



Economics, Ethics, and Public Policy: Values in the U.S. Net Neutrality Debate

AALOK MEHTA

University of Southern California, USA

Keywords: net neutrality, communications policy, Federal Communications Commission, rulemaking, democratic participation

No issue overseen by the Federal Communications Commission (FCC)—and few regulatory issues in general—have attracted as much attention as the agency’s 2014 open Internet rulemaking (FCC, 2014). In it, the FCC proposed maintaining net neutrality, the idea that broadband access providers should treat data equally, but also suggested allowing “commercially reasonable” paid prioritization agreements (FCC, 2014, para. 89). These “fast lanes” would offer preferential treatment of edge providers by Internet service providers (ISPs) in return for compensation, which is anathema to many net neutrality proponents. The Commission received 3.7 million comments on the issue, far surpassing any other rulemaking in the agency’s 80-year history. The initial 800,000 comments reflected a strong pro-net neutrality sentiment, with “less than 1 percent of comments . . . clearly opposed to net neutrality” (Lannon & Pendleton, 2014). The reply round of comments, however, was more mixed, with anti-net neutrality filings outnumbering continued strong representation from net neutrality advocates (Pendleton & Lannon, 2014). Ultimately, the Commission sided with the latter group, issuing robust net neutrality rules that placed both wireline and wireless broadband providers under Title II, or common carrier, authority and banning paid prioritization (FCC, 2015).

At first glance, net neutrality—with its long agency history—seems ripe for exhaustion, rather than a rekindling, of public interest. The 2014 debate, for example, built upon a 2010 rulemaking that also attracted significant public participation and considered many of the same issues (FCC, 2010). Then, the FCC backed net neutrality rules under ancillary regulatory authority (Section 706) instead of Title II, and was quickly litigated. Although portions of the 2010 rules were upheld in *Verizon v. FCC* (2014), the court ruled that common carrier-like nonblocking and nondiscrimination provisions—key elements for protecting net neutrality—were not permissible as long as the FCC continued to not classify broadband providers as common carriers.

At least one key element sustaining interest in net neutrality is a small group of nonprofit and commercial organizations for whom it is a foundational issue. They have continuously beat the drums on the topic, framing and reframing it for more than a decade to identify, cultivate, and expand an active “public” constituency. Roughly four-fifths of comments filed in 2014 came as part of form letters organized by these groups—far more if individual signatures on concatenated files are counted separately (Pendleton & Lannon, 2014). This dynamic was not limited to net neutrality advocates. In response to the flood of

supportive comments during the initial reply period, a single anti-net neutrality organization successfully generated thousands of reply comments warning against a “government takeover” of the Internet.

That such public action was framed, rendered, and activated by a set of interest groups, however, does not fully explain the robust public participation. Although new technologies have significantly lowered the cost of political action, public engagement outside of general elections remains an extraordinary, rather than routine, action—especially on technical regulatory topics. Many issues with substantial impact on daily life, such as intellectual property or surveillance policy, feature similar webs of interest groups but fail to garner an equally vigorous reaction. In the net neutrality proceeding, however, interest groups took extraordinary steps to ensure continued participation, even when the FCC’s antiquated comment systems buckled several times under the strain. Parsing the underlying dynamics of net neutrality participation, therefore, offers lessons not only about the continuing impact and importance of communications policy on the electorate but a general blueprint for understanding how to cultivate and sustain political engagement on various significant political decisions.

One compelling explanation for this unique level of engagement centers on the proposal to allow paid prioritization. This nakedly commercial possibility, in combination with several distinctive political and social elements of the debate, provided a rich source of narratives that allowed activists to renew and sustain public interest by highlighting the limited economic frame in which policy makers have placed net neutrality—a frame that captures only part of what the average citizenry finds valuable online. The underlying dynamics of this process offer perhaps the best potential road map in recent history for broadening and improving public democratic engagement and expanding the analytical methods used in the development of public policy.

Economics and Communications Policy

As with much U.S. policy, communications now operates under a fundamentally market-oriented approach, with the FCC implementing a significant deregulatory agenda in recent years. The 1996 Communications Act codified this through provisions fostering video and telecommunications competition and providing forbearance authority. The result is that U.S. communications policy has fallen under the prevailing policy logic of economism (i.e., market fundamentalism or corporate libertarianism) (Pickard, 2013). This logic has three core tenets: that market-based systems are the preferred method for social organization since they represent voluntary arrangements and are highly efficient at allocating goods under many conditions (Schultze, 1977); that government intervention is only justified in cases of market failure, and even then only when potential benefits outweigh the inefficiencies of administration; and that such interventions, when justified, should aim primarily to correct the market failure and restore efficient market operation (Stiglitz, 1989). The traditional debate over open Internet protections falls squarely in this paradigm, focusing heavily on the economic consequences of various regulatory scenarios.

The dominance of economism in policy analysis has several negative impacts on public participation. First, despite their sophistication and success, economic techniques such as cost-benefit analysis struggle to adequately incorporate many important social and political outcomes, particularly those that are not easily quantified or traded in markets. Second, such techniques are inherently elitist.

The average citizenry does not regularly encounter concepts such as consumer surplus, nor are they considered essential elements of basic education; economism renders policy decisions the realm primarily of technocratic experts in market mechanisms or law. Finally, economism implies a certain level of fatalism about policy outcomes. In assuming that markets are scientific phenomena that operate through the gravity of natural law, economists downplay the desirability and the possibility of active interventionism in the pursuit of social and political goals.

In the open Internet debate, well-established economic analysis procedures fail to produce a coherent answer about key points of contention or to fully encompass the Internet's value-generating aspects. Although this does not completely derail the privileged position of economism within communications policy, it does open a seam for a broader set of values and concerns around net neutrality to emerge. This provides a richer set of narratives that advocates can use to engage and enlarge their constituencies, but it also directly primes and activates certain elements of the citizenry. In this way, advocacy organizations have been able to inject a variety of values, not just commercial concerns, into the policy maker calculus and sustain a unique level of public engagement. In particular, three major characteristics of the net neutrality debate, if not necessary, seem at least sufficient to engender broad public engagement on an arcane regulatory issue.

Three Major Factors Driving Net Neutrality Participation

Economic Ambiguity

Although the FCC, in its rulemaking, sought "comment on the current role of the Internet's openness in facilitating innovation, economic growth, free expression, civic engagement, competition, and broadband investment and deployment" (FCC, 2014, para. 34), social and civic issues are mentioned far less frequently than innovation, investment, and competition. The Commission highlights online speech in only four sections, whereas the "virtuous cycle" of innovation—just one of many economic issues under consideration—is mentioned in nine paragraphs alone.

Economic analysis fails to provide clear policy guidance on net neutrality, however, in five major ways. First, the most important economic questions surrounding net neutrality policy are its implications for innovation and network investment (FCC, 2014). For example, Wu (2003), who coined the term *net neutrality*, emphasized the tension between whether data applications at the edge of networks will continue to be the primary source of innovation or whether such developments are more likely to arise via vertically integrated partnerships with service providers. However, predicting the sources and impacts of innovation—especially the disruptive applications associated with the Internet—has historically been extremely difficult. Moreover, there are few concrete proposals for vertical partnerships that cannot be addressed by less controversial alternative mechanisms, such as content delivery networks, further muddling the potential impact of net neutrality on innovation.

Net neutrality's role in network investment is also unclear. Differentiated services allow for price discrimination, which is an incentive to investment, although it reduces the overall value of that service (Peha, 2007). Economides and Hermalin (2012) find that, in a dynamic model of networks, "an ability to

discriminate unambiguously results in the ISP installing greater bandwidth,” but that whether the welfare-enhancing aspects of such investments are “strong enough to counterbalance the static inefficiency of discrimination is ambiguous” (p. 605). This depends on whether household welfare outweighs Internet service provider profits, another difficult question to answer a priori.

A third complicating factor is ISP incentives to profit from congestion. Internet service providers may be able to charge higher prices and receive greater overall profits when networks are congested (Peha, 2007), which acts as a disincentive for network investment. Paid prioritization exacerbates such pressures, because it allows ISPs to invest in profitable new differentiated services while continuing to underprovision general network capacity. Some proponents of net neutrality link this issue to data caps and “zero rating” of certain data applications, via which many ISPs are already monetizing or otherwise leveraging limited bandwidth.

Fourth, ISPs serve as key platforms in complex two-sided markets, a relatively new, still incomplete field of economics. Pricing in two-sided markets—which serve two distinct groups of users that offer each other networked benefits—is complex, with final pricing structures often unknown (Faulhaber, 2007). ISPs, moreover, hold a “terminating monopoly” over one side of the market; currently, no robust analyses exist of two-sided markets under such conditions (FCC, 2014, para. 42). Opaqueness in two-sided markets may also lead to outcomes that cannot be predicted even by the platform owners. Network owners may, in these circumstances, prioritize short-term interests even when long-term investments might offer greater total profits (Wu, 2003). Furthermore, many edge providers also support two-sided markets by virtue of their reliance on advertising revenue streams, typically with one side of the platform catering to residential broadband users. It is unclear whether simple two-sided market analysis remains valid amid such complex nested interactions.

Finally, there is no clear support for various theories arguing that ISPs can improve social welfare, particularly regarding complementary applications, by being allowed to maintain terminating monopolies over broadband service. Farrell and Weiser (2003), for example, find eight ways in which internalizing complementary efficiencies—the idea that a “platform monopolist gains from an *efficient* applications market” (p. 104)—can fail. Likewise, van Schewick (2007) concludes that many established exceptions to the one monopoly rent theorem—the notion that “a monopolist in a primary market does not generally have an incentive to exclude its competitors from a secondary, complementary market” (pp. 334–335)—apply to Internet communications, and may continue to do so even in the face of last-mile competition.

Alone, any single ambiguous economic finding might do little to engender broader framings of net neutrality. In aggregate, however, such analyses imply that economic analysis is insufficient to provide guidance on net neutrality and that policy can be decided productively only by incorporating alternative decision criteria. This phenomenon obviates, to some extent, the privileged position of subject matter experts and technocrats and allows advocacy groups to emphasize various substitute social values that are inherently more compelling to the citizenry than pure economic efficiency.

Counterbalancing Corporate Interests

Even in the absence of a clear economic logic, it may be perfectly rational for both legislators and other policy makers to implement policies that favor incumbent companies. Regulators working in technical areas possess skills particularly attuned to their regulated industry, such that unfavorable regulations might foreclose future employment opportunities (Green & Nader, 1973). Communications industries are considered exemplars of such regulatory capture due to the highly technical nature of communication regulation and industrial tendencies toward natural monopoly. Similarly, legislators might be willing to offer favorable regulations to industry in return for electoral resources (Stigler, 1971); such arrangements have only become more common in recent years due to a general trend of increasing business expenditures on lobbying and a series of court cases that have loosened restrictions on the flow of corporate funds during electoral cycles. For these reasons, the net neutrality debate is often tinged with accusations that broadband access providers, as terminating monopolies, possess undue political power and have been able to forestall network openness rules in an undemocratic manner.

In net neutrality, however, there is, in a very broad and naïve sense, a general dichotomy between industrial interests. While powerful Internet service providers such as Comcast and Verizon generally oppose net neutrality—which would foreclose new revenue sources—many substantial content providers, most notably Netflix, as well as influential start-ups and their venture capitalist financiers, favor strong open Internet protections to reduce their entry and operating costs. These positions map in predictable ways to the ambiguous economics regarding innovation in the network or the edge, although such clear positions tend to become muddled as companies become larger and interact more closely with ISPs (such as Netflix, which has entered into several individual interconnection agreements to address streaming degradation) or as they become more diversified (such as Google, which is aligned with ISPs on other core business issues and has reduced its direct participation on net neutrality over time). Furthermore, while traditional telecommunications companies have typically engaged with much greater intensity on communications policy issues—and therefore have cultivated greater experience and knowledge on both process and substance—they are among the least popular companies in the United States. Many edge providers, on the other hand, have strong brand loyalty and customer appeal, and the start-up sector holds a special appeal in the United States for its connections with economic mobility, economic growth, opportunity, and disruptive innovation.

This does not mean that partisanship and regulatory capture are absent from the net neutrality debate; corporate interests continue to dominate much of the substantive discussion on both sides of the issue, through both *ex parte* agency interactions and powerful industry lobbying association intermediaries. But the conflict does have several important implications for the nature of advocacy efforts. First, it muddles the regulatory environment by making it more politically untenable to offer industry-favoring regulations—of any kind—without solid analysis and reasoning. Second, it increases the general amount of financial and other resources available to advocacy organizations, and therefore broadens their ability to engage in economic and noneconomic aspects of the debate, in public outreach efforts, and in conceiving and articulating noneconomic value sets. Finally, to the extent that commercial actors taking oppositional stances cancel out each other's claims about commercial harm, the conflict perpetuates the idea of economic ambiguity and reemphasizes a role for alternative values.

Importance of Noncommercial Activity Online

Even in the presence of competing corporate interests, an economic frame could still dominate in the absence of a compelling alternative set of narratives. However, the Internet provides no shortage of competing value sets. Without going into an exhaustive analysis of the history of Internet applications or of recent expansions in the scope of digital engagement, it is worth mentioning two significant, interrelated developments that provide substantial alternative sources of value online.

First, as the Internet has matured following its privatization, commercial applications have certainly thrived, but so too have noncommercial applications. In fact, much of the value of the Internet arises from such noncommercial sources, ranging from peer-produced information commons such as Wikipedia and various software repositories to niche content sites and discussion forums (Benkler, 2006). Thus, to the average Internet user, the idea that commercial concerns should dominate the discussion of net neutrality—that is, that new applications can thrive only through novel commercial arrangements between edge providers and network operators—conflicts with their actual experiences online.

Second, although the Internet was always a two-way communication medium, its interactive nature has now become remarkably robust, blurring the distinction between digital production and consumption. Almost all Internet users produce content and share it online, whether via blogging, participating in online discussion forums, posting videos, or using social networking sites. Thus, “mass self-communication”—consisting of self-generated, self-directed, and self-selected messages that nevertheless have a potential worldwide reach (Castells, 2007, 2009)—has become the default mode of communication online, and the sharp distinction drawn by the FCC between residential broadband consumers and edge providers clashes with a more murky reality. In fact, this capability for citizen production of information may be the biggest generator of value on the Internet through its ability to unequivocally increase personal autonomy (Benkler, 2006).

Further emphasizing these trends are several social phenomena. Many in the United States continue to harbor a corporate distrust instigated by the 2008 financial crisis and embodied most notably in the Occupy movement. This has strained customer–corporate relations, particularly in areas such as finance and telecommunications, where many users do not feel they have the option of disengagement. There are similar concerns about the corrupting role of corporate money in electoral processes given recent court decisions and the complicity of telecommunications companies in recent revelations of U.S. mass electronic surveillance. Because such “perceived complicity between the financial elite and political elite” emphasizes the importance of the “autonomous capacity to communicate and organize” (Castells, 2012, p. 21) via electronic means, both pro- and anti-net neutrality arguments assume a greater importance (whether the framing is, respectively, freedom from corporate rent seeking or from a government takeover of a well-functioning private communication ecosystem).

Net neutrality thus has a large natural constituency that is directly affected by regulatory decisions. Although this in itself may lead to only limited spontaneous self-organization and engagement, it offers advocacy groups strong, compelling narratives through which to activate citizens and channel their attention. In fact, many users were primed by their daily reliance on an open Internet so strongly

that they could easily be recruited to actively participate by grassroots outreach or satirical comedy shows. In this way, the citizenry becomes an important constraining force on any agency decision, supplementing more individually powerful voices in their concerns about paid prioritization arrangements.

Implications for Increasing Public Democratic Participation

Net neutrality is hardly unique in its implications for multiple dimensions of social policy. All regulatory decisions impact several societal outcomes simultaneously. However, this presents regulators with a pragmatic problem. When regulatory issues are framed in purely economic terms, the analysis—even though incomplete—is tractable, because policy makers can assess impacts in comparable dollar terms. However, social concerns often cannot be explicitly valued and are typically incommensurable, and thus require explicit trade-offs to be made about the desired state of the world. Moreover, moving beyond a singular economic frame means that the concept of efficiency can no longer be equated with Marshallian surplus and cannot provide policy guidance; efficiency is a universal good that gives little information about actual value choices being made (le Grand, 1990).

It is instructive to think of each policy decision as a choice between different bundles of outcomes. Because most people are willing to make substitutions between various values at stake—there are few truly absolutist positions, in which one particular value is nonnegotiable (le Grand, 1990)—policy making is essentially a negotiation process involving explicit trade-offs among different values. But whereas many of these values remain latent in a typical regulatory proceeding due to the dominance of economism, in net neutrality, economic ambiguity and robust alternative value sets allow many of these values to be co-opted, magnified, and channeled by advocacy groups in a way that makes policy makers acutely aware of their existence and importance. An environment conducive to innovation and network investment is just one of these values; others include fostering knowledge production and dissemination, maintaining fluidity between consumption and production online, protecting free speech, addressing inequities in access to information, and facilitating democratic and civic participation.

Proponents of strong net neutrality rules favor a certain type of economic growth—innovation at the edge in services and applications—as well as greater, more equal access to the Internet. They do not discount that differentiation may facilitate novel services, but argue that the costs—reduced application diversity, a loss in valuable existing services, a less neutral platform for speech, and reduced vibrancy in the digital public sphere—are too high. Opponents of net neutrality are willing to make a different trade-off—one that favors maximizing network investment and a particularly strong form of deregulation even if that engenders higher consumer costs and increased inequality.

As expected, the FCC decision is already facing legal and legislative challenges, so the ultimate outcome of this swell in public participation may remain unknown for several years. But it does suggest an agenda for fostering robust citizen participation—and increased legitimacy—in other policy debates. In particular, it suggests that technology that lowers the barrier to political engagement is no substitute for the hard labor of advocacy organizations that recruit and sustain citizen engagement. Moreover, it offers at least one path toward strong engagement: Advocates should highlight economic ambiguity and uncertainty, opening a greater role for nonexperts to engage; recruit oppositional corporate actors to

further highlight economic ambiguity and reduce the risk of capture; and emphasize, to the extent possible, the full range of values at stake in a debate. In some areas, it may be possible to highlight earlier, less market-focused forms of government oversight as well as capitalize on more general distrust of concentrated power, both corporate and governmental. Economism may still be a valid method of analysis for certain topics, but for many complex issues it seems to impoverish not only the idea space in which debate occurs but, through its inherent exclusionary nature, the very ideals of democratic engagement.

References

- Benkler, Y. (2006). *The wealth of networks: How social production transforms markets and freedom*. New Haven, CT: Yale University Press.
- Castells, M. (2007). Communication, power and counter-power in the network society. *International Journal of Communication*, 1, 238–266.
- Castells, M. (2009). *Communication power*. Oxford, UK: Oxford University Press.
- Castells, M. (2012). *Networks of outrage and hope: Social movements in the Internet age*. Cambridge, UK: Polity.
- Economides, N., & Hermalin, B. E. (2012). The economics of network neutrality. *RAND Journal of Economics*, 43, 602–629.
- Farrell, J., & Weiser, P. J. (2003). Modularity, vertical integration, and open access policies: Towards a convergence of antitrust and regulation in the Internet age. *Harvard Journal of Law and Technology*, 17, 85–134.
- Faulhaber, G. R. (2007). Network neutrality: The debate evolves. *International Journal of Communication*, 1, 680–700.
- FCC (Federal Communications Commission). (2010, December 23). *Preserving the open Internet*. Report and Order, GN Docket 09-191. Washington, DC: Author. Retrieved from https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf
- FCC (Federal Communications Commission). (2014, May 15). *Protecting and promoting the open Internet*. Notice of Proposed Rule-Making, GN Docket 14-28. Washington, DC: Author. Retrieved from <https://www.fcc.gov/document/protecting-and-promoting-open-internet-nprm>
- FCC (Federal Communications Commission). (2015, February 26). *Protecting and promoting the open Internet*. Report and Order on Remand, Declaratory Ruling, and Order. GN Docket 14-28.

- Washington, DC: Author. Retrieved from
http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0403/FCC-15-24A1.pdf
- Green, M., & Nader, R. (1973). Economic regulation vs. competition: Uncle Sam the monopoly man. *Yale Law Journal*, 82, 871–889.
- Lannon, B., & Pendleton, A. (2014, September 2). *What can we learn from 800,000 public comments on the FCC's net neutrality plan?* Washington, DC: Sunlight Foundation. Retrieved from
<http://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan/>
- Le Grand, J. (1990). Equity versus efficiency: The elusive trade-off. *Ethics*, 100, 554–568.
- Peha, J. M. (2007). The benefits and risks of mandating network neutrality, and the quest for a balanced policy. *International Journal of Communication*, 1, 644–668.
- Pendleton, A., & Lannon, B. (2014, December 16). *One group dominates the second round of net neutrality comments.* Washington, DC: Sunlight Foundation. Retrieved from
<http://sunlightfoundation.com/blog/2014/12/16/one-group-dominates-the-second-round-of-net-neutrality-comments/>
- Pickard, V. (2013). Social democracy or corporate libertarianism? Conflicting media policy narratives in the wake of market failure. *Communication Theory*, 23, 336–355.
- Schultze, C. L. (1977). *The public use of private interest.* Washington, DC: Brookings.
- Stigler, G. (1971). The theory of economic regulation. *Bell Journal of Economics and Management Science*, 2, 3–21.
- Stiglitz, J. (1989). Markets, market failures, and development. *American Economic Review*, 79, 197–203.
- Verizon v. FCC, 740 F.3d 623 (2014).
- van Schewick, B. (2007). Towards an economic framework for network neutrality regulation. *Journal on Telecommunications and High Technology Law*, 5, 329–391.
- Wu, T. (2003). Network neutrality, broadband discrimination. *Journal on Telecommunications and High Technology Law*, 2, 141–176.