutrality were more grassroots groups.[55] The major "officially recognized" civil rights groups operate as insiders, tending to serve as "the minority voice" inside the Beltway and in media coverage. "Next generation" civil rights groups that have emerged in the last fifteen years, though, have grown quickly, in more networked fashion, and have developed a

strong bottom-up voice on media issues, including Color of Change, a net-roots organization with 1.4 million members, and MediaJustice, the hub of a network of over a hundred local social justice organizations around the country. Collins-Dexter of Color of Change identified the tension this way: "Does it matter if you have a hundred smaller community-based organizations all saying we need this to organize and fight in our communities, when the people that are the overseers of what people's understanding of civil rights in America looks like are on the opposite side?"[56]

Groups like the NAACP, NUL, and the MMTC have long and important histories of activism, as traced by Allison Perlman, and serve as the primary representatives of people of color in the policy sphere and the public sphere after long, hard fights for a seat at the table.[57] In a new generation of civil rights activism, with a resurgent militancy for racial justice represented by the grassroots organizing of the Movement for Black Lives, activists are questioning how in touch the old guard of the civil rights movement still is with the concerns of communities of color on the ground today.[58] Collins-Dexter said, "There were clear divisions in the civil rights community, and the 'twenty-first-century' organizations that were built on the internet saw the power and the importance of net neutrality. Other organizations didn't—like NAACP, like a lot of the organizations that my mom and that other people identified with, were against net neutrality."[59] Net neutrality was one issue revealing political tensions within communities of color, along many of the same fault lines of the contemporary Democratic Party: generational and technological but also in liberal versus leftist political ideology and relative proximity to establishment power.[60]

The division within communities of color on this issue may have seemed puzzling or unusual for those who conceive of racial identity as a monolith or were unfamiliar with the current insider work of establishment civil rights advocacy.[61] Many legacy civil rights groups have deep and long-standing relationships with the media and telecommunications industries, including financial relationships. The NAACP, NUL, LULAC, and the MMTC received millions of dollars from broadband providers during the net neutrality fight, in the form of donations, contributions, sponsorships, and funding for community initiatives.[62] The anti–net neutrality stance of the legacy civil rights groups came under heavy fire from civil rights advocates on the other side of the issue, who emphasized these industry connections. Rashad Robinson, director of Color of Change, did not mince words, calling it a "corporate buyout" of civil rights groups, who he said were "on the wrong side of history," remarking, "Money talks, and in this case justice,

equality, and self-determination are taking a backseat to corporate sponsorship."[63] Net neutrality advocates expressed great discomfort calling out their civil rights elders, but such pointed public criticism came only as a last resort following many fruitless behind-the-scenes conversations, and they felt there was too much at stake to stay silent. Honig pushed back against the criticism as insulting and racist, with another MMTC official likening it to a "digital lynch mob."[64]

Racial justice activists within the net neutrality coalition worked hard to organize civil rights groups and lawmakers of color for their side by translating the consequences of net neutrality to the interests of their communities. Once a set of diverging opinions among civil rights advocates as a whole was demonstrated rather than the blanket opposition from the establishment, this shifted the existing private support from several lawmakers of color to public support, most notably civil rights icon Rep. John Lewis, and played a role in bringing FCC commissioner Mignon Clyburn fully on board with Title II reclassification. There is major power in defining who "speaks for" communities, and the newer, younger, more militantly progressive civil rights groups on the side of net neutrality had to assert theirs as an existing legitimate voice.

As the de facto official voice for communities of color, legacy civil rights groups and the Congressional Black and Hispanic Caucuses have great sway within Democratic politics, as the party seeks to maintain its bona fides as the party of diversity and inclusion. As such, gaining support from African American and Latinx representatives is a long-standing key strategy for industries, including especially media and telecom, seeking deregulation, merger approvals, and other industry-favorable policies that would otherwise be seen as not in the interests of those communities that are most vulnerable to corporate exclusion and exploitation.[65] There can be problematic rhetoric toward people of color "selling out" or "being duped" that can come from those raising such concerns, with some wrongfully lumping legitimate civil rights organizations in with "astroturf" industry front groups.[66] There nonetheless does exist a troubling trend of what Robinson has called "civil rights washing," akin to the "greenwashing" or "pinkwashing" of corporations seeking to project an image of environmental friendliness or feminism and LGBT inclusion, respectively, in the service of an agenda of further corporate oppression of communities of color.[67]

Equating corporate philanthropy with bribery, however, oversimplifies the situation. Accepting funding from a corporation does not buy support in a direct sense, but it does create dependencies, which constrain possi-

bilities. All of this exists within a larger structure of white supremacy and racialized income and wealth gaps that leave civil rights organizations and Black and Latinx congressional representatives at a fundraising disadvantage that major corporations exploit. The relationships between telecom companies and legacy civil rights groups—not only financial but also personal and professional—reflect a historical dynamic dating back to the height of the civil rights movement, when Black activists were able to make headway with major corporations when they could not count on rights and recognition from government. This reliance on corporate charity over robust government redistribution has only deepened with privatized regulation, further entrenching this dependence.

John McMurria offers analysis of the racial dynamics of net neutrality advocacy, critiquing what he sees as the "race neutral" perspective of net neutrality and lending credence to MMTC's call instead for "net equality."[68] Looking at the meaning of net neutrality in use, however—taking its meaning from how the concept has functioned, not how it has been defined—its race consciousness is clear in the social democratic and social justice discourses from advocates of color and their interventions in the public and policy spheres. The main separation between the two civil rights camps we can see in McMurria's analysis is their approach to existing power structures and how much to work within or against them. Is it better to seek greater diversity and inclusion within an unjust corporate world or to create conditions where that corporate power can be diminished or evaded? As Cyril has made clear, the media justice movement sees net neutrality as a necessary but insufficient condition to achieving a larger project of what could be called "net equality."[69] The media justice movement envisions a future for internet access that will be widely valued by communities of color—surveillance-free, publicly owned, universal, and nondiscriminatory broadband—but there are disagreements in how to get there. Legacy civil rights groups see strong net neutrality policy as at best a distraction and at worst a detriment to that project.

Some civil rights advocates presented net neutrality as beside the point for communities of color, even obstructing the goal of closing the digital divide; they suggest that inserting contentious issues like net neutrality only stirs the ire of the companies needed to make investments. Some African American media advocates presented net neutrality as "rules to protect wealthy, high-tech users" and an issue only for the "digital elites" who do not have to worry about the basic issues of access and affordability that people of color do.[70] This is right in line with long-standing telecom

industry rhetoric of net neutrality as a worry only for white tech bros and getting in the way of serving the needs of people of color. Not only does this rely on a very outdated image of who understands or cares about net neutrality, let alone outright missing who is affected by it, but it also erases the activists of color committed to net neutrality. Jessica González, of the NHMC and Free Press, said, "Part of what the internet service providers very intentionally did was try to make this an issue that's about white people and gamers and, that very common term, 'bandwidth hogs.' And they're not me! They're not Latinas organizing for justice! . . . The ISPs strategically tried to drive a wedge on race and say that this is just an issue for white folks when, really, nothing could be further from the truth."[71]

Legacy civil rights groups were constrained within political-economic structures of racial capitalism. The telecom industry was essentially holding hostage network investment for communities of color unless net neutrality was done away with. The old guard of the civil rights movement wanted to pay the ransom, while the younger activists would not negotiate. But constraining discursive structures also intertwined with structures of racism and white supremacy—that communities of color should be grateful for what access they get and not demand full and equal participation in society. A position like this on broadband access issues betrays the confounding logic that these two issues are inherently adversarial, so in order to close the digital divide we must leave behind net neutrality policy so that ensuring access for all means sacrificing equal participation for many. This amounts to a thoroughly discredited "trickle down" economic theory that more telecom revenue would surely become more investment in vulnerable communities, despite the long history showing otherwise. When faced with a choice of neutral access or no access at all, it is understandable to find the latter more in the interests of communities of color than the former. But why did so many civil rights advocates accept the false choice presented to them? The answer is not a simple one of being bought off or duped by phone and cable corporations; rather, it is about positions in relation to power.

People of color are hailed by the industry and policy-makers as consumers, not producers, and are asked to compromise full participation for basic social inclusion. This subject position of the "citizen-consumer" has been naturalized in media culture, and taking it up here means that access to the cultural expressions of others is seen as the best that can be hoped for.[72] Sacrificing net neutrality for universal broadband means shaping the emergent participatory affordances of internet technologies for self-

representation into familiar top-down media structures that have historically left communities of color on the outside looking in. The more "officially recognized" groups, such as the NAACP, LULAC, and the MMTC, have a seat (however sidelined) at the policy-making table. While these groups are genuinely looking out for the interests of communities of color, by taking up this citizen-consumer subject position on the inside and too often neglecting the grass roots of their communities on the outside, these groups have already accepted, to at least a certain extent, the discourses that channel power in this policy sphere, and this puts limits on the possibilities of meaningfully challenging the corporate power operative there.

Internet access issues like universal broadband service and net neutrality are ultimately about the same issues of a more fair and equitable media structure and a more inclusive society and culture. Therefore, the issues should be about both equal access *to* the network and equal access *on* the network. In many ways, net neutrality can be understood as in line with, not opposed to, familiar issues of access and racial justice in media—the ongoing work of civil rights advocacy groups toward diversity in ownership, employment, and representation in media industries. Net neutrality, just like the clearer case of universal broadband, is all about equitable access; net neutrality advocates argue that communities of color should not settle for just access to digital networks but access to a digital network where they have an equal opportunity for their voice to be heard. The next-generation racial justice advocates, along with all of those organizing for net neutrality, did this work about the internet on the internet and beyond.

Online/Offline

On September 10, 2014, internet users going to Netflix, Reddit, Tumblr, Vimeo, and over 40,000 other websites were met with the "spinning wheel of death," the dreaded symbol of page-loading delays. The pages were not actually loading slowly but were symbolically representing what the sites would look like if they were stuck in the slow lane in a world without net neutrality. Users were also met with a tool to submit a comment to the FCC and contact their member of Congress to stop this from happening. On what was known as Internet Slowdown Day, part of the Battle for the Net campaign—less than a week before the deadline for the first round of comments in the FCC's Open Internet rule-making proceeding—close to 800,000 comments were submitted to the FCC (added to the million comments that had already been submitted at that point), as well as over

300,000 phone calls and two million emails to congressional representatives.[73] This online protest, primarily organized by Fight for the Future, was modeled on the stunningly successful Internet Blackout Day the group had organized in 2012, recognized as the largest online protest ever and responsible for killing the proposed online censorship regime of the Stop Online Piracy Act.

"The internet" was commonly understood as the protagonist of the net neutrality story, in popular and scholarly tellings alike; two major studies of the battle summed it up as "The Internet Defends Itself" and "Score Another One for the Internet."[74] It is easy to understand why, as such prominent activism toward net neutrality took place on the internet and for the internet—not just on Internet Slowdown Day but spreading and dominating the debate on Twitter, Reddit, Tumblr, and YouTube. This is also a sexy frame for the issue—putting the technology at the center—even poetic in the imagery of the self-defense. But what does this mean exactly? Have digital networked technologies spontaneously grown their artificial intelligence to fully automate themselves and rise up against the humans who wish to shackle them? "The internet" in this discourse stood not only as a synecdoche for the whole sociotechnical system of the internet and its historical operations but also as a metonym for the people within that sociotechnical system. However, to understand the battle for net neutrality, we must ask, What is revealed, and what is obscured, by explaining it as "the internet" saving itself? Activists, even those who speak in this same shorthand and organized under the banner of "Team Internet," described this dynamic of their work with more clarity and nuance, including how the work of "the internet" was not on the internet.

"The internet" was understood first as "a powerful constituency" for net neutrality as a cause.[75] The issue first emerged in an online environment of the mid-2000s more defined by personal websites, blogs, online message boards, peer-to-peer file-sharing services, and an emerging set of user-generated content platforms—a devoted core of internet users self-evidently vulnerable to the whims of broadband providers that was a crucial initial base on which the first net neutrality campaign was built. The explosive growth of online social media, content platforms, marketplace-based businesses, and political activism that coincided with the intensifying fight further grew this base of small, independent creators worried about gatekeepers. By the time the net neutrality fight had fully flowered in 2014, tens of millions of people relied on the internet as their main means of social connection, economic dealings, and cultural

and political engagement—and so expanded the base for net neutrality. Especially meaningful for net neutrality activism from racial justice organizers, as mobile broadband and smartphones made fast internet access more affordable and accessible to low-income communities of color, those who were marginalized and excluded from mainstream media had a powerful new means to participate and represent themselves in politics, culture, and the economy, a new development precariously perched on the existence of net neutrality.

A Free Press tagline used during the campaign can be seen as a useful clarification of the typical internet-centric image of net neutrality activism: "Use the Internet to Save the Internet."[76] Here some poetic parallelism remains, but the people are actually in the picture: the internet is being saved by people who are using internet-based communication tools. This discourse was productive for activists because it foregrounded the stakes of the issue, using "the internet" as shorthand for the culture, politics, and economy made possible through the use of digital networked technologies that would be lost if the fundamental operations of its infrastructure were to be altered to centralize power. This frame also drew attention to the connection between the thing being fought for ("the internet" as a sociotechnical system and its social, cultural, political, and economic affordances), the people fighting for it (the subject being addressed by the slogan, presumably encountered on the internet and therefore a part of "the internet" in the metonymical sense), and the way of fighting for it (using the digitally networked information and communications technologies of "the internet"). "Us[ing] the Internet to Save the Internet" means using a tool that enables and amplifies individual and collective voice at tremendous scale and speed to challenge just the concentrated power that would curtail the ability of the tool to do that. Using the technology being threatened to protect the technology being threatened made sense.

Net neutrality was a natural fit for internet activism. David Segal, director of Demand Progress, had a theory that issues like net neutrality work well for online activism because the people who care are already there online: "It's much easier to use the internet to organize a grassroots campaign when the cause involves the internet. Everyone online already has a stake in the fight, and the websites themselves can use their platforms to rally their users."[77] That the main people needing to be organized are already using the tools of the organizing has helped, and people on the internet want the internet to keep working. Even as the blogosphere of the mid-2000s was replaced by social media by the 2010s, internet users still

held worries about discrimination and marginalization. People are reliant on another layer of giant monopolistic corporations with the ability to control the flow of information, but they still need those platforms to not be the victims of broadband providers either. The online communities connected on social media platforms were key to the advocacy, especially on Reddit and Tumblr, where users encountered the companies' protests, and even if Facebook, Twitter, or YouTube did not participate in any online protests for net neutrality, their users still encountered on the platforms other users who did. For advocates, these platforms were crucial not just in spreading their messages but in listening and learning from the conversations happening in these spaces already.

Organizers understood the sort of activism they were engaged in, and its success against powerful opposition, as an evocative example of exactly the sort of thing that is possible only with an open internet. Net neutrality in this way, as with so much media activism, was a meta-issue for any other political cause, work on which would surely need the internet in one way or another. To paraphrase the axiom of 1970s insurgent media-reforming FCC commissioner Nicholas Johnson, whatever your first priority is, net neutrality should be your second priority.[78] This was especially understood by the marginalized communities historically denied access to representation in mainstream media or at the table of decision-making, who were able to amplify their voices in a more inclusive online media environment.

Digital technologies made possible a number of innovative tactics undertaken by net neutrality advocates. Easy access and widely spread information about the issue and the policy proceedings, as well as tools to streamline the process of submitting agency comments and making calls to Congress, had existed online prior to this particular policy fight, but relatively new methods were applied too. An automated system enabled one-click calls to random phone numbers at the FCC offices, so activists were less likely to find themselves stuck with full voicemail boxes on the other end of the line, and the fervent support for the cause could not be ignored, as everyone from low-level staffers to commissioners themselves was inundated with calls.[79] A separate website for all 535 members of Congress was created to track their stance on net neutrality and to facilitate people contacting them if they were not on board.[80] There was even a real-life slow lane for the FCC: a web host slowed down its traffic going into FCC offices to dial-up speeds in protest.[81] Even though there was so much focus on the technology, it was actually about the people using that technology. There were important affordances and possibilities enabled by the

technology, but ultimately it came down to how it was used by the particular people doing the work.

For as much focus on the new technologies of activists as there often is now, net neutrality advocates did not focus on any unparalleled technological prowess for their success but tended to credit good hard work, passion, and creativity.[82] Perhaps the most important internet-informed aspect of their success had more to do with digital culture, not purely technology, than anything: the tactical advantage of a deep understanding of the workings of the online attention economy and the ingenuity it takes to keep an issue salient throughout every twist and turn of a long, inscrutable, convoluted policy-making process and channel that toward further engagement and action. Their efficient and evocative visual storytelling—with humor and irreverence, urgency and moral clarity—helped cut through the glut of content online and moved people to act. A spinning wheel online evinces a rather visceral reaction; people understand how throttling a live-streamed protest rings as censorship. Once they had that attention, the work was to do something with it—online engagement is only effective if it turns into real action.

This is the heart of "netroots" activism: organizing not just online but offline too. Netroots organizations specifically work on building and then mobilizing a large grassroots base, both on the internet and on the ground. Fight for the Future was the group in the coalition most responsible for these digital tactics and is recognized for bringing a previously missing high level of technological literacy and sophistication to media advocacy.[83] But rather than emphasizing the exciting new technological techniques the group used, Greer saw their work as just digitized versions of tried-and-true activist practices, describing much of the coalition's work as just "field organizing 2.0."[84] The net neutrality coalition was built through engaging conversations with different people in different spaces, making arguments to bring them over to their side, connecting it to their lives and their interests, and getting them committed in specific ways.

The means were digital, but the ends were much more. Indeed, much of what is described as online activism is informing and organizing people and then mobilizing them to actions actually taken on the ground. It was not just web icon protests, tweets, and petition clicks but speaking up at packed hearings and demonstrations, even bodies put on the line in direct action. This makes the net neutrality case a rather vivid example to dissolve the "digital dualism" that sees the internet as a separate place from "IRL" (in real life).[85] Advocates share the concerns raised by critics of online orga-

nizing of lazy and ineffective "clicktivism" but specify that the problem is not online awareness raising and protest actions themselves but more that they are not deployed strategically.[86] "The critiques of clicktivism, I think, are fair in a lot of ways—if that's all that you do. But if it's integrated into a larger organizing plan, it's important," Free Press's Karr said.[87] When used strategically, online activism does not replace offline activism but instead augments and facilitates it. Getting people to click a button to sign a petition or retweet something draws attention to an issue and shows support, but organizers saw these as starting points. The netroots organizers in the net neutrality coalition employed the classic model for this: the "ladder of engagement." That petition signature is just the lowest rung, where organizers see general interest and gather names and email addresses, which are then used to ask more of people, such as a donation or a phone call to a representative. From there, participants are asked to lobby representatives in person and, with more experience, begin to lead and organize similar actions themselves. At the top of the ladder, people have become experts, serving as spokespersons for the issue at events and in local media.

We must look at how this online activism creates offline actions—in other words, what happens when "the internet" shows up IRL, out in the streets? There was a focus on both bringing the issue to where the people are, online and off, but also bringing the people to the issue. Using a distributed organizing model, local volunteer anchors arranged dozens of protests, rallies, demonstrations, and events at FCC branches and other government offices all over the country in 2014, from New York; Boston; San Francisco; and Seattle to Scottsdale, Arizona; Findlay, Ohio; and Dubuque, Iowa.[88] Crim recalls watching President Obama's motorcade leaving his Hollywood fundraiser passing a street lined with protesters she had organized, looking to hold him to his promise to deliver strong net neutrality and calling for Title II reclassification, not knowing which one of the limousines carried the president yet sure he had to have seen them.[89] They were pelted with dirt from the helicopters rising over them; a few months later the president was on their side, calling for Title II.

Over the course of the Title II fight, the FCC saw an unprecedented sustained campaign of protests, demonstrations, and direct action, employing a variety of creative tactics that made net neutrality support impossible to ignore. Net neutrality advocates brought the pressure directly to the agency bureaucrats unaccustomed to the kind of populist energy that was suddenly directed their way. Even with the increasing popular activism toward the agency brought by the post-millennium media reform/democ-

racy/justice movements, this was a whole new level. FCC meetings were disrupted by protesters shouting about Comcast and dropping banners for reclassification.[90] Occupy the FCC, a group of activists organized by Popular Resistance and Fight for the Future, camped out in front of the FCC building for ten days demanding reclassification and eventually cajoled Chairman Wheeler to meet with them.[91] Activists from Popular Resistance even blockaded Chairman Wheeler's driveway, chanting, "Don't let the internet die! Time to reclassify!" singing, "Which side are you on, Tom? Are you with the people or the telecoms?" and holding signs with messages like "The people demand FULL TITLE II."[92] They refused to let him pile his six-foot-four frame into his Mini Cooper and drive to his office, saying they could not let him go to work if he was not working for the public. After talking with them and posing for the camera with their "Save the Internet" banner, Wheeler walked to the Metro station.[93]

The front lawn of the FCC was an unlikely stage for activist street theater. This included a showdown between the costumed competitors Net Neutral-i-kitty and Cable Boss. Despite the latter attempting to buy off the referee, the former emerged victorious, accompanied by chants of "Whose Net? Our Net!" from the crowd.[94] At another demonstration, FCC staffers were given plush stuffed cats that came with stories attached from everyday people about what the open internet means to them and their lives.[95] Crim, who organized these events, explained, "It was very silly. Of course, this is a serious issue, but we wanted to have that silly feel to get the attention of people inside the agency and also get some press attention for that . . . Even when we couldn't physically bring humans to their office, we were bringing their stories and other representations of the issue."[96]

Zeynep Tufekci has developed a "capacities and signals" theory of social movements and explains how digital technologies have altered the dynamics of movement action.[97] Tufekci explains that in order to affect change, social movements must build multiple capacities and signal the strength of those capacities to those in power. Rather than assess social movements by the number of people at a rally or march, we better understand their power by seeing such outputs as signals of a set of variable underlying capacities. These include narrative capacity (legitimizing the cause and persuading people toward it), disruptive capacity (making the status quo practically untenable), and electoral or institutional capacity (forcing support from decision-makers). These capacities are signaled through movement actions like protests, demonstrations, and direct action targeted toward the powerful, who then interpret and assess these signals in making decisions. Tufekci

shows how the affordances of digital technologies bring both power and fragility to social movements. Digital technologies make messaging, organizing, and mobilizing activities much cheaper and easier, which enhances the capacity building and signaling of social movements but also means that movements are able to signal beyond what their capacity may actually be. The internet makes it comparatively easy to spread a persuasive message and get a large number of people to speak out or even show up for it, but that does not necessarily translate into enough people or commitment to truly threaten those in power when push comes to shove.

We can evaluate the campaign for net neutrality on Tufekci's terms. Net neutrality advocates developed and signaled strong narrative capacity with messaging and demonstrations online and offline, consistently getting attention on social media and mainstream media alike and seeing their rhetoric become the dominant discourse of the issue. The actions like occupations, blockades, and interruptions did obstruct the operations of the FCC enough to serve as a narrative capacity signal to get attention and make a point, but they did so too indirectly and too briefly to signal truly disruptive capacity.

Interpreting the electoral/institutional capacity signaled by the net neutrality campaign is more complicated. Tufekci looks at the SOPA protests as an example of an online mobilization signaling perhaps above its true capacity: the flood of phone calls to congressional offices "freaked out" everyone on Capitol Hill as a strong signal of potential electoral consequences, but the calls were automatically connected and organized largely through big centralized online platforms, so they represented less effort than such action previously would and thus may not be replicable with the same impact on policy-makers' agenda.[98] The comparable online demonstrations, from many of the same organizers, of the net neutrality campaign drove comments, phone calls, emails, and online and in-person protests directed toward policy-makers, but the primary targets at the FCC are insulated from democratic accountability and have only circumscribed mechanisms for inclusions of public voice in its policy-making processes. However, for net neutrality, the action was not only online, was less reliant on tech giants, and even the automated submissions made much more room for thoughtful and personal individual comments rather than just form letters. Maximizing the potential of digital technologies while not relying on it as a shortcut was a balance that net neutrality advocates worked to strike, largely successfully.

The media advocacy and activism sketched above was crucial in orga-

nizing and mobilizing people to engage with the issue of net neutrality and influence FCC policy. The perspectives of key advocacy participants help us understand the strategies, tactics, and practices of the campaigns organized by advocacy groups and shed light on some lessons learned from this work. When not told as a battle of corporate giants, the story of the net neutrality debates has been put in terms like "the internet saves itself," which privileges the shiny technologies and erases the actual people using them: dedicated and passionate organizers and masses of people working collectively over the course of a decade to achieve a win for the public interest that all too many serious observers wrote off as impossible. The angle of activists using the online public sphere to fight for that sphere is a compelling point we must consider, but with a view toward both the technological affordances of the open internet as well as the specific strategies and tactics activists used to make the most of those potentials to serve the advocacy goals at hand. Media democracy activists were able to get from the FCC nearly everything they were fighting for in 2015, despite facing fierce opposition from the telecom industry, scant help or undermining concessions from the largest purported allies in the tech industry, and an FCC eager for compromise. At the heart of this "David and Goliath" story is the lesson of how mass people power can overcome concentrated corporate power. The millions of voices mobilized by the media democracy movement became a force that could no longer be ignored and pushed the FCC to meet their demands for strong net neutrality. It had always been good policy, but activism made it good politics too. These campaigns also proved to be more than just empty "clicktivism," as much online activism is dismissed, because rhetoric and demonstrations on social media, websites, memes, and videos also turned into filed comments, phone calls, marches, protests, and occupations putting bodies on the line to effect meaningful policy change.

Conclusion

Boring Points

The two major emergencies of the time—climate change and the COVID-19 pandemic—offered examples of both the necessity of a broadband connection without discrimination or restriction and the precarity of net neutrality in the wake of repealed policy protection. As the largest wildfires in California history raged in 2018, Santa Clara County firefighters found the wireless data services they used to coordinate and deploy critical resources slowed to a trickle, disrupting the flow of information and communication needed for the emergency response. Verizon was throttling their bandwidth because the firefighters had exceeded the cap on their "unlimited" data plan; when the fire department pleaded with customer service, they were told to buy the more expensive subscription package.[1] When the coronavirus first swept through the United States in 2020, office and school closures made work and classes at home the new way of life for millions of people, proving fast, reliable, affordable, and equitable access to the internet all the more essential. When the tremendous surge in traffic from online meetings and classes, as well as increased streaming and gaming, put broadband networks to the test, many operators made necessary investments to expand capacity, and internet infrastructure remained resilient through unprecedented usage.[2] Telecom companies pledged during the pandemic not to cut off service, as well as not to enforce data caps, but some broadband providers throttled essential connections during the crisis, and there were no binding regulations in place to stop them.[3]

The survival of net neutrality is crucial as a democratic communications

infrastructure, but as the story told in this book came to an end, broadband remained unprotected from discrimination in US government policy, with the dismantling of net neutrality regulations by the Trump administration's FCC in 2017. However, the fight for net neutrality did not end there. It carried on in the courts, Congress, the FCC, state houses, online, and in the streets. The ending to the net neutrality story is yet to be written.

With the election of Donald Trump as president of the United States, what may have appeared a complete upheaval since 2016 was rather an unmasking, escalation, and acceleration of already long existing dangerous forces in American political economy and culture, and net neutrality was no different. We can recognize echoes from throughout the net neutrality story traced earlier in the events of the Trump era, just in darker tones. In 2017 FCC chairman Ajit Pai, a former Verizon attorney, led the repeal of the Open Internet protections and reversed the Title II classification under a corporate libertarian banner of "Restoring Internet Freedom."[4] Net neutrality discourse mutated and took root in further places. Comcast and other broadband providers began saying they support net neutrality, just not Title II.[5] Discussions of bipartisan net neutrality bills floated through Congress, including some of the same Republican efforts to deliver basic rules, but with no agency capacity to actually enforce them.[6] Net neutrality regulation became officially privatized, with no federal rules and broadband providers left to police themselves; industry promises and user vigilance became the new governance system for the open internet. In the 2019 *Mozilla v. FCC* case, the DC Circuit upheld the net neutrality repeal, ruling that the FCC has the authority to change its mind and was not acting arbitrary and capricious.[7] The *Mozilla* ruling offered a silver lining for net neutrality advocates, though, overturning the FCC's attempt to ban state governments from implementing their own legislation. And several states passed net neutrality laws; California's law is even stronger than the FCC's old rules, explicitly applying to interconnection deals and outlawing paid zero-rating.[8]

Net neutrality remained amazingly popular even as it was eroded as policy. Net neutrality consistently had supermajority support across the political spectrum in public opinion polling, such as one survey that found 91 percent agreeing with the principle.[9] The people got wonkier, with further informed and sophisticated messaging and rhetoric, while the wonks tried to be popular. For example, Chairman Pai's presence at the FCC was marked with strained efforts at internet humor, with constant movie references, a signature oversized novelty Reese's mug, and an infamous

video attempting to revive the "Harlem Shake" meme, dancing in costume alongside fringe right-wing media figures.[10]

Net neutrality organizing stretched wider and deeper, growing more distributed and going further to the grassroots but with some risk of confusion and cooptation. Team Internet held simultaneous protests at over seven hundred Verizon stores around the country, not only raising visibility and ramping up pressure but also building local organizing infrastructure as the fight moved to Congress, and district-by-district pressure was key.[11] Battle for the Net also organized another online protest, the Internet-Wide Day of Action to Save Net Neutrality, which brought demonstrations to more than 125,000 websites and drove millions of messages to the FCC and Congress.[12] This broader participation was anchored by the online communities, creators, and smaller tech companies at the base of the existing advocacy coalition, but this time it included most of the big tech companies previously on the sidelines, such as Google, Facebook, Amazon, and Netflix.[13] A surprising participant ostensibly lending support for net neutrality was actually attempting to appropriate the popular mobilization: AT&T posted a statement saying it was "joining the 'Day of Action' in support of an Open Internet," but when the telecom giant sent a message to its subsidiary DirecTV customers pointing people to an automated comment submission to the FCC and Congress, the canned message turned out to be a deceptively worded statement of support for repealing the net neutrality rules.[14]

The repeal process smashed the public comment record set the last time, with nearly 22 million comments split for and against the repeal. However, as found in subsequent investigations by journalists, activists, and prosecutors, more than 80 percent of the comments were not real, coming from bots and spammers with little security measures in their way from the FCC.[15] A settlement with the New York attorney general revealed that a secret campaign funded by the broadband industry submitted 8.5 million faked comments in support of the repeal, using real people's identities without their knowledge or consent.[16] Clearing away all the fraud and misinformation, a study found that 99.7 percent of unique real comments were pro–net neutrality and 98.5 percent of personalized comments, from across the country and political divides, understood the issue and opposed the repeal.[17] Near-unanimous support for net neutrality in unique comments was also found in a broadband industry–funded study, but it emphasized instead the "unprecedented volume and clutter" of the record.[18] The chaotic policy-making process resulted in a public record not filled with

meaningful evidence for repealing the Open Internet rules but so overwhelmed with obvious junk that it became easy for the Pai FCC to not just dismiss the will of the people but also to discredit the very concept of public participation in the agency's decision-making.[19] The Republican majority at the FCC was committed to repealing the Open Internet rules from the very beginning, and the policy-making proceeding was an exercise in legitimating this decision. The strong advocacy coalition that in 2015 had succeeded against all odds could not, in 2017, overcome the larger political economic and structural constraints they fought within.[20]

Ousting Donald Trump from the White House and Republicans from majorities in Congress in 2020 was pivotal for the fate of net neutrality in the United States. The outcome of this crucial election created the conditions necessary for a return of strong net neutrality policy, but there was little action as of the first year of unified Democratic control. Joe Biden came into the presidency with investment in infrastructure and encouraging competition in concentrated industries as priorities, along with a campaign promise to reinstate net neutrality protections and Tim Wu appointed as a close economic adviser, so his administration appeared primed to move quickly toward new rules.[21] President Biden signed an executive order outlining a coordinated interagency competition initiative that included a call on the FCC to restore net neutrality regulations, arguing that denying broadband providers revenue from new tolls through prioritization schemes would make telecom companies focus on improving and expanding network infrastructure and head off anti-competitive practices.[22]

However, adopting and implementing any telecom policy is impossible without functioning regulatory and legislative bodies. While President Biden appointed former commissioner and net neutrality proponent Jessica Rosenworcel as acting FCC chair, a lengthy delay in naming her as permanent chair and nominating and confirming a fifth commissioner left the agency deadlocked with two Democrats and two Republicans.[23] On Capitol Hill, attempts to settle the matter in law continued in fits and starts, largely led by Democratic senator Ed Markey's efforts to codify the Open Internet rules and secure public utility authority for broadband at the FCC, but it stalled out in the face of Republican opposition.[24]

In the years after the 2017 net neutrality repeal, incidents of broadband discrimination did occur but were not widespread, and there was not a total withering of the public internet. The telecom industry seized on this to paint net neutrality policy as unnecessary and its supporters as hysterical, but the worst-case scenario never materialized because of the sustained

public pressure. As one advocate put it, net neutrality supporters "served as their own 'watchdog' at a time when the FCC [was] absent," and broadband providers remained "on their best behavior" out of fear of popular backlash and the threat of future regulation.[25] People's vigilance can only go so far on its own, and binding government regulation remains necessary to protect democratic communications infrastructure.

As of this writing, whether and how US net neutrality policy will return remains to be seen. Yet what can we conclude from the net neutrality story thus far? Here are some closing thoughts in a review of the major points this book has sought to make. These are some lessons we can learn from the net neutrality fight, whatever its outcome turns out to be.

Regulation and infrastructure are both, as Becky Lentz and Susan Leigh Star have each memorably put it, "boring."[26] With inner workings hidden from public view, buried underneath an image as tedious and dull, or literally buried underneath the ground, the bureaucratic proceedings of communications policy and underground pipes of internet infrastructure are not exactly the sexiest subject matter. And yet, as the explosive popular interest and engagement with net neutrality has upended these expectations of boredom, the issue shows just how compelling and important regulation of broadband infrastructure is as a political battle for control of communications and culture—and, indeed, how the discourse of "boring" is strategically deployed by the powerful interests seeking this control in attempts to repel public scrutiny.

Inspired by this reputation of regulation and infrastructure, I present the major themes of this book as *boring points*. Rather than reinforcing the misnomer of these matters as dry and uninteresting, however, I employ "boring" in another sense. The "boring points" laid out through this book were key moments of the net neutrality story where meaningful insights can be revealed—bits with which we can "bore" into issues of media policy, industries, and advocacy, drilling down to excavate underlying dynamics and meanings. This book has laid out four "boring points," which are all, of course, actually very interesting.

The first point dealt with *cultural power in policy-making through discursive construction*. Too many studies of policy understand processes like those of the FCC as an objective system of rational problem-solving, but piercing into the sterile technocratic surface uncovers the dirty struggle for power underneath—power that is not only channeled but also constituted by the use of language. Understanding these dynamics through discourse theory highlights the cultural dimension of policy and advocacy. The cases

here show that the power of government regulation comes down to how specific words are used to define technologies, institutions, and practices and how influence over this discursive struggle can come via stories that connect with people and move them to engage in this process.

The second point examined the *privatization of regulation in neoliberal industrial governance*. Although "deregulation" is typically seen as a defining feature of the neoliberal political economic system of the last four decades, the oligopolies of the media, telecommunications, and technology industries are characterized not so much by an absence of regulation as by the privatization of regulation. As this book has shown, the workings of the major corporations on both sides of the net neutrality issue represent a sort of privatized regulation, where they were able to work out among themselves in backroom deals how the internet would work, with little public input or accountability, and write the rules by which they would be regulated. Unsurprisingly, private control and profit maximization for the largest corporate players were the priorities under this arrangement, at the expense of public values and democratic communications.

The third point brought together the typically antithetical forces of *"wonkish" policy and populist politics*, highlighting some productive methods of democratic intervention into technocratic governance. Increasingly, significant decisions are made not in the public realm of true political deliberation but tucked away in regulatory proceedings characterized by the revolving door of regulators, lobbyists, and think tankers—the rarefied domain of policy wonks, not the everyday people whose interests are meant to be served there. Here, under the antiseptic gloss of expertise and econometric legalese, a largely unaccountable technocratic priesthood has historically made consequential choices shaping media structures and systems in favor of corporate control. But an increasing mass of citizens have raised their voices within these processes and have learned to put their demands in the language required to be heard there. Indeed, an issue like net neutrality lays bare the impact of seemingly innocuous decisions about legal terminology and technical standards on people's daily lives and how closely the open internet is tied to the progressive populist causes of media democracy, economic equality, and social justice. Thus, an important goal of this book has been to identify and explain how advocates helped to connect the discourses of net neutrality as a wonkish matter to vital populist issues, both informing publics about the inner workings of policy and infrastructure and mobilizing them to act effectively toward concrete but formerly obscured targets, by tapping into people's hatred of corporate oli-

gopoly power and the way privatized infrastructure control discriminates against marginalized people.

The fourth point bears on how *democratic communications infrastructure supports successful policy activism and advocacy*. The claim that net neutrality is a necessary condition to ensure democratic social and political participation animated much of the popular support for net neutrality protections, and, indeed, the fact that mass grassroots activism organized and mobilized through the internet succeeded in winning protections for net neutrality can be seen as proof of this concept. The principle of net neutrality is itself a kind of democratic communications infrastructure, providing the technical, regulatory, and cultural affordances necessary (yet not sufficient) for free expression, public participation, and social and political movements. In this way, net neutrality is both an end and a means to an end; protecting the open internet is crucial for media democracy, which is itself crucial for so many other progressive social and political goals. The success of these campaigns, then, poetically proves the point about the importance of net neutrality and is an instructive example of how the open internet can help serve other advocacy efforts.

Overall, we can see a picture in which the cultural and economic power accumulated by large corporations in the regulatory arena makes for tough terrain for meaningful public participation and representation in communications policy-making. And yet publics and progressive activists were able to successfully steer existing discursive and technical resources and develop new ones toward a significant policy victory. Understood this way, the story of net neutrality can be seen as an example of how corporate dominance of policy can be overcome by activists working together with larger numbers of everyday people to deliver a democratizing outcome and some of the structural affordances that make these sorts of successes possible. The failure of net neutrality policy in 2017 was a result of the larger failure of the institutions of American popular democracy itself, following directly from the countermajoritarian structural advantages that favored the election of Donald Trump and unrepresentative policy-making processes that empowered his administration to dismantle the regulations. The conditions in Washington following 2020 signal the likelihood of a return of US net neutrality policy, but the issue's resolution will ultimately occur within a larger historical conjuncture defined by the diverging paths toward either deepened or dissolved democracy. Net neutrality will survive, thrive, or perish hand in hand with democracy itself.

Notes

Introduction: The Broadband Battle

1. Michael Calderone, "How Volunteer-Run Argus Radio Broadcast Ferguson Protests Live to the World," *Huffington Post*, August 14, 2014, https://www.huffpost.com/entry/argus-radio-ferguson-protests_n_5679149; Kristen Hare, "How Argus Radio Livestreams from Ferguson," Poynter, August 22, 2014, https://www.poynter.org/reporting-editing/2014/how-argus-radio-karg-livestreams-from-ferguson/; Joan E. Solsman, "How Ferguson Brought Live Streams into the Mainstream," CNET, August 26, 2014, https://www.cnet.com/news/how-ferguson-brought-live-streams-into-the-mainstream/; Laura Sydell, "As Ferguson Unraveled, the World Found a New Way of Watching," *Morning Edition*, NPR, August 25, 2014, https://www.npr.org/sections/alltechconsidered/2014/08/25/342591732/as-ferguson-unraveled-the-world-found-a-new-way-of-watching

2. Although much has been written about net neutrality, there remain gaps that this book seeks to fill. The political and industry conflicts involved with net neutrality saw extensive journalistic reporting and analysis as the policy battle unfolded. A copious amount of research on net neutrality was published during the policy-making process, nearly all of it in law journal articles, economic analyses, and technical papers. See, for a sample: Ammori 2012; Atkinson and Weiser 2006; Bauer and Obar 2014; Cherry 2006, 2008, 2011; Clark 2007; Crawford 2007, 2009; Economides 2008, 2011a, 2011b, 2012; Felten 2005, 2006; Frieden 2007a, 2007b, 2007c, 2008, 2010; Herman 2006; Hogendorn 2005, 2007, 2012; Jordan 2007, 2009, 2010, 2011; Jordan and Ghosh 2010; Marsden 2007, 2008; May 2007; Meinrath and Pickard 2008; Musacchio and Kim 2009; Newman 2008; Nunziato 2010; Peha 2006; Sicker and Grunwald 2007; Sidak 2006; Varona 2009; Weiser 2008; Weisman and Kulick 2010; Weitzner 2006; Lehr, Sirbu, Peha, and Gillett 2007; Wu 2003, 2006, 2007; Wu and Yoo 2007; Yemini 2008; Yoo 2004, 2005, 2006, 2007, 2008. This work was largely aimed at intervening in the net neutrality debates, serving as evidence and arguments to influence policy-making rather than analysis of these debates and the policy-making process itself. Beyond the vast majority of net neu-

trality research concentrated in legal, economic, and technical disciplines, a handful of social science articles have considered the social and political implications of the net neutrality debates, mostly from administrative, quantitative approaches. Valuable scholarly journal articles on the net neutrality debates have explored the issue at the level of the larger-scale policy process (Hart 2011), mainstream media coverage (Kim, Chung, and Kim 2011), online discussions (Herman and Kim 2014; Lee, Sang, and Xu 2015), and messaging and representations (Hartman 2012; Ly, MacDonald, and Toze 2012), but has not developed a critical big picture view connecting the specific dynamics of policy, industry, and advocacy laid out here. This, however, leaves a need for a book-length qualitative analysis with historical and theoretical depth that looks at the issue with some critical distance, taking a step back from the fray to take a longer view of the broader social and cultural implications. This is what this book is seeking to do.

3. The communication and media studies scholars who have developed full-length treatments of the subject have taken approaches that are different from my own. Victor Pickard and David Berman's *After Net Neutrality: A New Deal for the Digital Age* (2019) covers much of the same ground as I do here but they aim their analysis primarily toward an argument for, and beyond, strong net neutrality regulation. In *The Paradoxes of Network Neutralities*, Russell A. Newman (2019) takes a discursive approach to net neutrality but to argue a position directly opposed to mine: that net neutrality is not a challenge to neoliberalism but, in fact, is neoliberal.

Other communication and media scholars' ongoing research projects focus on net neutrality less exclusively. Becky Lentz has written extensively on discourses of media policy and advocacy related to net neutrality (2011, 2013, 2016), leading up to her forthcoming book *Docket Politics*, but her analysis is primarily of the prehistory of the issue. Jennifer Holt addresses net neutrality as one issue in her in-progress *Cloud Policy* research on the regulation of digital media infrastructure (2014, 2016, 2017, 2019).

Most prominent among existing legal, economic, and technical books on net neutrality are Barbara van Schewick's *Internet Architecture and Innovation* (2010), Dawn Nunziato's *Virtual Freedom: Net Neutrality and Free Speech in the Internet Age* (2009), Marvin Ammori's *On Internet Freedom* (2013), Thomas Hazlett's *The Fallacy of Net Neutrality* (2011), and Christopher T. Marsden's *Network Neutrality: From Policy to Law to Regulation* (2017) and *Net Neutrality: Towards a Co-Regulatory Solution* (2010). There have also been several edited anthologies on the topic from a variety of approaches, such as Andrew Firth and Natalie Pierson's *The Open Internet, Net Neutrality, and the FCC* (2011), Zack Stiegler's *Regulating the Web: Network Neutrality and the Fate of the Open Internet* (2012), and Thomas M. Lenard and Randolph J. May's *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated?* (2006).

Net neutrality also comes up in other books that are not primarily focused on the topic. Net neutrality is a prominent point of discussion in several broader analyses of media and communications industries, policies, and technologies, coming from a generally political economic perspective, such as Susan Crawford's *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age* (2013), Rob-

ert McChesney's *Digital Disconnect: How Capitalism Is Turning the Internet against Democracy* (2013), Tim Wu's *The Master Switch: The Rise and Fall of Information Empires* (2011), Jonathan E. Nuechterlein and Philip J. Weiser's *Digital Crossroads: Telecommunications Law and Policy in the Internet Age* (2013), and Brett Frischmann's *Infrastructure: The Social Value of Shared Resources* (2012). Other books take up the issue as part of broader considerations of legal and technological issues with the internet but without direct extended attention, including Lawrence Lessig's *The Future of Ideas: The Fate of the Commons in a Connected World* (2002) and *Code: And Other Laws of Cyberspace, Version 2.0* (2007), Yochai Benkler's *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006), and Jonathan Zittrain's *The Future of the Internet—and How to Stop It* (2008). Relevant manuscripts also include media histories with contributions to adjacent issues of policy, industry, and advocacy, such as John McMurria's *Republic on the Wire: Cable Television, Pluralism, and the Politics of New Technologies, 1948–1984* (2017), Allison Perlman's *Public Interests: Media Advocacy and Struggles over US Television* (2016b), and Victor Pickard's *America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform* (2014).

4. My research for this project relies primarily on historiographical methods of gathering evidence to record the very recent past, along with interview research. I draw from materials in policy proceedings, corporate records, technical literature, advocacy work, public relations messaging, user social media content, and trade press and mainstream media coverage. I supplement this material with interviews, oral histories, and observations from advocates, activists, organizers, analysts, and other participants in the policy-making processes and campaigns around them. I apply mixed qualitative methods to case studies focused on specific key moments in the story, such as court cases, corporate negotiations, and regulatory proceedings, with analysis of the language and practices used as the basis for arguments about the key themes and topics of media discourse, infrastructure, and participation. My textual analysis is interpretive in nature rather than empirical in the positivist sense typical of most policy studies.

5. Ken Belson, "Senator's Slip of the Tongue Keeps on Truckin' over the Web," *New York Times*, July 17, 2006, https://www.nytimes.com/2006/07/17/business/media/17stevens.html

6. See Kimball 2014.

7. In this book, I use the terms "broadband providers/companies/industry" interchangeably with terms like "telecom companies/industry," "internet access providers/companies/industry," "network operators," and "phone/cable companies/industry." I also use the term "internet access providers" rather than "internet service provider (ISP)"; while the latter is more commonly used, the former speaks more directly to what it is they do.

8. See the field of critical media infrastructure studies; start with Parks and Starosielski 2015.

9. Lee and Wu 2009; Om Malik, "With 'Sponsored Data' AT&T Is Double Dipping. And That's Just Dirty," *Gigaom*, January 6, 2014. http://gigaom.com/2014/01/06/with-sponsored-data-att-is-double-dipping-and-thats-just-dirty/. See also Kimball 2014.

10. Ken Fisher, "SBC: Ain't No Way VoIP Uses Mah Pipes!," *Ars Technica*, October 31, 2005, https://arstechnica.com/uncategorized/2005/10/5498-2/

11. David Meyer, "Deutsche Telekom Plans over-the-top Partner Push, Building on Existing Deals with Spotify and Evernote," *Gigaom*, March 6, 2014. http://gigaom.com/2014/03/06/deutsche-telekom-plans-over-the-top-partner-push-building-on-existing-deals-with-spotify-and-evernote/; Nilay Patel, "AT&T's Sponsored Data Is Bad for the Internet, the Economy, and You," *The Verge*, January 6, 2014. http://www.theverge.com/2014/1/6/5280566/att-sponsored-data-bad-for-the-internet-the-economy-and-you

12. See Kimball 2015.

13. Wu 2002, 2003.

14. Saltzer, Reed, and Clark 1984.

15. Tim Berners-Lee, "Net Neutrality: This Is Serious," Timbl's blog, June 6, 2006, https://web.archive.org/web/20170715192529/http://dig.csail.mit.edu:80/breadcrumbs/node/144

Chapter 1

1. Of course, there is no guarantee that people's voices will not be drowned out by toxic harassment or just information overload, algorithmically erased or marginalized, or benefit social justice rather than oppression. This has more to do with the dynamics of the big platforms that shape the online public sphere and their ownership and governance, which is a dire issue beyond the bounds of this book.

2. D'Acci 1994. See also D'Acci 2004. Here, the social historical context is briefly traced in the introduction, and it underlies the whole picture but is not examined directly in depth. In order to consider the relevant relational dynamics of policy and technology, I specifically analyze the regulation on and of infrastructure instead.

3. Streeter has thoroughly developed a discursive approach to media policy that informs my own. Foundational to the theoretical framework of this book are theories of discourse, articulation, and culture from Gramsci, Foucault, Williams, and Laclau and Mouffe. Within critical policy studies, discourse theory has been used as a lens through which to examine, for instance, environmental, transportation, education, and urban policy, and has grown prominent as a theoretical basis for media policy studies as well (see Fischer et al., 2016; Streeter 2013). Several varieties of discourse theory have been used to critically explore policy-making—most prominently, Fairclough's (2013) critical discourse analysis and what Howarth (2009) calls poststructuralist discourse theory. The understanding of discourse that grounds this book is based in poststructuralist discourse theory, as described by Howarth (2000, 2009), stemming from Laclau and Mouffe's (2001) augmentation of Foucault's conception of discourse with Gramsci's view of hegemony. In particular, for Howarth (2000, 1–15), following Laclau and Mouffe, discourse is an articulatory practice; power is constituted in a hegemonic process of linking together different terms and practices into discourse coalitions.

4. "Net Neutrality, Shall I Compare Thee to a Highway? A Showerhead?," *All Things Considered*, NPR, July 21, 2014, https://www.npr.org/sections/alltechconsi

dered/2014/07/21/333737282/net-neutrality-shall-i-compare-thee-to-a-highway-a-showerhead

5. "Neutrality, n.," in *Oxford English Dictionary* (Oxford: Oxford University Press, 2003).

6. Brandi Collins-Dexter, interview with the author, July 9, 2019.

7. Timothy Karr, interview with the author, May 22, 2019.

8. Sandvig 2006; Frischmann 2012; Bauer, Clark, and Lehr 2009; van Schewick 2010.

9. Perlman 2010.

10. Sandvig 2007.

11. Lemley and Lessig 2001.

12. Streeter 2013, 497; emphasis in original.

13. I am not the first to see net neutrality functioning as an empty signifier; Becky Lentz (2013) and Russell Newman (2016) have remarked on this as well. I go beyond these comments to try to fully consider the consequences of this for the spread and influence of its discourse. Newman finds the moment that net neutrality was rearticulated beyond its economistic origins as the emptying of the signifier, but Lentz finds "neutral" in its very first appearance in relevant FCC discourse—the Computer Inquiries from the 1960s to the 1980s—playing an "ambiguous role." Quoting Howarth (2000, 188), Lentz explains it as able to "unify and sediment a wide range of practices and discourses" (2013, 573).

14. Wu 2003.

15. Tim Wu, "Net Neutrality and the Idea of America," *The New Yorker*, May 16, 2014, https://www.newyorker.com/tech/annals-of-technology/net-neutrality-and-the-idea-of-america

16. The various ways net neutrality has been defined as a principle are understood here as a mutation of discourses, in line with Foucault's (1991) conception of historical "genealogy." See also Kimball 2012.

17. In his analysis of net neutrality discourse, Russell Newman argues that net neutrality is a fundamentally neoliberal principle—"arguably among the most neoliberal of debates" (2016, 5976). This counters the more conventional view of net neutrality, shared by this book, as public interest protection standing against the ravages of neoliberal deregulation and privatization. Newman's contrarian argument is nonetheless an important one, usefully discerning the discursive ground from which the net neutrality concept first grew. The insight this perspective on neoliberalism lends on net neutrality's meaning in use—as a fluid discourse, mutating beyond its origination, articulated to many different value sets in different contexts—is less fruitful.

Surely economistic market-based logic remains dominant in policy discourse, reflecting and reconstituting the current political economic structure of neoliberal capitalism, and net neutrality discourse does not escape that. What seems most notable to me, however, is not that net neutrality has recirculated typical neoliberal discursive formations but the surprising degree to which it has articulated different ones. Newman focuses on the origin moment of Wu's law journal article (2003) introducing the concept and seizes on Wu's evolutionary metaphor in celebration of disruptive innovation, and assumption of private infrastructure ownership,

as setting the neoliberal ground on which net neutrality discourse would unfold. Net neutrality did not remain there, though; it moved widely across varied discursive terrain, especially as the battlefront moved to reclassification of broadband as a public utility, a debate solidly about social democratic public goods. As we have already seen, Wu himself was not sounding so neoliberal a few years later. As we will see in chapter 6, the economistic terms and market-based presumptions of Beltway discourse were just part of a distributed, targeted messaging strategy speaking to different constituencies in different terms and a larger outside-in strategy that worked to bring other discourses into the policy-making process. Newman acknowledges this but sees it as a vulnerability, not a strength (2016, 5981).

Activists strategically linking their demands to discourses that channel power in decision-making spaces in the current conjuncture makes sense as hegemonic power-building. This means that neoliberal arguments will exist in the discursive coalition for net neutrality alongside liberal democratic and social democratic arguments. Newman sees this serving the interests of neoliberal capital in equating the marketplace with democracy, freedom, and equality. For Newman, that "free-market innovation" articulations were key within the net neutrality coalition was constraining, keeping all the rest in the orbit of the central star of neoliberalism. However, we can also see net neutrality discourses as extending—showing the existence of and charting a course away to another, more just, universe.

18. Streeter 2013.

19. Couldry and Mejías 2019; Noble 2018; Roberts 2019; Vaidhyanathan 2018; Tufekci 2015; Phillips and Milner 2021; Zuboff 2018.

20. Gillespie 2007.

21. Gillespie 2007.

22. Douglas 1987; Hilmes 1997, 2012; McChesney 1993; Slotten 2000; Smulyan 1994; Parsons 2008; Streeter 1997.

23. Streeter 2010; Turner 2006.

24. Streeter 2010, 175.

25. Crawford 2009.

26. Bowker et al. 2010, 98. See also Larkin 2013; Star 1999; Star and Bowker 1999; Sandvig 2013.

27. The internet is enabled by resources of both "material infrastructure" and "information infrastructure," to borrow language from science and technology studies (see Jackson et al. 2007; Sandvig 2013). The *material infrastructure* of the internet includes the fiber optic and coaxial cables, copper telephone wires, cellular towers, satellite dishes, and electromagnetic spectrum that make up the access networks; the fiber optic trunk lines of transit and backbone networks; and the routers, switches, servers, and data centers that host and transmit online content and communications. The *informational infrastructure* of the internet includes the standards, protocols, norms, databases, software, and code that are critical to the internet, most prominently including the TCP/IP (Transmission Control Protocol/Internet Protocol) protocol suite and the Domain Name System (DNS). See Frischmann 2012.

28. Nunziato 2009. See also Stein 2006 on "defensive" versus "empowering" approaches to free speech.

29. Berlin 1958.
30. Ammori 2012; Balkin 2008a, 2008b.
31. Pickard 2013, 2014.
32. Ali 2021; Dunbar-Hester 2014b; Freedman et al. 2016; Klineberg 2008; McChesney 2007; Pickard 2019.
33. Abbate 2000; Ryan 2013.
34. Abbate 2010; Frischmann, 2001.
35. Baker 2002; McChesney 2004.
36. Frischmann 2012.
37. Crawford 2009; Noam 1994.
38. R. Newman 2019.
39. Wu 2003.
40. Susan Crawford, "Ajit Pai's Shell Game," *Wired*, November 29, 2017, https://www.wired.com/story/net-neutrality-fiber-optic-internet/; Evan Malmgren, "Nationalize the Networks," *Dissent*, December 14, 2017, https://www.dissentmagazine.org/online_articles/net-neutrality-repeal-case-for-public-broadband; Malmgren, "The New Sewer Socialists Are Building an Equitable Internet," *The Nation*, November 28, 2017, https://www.thenation.com/article/archive/the-new-sewer-socialists-are-building-an-equitable-internet/
41. Ben Tarnoff, "Time to Release the Internet from the Free Market—and Make It a Basic Right," *The Guardian*, November 29, 2017, https://www.theguardian.com/technology/2017/nov/29/net-neutrality-internet-basic-right-america-trump-administration
42. Malmgren, "Nationalize the Networks"; Pickard and Berman 2019.
43. Communications Act of 1934, 47 U.S.C. 151.
44. Communications Act of 1934, 47 U.S.C. 151.
45. See Fischer et al. 2016.
46. Fischer et al. 2016, 8.
47. Fischer et al. 2016, 7.
48. See, e.g., Dunbar-Hester 2013, 2014b; Freedman 2008; Gangadharan 2009, 2013a, 2013b; Hackett and Carroll 2006; Lentz 2011, 2013; McChesney 2007; Perlman 2016b; Pickard 2014; Streeter 1996, 2013.
49. The phrase "privatized regulation" has been used in different policy contexts to describe other forms of private regulation with public consequences or combined public-private policy-making but in a way slightly different from the sense in which I define it here. See, e.g., Fouilleux 2012; Hintz 2015; O'Rourke 2003; Upham 1996.
50. Boddy 1990; Litman 2000; McChesney 1993; 2004; Perlman 2016b; Pickard 2014.
51. Freedman 2008; McChesney 2004; Pickard 2014.
52. Pickard 2014.
53. Marsden 2010.
54. Mueller 2010; DeNardis 2009.
55. Grieveson 2004.
56. Balkin 2018; Klonick 2017; Gillespie 2017, 2018; Roberts 2019.
57. Siva Vaidhyanathan, "Facebook and the Folly of Self-Regulation," *Wired*,

May 9, 2020, https://www.wired.com/story/facebook-and-the-folly-of-self-regulation/

58. Gillespie 2010, 2017, 2018; Klonick 2017; Napoli 2019; Roberts 2019; Tufekci 2014, 2015; Vaidhyanathan 2018.

59. A different version of this section appeared in Kimball 2016.

60. Examples include, for instance, the *Washington Post*'s Wonkblog (https://www.washingtonpost.com/news/wonk/) and American University's WONK branding (http://wiltroutmarketing.com/project/american-universitys-wonk-brand-campaign/).

61. Freedman 2008; Holt 2014; Lentz 2009; Napoli 2008; Noriega 2000; Streeter 1996.

62. Lentz 2014, 2016; Perlman 2016a, 186.

63. "Populism," *Oxford English Dictionary* (Oxford: Oxford University Press, 2016), https://www.oed.com/view/entry/147930; Laclau 2005; Mouffe 2019.

64. Laclau 2005, 1–64.

65. Laclau 2005, 67–124.

66. The Occupy movement's "We are the 99%" rhetoric clearly and effectively articulated a collective identity and an antagonism against the corporations and wealthy elite responsible for the conditions of intensifying economic inequality and oppression. Although it was produced and led by the right-wing libertarian elite, at least part of the Tea Party's antigovernment populism was animated by genuine frustrations and anxieties about the survival of individual liberties in the face of centralized state power, but the discourse and energy of the movement was a corporate libertarianism that articulated the individual freedoms sought instead to corporations seeking markets free from regulation.

67. Perlman 2016a.

68. Perlman 2016b. See also Dunbar-Hester 2013, 2014a; McChesney 2007; Obar and Schejter 2010; Pickard 2014.

69. See Dunbar-Hester 2014b; Freedman, Obar, Martens, and McChesney 2016; Hackett and Carroll 2006; Klineberg 2007; Napoli 2008; McChesney 2004, 2007; Mueller, Pagé, and Keurbis 2004; Shade 2011.

70. Obar and Schejter 2010; Blevins and Brown 2006.

71. Gangadharan 2013b.

Chapter 2

1. Streeter 1987, 174.

2. Williams 1976.

3. Hugh Slotten (2000) shows how, historically, battles for control of media have played out through seemingly trivial technical and administrative decisions, and Jack Balkin (2008b) argues that this is only becoming more prevalent as political issues are debated as matters of technical design and standardization.

4. Gillespie 2006.

5. Broadband is understood as "high-speed" internet access, but the speed of what the FCC counts as "high-speed" has also been key to the contested definitions of "broadband." This discursive battle was reopened by the Trump administra-

tion's FCC chairman, Ajit Pai, who lowered the bar for the definition of broadband, determining how availability of broadband and competition within its market are measured and bringing consequences for what level of intervention the FCC justifies.

6. The most relevant work on net neutrality, FCC terminology, and its role in policy change from within communication and media studies comes from Becky Lentz, whose perspective is similar to the one I develop here. Indeed, her work covers many of the same contested FCC definitions considered in this chapter (2013) and sees such regulatory discursive struggles as consequential for shaping media structures and practices (2011). While we share much, my analysis differs through at least two unique contributions. First, while Lentz operates within the more strictly structuralist theoretical framework of "critical discourse analysis" (CDA) and asserts a view of regulatory definitions as "nodal points" in an intertextual process (2011, 2013), my discursive analysis comes from a more culturalist Foucauldian approach and sees such definitions as "keywords" for regulatory discourse related to media emergence. Second, as her work seeks to "excavate historicity" in the net neutrality debate, Lentz's focus is on what I see as the prehistory of net neutrality and not "net neutrality" discourse proper—looking more at the FCC's Computer Inquiries of the 1960s–1980s than the FCC's broadband proceedings of the 2000s and their judicial challenges that I am concerned with. This also separates my work from histories that seek to trace the roots of net neutrality as a concept, back to the end-to-end arguments and common carriage tradition as well as the Computer Inquiries (Holt 2011; Schaeffer 2013; Lentz 2011, 2013). I have acquired helpful background knowledge on the regulatory terminology covered in this chapter from the informal discussions among internet and telecommunications lawyers and policy practitioners that take place on the email Listserv Cybertelecom. *Cybertelecom*, 2010–2014, http://www.cybertelecom.org/cybert.htm

7. Foucault 1981, 1982.

8. Telecommunications Act, U.S. Code 47 (1996), Sec. 151.

9. Telecommunications Act, Sec. 151(a).

10. Telecommunications Act, Sec. 153(46).

11. Telecommunications Act, Sec. 153(43).

12. Telecommunications Act, Sec. 153(20).

13. Telecommunications Act, Sec. 151(a).

14. See examples of cyberlibertarian discourse discussed in Lessig 1999; Goldsmith and Wu 2006; Mueller 2010. For regulation and innovation, see Abbate 2000; Streeter 2010.

15. Cannon 2003.

16. Cannon 2003; Lentz 2011. The Computer Inquiries worked in concert with the similar open access mandates of the FCC's 1968 Carterfone decision and the Modified Final Judgment in the AT&T breakup. Ruling, In the Matter of Use of the Carterfone Device in Message Toll Telephone Service ("Carterfone"), 13 FCC 2d 420 (1968), http://www.uiowa.edu/~cyberlaw/FCCOps/1968/13F2-420.html; Modification of Final Judgment ("MFJ"), *US v. AT&T*, 552 F. Supp. 131, 229 (DDC 1982), http://web.archive.org/web/20060830041121/http://members.cox.net/hwilkerson/documents/AT&T_Consent_Decree.pdf; Wu 2007.

17. Final Decision, Second Computer Inquiry ("Computer II"), 77 FCC 2d 384 (1980), http://en.wikisource.org/wiki/Second_Computer_Inquiry/Final_Decision. Computer II defined "basic services" as an "offering of pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Computer II, para. 19. It defined "enhanced services" as "offered over common carrier transmission services used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 CFR Sec 64.702(a) (2002) (Comstock and Butler 2000, 10–12; Oxman 1999).

18. Cannon 2003.

19. Comstock and Butler 2000.

20. Noam 2009, 275–78.

21. See "From Ships to Bits," *The Economist*, May 15, 2010, http://www.economist.com/node/16106593

22. The two bodies of English common law that common carriage principles come from are bailment law, where carriers are responsible for the safe passage of the goods they carry, and franchise law, where companies allowed by the state to provide for general transport services must provide those services equally. See Crawford 2009; Noam 1994; Sterling, Bernt, and Weiss 2005; Speta 2002.

23. Crawford 2009.

24. Hale 1787.

25. Pool 1983; Wu 2006; Cherry 2003.

26. Pacific Railroad Acts (1862–1874); Telegraph Lines Acts (1866–1888); Interstate Commerce Act of 1887; Mann-Elkins Act of 1910.

27. Crawford 2009, 880.

28. Nachbar 2008.

29. Crawford 2009, 882–83.

30. Comstock and Butler 2000.

31. Crawford 2010.

32. Selwyn and Golding 2011.

33. *Midwest Video II*, 440 US 689 (1979), http://supreme.justia.com/cases/federal/us/440/689/

34. Comstock and Butler 2000.

35. Telecommunications Act, Sec. 153(20); emphasis added.

36. Report to Congress ("Stevens Report"), Federal-State Joint Board on Universal Service, 13 FCC Record (1998), http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf

37. *National Cable & Telecommunications Association v. Brand X Internet Services ("Brand X")*, 545 US 967 (2005), 1012–13.

38. Stevens Report, para. 81.

39. Stevens Report, para. 69, n. 138.

40. Internet Over Cable Declaratory Ruling, *Re: Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities* ("Cable Modem Order"),

17 FCC Record 4798 (2002), https://docs.fcc.gov/public/attachments/FCC-02-77A1.pdf

41. *AT&T v. City of Portland*, 216 F3d 871 (9th Circuit, 2000).

42. Cable Modem Order (2002), 4802, para. 5.

43. *Brand X* (2005).

44. *Chevron v. Natural Resource Defense Council*, 467 US 837 (1984).

45. *Brand X* (2005), 17.

46. *Brand X*, Justice Antonin Scalia, dissenting (2005), 3–4.

47. Policy Statement, *Re: Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities* ("Wireline Broadband Order"), 20 FCC Record 14986 (2005), https://docs.fcc.gov/public/attachments/FCC-05-151A1.pdf

48. Letter to Chairman Julius Genachowski, *Re: Preserving the Open Internet*, GN Docket No. 09-191 (April 30, 2010), 5.

49. See Wireline Broadband Order (2005); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks* ("Wireless Broadband Order"), 22 FCC Record 5901 (2007), http://www.govexec.com/pdfs/041510d1.pdf

50. Daniel Roth, "The Dark Lord of Broadband Tries to Fix Comcast's Image," *Wired*, January 19, 2009, http://archive.wired.com/techbiz/people/magazine/17-02/mf_brianroberts?currentPage=all

51. Robb Topolski (as: funchords), "Comcast Is Using Sandvine to Manage P2P Connections," discussion forum post, *DSLReports*, March 11 2001, http://www.dslreports.com/forum/remark,18323368

52. Peter Svensson, "Comcast Blocks Some Internet Traffic, AP Testing Shows," *Washington Post*, October 19, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html; Peter Svensson, "AP Tests Comcast's File-Sharing Filter," *USA Today*, October 19, 2007, http://usatoday30.usatoday.com/tech/products/2007-10-19-2072341885_x.htm; Seth Schoen, "EFF Tests Agree with AP: Comcast Is Forging Packets to Interfere with User Traffic," blog post, *Electronic Frontier Foundation*, October 19, 2007, https://www.eff.org/deeplinks/2007/10/eff-tests-agree-ap-comcast-forging-packets-to-interfere; Peter Eckersley, "Comcast Is Also Jamming Gnutella (and Lotus Notes?)," blog post, *Electronic Frontier Foundation*, October 20, 2007, https://www.eff.org/deeplinks/2007/10/comcast-also-jamming-gnutella-and-lotus-notes; Jacqui Cheng, "Evidence Mounts That Comcast Is Targeting BitTorrent Traffic," *Ars Technica*, October 19, 2007, http://arstechnica.com/uncategorized/2007/10/evidence-mounts-that-comcast-is-targeting-bittorrent-traffic

53. Ernesto, "Comcast Throttles BitTorrent Traffic, Seeding Impossible," blog post, *TorrentFreak*, August 17, 2007, http://torrentfreak.com/comcast-throttles-bittorrent-traffic-seeding-impossible/

54. Svensson, "Comcast Blocks Some Internet Traffic."

55. Svensson, "Comcast Blocks Some Internet Traffic."

56. Svensson, "Comcast Blocks Some Internet Traffic."

57. A Comcast spokesperson stated, "We're not blocking any access to any application, and we don't throttle any traffic." Marguerite Reardon, "Comcast

Denies Monkeying with BitTorrent Traffic," *CNET News*, August 21, 2007, http://www.cnet.com/news/comcast-denies-monkeying-with-bittorrent-traffic/

58. Memorandum Opinion and Order, *Re: Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications* ("Comcast Order"), 23 FCC Record 13,028 (2008), https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf, 4–5.

59. Comcast Order, 5.

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Chapter 3

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Chapter 4

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Chapter 6

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