

NET NEUTRALITY IN 2023



by Greyson Gee and David Dunmoyer

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Net Neutrality in 2023

Greyson Gee and David Dunmoyer

Executive Summary

Since the term “net neutrality” was first introduced in 2003, this policy issue has entered the mainstream lexicon and consistently reemerged through numerous presidential administrations. Net neutrality, formally referred to as network neutrality, is broadly defined as the aim to ensure that all data is treated equally by internet service providers (ISPs) and governments ([Kenton, 2023](#)). This paper unpacks the specifics of this policy aim, analyzes longstanding federal regulation on the telecommunications sector, and briefly explores how such a policy would be implemented.

Due to the fiercely political nature of net neutrality, this paper also explores the arguments offered on both sides of the discussion, with a short analysis on the evolution of both the policy issue and technical components associated with ISP service delivery. Given the U.S. has experienced periods where ISPs have operated under net neutrality guidelines and without, this provides a natural experiment with associated findings. Such findings are crucial to separating the politics from the policy.

Finally, given this paper’s publication at a time when the Biden administration and the Federal Communications Commission (FCC) have revived the topic, the authors explore how the rationale and arguments in support of net neutrality have changed in the last decade.

What Is Net Neutrality?

Considered by some as the “third rail of broadband policy” due to its controversy, the term net neutrality has come to encompass the idea that internet providers must treat all internet traffic equally ([Fung, 2023](#)). While common sense and public statements indicate that both sides of the net neutrality debate are in support of an internet that is open and non-discriminatory to any websites or internet traffic, those in support of net neutrality wish to codify rules and empower the federal government to enforce such a vision ([Comcast, n.d.](#); [AT&T, n.d.](#); [Verizon, 2016](#)). As will be explored in depth later, those opposed to policy aims of net neutrality contend that such actions hamstring ISPs from innovating and delivering, unhampered, on their strong incentive to provide the most reliable and efficient service to their customers.

In September 2023, when FCC Chair Jessica Rosenworcel exhumed the issue of net neutrality after nearly a half decade of dormancy, she defined the issue as follows: “For everyone, everywhere, to enjoy the full benefits of the internet age, internet access should be more than just accessible and affordable. The internet needs to be open” (quoted in [Associated Press, 2023, para. 2](#)).

When removed from politics and the associated policy of net neutrality, this strikes many as an agreeable statement. But a brief background of Title II of the Communications Act of 1934 is required to understand what this statement means in practice.

Key Points

- Definitions of net neutrality make it seem to be a laudable policy goal, but the specifics of such a regulation precipitate a wholly different outcome.
- Internet speed, access, and affordability have increased under a free market regime more than under net neutrality.
- Proponents of net neutrality continue to cite concerns over the dire consequences of an open market, despite the data indicating otherwise.

The most effective lens to view the history of net neutrality in the United States is that of the two eras of classification of which internet service providers have been categorized—Title I and Title II of the Communications Act of 1934.

The Communications Act of 1934 (the Act) is a comprehensive regulatory framework for interstate and foreign communications conducted via wire and radio. The Act's impetus was multifold. Initially, in the prior decade, radio became a burgeoning enterprise with new radio stations being created at a breakneck rate. Although radio was already subject to regulations with the Radio Act of 1912 and the Radio Act of 1927—with the latter creating a temporary administrative body, the Federal Radio Commission—the Franklin Delano Roosevelt administration sought to better equip the FCC to operationalize the 1927 act's criterion to usher in “public interest, convenience, and necessity” ([Gobetz, n.d., para. 4](#)). Given concerns over unstandardized radio regulations emerging from the 1927 act and increased interference between stations amidst the rise of FM radio, a key catalyst for the Communications Act of 1934 was streamlined oversight.

The second major catalyst was a growing concern over how telecommunications monopoly¹ the Bell System might take actions contra to consumer welfare ([George, 1969](#)). Bell was a self-proclaimed, government-granted monopoly that amassed dominant market positions over both telecommunications services and equipment. During his *Annual Message to Congress* in January 1934, President Roosevelt asserted his administration's priorities in clear terms:

We seek the definite end of preventing combinations in furtherance of monopoly and in restraint of trade, while at the same time we seek to prevent ruinous rivalries within industrial groups which in many cases resemble the gang wars of the underworld and in which the real victim in every case is the public itself. ([Roosevelt, 1934, para. 12](#))

Other motives for the Act include technological advancements and the growing consumption of telecommunications by Americans. However, integral to understanding the current thrust for net neutrality is that, regardless of one's opinion of the Act, it sought to address what explicitly met the traditional economic definition of a natural monopoly in the telecommunications industry in the 1930s.

Title I of the Act is most notable for its creation of a new regulatory body tasked with promoting fair and equitable access to telephone and broadcasting services—the Federal Communications Commission ([Communications Act, 1934](#)). In essence, Title I laid the foundation for the FCC's purview as a regulator in the field of communications, streamlining prior regulatory bodies and making it the enforcer and executor of the Act.

Title II classifies the communications technologies outlined in the Act as common carriers and introduces enforcement tools and regulations to secure this aim ([Communications Act, 1934](#)). This common carrier distinction means that such technologies must be treated more akin to the U.S. Postal Service, in that they be made accessible to anyone who wishes to be a customer without discrimination and at reasonable rates ([Kokalitcheva, 2014](#)). The FCC is given full discretion to enforce this, and is able to fine companies “\$6,000 for each such offense and \$300 for each and every day of the continuance of such offense” ([Communications Act, 1934, Section 202\(c\)](#)). Mechanically, Title II enforces this by enlisting the Interstate Commerce Act's tariffing

¹ A natural monopoly emerges in a sector with high barriers to entry, a significant up-front cost burden, or such a significant economy of scale that effectively prevents emergent competition. These conditions may give rise to one dominant actor, which may take actions to directly advance its monopoly hold on the market in a sector or industry. It is often thought that telecommunications, utilities, railways, and the like are natural monopolies. However, Judge Richard Posner ([1968, p. 582](#)), an eminent law and economics scholar, has long argued that “it is rare that an entire industry is a natural monopoly.” Of Bell, he argued, “Even the Bell System, which comes close to monopolizing the telephone industry, is a federation of semiautonomous regional operating companies rather than a monolith” ([p. 574](#)).

A true natural monopoly is different than the more common government-granted monopoly, in which government grants preferential status or treatment to a private sector actor which then holds the sole dominant economic position in a given industry or market. While Posner viewed Bell as a federation rather than a monolith, Adam D. Thierer ([1994](#)) has emphasized the role government played in granting Bell an “unnatural monopoly” status:

The telephone monopoly, however, has been anything but natural. Overlooked in the textbooks is the extent to which federal and state governmental actions throughout this century helped build the AT&T or “Bell system” monopoly. As Robert Crandall (1991: 41) noted, “Despite the popular belief that the telephone network is a natural monopoly, the AT&T monopoly survived until the 1980s not because of its naturalness but because of overt government policy.” Indeed, a chronological review of the industry's development produces an indisputable conclusion—at no time during the development of the Bell monopoly did government not play a role in fostering a monopolistic system. ([p. 268-269](#))

provisions, making it mandatory that carriers disclose their rates to the FCC. Furthermore, carriers are severely limited in taking actions in accordance with strategic business goals, requiring FCC authorization before discontinuing or reducing service, for example ([Linebaugh, 2022](#)).

This notion of regulating services as common carriers is indeed the aim of net neutrality. Nebulous definitions of net neutrality aside, it ultimately comes down to the legal classification given to broadband internet service pursuant to the Act. Specifically, those who support net neutrality support regulating ISPs as common carriers by expanding Title II coverage to ISPs, to be enforced by the FCC. This would limit the autonomy of ISPs and require stronger deference to the FCC in operating their business and services. In essence, the debate precipitates the question: do we trust the free market to continue delivering its services in a non-discriminatory, equal manner, or is there a track record indicative of discriminatory practices that necessitates government intervention?

History of Net Neutrality in the United States

The term “net neutrality” was coined by Columbia University Law School professor Tim Wu ([2002](#)) in his essay, *A Proposal for Network Neutrality*. Wu argued that the actions of ISPs in the early 2000s surrounding usage restrictions on Virtual Private Networks (VPNs), equipment, and charges for certain types of applications would stifle innovation and interfere with the natural evolution of internet technologies. Wu identified these issues as falling into a category of non-permissible ISP discrimination, thus necessitating government regulation. This formed the basis of what we now recognize as the concept of net neutrality.

From the beginning of the internet, it was understood that access would be open and neutral. The earliest internet-related rulemaking actions of the FCC were oriented around the notion that access to the internet must be ubiquitous, its framework consistent, and that ISPs exist in a “minimal regulatory environment that promotes investment and innovation” ([FCC, 2002](#)).

The most effective lens to view the history of net neutrality in the United States is that of the two eras of classification of which internet service providers have been categorized—Title I and Title II of the Communications Act of 1934.

Comcast v. FCC

Before 2015, attempts to regulate ISPs were made under their classification as “information services” under Title I, which limited the FCC’s ability to regulate. In 2007, Comcast was found to have restricted BitTorrent, a peer-to-peer

Federal policymakers should recognize that without robust congressional action on this issue, there will continue to be regulatory oscillation that will only further inhibit growth, innovation, and expanded internet access for those Americans who need it most.

file-sharing protocol, since its users often required large amounts of internet traffic that threatened the stability of Comcast’s network ([Kumar, 2008](#)). In March 2008, Comcast and BitTorrent agreed to prevent throttling, and both parties agreed that Comcast would adopt a protocol-neutral approach and find different ways to manage internet traffic ([Carmack, n.d.](#)). *Comcast v. FCC* resulted in Comcast paying a \$16 million settlement with no admission of wrongdoing ([Cheng, 2009](#)).

In August 2008, after BitTorrent and Comcast’s dispute had come to a resolution without governmental interference, the FCC voted 3–2 to sustain a complaint against Comcast for throttling the BitTorrent file-sharing protocol. With this vote also came a ruling that required Comcast to end all similar throttling by the end of 2008, and required they disclose their network management practices within 30 days of the issued order ([FCC, 2008](#)). At the time, then-FCC Chairman Kevin Martin said that the order was intended to set a precedent and discourage other ISPs from engaging in similar behavior (quoted in [Hansell, 2008](#)). According to *The New York Times*, Martin argued, “We are preserving the open character of the internet. ... We are saying that network operators can’t block people from getting access to any content and any applications” (quoted in [Hansell, 2008](#)).

The U.S. Court of Appeals for the District of Columbia reviewed the actions of the FCC and found that the FCC exceeded its authority to regulate information services as stipulated under Title I. The court reasoned that “the [FCC] has failed to tie its assertion of ancillary authority over Comcast’s Internet service to any ‘statutorily mandated responsibility’” (*Comcast Corp. v. FCC, 2010, p. 36*). The decision was the first pertaining directly to network management and ISPs. After the order was struck down, FCC commissioners vowed to continue fighting for net neutrality.

According to a study undertaken by BroadbandNOW, innovation, burgeoning economies of scale, and market competition amongst service providers have driven the cost of broadband internet plans down consistently from 2016 through 2022.

2015: Open Internet Order

As time progressed, it became clear to net neutrality proponents that the only viable path for the FCC to regulate ISPs was for the FCC to reclassify them as Title II telecommunications services. This was accomplished at the directive of then-President Barack Obama, who, in November 2014, recommended that the FCC take this path ([Wyatt, 2014](#)). By January 2015, the FCC announced it would vote on a preliminary ruling to define ISPs as Title II common carrier telecommunication services. On February 25, 2015, the FCC voted to reclassify by a vote of 3–2, thus opening ISPs to regulation that had not been possible under Title I ([FCC, 2015](#)).

The Open Internet Order of 2015 enabled the FCC to regulate ISPs in ways that were not possible under their Title I classification. For example, Sections 201 and 204 of Title II empower the FCC to prohibit prices that are deemed to be “unjust” and also set rates for ISPs when their rates are determined to be “unjust” ([Communications Act, 1934, p. 36](#)). These sorts of regulations could be considered reasonable when dealing with the original object of Title II, telephone networks. However, when dealing with broadband service providers, this sort of blanket approach leads to inefficiencies and disincentivizes innovation and investment, as will be discussed in the section below on the impact of net neutrality policies on ISPs.

2017: Restoring Internet Freedom

When President Donald Trump was elected in 2016, it was expected that his administration would reverse the Open Internet Order of 2015, which was a major policy priority of Republicans in the 2016 election cycle ([LaFrance, 2016](#)). To accomplish this, Trump moved shortly after his inauguration to appoint then-FCC Commissioner Ajit Pai as chairman of the FCC. Pai, who was nominated to fill a Republican commissioner seat by President Obama in 2015, was a staunch opponent of the 2015 Open Internet Order ([FCC, 2017a](#); [Kang, 2017](#)) Citing free market

principles, and a desire to aid small ISPs to spur growth and innovation, Pai ordered that ISPs be reclassified under Title I and that the regulations enacted by the previous administration be reversed ([FCC, 2018](#)).

In the “Restoring Internet Freedom” (RIF) ruling, the FCC argued that the Title II classification order of 2015 caused the nation’s 12 largest ISPs to reduce capital expenditures by \$3.6 billion, a 5.6% decline relative to 2014 levels ([FCC, 2017b](#)). After the public comment period, the FCC voted on the final implementation of the Restore Internet Freedom order on December 14, 2017, by a 3–2 margin ([FCC, 2017c](#)). In the period between the RIF order and the end of the Trump administration, Congress attempted in both 2018 and 2019 to modify the RIF order by voting to codify the 2015 Open Internet Order into law. Each attempt failed, which prompted the Biden administration to seek to restore the net neutrality regime ([CRS, 2022](#)).

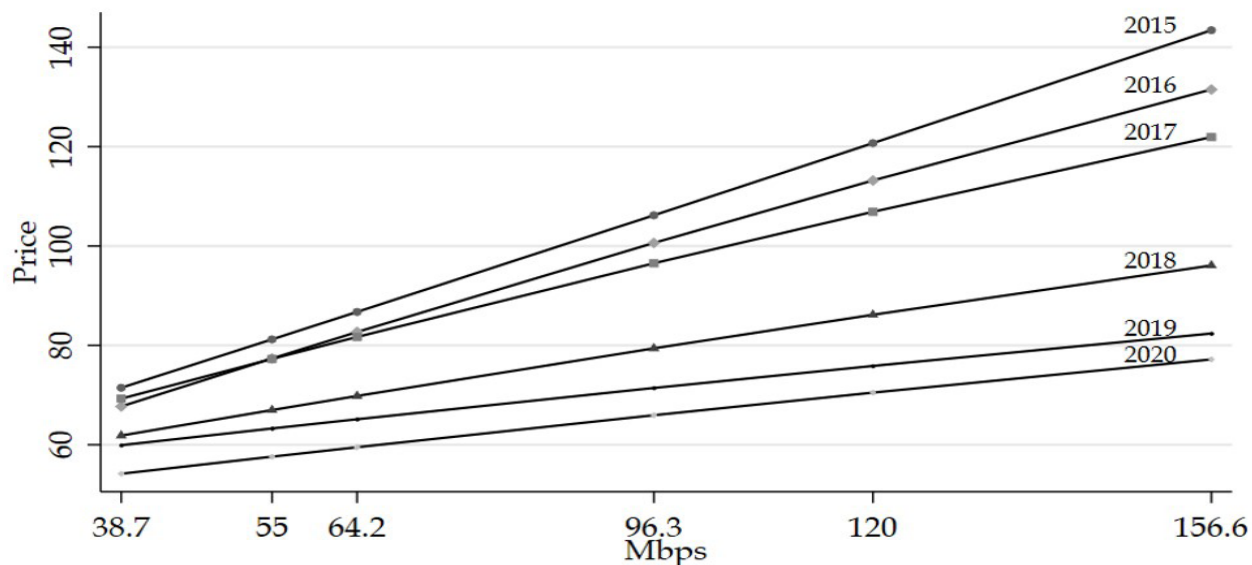
2021: The Biden Administration

When President Biden took office in January 2021, it was expected by many net neutrality advocates that his administration would reverse the Restoring Internet Freedom order from the Trump FCC ([Reardon, 2021](#)). When Ajit Pai announced his departure from the commission that same month, Biden named Jessica Rosenworcel, an Obama appointee, as acting chairwoman. Chairwoman Rosenworcel’s previous statements regarding net neutrality served as an indication as to the direction that the commission would take ISP regulation ([Amiri, 2019](#)).

On July 9, 2021, in his first policy action regarding net neutrality, President Biden signed Executive Order 14036, “Promoting Competition in the American Economy.” This order laid out several initiatives by the administration on market competition, healthcare, agriculture, and technology. This order also included a provision to adopt, “through appropriate rulemaking ‘Net Neutrality’ rules similar to those previously adopted under title II of the Communications Act of 1934” ([Exec. Order No. 14036, 2021, Sec. 5\(l\)\(i\)](#)).

The resignation of Pai in 2021 left an even Republican-Democrat split on the commission, thus chilling any further rulemaking for the next few years. The momentum shifted in favor of net neutrality regulation with the recent confirmation of Anna M. Gomez to the commission in September 2023 ([Robertson, 2023](#)). If the historic democratic party position on this issue is any indication, it is now only a matter of time before ISPs are reclassified under Title II and the net neutrality regulatory scheme returns.

Figure 1
Broadband Price-Speed Relationship by Year



Note. Data from *Are Broadband Prices Declining? A Look at the FCC's Price Survey Data* by G. Ford, Phoenix Center for Advance Legal & Economic Public Policy Studies, October 26, 2020 (<https://phoenix-center.org/perspectives/Perspective20-07Final.pdf>).

Impact on Internet Service Access

Given that ISPs operating in America have provided their services both with and without net neutrality regulations in place, the variance in federal ISP policy regimes provides ideal conditions to compare the policy's impact on internet service over time.

Although proponents of net neutrality contend that ISPs lack the incentive structure to provide increasingly accessible and consumer-friendly options, the data tell a different story. According to a study undertaken by BroadbandNOW (Shevik, 2023), innovation, burgeoning economies of scale, and market competition amongst service providers have driven the cost of broadband internet plans down consistently from 2016 through 2022.² The study found that:

- For internet plans with download speeds ranging from 25 to 99 megabits per second (Mbps), the average price decreased by \$8.80 or 14%.

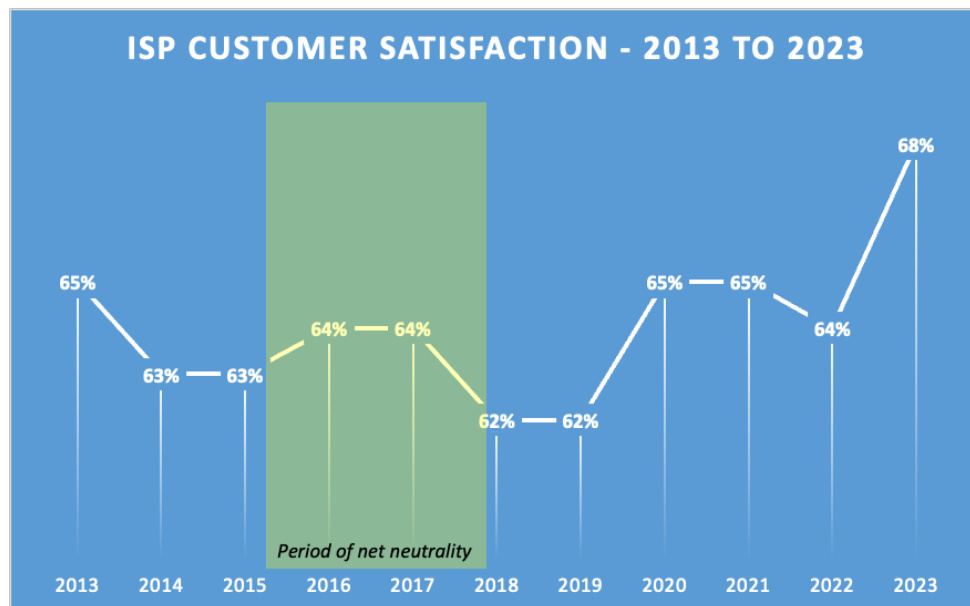
- For internet plans with download speeds ranging from 100 to 199 Mbps, the average price decreased by \$32.35 or 35%.
- For internet plans with download speeds ranging from 200 to 499 Mbps, the average price decreased by \$34.39 or 35%.
- For internet plans with download speeds equal to or greater than 500 Mbps, the average price decreased by \$59.22 or 42%.

Furthermore, as illustrated by **Figure 1**, price reductions have not only remained consistent, but cost reductions were more pronounced following the reversal of net neutrality during the Trump administration in 2017.

Another consideration is whether there has been a dip in ISP customer satisfaction surrounding net neutrality policy regime changes. Initially, it is important to note that customer satisfaction with ISPs over time—relative to other sectors tracked by organizations like the American

² Of note, this study evaluates the cost of broadband just prior to the reversal of net neutrality through a period where ISPs were not regulated as common carriers.

Figure 2
Customer Satisfaction With ISPs from 2013 to 2023



Note. Data from *Access Competitive Benchmarking for the Largest ISPs*, American Customer Satisfaction Index, n.d. (<https://www.theacsi.org/industries/telecommunications-and-information/internet-service-providers/>) and authors' calculations.

Customer Satisfaction Index (ACSI)—has remained at the lower end of such indexes, irrespective of policy changes at the state and national level (Paul, 2023). However, as is illustrated in **Figure 2** (next page), customer satisfaction levels over time have remained relatively stagnant, with a slight upward trend and minimal shifts surrounding federal net neutrality policy changes. Perhaps most importantly, however, the FCC's call to reintroduce net neutrality policies coincides with the highest ISP customer satisfaction in the history of ACSI's index, following the industry operating in a six-year period of no net neutrality framework in place.

Finally, Europe provides an insightful case study. While the U.S. has vacillated between common carrier regulation of ISPs and basic transparency provisions, the European Union has had a net neutrality law in effect since 2015, coined the Open Internet Regulation (Regulation [EU] 2015/2120: 2015). Noting the absence of comprehensive research and quantitative analysis on the financial and innovation effects of net neutrality on service providers, European researchers published a thorough quantitative review of net neutrality in a 2022 study in the *European Journal of Law and Economics* (Briglauer et al., 2022). Using an Organisation for Economic Co-operation and Development (OECD) panel data set for 32 countries to provide the first estimation results on the causal impact of

net neutrality on new high-speed infrastructure investment by service providers, researchers found:

Despite substantial direct and indirect costs related to network neutrality regimes, there is no supportive evidence so far for the central claims of net neutrality proponents. In this paper, we focus on a specific effect that net neutrality may have on ISPs' incentives to invest in high-speed broadband networks. More specifically, we provide first results on the causal impact of network neutrality regulations on fiber-based network investment by ISPs. Our empirical analysis finds that network neutrality regulations exert a significantly negative and substantial impact on fiber investments. (p. 552)

Further, the researchers ultimately conclude that “net neutrality regulations seriously impact the deployment of general-purpose broadband infrastructures which generate considerable externalities across a wide range of sectors of the economy” (Briglauer et al., 2022). As stressed by the authors, these findings stem from the most comprehensive quantitative analysis of existing data to date. Of the 32 OECD countries, 30 have implemented net neutrality regulations during the analyzed period from 2000 to 2021. These net neutrality regulations served as the primary explanatory variables in the study, compared against the dependent variables of fiber investment and subscription.

Thus, this study was conducted to determine what effect such policies have on incenting ISPs to invest in new fiber-based network infrastructure.

Why Net Neutrality Is Reemerging

When considering the reemergence of net neutrality regulation, it is fitting to analyze the motives of its proponents. The stated aim of net neutrality is to provide reasonable regulation to ensure that the internet remains “open.” This was the asserted motivation of the 2015 Open Internet Order and is the basis of most rhetoric in favor of net neutrality regulation.

However, given the increased access the FCC would have to the internet provider and customer information, the federal government could leverage this as another vector of surveillance on individuals, similar to what was done under the PATRIOT Act before the legislation sunset in 2020 ([American Civil Liberties Union, n.d.](#)). At a time when consumers are demanding enhanced digital privacy ([Bloom, 2022](#)), the FCC has yet to demonstrate that guardrails will be set up to prevent abuse or that their net neutrality regulation will not be used as a tool for surveillance or digital monitoring.

As of October 2023, the FCC has voted to begin the rulemaking process to reinstate net neutrality by reclassifying ISPs as Title II telecommunication services. With the Biden nomination of Anna M. Gomez in September 2023 tilting the balance of power toward Democrat appointees, it is almost guaranteed that the FCC will return ISPs to their Title II classification, and in doing so, reinstate the various regulations that came with it. Federal policymakers should be aware of this and recognize that without robust congressional action on this issue, there will continue to be regulatory oscillation that will only further inhibit growth, innovation, and expanded internet access for those Americans who need it most.

Shifting Justifications for Title II Classification

Politicians and regulators have substantially altered their reasoning for the necessity of net neutrality since the Obama-era Open Internet Order ([FCC, 2023](#)). Before 2015, the rhetoric of those in favor of net neutrality was oriented around the impending collapse of the internet. It was posited that if the FCC did not reclassify ISPs, thus subjecting them to more invasive regulation, free and fair use of the internet would cease to be a reality. One vocal champion of net neutrality, Sen. Chuck Schumer (D-NY), advocated for the passage of the “Save the Internet Act,” a name which suggests that internet services were in great danger after the

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regulatory reversal of the Trump-era FCC. Sen. Schumer harkened back to the rhetoric of 2015 by saying:

We must keep the internet free and open to everyone: from the students writing their theses to the **consumers purchasing their holiday gifts** [emphasis added] to the grandparents talking to their family over Skype all the way to the startup company operating out of its founder’s basement. ([Office of Senate Majority Leader Chuck Schumer, 2017, para. 6](#))

These concerns did not come to fruition. As discussed above, in the absence of Title II regulation, ISPs increased their infrastructure investment and lowered consumer costs. This outcome does not match the rhetoric of net neutrality proponents in recent years. In continued defense of their policy objectives, a new rationale has emerged, with the Biden administration now arguing that national security threats necessitate FCC oversight of ISPs.

From an Open Internet to a Looming National Security Threat

As head of the FCC, Chairwoman Jessica Rosenworcel started the process of shifting justifications for ISP reclassification from concern for the continuing existence of the internet to an explicit threat to national security. In a fact sheet posted by the Office of the Chairwoman, the FCC said that outside of protecting the open nature of the internet, reclassification would also equip the FCC “and its national security partners [with] the tools needed to defend our networks from potential security threats” ([FCC, 2023](#)). She doubled down in another statement: “while the FCC has acted on a bipartisan basis to secure our communications networks against companies controlled by hostile foreign governments, the lack of specific authority over broadband leaves open a national security loophole” ([FCC, n.d., p. 1](#)). Never before had the FCC claimed that an unregulated internet was a threat to national security.

Recent history has demonstrated that federal data collection programs often run awry of their original objectives. For example, take the Department of Homeland Security's Cybersecurity & Infrastructure Security Agency (CISA). Signed into law in November of 2018, CISA aimed to streamline and bolster collaboration between federal agencies and private sector organizations working to address emerging cybersecurity threats. In 2023, it was made known through the "Twitter Files" and independent reporting that CISA had colluded with Big Tech, academia, and other powerful institutions to censor speech and surveil Americans on social media ([Judiciary Committee, 2023](#)). Mission creep and regulatory capture have emerged from federal efforts to enhance cybersecurity preparedness through regulation.

Big Tech and ISP Regulation

Another aspect of shifting justifications for ISP regulation is rooted in the fact that Big Tech has a pecuniary interest in having ISPs regulated. Companies such as Google state concern about ISPs throttling their content and are adamant that the FCC step in to protect their services to preserve their market dominance ([Layton, 2023](#)). However, in recent years, especially in the aftermath of the COVID-19

pandemic, the public has learned about the lengths to which social media executives went to censor speech about current events, often with the explicit direction and endorsement of the federal government ([Taibbi, 2023](#)). Given these events, it is a reasonable concern that the FCC would be used as an additional tool to suppress and restrict protected speech.

Conclusion

Innovation and advancements in the internet services market continue to make the internet more accessible, affordable, and non-discriminatory. While net neutrality proponents claim the U.S. needs regulation to work toward this goal, existing bodies of literature indicate the market is far better equipped to guide us down this path rather than onerous regulations that introduce distortions to the marketplace. And while the arguments employed by net neutrality proponents have changed as the ISP market has only evolved further to increase consumer welfare, their strategy remains the same: catastrophizing. Before getting sucked into the vortex of unsubstantiated talking points and comments in the net neutrality debate, it is crucial that the available data and quantitative assessments drive policy decisions. ★

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