VIDEO GAMES: THE ODDLY FAMILIAR TERMS OF DEBATE ABOUT TELCO ENTRY INTO THE VIDEO SERVICES MARKET

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> "You cannot step twice into the same river; for other waters are continually flowing in."
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> —Heraclitus (Fragment 41)
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> "This life as you now live it and have lived it, you will have to live once more and innumerable times more; and there will be nothing new in it . . . ."
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> —Nietzsche[1]

INTRODUCTION

Two clichés sum up the telecommunications policy world for the past half dozen years. First, the only constant is change. Second, the more things change, the more they stay the same. The main topics of debate have turned, in just three years, from unbundled network elements and "open access" to video franchising reform and "net neutrality." But the deep structure of the debate remains eerily familiar. As discussed below, the disputes today, like those three years ago, still concern (i) the role of cooperative federalism in implementing national telecommunications policy, (ii) the extent to which upstarts should be permitted to skim the cream of the incumbent's customer base, (iii) how to characterize new services within an outdated statutory framework, and (iv) whether regulatory intervention is needed to keep last-mile broadband providers from harming the Internet.

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1. FRIEDRICH NIETZSCHE, THE GAY SCIENCE 341 (Walter Kaufman trans., Vintage Books 1974).

I. THE ONLY CONSTANT IS CHANGE.

Before we examine how things have stayed the same, let us first consider how much they have changed. It has not been that long since, in August 2003, the Federal Communications Commission released the *Triennial Review Order*, which accentuated the longstanding debate between competitive and incumbent local exchange carriers ("CLECs" and "ILECs") about "UNE-P."[2] UNE-P was the regulatory entitlement that allowed new entrants to lease, at rates determined under a malleable cost methodology known as TELRIC, all the components of the telephone system they needed to provide mass market telephone service.[3] ILECs hated both UNE-P and TELRIC because, they said, such regulatory perks made it too easy for CLECs to cream-skim the most profitable customers and undersell the ILECs, who alone were burdened by implicit universal service subsidies and carrier-of-last-resort obligations designed for a non-competitive environment.

In the *Triennial Review Order*, the FCC delegated enormous discretion to the states to decide when UNE-P would be available to CLECs. That decision continued a lively legal debate, first raised in the *Iowa Utilities Board* litigation of the 1990s,[4] about the proper relationship between the federal government and the states and localities in implementing the Telecommunications Act of 1996.[5] The D.C. Circuit put a lid on that debate a year later when, in an opinion written by Judge Stephen Williams, it held that the FCC had violated its statutory responsibilities by ceding so much of its authority to the states.[6]

The UNE-P controversy was one dispute that defined telecom policy through the early 2000s; another was the proper statutory characterization of broadband Internet services and the consequences of the answer

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2. *See* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report & Order & Order on Remand & Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16,978, 17,041-48 (2003) [hereinafter *Triennial Review Order*], *vacated in relevant part,* United States Telecom Ass'n v. FCC (*USTA II*), 359 F.3d 554 (D.C. Cir. 2004).

3. "UNE-P" stands for "unbundled network elements—platform," and "TELRIC" stands for "total element long run incremental cost." For an overview of TELRIC and the rise and fall of UNE-P, *see* JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 98-108, 431-53 (2005) [*hereinafter* DIGITAL CROSSROADS].

4. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 379-80 (1999) (upholding FCC jurisdiction to implement pricing rules of the Telecommunications Act of 1996).

5. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18 and 47 U.S.C.) [hereinafter 1996 Act].

6. *USTA II*, 359 F.3d at 568.

for network access by unaffiliated providers. Starting in the late 1990s, people argued about whether cable modem service contained a "telecommunications service" subject to common carriage obligations under Title II of the Communications Act, or whether it was solely an "information service" subject to Title I and exempt from network sharing obligations.[7] When Congress added these defined terms to the Act in 1996, it did not clearly answer this statutory characterization question, because cable modem service would not enter the market for another couple of years: a classic example of technological change outpacing legislation.

In 2002, after more than three years of political paralysis, the FCC finally answered this statutory characterization question in favor of the cable companies, thereby ending, it seemed, the longstanding regulatory uncertainty that had complicated investment decisions.[8] A year later, in the *Brand X* case, the Ninth Circuit stirred up the debate anew when it overturned the FCC's answer to that question and found a "telecommunications service" within cable modem service.[9] But ultimately, in 2005, the Supreme Court restored order by reversing the Ninth Circuit and reinstating the FCC's deregulatory characterization.[10]

Riding on the answer to this abstruse statutory characterization question was the issue of "open access"—the ability of independent ISPs like Earthlink to gain access to the networks of cable companies like Comcast. Advocates of network "openness" feared that, without such access, Comcast and the rest would begin discriminating against unaffiliated applications providers and destroy the traditional end-to-end ethic of the Internet. But the FCC's *Cable Modem Order* and the Supreme Court's eventual affirmation of that order put an end to that whole open access debate. And the parallel debate about multiple ISP access to the *telcos'* wireline broadband platforms ended in August 2005, when the FCC repealed the key *Computer Inquiry* rules that, for 25 years, had forced telcos to unbundle their information services from their telecom

7. *See generally* DIGITAL CROSSROADS, *supra* note 3, at 162-67. Title II of the 1996 Act, codified at 47 U.S.C. §§ 201-207 (2000), contains the legacy common carrier regulations applicable to conventional telephone companies. Title I, codified at 47 U.S.C. §§ 101-104, 151 (2000), gives the FCC residual authority of uncertain scope to regulate interstate communications services that are not otherwise addressed by the substantive titles of the Communications Act. *See, e.g.,* United States v. Sw. Cable Co., 392 U.S. 157 (1968).

8. *See* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Declaratory Ruling & Notice of Proposed Rulemaking*, 17 FCC Rcd. 4,798, 4,801-02 (2002) [hereinafter *Cable Modem Order*].

9. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003).

10. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S.Ct. 2688, 2702 (2005).

services and sell the latter on nondiscriminatory terms to unaffiliated information service providers.[11]

II. THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME.

On the surface, the four topics just discussed have passed from center stage: the debate about cooperative federalism lost much of its relevance with the demise of *Triennial Review Order*; as UNE-P died, so did much of the controversy about cream-skimming by new entrants; *Brand X* resolved the vexing statutory characterization problems that had beset disputes about how to treat cable modem service; and, specifically, *Brand X* put an end to those longstanding debates about open access to cable modem platforms. But appearances deceive. These four issues—federalism, cream-skimming, statutory characterization of unforeseen services, and broadband network access—are, in a nutshell, the same four issues that people argue about today when they debate the terms on which telcos and other new entrants may enter the market for multichannel video services in competition with traditional cable television companies.

Federalism

Since the dawn of cable television several decades ago, the states and thousands of local governments have played a critical role in deciding the terms on which cable companies can use public rights of way to provide multi-channel video services to end users.[12] Originally, many policymakers viewed cable television as a natural monopoly market, and many states and localities granted exclusive franchises to particular companies in exchange for heavy regulatory oversight. Over time, policymakers recognized that the public would benefit from competition in this market—from direct-to-home satellite providers such as DirecTV and EchoStar, cable overbuilders such as RCN, and traditional telephone companies.[13] The telcos never seriously threatened to enter this market until, with the growth of broadband Internet access, they began deploying fiber-optic cables deeper and deeper into the nation's residential

11. *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report & Order & Notice of Proposed Rulemaking*, 20 FCC Rcd. 14,853, 14,857 (2005).

12. *See generally* Jerry Brito & Jerry Ellig, *Video Killed the Franchise Star: The Consumer Cost Of Cable Franchising and Proposed Policy Alternatives*, 5 J. ON TELECOMM. & HIGH TECH. L. 199, 202-206 (2006).

13. *See generally* DIGITAL CROSSROADS, *supra* note 3, at 357-84.

neighborhoods—cables with enough capacity to support not just fast access to the public Internet, but high-quality video programming as well. Although that fiber build-out remains a work in progress, the largest telcos contend that they will deliver the benefits of widespread video competition as soon as they are assured of freedom from the cumbersome obligation to obtain thousands of franchises to use public rights-of-way for that purpose.

It was one thing for cable companies to negotiate such franchises with municipalities over a period of many years when, for all practical purposes, they were literally the only multi-channel video providers in town. It is quite another thing for a new video entrant to negotiate thousands of franchises when it must build up a big footprint quickly enough to cover the prodigious cost of programming and the enormous capital expenditures needed to bring fiber close to the home, all before it has any certainty that it will win even one subscriber and while competing with an entrenched incumbent that greets new entry by slashing prices. Thus telcos claim, with some justification, that they could provide competing video services much faster if Congress or the FCC stepped in to impose national rules for telco entry into the video market.[14]

This has devolved into a predictable debate between incumbents and new entrants about the relative merits of federal vs. local oversight of the franchising process. The incumbents favor the localities, with whom they have dealt for many years, and the new entrants, fearful of delay and regulatory capture at the local level, favor a much greater role for federal authorities. In many ways, these are exactly the same sides that the corresponding industry groups took in the federalism debate that followed enactment of the Telecommunications Act of 1996. Then, the incumbents, with their greater state-level lobbying resources, favored a greater state role, whereas the new entrants, suspecting regulatory capture at the state level, favored a greater federal role, although the two sides flipped institutional allegiances later once state officials revealed

14. In late 2005, the FCC opened an inquiry into whether it could and should adopt national rules forcing local authorities to streamline the process for obtaining video franchises. *See* Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as amended by the Cable Television Consumer Prot. & Competition Act of 1992, *Notice of Proposed Rulemaking*, 20 FCC Rcd. 18,581 (2005). The FCC then put that proceeding essentially on hold pending congressional consideration of the issue. In early 2006, different bills began circulating in the House and Senate that, among other things, would give the FCC explicit authority to grant video franchises for new entrants on a national level or subject local franchising authority to severe federal constraints. As of this writing (October 2006), the Senate appears unlikely in the near term to approve any video franchising reform proposal without including, as part of a package deal, a set of strong net neutrality requirements that the telcos would view as a poison pill and the House would uncompromisingly reject.

much greater sympathy to CLEC interests than anyone had anticipated.[15]

Cream-skimming

As with the UNE-P debate, the substance of the video franchise debate involves arguments by incumbents that they lack regulatory parity with putatively cream-skimming new entrants. Cable companies have long been subject to build-out and anti-redlining obligations.[16] These are the cable industry's counterpart to the telephone industry's universal service and carrier-of-last-resort obligations,[17] although cable companies do not have true universal service obligations in the sense of having to bear the costs of serving all (as opposed to most) customers within a given area.

The telcos answer, at the outset, that as the third or fourth entrant into this market, they should not be subject to such regulation any more than CLECs have been under the 1996 Act, and CLECs are typically immune from provider-of-last resort obligations. The telcos also disavow any interest in redlining. And they claim that market pressures will force them to offer video service as ubiquitously as possible, even without regulatory requirements, to catch up with the cable incumbents' formidable subscribership numbers. But cable companies are skeptical about those assurances and fear that, for the indefinite future, telcos could maintain a competitive edge by serving only wealthier households likely to order premium services without incurring the costs of building out to serve less profitable households.

Cable companies also fear that franchise relief would tilt the playing field in favor of the telcos by exempting them from various benefits the cable companies have traditionally bestowed on local governments. For example, the cable incumbents have long paid a percentage of their revenues to municipalities in the form of franchise fees, which greatly exceed the costs imposed by the cable companies' use of municipal rights-of-way. In effect, these above-cost fees are a local tax on cable service, which cable companies pass through to end users. That pass-through is an economically inefficient means of raising local revenue, but in theory it should create no *competitive* distortions in the video market if all major competitors also pay the same fees.

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15. *Compare Iowa Utils. Bd.,* 525 U.S. at 385 (rejecting ILEC advocacy for exclusive state pricing jurisdiction for unbundled network elements), *with USTA II,* 359 F.3d at 581-82 (rejecting CLEC advocacy for delegation of federal authority to the states).

16. 47 U.S.C. § 541(a)(3), (4) (2000).

17. *See generally* DIGITAL CROSSROADS, *supra* note 3, at 333-55.

Should telcos pay the same fees? One could make the argument that, at least as a theoretical matter, telcos should not have to pay states or localities any fees in addition to those they already pay for the same rights-of-way to provide broadband services. After all, the telcos have laid, and are laying, fiber-optic cables along public rights-of-way to provide broadband services as well as video, and municipalities incur no extra costs or disruption when telcos shoot video-related packets through those same pipes. To reach a politically viable compromise, however, most telcos say they are willing to pay roughly the same franchise fees to localities as the cable companies, although they would prefer a streamlined franchising mechanism with a federally prescribed fee level. But the devil is in the details, and the cable companies fear that, if subject to different franchising procedures, the telcos will achieve a competitively biased advantage in this respect as well. And the telcos also want to avoid doing the miscellaneous favors that cable incumbents have long promised to do for municipalities in return for their original franchises or when those franchises are up for renewal, such as providing institutional networks or wiring fire stations and other local government buildings for free.

In all these respects, the cable incumbents remain saddled with legacy obligations designed for an age when they faced very little competition, and they oppose any effort to relax those obligations for new entrants because they fear that doing so would introduce competitive bias. The telco entrants answer that any competitive asymmetries introduced by franchise relief should be of little policy concern, since incumbents always face greater regulatory obligations than new entrants, and the proper response to growing competition is to relieve burdens on incumbents, not impose them on new entrants. This set of issues, relating to regulatory parity in an era of demonopolization, is endemic to the communications field.[18] It arose in the ILEC-CLEC battles under the 1996 Act, and it persists today not just in the video services market discussed here, but in other areas as well, such as the extent to which VoIP providers should be subject to legacy obligations designed for monopoly-era telephone companies.[19]

Statutory characterization of unforeseen services

Much like the *Brand X* debate several years ago about how to characterize cable modem service, the video debate presents challenging is-

18. *See id.* at 25-30.

19. *See id.* at 220-22.

sues about how to characterize new, IP-based services that were unforeseen when the relevant statutory definitions were written. Under section 621 of the Communications Act, Title VI franchise obligations apply only to a "cable operator" that provides a "cable service" over a "cable system."[20] Of the two major telcos with aggressive video plans, Verizon concedes that its service and network, at least as currently configured, fall within the scope of that provision, but AT&T does not concede the same about its own, quite different service and network. In particular, AT&T claims that its Project Lightspeed service does not meet the definition of a "cable service" because it is based on the Internet protocol, it is two-way and highly interactive, and it consists of subscriber-specific video streams rather than the broadcast model used in the traditional cable architecture.[21] The cable incumbents disagree that those characteristics of Project Lightspeed make any difference to AT&T's statutory duty to obtain video franchises.[22] This disagreement involves divergent interpretations of the intricately interrelated definitions of "cable operator," "cable service," "cable system," "interactive on-demand services," and "video programming," all set forth in section 602 of the Communications Act.[23]

This statutory characterization debate, which first assumed prominence in 2005, subsided a bit during 2006 while Congress took up the issue of video franchising reform, and ultimately it may fall into irrelevance if Congress resolves the issue itself through statutory revision. The key point for present purposes is that this debate bears a strong family resemblance to all the other statutory characterization debates that arise whenever Congress writes legislation for the communications industry. By its nature, lawmaking involves drawing lines and assigning different rules to different categories of services or providers. As technology evolves, it blurs the lines, makes the old categories arbitrary, and spawns intense semantic debates of interest only to lawyers. That is a key sign that the law needs to be changed.

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20. 47 U.S.C. § 541 (2000).

21. *See*, *e.g.*, Comments of AT&T Servs. Inc. to the *Notice of Proposed Rulemaking* in IP-Enabled Services, WC Dkt. No. 04-36 (Jan. 12, 2006), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518309058.

22. Comments of Nat'l Cable & Telecomm. Ass'n to *Notice of Proposed Rulemaking* in IP-Enabled Services, WC Dkt. No. 04-36 (Nov. 1, 2005), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518176498.

23. 47 U.S.C. § 522 (2000).

Network access

The prospect of legislative overhaul brings us, finally, to the topic of network access. The 1996 Act provided what Congress then viewed as a forward-looking response to the network access debate: the specification of CLEC rights to lease capacity on the last-mile facilities of incumbent telephone companies.[24] That particular debate persists in various contexts, but, as discussed, the demise of UNE-P makes it much less important than it was before. And the traditional "open access" debate—that is, the debate about the rights of independent ISPs to gain access to DSL and cable modem networks—has all but disappeared in the wake of the Supreme Court's *Brand X* decision and the FCC's partial repeal of the *Computer Inquiry* rules in 2005.

So the network access debate is dead, right? Long live the network access debate. The same debate, in slightly different form, carries on, though this time the proposed regime is called "net neutrality." Whereas the 1996 Act focused on creating greater competition at the physical layer, and "open access" initiatives focused on creating alternatives to cable- or telco-affiliated ISPs at the logical layer, net neutrality proposals focus directly on protecting competition at the applications and content layers.[25] In particular, advocates of net neutrality rules seek to prohibit owners of physical-layer transmission networks from "discriminating" against, or among, unaffiliated providers of applications or content in ways that, by some standard, would harm consumer welfare.[26] Opponents of such rules maintain that they, too, oppose "discrimination" that harms consumers over the long term but argue that market forces will almost always preclude such discrimination and that government intervention would do more harm than good.[27]

In a February 2004 speech later published in this *Journal*, then-FCC Chairman Michael Powell propelled this debate into the broader public consciousness when he became the first high-profile official to suggest that the government might someday need to play a backstop role in policing "Internet Freedom" principles.[28] Since then, the FCC as an institution has given a few nods in the same direction. First it issued a vague

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24. 47 U.S.C. §§ 251(c)(3), 251 (d)(2) (2000).

25. *See generally* DIGITAL CROSSROADS, *supra* note 3, at 149-90.

26. *See generally* Tim Wu, *Why have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. ON TELECOMM. & HIGH TECH. L. 15 (2006).

27. *See* DIGITAL CROSSROADS, *supra* note 3, at 168-79 (discussing opposing viewpoints).

28. *See* Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 5 (2004).

policy statement in 2005 encouraging broadband providers to accommodate consumer choice on the Internet.[29] Then it extracted "voluntary" and temporary promises from AT&T and Verizon to comply with that policy statement as a condition for their recent mergers.[30] As this essay goes to press, Congress is also considering various net neutrality proposals, although any "strong" version—such as a provision that would entitle an aggrieved applications provider to sue a broadband provider for equal treatment—seems unlikely to pass anytime soon.

Discussions about net neutrality remain very long on academic theory and very short on practical considerations. Part of the reason is that, with rare exceptions, broadband providers have not discriminated in any plainly abusive sense against unaffiliated applications or content providers.[31] But the issue will come to a head when telcos and the cable companies begin running all of the services they provide consumers, including both voice and video, as applications over a unified IP platform. As that process unfolds, it will become increasingly necessary for these physical-layer transmission providers to distinguish among the packets passing through their pipes and give preferential treatment to some packets over others to ensure quality of service for time-sensitive applications. And preferential treatment is precisely what worries net neutrality advocates, who resist any major deviation from the end-to-end ethic of packet neutrality that has characterized most forms of Internet access from its inception.[32]

Video-over-IP, with its prodigious quality-of-service demands, is the ultimate net neutrality battleground. Here it is important to distinguish between two types of video applications: streaming video, which operates in close to real time and can compete with conventional television services, and non-real-time video downloading services. For the

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29. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, 20 FCC Rcd. 14,896 (2005).

30. *See*, *e.g.,* SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, *Memorandum Opinion & Order*, 20 FCC Rcd. 18,290, 18,392 (2005).

31. The most prominent exception has been the short-lived decision of a rural telephone company, Madison River Communications, to block the ports that its DSL customers used for VoIP ("voice over Internet protocol") services. Madison River quelled the ensuing public furor by agreeing, in an FCC-sponsored consent decree, to unblock the ports, even though the FCC lacked any explicit regulatory authority to order that relief on its own initiative. *See* Madison River Commc'ns LLC and Affiliated Cos*., Order & Consent Decree*, 20 FCC Rcd. 4,295 (2005).

32. *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 36-47 (2001); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003); J. H. Saltzer et al., *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUTER SYSTEMS 277 (1984).

foreseeable future, net neutrality concerns are more likely to arise for streaming video than for download services. At least today, high-quality streaming video requires quality-of-service guarantees in the form of prioritized IP packets over a managed IP network, and that is what the network owners propose to give themselves and their chosen video partners and not unaffiliated providers of Internet-based streaming video services. To be clear: the major telcos and cable companies, as providers of physical-layer transmission services, are unlikely ever to block or gratuitously degrade the video streams of unaffiliated providers operating on the public Internet. But the telcos and cable companies are also unlikely to ensure for these public Internet providers the same quality of service they give their preferred video channels over their managed IP networks—unless those providers agree to pay a market-based rate for the privilege.

Is this a good thing or a bad thing? In our recent book, Phil Weiser and I have avoided the sorts of animated broad-brush answers that characterize so much of the opposing advocacy.[33] At bottom, we argue, policymakers must weigh the asserted *need* for government intervention in this market against the potential *costs* of such intervention, and that cost-benefit analysis is exceptionally difficult to resolve when so many of the variables remain unknown.

The asserted *need* for net neutrality regulation is the first of those unknown variables. Opponents of government intervention raise good questions about whether non-price-regulated platform providers will have the incentive to engage in inefficient, anticompetitive discrimination against higher-layer providers, given the economic principle known as the internalization of complementary externalities ("ICE").[34] They also question whether the market would allow platform providers to act on such incentives even if they had them, given the competitive pressures posed by existing and potential platform rivals.[35] To be sure, a cable-telco duopoly for broadband services, where and when it persists, is not

33. *See* DIGITAL CROSSROADS, *supra* note 3, at 169-79.

34. *See* Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85 (2003). Roughly speaking, the ICE principle holds that a non-price-regulated provider of a platform monopoly has an incentive to maximize the value of its platform by encouraging competition in the market for complementary applications and thus lacks an incentive to injure unaffiliated applications providers except in specific circumstances, such as where an application threatens to replace the platform itself.

35. *See* Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1 (2005); Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23 (2004).

the same as full competition, and the ICE principle has much-discussed cracks.[36] But these antitrust-oriented questions about whether a physical-layer provider has the *incentive* and *ability* to harm competition in adjacent markets are the questions we need to ask. We should not simply assume that, if the government leaves them alone, platform owners will try to harm consumer choice in adjacent markets, much less that they will succeed. Nor should we throw traditional economic analysis to one side on the ground that the end-to-end ethic of the Internet trumps all other values and must be rigidly maintained in all contexts no matter what the effect on consumers.

There is also great uncertainty about the potential *costs* of net neutrality regulation, and thus about whether those costs outweigh the uncertain benefits. Here, too, asking the right questions is as important as offering thoughtful answers. If all video streams over an IP platform are entitled to the same quality of service, will any video stream have enough quality of service to serve as an attractive alternative to conventional video delivery? Many advocates of net neutrality regulation envision a world of redundant dumb transmission pipes similar in principle to the dumb wires and outlets in the electric power grid.[37] But if net neutrality rules lead to the commoditization of all pipes, such that one pipe is largely indistinguishable from another and the providers' margins are all small, why would any private firm risk lots of money in building those pipes to begin with? From a financial perspective, isn't this a bit like trying to persuade investors to buy bonds with a small yield but a high risk of default?

Finally, since few people seriously argue that *all* prioritization among packets is per se bad for consumers—almost everyone agrees, for example, that real-time applications such as voice and video should take priority over other applications—who, exactly, will adjudicate which sorts of prioritization *are* bad and should be banned? How fact-specific and expensive will such adjudications be? And how much will the uncertainty caused by unpredictable, case-by-case regulatory intervention depress investment incentives?

I can answer only one of these questions with certainty. If codified into law, any net neutrality guarantee will produce many fact-intensive disputes and fill the sails of Washington law firms for many years. I work in such a firm and would be grateful for the opportunity. But what's good for telecommunications lawyers is not necessarily good for

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36. *See* DIGITAL CROSSROADS, *supra* note 3, at 157-58, 171-74; Farrell & Weiser, *supra* note 34.

37. *See, e.g.,* LESSIG, *supra* note 32, at 39.

consumers. That is a lesson we should have, but may not have, learned from the lawyer-enriching, but ultimately pointless, UNE-P litigation that persisted for eight years after enactment of the 1996 Act. But as they say, the more things change, the more they stay the same.