

# E-RULEMAKING AND DEMOCRACY

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*E-rulemaking—the use of digital technologies in forming regulations—has democratized the highly technical, highly consequential regulatory process, breathing life into the two core democratic promises of the notice-and-comment process that for decades languished in crowded docket rooms in Washington. First, e-rulemaking has enhanced democracy in the participatory sense. By making rulemaking materials broadly available, e-rulemaking enables public participation on a scale that was unthinkable when notice-and-comment rulemaking was a paper-based process. This in turn allows agencies to use public comments as a gauge of public opinion, a political temperature check, a tool to inform their understanding of “capital-P” Politics—the sort of media-sensitive, partisan political pressure that touches so much of modern governance. Second, e-rulemaking has enhanced democracy in the epistemic sense. Digital technologies allow agencies to harness the dispersed information power of the American people in order to form more substantively sound regulations that are informed by “small-p” politics—the sort of empathetic, objective, and inquisitive set of values that underlie the very purpose of administrative agencies as depoliticized institutions bringing expertise to bear to improve the general welfare of an increasingly complex society.*

*In the summer of 2014, e-rulemaking enabled the FCC to receive and process an unprecedented 3.9 million public comments on its proposed net neutrality rules. In February 2015, the FCC promulgated the final net neutrality rules, which were upheld in total by the United States Court of Appeals for the District of Columbia Circuit in June 2016. The net neutrality rulemaking illustrates how the Internet has enabled the participatory postulate of notice-and-comment rulemaking, long relegated to the realm of democratic potential, to become a democratic reality. Yet the rulemaking also indicates that the less stringent cost-benefit analysis requirements placed on independent agencies like the FCC make them more prone to embrace e-rulemaking’s participatory, as opposed to epistemic, democratic values. For the experiment of e-rulemaking to succeed in not only narrowing the juncture between the public and the regulatory process, but also in capturing the widely held information power of the American people in order to facilitate the kind of depoliticized decisionmaking that leads to better regulations and ultimately enhances social welfare, the epistemic democratic capacity of e-rulemaking must be protected*

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*vigilantly. Rigorous empirical requirements like those placed on executive agencies may be the best guarantor of those epistemic democratic values.*

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## INTRODUCTION

From May 15, 2014 to September 15, 2014, members of the public submitted 3.9 million comments to the FCC on the agency's "net neutrality" or "Open Internet" rules.<sup>1</sup> The number of comments submitted in the net neutrality rulemaking was unprecedented—both within the FCC<sup>2</sup>

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1. See Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,742 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, and 20); Gigi A. Sohn, *FCC Releases Open Internet Reply Comments to the Public*, FCC OFFICIAL BLOG, (Oct. 22, 2014, 4:07 PM), <http://www.fcc.gov/blog/fcc-releases-open-internet-reply-comments-public>.

2. See Sohn, *supra* note 1 ("It is now well known that the FCC's Open Internet docket

and in the history of the administrative state.<sup>3</sup>

Record participation in the net neutrality rulemaking was made possible by the innovation of electronic rulemaking (e-rulemaking), which allows agencies to use digital technologies to develop regulations.<sup>4</sup> Over the past decade, federal agencies have come to use e-rulemaking to inform regulatory processes by making rulemaking materials—including proposed rules, scientific and technical support, and public comments—widely accessible, enabling diverse and effective public participation.<sup>5</sup> The success of e-rulemaking thus depends on the proliferation of personal computers and Internet access—technological developments that, incidentally, lay at the heart of the FCC's record-breaking rulemaking.

At first blush, the unprecedented number of public comments submitted in the net neutrality rulemaking seems like an unequivocal victory for democratic participation in regulatory processes. Yet two distinct democratic ideals are embodied in e-rulemaking—two concepts that mirror Congress's reasons for creating the paper-based version of notice-and-comment rulemaking in 1946.<sup>6</sup> First, e-rulemaking has the potential to enhance democracy in the *participatory sense*. Digital technologies enable public participation on a scale that was unthinkable when notice-and-comment rulemaking was a paper-based process. The participatory view of e-rulemaking embraces the ability of digital tools to enable sheer quantities of public comments.<sup>7</sup> It values the content of the comments as a useful

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is the most commented upon rulemaking in the agency's history.”); see also Nancy Scola, *Inside the Collapse of the FCC's Digital Infrastructure—and the Rush to Save It*, WASH. POST (Sept. 24, 2014) (noting the strain caused by the record number of comments), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/24/inside-the-collapse-of-the-fccs-digital-infrastructure-and-the-rush-to-save-it/>.

3. A thorough review of record-breaking rulemakings reveals that no agency received more than 3.9 million public comments on any single rulemaking before the net neutrality rulemaking. See, e.g., Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 127 (2012) (referencing the 2.1 million comments the EPA received on a greenhouse gas rule as the record for public participation); Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1345–61 (2011) (listing several instances of widespread participation in e-rulemaking, the highest of which was the 1.6 million comments submitted to the U.S. Department of Agriculture on its roadless area rules).

4. See COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING & CYNTHIA R. FARINA, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING* 3 (2008) [hereinafter *ACHIEVING THE POTENTIAL*], <http://scholarship.law.cornell.edu/facpub/1237>.

5. See *id.* at 8–31.

6. See Cass Sunstein, *Democratizing Regulation, Digitally*, DEMOCRACY J. (Fall 2014), <http://www.democracyjournal.org/34/democratizing-regulation-digitally>.

7. See Mendelson, *supra* note 3, at 1380 (arguing that agencies ought to more seriously consider the large volumes of comments they receive, even when those comments amount to simple statements of preference or value); Farina et al., *supra* note 3, at 128–29 (noting that

gauge of public opinion, a political temperature check that can and should impact the rules an agency ultimately adopts.<sup>8</sup> Second, e-rulemaking has the potential to enhance democracy in the *epistemic sense*. E-rulemaking allows technocrats drafting highly consequential regulations to harness the widely dispersed information power of the American people.<sup>9</sup> It enables regulators to consider a broader array of facts and diversity of experiences in formulating regulations. Under the epistemic view, the goal of e-rulemaking “is emphatically not to conduct an opinion poll, to take some kind of political temperature, to see how much applause a proposal is able to attract, to defuse public opposition,” but rather “the goal is overwhelmingly substantive, in a sense even Hayekian—to fill gaps in knowledge and to see what might have been overlooked.”<sup>10</sup>

While the net neutrality public comments garnered intense media coverage, no publicly available legal scholarship has yet pursued the question of what the unprecedented public participation in the net neutrality rulemaking shows about the successes and challenges of e-rulemaking in the modern day.<sup>11</sup> This Article adopts the net neutrality rulemaking as a case study in an effort to understand that question. Part I explores the creation of the notice-and-comment rulemaking process when it was first innovated and envisioned as a paper-based system. Part II provides an overview of the creation and evolution of e-rulemaking,

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“technology and participation are no longer linked, but fused: technology instantiates participation. And with this fusion, technology becomes political. . . . In this techno-political environment, participation is axiomatically good, and more participation is necessarily better”).

8. See Mendelson, *supra* note 3, at 1556–71; Nina A. Mendelson, *Should Mass Comments Count?*, 2 MICH. J. ENVTL. & ADMIN. L. 173, 181 (2012) (noting that “agency officials might pay attention to large volumes of comments, for example, to help gauge public resistance or anticipate significant opposing public views”).

9. See Farina et al., *supra* note 3, at 129, 132–33, 156 (urging agencies to eliminate the “equal treatment norm” in considering public comments and to focus on “information quality” and “deliberativeness of preference formation”).

10. See Sunstein, *supra* note 6 (“Democratization of the regulatory process, through public comment, has an epistemic value. It helps to collect dispersed knowledge and to bring it to bear on official choices.”); see also Farina et al., *supra* note 9, at 137 (noting that ideas expressed in mass comments “may be good enough for electoral democracy, but they are not good enough for rulemaking, even when rulemaking is heavily laden with value choices”).

11. See Edward Wyatt, *Net Neutrality Comments to the F.C.C. Overwhelmingly One-Sided, Study Says*, N.Y. TIMES, BITS BLOG (Sept. 18, 2014, 4:36 PM), <http://nyti.ms/1DmgcPR>; Alex Wilhelm, *FCC Confirms that Nearly 4M Net Neutrality Comments Were Submitted by the Public*, TECHCRUNCH (Dec. 23, 2014), <https://techcrunch.com/2014/12/23/fcc-confirms-that-nearly-4m-net-neutrality-comments-were-submitted-by-the-public/>; Elise Hu, *3.7 Million Comments Later, Here's Where Net Neutrality Stands*, NAT'L PUB. RADIO (Sept. 17, 2014, 3:12PM), <http://n.pr/1qfO5ax>.

highlighting distinctions in the requirements placed on executive agencies and independent agencies. Part III offers a deep content dive into the FCC's net neutrality rulemaking and explores the substance conveyed in the public comments. Part IV derives lessons of experience from the net neutrality rulemaking. The Article concludes that public comments generated through e-rulemaking mattered tremendously to the FCC in forming its ultimate regulations. It notes, too, that *how* public comments mattered to the agency included both participatory and epistemic values. The net neutrality case study indicates that the less stringent cost-benefit analysis requirements likely make independent agencies like the FCC more prone to embrace e-rulemaking's potential to enhance democracy in the *participatory sense*, while the more rigorous cost-benefit analysis requirements incentivize executive agencies to embrace e-rulemaking's potential to enhance democracy in the *epistemic sense*.

#### I. NOTICE AND COMMENT RULEMAKING: BEFORE THE INTERNET

The public has had the opportunity to comment on proposed federal regulations since the innovation of notice-and-comment rulemaking under the Administrative Procedure Act (APA) in 1946.<sup>12</sup> The APA was Congress's response to the tremendous growth of the regulatory state during the New Deal era.<sup>13</sup> Its strictures were designed to broker a compromise between critics of the regulatory state, who were skeptical of the administrative apparatus's conformity with the Constitution, and supporters of the regulatory state, who advocated for agencies' technical expertise as a necessary response to the problems of an increasingly complex society.<sup>14</sup>

Notice-and-comment rulemaking was the APA's single most significant invention.<sup>15</sup> Before the APA, congressionally created regulatory agencies were able to issue "rules" in the form of decisions resulting from adjudication between regulated parties, which would bind future regulated

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12. See generally, Administrative Procedure Act (APA), 5 U.S.C. §§ 551–59 (2012) (establishing administrative procedures for agencies).

13. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1938).

14. See Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452–54 (1986); see also Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 448 (1987); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG. 180 (1999).

15. See 5 U.S.C. § 553 (2012); see also STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES*, 519 (7th ed. 2011); KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 65 (1969) (calling informal rulemaking "one of the greatest inventions of modern government").

parties.<sup>16</sup> Congress's decision to give agencies rulemaking authority through notice-and-comment processes was thus a novel democratic guarantee. Congress required regulatory agencies to give all "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and to consider "the relevant matter presented."<sup>17</sup> Congress also required agencies to incorporate a response to the public's comments in a concise statement along with the final regulation.<sup>18</sup> Over time, federal courts gave teeth to the APA's statutory language, requiring agencies to explain their decisionmaking process by teasing out and summarizing major policy issues raised in the comments and explaining the agency's course of action in light of its statutory obligations.<sup>19</sup>

The growth of the regulatory state during the New Deal meant that unelected administrative rulemakers were exercising significant and growing lawmaking authority—an authority derived from a constitutionally uneasy blend of legislative, adjudicative, and executive powers. By allowing the public to weigh in on proposed regulations, Congress's innovation of notice-and-comment rulemaking thus introduced two distinct democratic checks on the federal regulatory state. First, it provided a democratic check on unelected technocrats who were otherwise only indirectly accountable to the American people.<sup>20</sup> Second, requiring public comments on proposed regulations enhanced the information available to regulators.<sup>21</sup> By harnessing the tremendous information power of the American people, notice-and-comment rulemaking prevented regulators from making costly mistakes and improved the quality of regulations by exposing rulemakers to a diversity of information held by industry insiders as well as members of

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16. See Cary Coglianese, *E-Rulemaking: Information Technology and Regulatory Policy*, *New Directions in Digital Government Research* 5 (2004) [hereinafter Regulatory Policy Program Report], [http://www.ksg.harvard.edu/press/E-Rulemaking\\_Report.pdf](http://www.ksg.harvard.edu/press/E-Rulemaking_Report.pdf).

17. See 5 U.S.C. § 553(c).

18. *Id.*

19. See *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987) ("At the least, such a statement should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve."); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) ("To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether. For unless there is common ground, the comments are unlikely to be of a quality that might impress a careful agency.").

20. See 5 U.S.C. § 553(c); see also CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 167 (4th ed. 2010).

21. See 5 U.S.C. § 553(c).

the general public.<sup>22</sup>

In practice, however, the APA's democratic promises fell short. Until the early 1990s, only Beltway insiders made use of the APA's procedural constraints on the administrative state. Before the Internet, members of the public could access proposed and final regulations only by viewing paper copies of the Federal Register and Code of Federal Regulations available at select libraries.<sup>23</sup> And rulemaking "dockets"—an umbrella term encompassing all materials related to a rulemaking, including proposed and final rules, public comments, and scientific and technical findings—sat in file cabinets in vast, disorganized docketing rooms in Washington D.C.<sup>24</sup> Because of the physical impediments to accessing necessary materials, before the Internet, informed participation required physical travel to a labyrinth docketing room in Washington D.C.<sup>25</sup> It is unsurprising, then, that little empirical research is available on public participation in notice-and-comment rulemaking for the first five decades of the APA.<sup>26</sup> Three studies analyzing participation across multiple agencies in 1989, 1992–1994, and 1996, found that the median number of comments submitted for each rule was twenty-five, twelve, and thirty-three, respectively.<sup>27</sup> In a study of fourteen rulemakings from 1996, the greatest number of comments submitted on a single rulemaking was 2,250.<sup>28</sup>

Nearly half a century after the APA's enactment, two changes transformed notice-and-comment's potential from theory to reality: (1) the growing prevalence of notice-and-comment rulemaking as the basis for regulatory activity and (2) the Internet.<sup>29</sup> In large part due to increasingly stringent judicial review, agencies largely shifted from "formal" adjudicatory procedures to "informal" notice-and-comment rulemaking processes.<sup>30</sup> As agencies responded to legal incentives to utilize notice-and-comment rulemaking, the Internet and the proliferation of personal computers made accessing notices of proposed rulemaking and submitting comments a viable option for the general public. The vast technological

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22. See Sunstein, *supra* note 6.

23. See KERWIN & FURLONG, *supra* note 20, at 10–22.

24. See Regulatory Policy Program Report, *supra* note 16, at 10.

25. *Id.* at 10–11; see also BREYER ET AL., *supra* note 15, at 570; ACHIEVING THE POTENTIAL, *supra* note 4, at 21–22.

26. See KERWIN & FURLONG, *supra* note 20, at 189.

27. See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 950 (2006).

28. See *id.*

29. See Regulatory Policy Program Report, *supra* note 16, at 5; see also Stuart W. Shulman et al., *Electronic Rulemaking: A Public Participation Research Agenda for the Social Sciences*, 126 SOC. SCI. COMPUT. REV. 162, 172–73 (2003).

30. See Regulatory Policy Program Report, *supra* note 16, at 5.

advances of the 1980s and 1990s thus breathed new meaning into the democratic accountability and information-enhancing promises motivating the original enactment in the APA. By the mid-1990s, a few early-moving agencies began to remedy democratic deficits in paper-based notice-and-comment rulemaking by experimenting with e-rulemaking by moving regulatory materials and public comments to online forums.

## II. E-RULEMAKING: TWO DEMOCRATIC PROMISES MADE POSSIBLE

### A. *The Innovation and Evolution of E-Rulemaking*

The federal government's interest in e-rulemaking is "almost as old as the Internet."<sup>31</sup> In the early 1990s, three agencies—the FCC, the Department of Transportation (DOT), and the Nuclear Regulatory Commission (NRC)—capitalized on the Clinton Administration's identification of a universal demand for "earlier and more frequent" opportunities for participation in the rulemaking process by digitizing rulemaking materials and making them available to the public online.<sup>32</sup> By the mid-1990s, the American people could access the Federal Register and the Code of Federal Regulations online.<sup>33</sup> As agencies increased their utilization of digital technologies, e-rulemaking gained legal legitimacy.<sup>34</sup>

By the turn of the 21st century, the government turned its attention to streamlining individual agency e-rulemaking efforts. In 2002, the Bush Administration enacted the E-Rulemaking Initiative in an effort to simplify cumbersome paper-based rulemaking processes and to digitize materials in a government-wide, centralized online rulemaking management system.<sup>35</sup> To implement its centralized system, the Office of Management and Budget (OMB) prohibited executive agencies from operating "duplicative

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31. See ACHIEVING THE POTENTIAL, *supra* note 4, at 21 ("The roots of federal e-rulemaking stretch back almost as far as creation of the World Wide Web."); *Improving Regulatory Systems*, NAT'L PUB. RADIO LIBRARY (1993), <http://govinfo.library.unt.edu/npr/library/reports/reg04.html> (emphasizing the need to develop information technology in order to improve public awareness and participation in the regulatory process).

32. See ACHIEVING THE POTENTIAL, *supra* note 4, at 3, 21–22; Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 447 (2011) ("The true potential of Rulemaking 2.0 is unknowable at this point because e-rulemaking has not tried systematically to address the barriers of stakeholder unawareness, process ignorance, and rulemaking information overload.").

33. See Regulatory Policy Program Report, *supra* note 16, at 13.

34. In 1995, for example, the Administrative Conference of the United States concluded that administering rulemaking online comported with the APA's basic requirements. See KERWIN & FURLONG, *supra* note 20, at 189.

35. See Mark Forman, *E-Government Strategy*, E-GOVERNMENT TASK FORCE, 27 (Feb. 27, 2002), [http://photos.state.gov/libraries/bahrain/231771/PDFs/egov\\_strategy.pdf](http://photos.state.gov/libraries/bahrain/231771/PDFs/egov_strategy.pdf).



or ancillary” electronic tools (e-tools) related to rulemaking, reasoning that creating and operating separate systems would waste resources.<sup>36</sup>

The decision to create a centralized rulemaking web portal was ultimately realized in Regulations.gov.<sup>37</sup> In January 2003, Regulations.gov allowed the public to access and comment on executive agencies’ proposed regulations.<sup>38</sup> In September 2005, Regulations.gov was updated to include the Federal Docket Management System (FDMS), an electronic document management database that contains electronic versions of rulemaking materials and simple search mechanisms.<sup>39</sup> FDMS improved management capabilities from the agencies’ end.<sup>40</sup> The OMB further revised Regulations.gov in 2007, introducing an RSS feed, a fast indexed-based commercial search engine with a full-text search capability.<sup>41</sup> By 2008, all executive agencies had adopted FDMS and eliminated alternative docket and commenting systems.<sup>42</sup>

### B. E-Rulemaking in Executive Agencies

The Obama Administration’s emphasis on open government made way for a natural expansion of the Bush Administration’s advances in e-rulemaking. The Obama Administration’s Executive Order 13,563,<sup>43</sup> a “kind of mini-constitution for the regulatory state,”<sup>44</sup> marks the federal government’s most significant commitment to e-rulemaking to date. Issued in January 2011, Executive Order 13,563 requires agencies to base

36. See ACHIEVING THE POTENTIAL, *supra* note 4, at 12.

37. See, e.g., *Presidential Initiatives: E-Rulemaking*, WHITE HOUSE ARCHIVES [hereinafter *Presidential Initiatives*], <http://georgewbush-whitehouse.archives.gov/omb/egov/c-3-1-er.html>.

38. See *id.* (“With the emergence of the Internet, citizens are going online to exercise this right more than ever before. In January 2003, the interagency eRulemaking Program developed Regulations.gov . . . to provide citizens with a central place to learn about all proposed regulations and to have their comments shape the rulemaking process at Federal agencies. Regulations.gov removes logistical and institutional barriers that previously made it difficult, if not impossible, for a citizen to navigate the vastness of Federal regulatory activities.”).

39. See ACHIEVING THE POTENTIAL, *supra* note 4, at 3, 23–24.

40. See *Presidential Initiatives*, *supra* note 37 (noting that the Federal Docket Management System (FDMS) provides “secure login, e-Authentication single sign-on, role-based access control, e-mail notification, configurable workflow management, electronic records management . . . and a system integrated with the digitization and ingestion of paper documents”).

41. *Id.*

42. See ACHIEVING THE POTENTIAL, *supra* note 4, at 12.

43. See Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

44. See, e.g., Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 170 (2014).

regulations “on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.”<sup>45</sup> To promote such an open exchange of information, it directs executive agencies to take three steps to the extent feasible and permitted by law. First, it requires executive agencies to afford the public with a “meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”<sup>46</sup> Second, it obligates executive agencies to use Regulations.gov in order to provide timely access to the rulemaking docket—which includes relevant scientific and technical findings such as the analysis of costs and benefits—in an open format that can be easily searched and downloaded.<sup>47</sup> Third, it requires agencies to provide “an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.”<sup>48</sup> In an effort to extend participation to members of the public likely affected and with relevant expertise, Executive Order 13,563 also instructed agencies to “seek out the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.”<sup>49</sup>

Executive Order 13,563 reinforced Regulations.gov as the focal point for the public participation in the notice-and-comment process. Today, Regulations.gov provides all executive agencies with access to rulemaking materials, including relevant scientific and technical findings, along with a simple form to submit comments on proposed regulations.<sup>50</sup> Members of the public can browse an education section describing the regulatory process and the role of public comments in informing regulatory decisions, access a particular rulemaking or regulatory activity by using one of the many search functions available on the homepage, and download XML data sets to conduct their own data analysis.<sup>51</sup> FDMS remains the primary interface point for executive agencies.<sup>52</sup> It has eliminated the need for paper records, though comments submitted via email, fax, or mail must be inputted or digitized.<sup>53</sup>

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45. See Exec. Order No. 13,563, *supra* note 43, at 3,821.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. See REGULATIONS.GOV, [HTTP://WWW.REGULATIONS.GOV](http://www.regulations.gov) (LAST VISITED OCT. 18, 2016).

51. *Id.*

52. ACHIEVING THE POTENTIAL, *supra* note 4, at 12.

53. *Id.* at 12–13.

Importantly, Executive Order 13,563 requires executive agencies engaging in e-rulemaking to conduct a cost-benefit analysis. The Order notes that “our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.”<sup>54</sup> Therefore, the regulatory system must be “based on the best available science,” “allow for public participation and an open exchange of ideas,” and “promote productivity and reduce uncertainty.”<sup>55</sup> To achieve this, the regulatory system must “take into account benefits and costs, both quantitative and qualitative,” and use the “best, most innovative, and least burdensome tools for achieving regulatory ends.”<sup>56</sup> Accordingly, Executive Order 13,563 requires executive agencies to conduct cost-benefit analysis by:

(1) propos[ing] or adopt[ing] a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor[ing] its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select[ing], in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify[ing] performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify[ing] and assess[ing] available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.<sup>57</sup>

In applying these principles, the Order directs each agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”<sup>58</sup> Moreover, “where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”<sup>59</sup>

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54. Exec. Order No. 13,563, *supra* note 43, at 3,821.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

### C. E-Rulemaking in Independent Agencies

In July 2011, President Obama issued Executive Order 13,579, which provides that independent agencies *should* follow Executive Order 13,563.<sup>60</sup> Under Executive Order 13,579, independent agencies are encouraged but not required to use Regulations.gov and FDMS to provide access to the rulemaking docket and to provide opportunity for public comment. Acknowledging the epistemic potential of e-rulemaking, Executive Order 13,579 provides that regulatory “decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking.”<sup>61</sup> Notably, Executive Order 13,579 also makes cost-benefit analysis optional, providing that regulatory decisions “*should* be made only after consideration of their costs and benefits.”<sup>62</sup>

Although 160 agencies use FDMS and Regulations.gov, a small number of independent agencies have continued to use their own electronic docketing and online commenting systems as permitted by law.<sup>63</sup> The FCC is one of the few that has not integrated with the federal FDMS system accessible through Regulations.gov. Instead, the FCC manages its own e-rulemaking system, the Electronic Comment Filing System (ECFS).<sup>64</sup> As in all FCC rulemakings, therefore, ECFS was the technological engine behind the FCC’s most controversial rulemaking to date: net neutrality.<sup>65</sup>

## III. THE NET NEUTRALITY E-RULEMAKING

### A. The Underlying Policy Debate

The FCC put its e-rulemaking system to the test in summer 2014, when it was inundated with comments related to net neutrality, a regulatory issue with a uniquely tangible effect on the general public. Coined by law Professor Tim Wu in 2002, the term “net neutrality” refers to the principle of non-discrimination on the Internet—namely, the idea that broadband providers must treat all Internet content and applications equally.<sup>66</sup> In

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60. Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011).

61. *Id.*

62. *Id.* (emphasis added).

63. See generally REGULATIONS.GOV EXCHANGE, WHITE HOUSE, [HTTPS://WWW.WHITEHOUSE.GOV/OPEN/INNOVATIONS/REGULATIONS-GOV-EXCHANGE](https://www.whitehouse.gov/open/innovations/regulations-gov-exchange) (LAST VISITED OCT. 17, 2016).

64. See *Welcome to the New Electronic Comment Filing System*, FCC (last visited Oct. 17, 2016, 5:25 PM), <https://www.fcc.gov/ecfs/>.

65. See *id.*

66. See Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH

requiring broadband providers to adhere to a sort of veil of ignorance with respect to transmitting content, services, and applications to the consumer, the net neutrality principle is in many respects an equalizer.

Net neutrality is also the focal point of a heated debate about the Internet's architecture and how it should be regulated.<sup>67</sup> While the stakeholders in this debate are vast, their interests can be generally broken down by virtue of the four principle participants in the global network of interconnected computer networks that make up the internet: (1) end users, (2) edge providers, (3) broadband providers, and (4) backbone networks.<sup>68</sup> End users are essentially Internet users—individuals who consume content, services, and applications over the Internet.<sup>69</sup> Edge providers, such as Google, Netflix, Facebook, and Wikipedia, “provide content, services, and applications over the Internet.”<sup>70</sup> Broadband providers like Comcast, Time Warner, and Bright House generally enable end users’ access to these content, services, and applications for a fee.<sup>71</sup> Broadband providers furnish high-speed Internet access to end users through high-speed communications technologies, such as cable modem service, Digital Subscriber Line (DSL), fiber optics, satellite, and wireless.<sup>72</sup> Broadband providers then interconnect through backbone networks, or “long-haul fiber-optic links and high-speed routers capable of transmitting vast amounts of data.”<sup>73</sup>

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TECH. L. 141, 172 (2003) [hereinafter Wu, *Network Neutrality*]; Tim Wu, *A Proposal for Network Neutrality* (June 2002) [hereinafter Wu, *Proposal*] (unpublished proposal), <http://www.timwu.org/OriginalNNProposal.pdf>; see also Jeff Sommer, *Defending the Open Internet*, N.Y. TIMES (May 10, 2014), <http://www.nytimes.com/2014/05/11/business/defending-the-open-internet.html>.

67. See Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1975, 2029–30 (2006) (“[T]he notion of end-to-end neutrality has been offered as a normative ideal of an Internet free from internal filtering. Many cyberlaw scholars have taken up end-to-end as a battle cry for Internet freedom, invoking it to buttress arguments about the ideological impropriety of filtering Internet traffic.”); Barbara Van Schewick, *The Case for Rebooting the Network Neutrality Debate*, ATLANTIC (May 6, 2014), <http://www.theatlantic.com/technology/archive/2014/05/the-case-for-rebooting-the-network-neutrality-debate/361809/> (noting that “‘network neutrality’ has long been a rallying cry in the United States”).

68. See *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 690 (D.C. Cir. 2016) (setting forth the “four major participants” in the Internet marketplace”); see also Black’s Law Dictionary (10th ed. 2014) (defining the Internet).

69. See *U.S. Telecom*, 825 F.3d at 674; see also *Verizon v. FCC*, 740 F.3d 623, 629 (D.C. Cir. 2014).

70. *U.S. Telecom*, 825 F.3d at 689 (quoting *Verizon*, 740 F.3d at 629).

71. See *id.*

72. See *id.* at 690; see also *Verizon*, 740 F.3d at 629; TYPES OF BROADBAND CONNECTIONS, FCC, <https://www.fcc.gov/general/types-broadband-connections>.

73. See *U.S. Telecom*, 825 F.3d at 690 (quoting *Verizon*, 740 F.3d at 628).

End users, edge providers, broadband providers, and backbone networks are each distinctively affected by the net neutrality principle, which has been in place since the birth of the Internet in the 1990s. At the beginning, end users primarily used the Internet for static web browsing and email.<sup>74</sup> Because these activities are relatively homogeneous from a content transmission perspective, the original Internet protocol suite naturally followed an “end-to-end” design whereby providers routed packets without regard to the source of the content or its destination.<sup>75</sup> The end-to-end principle is “famously indifferent both to the physical communications medium below it, and the applications running above it.”<sup>76</sup>

Today’s Internet looks vastly different from its original form. End users turn to the Internet for an increasingly wide array of content, services, and applications. Now, nearly 300 million individuals in the United States turn to the Internet to stream video, shop, share photos, and interact in a variety of social platforms—and often engage in such activities through mobile broadband services.<sup>77</sup> As the nature of the Internet morphs and grows, broadband providers argue that the ever-escalating quantity of data transmitted from edge providers to end users is congesting and straining their networks.<sup>78</sup> In light of these constraints, many broadband providers have called for a deviation from the net neutral policies so integral to the Internet’s original infrastructure, advocating for permission to collect fees from large edge providers to provide better service and accommodate the growing demand.<sup>79</sup> Herein lies the passionate policy debate surrounding the FCC’s net neutrality rulemaking, which is at its core a question of whether to treat the Internet’s “tradition of openness as prescriptive” by mandating that providers continue the traditional practice of non-discrimination.<sup>80</sup>

Proponents of net neutrality are focused on the importance of *openness* and *equality* in the Internet’s architecture. Their primary concern lies in the precarious relationship between broadband providers and edge providers.

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74. See Shane Greenstein et al., *Net Neutrality Rules Will Make Winners and Losers Out of Businesses*, HARV. BUS. REV. (Jun. 27, 2016), <https://hbr.org/2016/06/net-neutrality-rules-will-make-winners-and-losers-out-of-businesses>.

75. See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* 164 (2009).

76. Wu, *Network Neutrality*, *supra* note 66, at 146 n.15 (“The metaphors of above and below come from the fact that in a layered model of the Internet’s design, the application layers are above the TCP/IP layers, while the physical layers are below.”).

77. See Greenstein et al., *supra* note 74.

78. See *id.*

79. See *id.*

80. ZITTRAIN, *supra* note 75, at 178.

In a world where openness is not hardwired in the Internet's architecture, broadband providers might create a hierarchy of access that operates to their own advantage. Broadband providers could, for example, charge certain edge providers a premium for faster content delivery to end users.<sup>81</sup> At the same time, they could slow down or prevent end users from accessing non-premium, competing edge providers' content or services.<sup>82</sup> Broadband providers might also prioritize their own content or services, which in a net neutral world, are transmitted in packets with identical speed and quality to any third party edge providers' content or services.<sup>83</sup> Time Warner, for example, might degrade the quality of the end users' access to Netflix in order to promote its own streaming television programs. In exchange for hefty fees, Comcast might ensure that end users can access *The Economist's* website at lightning speed, simultaneously downgrading competing news sources as part of the agreement. By preventing such anticompetitive, nepotistic, or self-promotional behavior, net neutrality is also thought to encourage innovation on the Internet by keeping barriers to entry low for new websites and applications.<sup>84</sup> The Internet's equality architecture has allowed new companies to compete with giants. It fostered the egalitarian milieu needed for Mark Zuckerberg to create Facebook in his Harvard dorm room, Daniel Ek to dream up the music streaming service Spotify at age sixteen, and Jeremy Stoppleman to come up with the review website Yelp as a student sick with the flu struggling to find reliable recommendations for a local physician.<sup>85</sup> Net neutrality advocates argue

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81. See *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 690 (D.C. Cir. 2016); *Verizon v. FCC*, 740 F.3d 623, 629 (D.C. Cir. 2014).

82. See *U.S. Telecom*, 825 F.3d at 690.

83. See *Verizon*, 740 F.3d at 629.

84. See Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 *UCLA L. REV.* 1653, 1666–67 (1998) (“In cyberspace, barriers to entry are low and no greater for speakers than listeners. Individuals can become mass transmitters of information and opinion alongside government agencies, commercial enterprises, and noncommercial private associations. On this view, the Internet is a technological template for robust, uninhibited, and highly decentralized discourse among individuals.”). See also Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 *UCLA L. REV.* 925, 945 (2001) (warning that “innovators are less likely to invest in a market in which a dominant player has the power to behave strategically against it”); see also Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 *DUKE L.J.* 1245, 1266–67 (2003) (“[P]olicies that introduce into the network significant commons-based elements, over which no one exercises control and which are therefore open for any individual to use to build their own window on the world, represent an important mechanism for alleviating the autonomy deficit created by an exclusively proprietary communications system.”).

85. See ZITTRAIN, *supra* note 75 at 164; Nicole Dyer, 35 *Innovators Under 35*, *MIT TECH. REV.*, <http://www2.technologyreview.com/tr35/profile.aspx?TRID=1312>; Angus

that the Internet needs to maintain the same equality and openness to foster like innovation in the future.

Critics primarily focus on the deleterious effects of absolutism in net neutrality on *competition* and its attendant effects on economic prosperity and innovation. They argue that regulations requiring unmitigated fidelity to the net neutrality principle create distortions in the market for broadband, squelching investment and producing inefficiencies that ultimately harm consumers.<sup>86</sup> Critics contend that the prohibition on even reasonable rate distinctions arbitrarily benefits certain edge providers while presenting challenges to others.<sup>87</sup> For example, while dominant edge providers that depend on above-minimum speed and quality, like Netflix and YouTube, could and (likely would) pay for content transmission, they are not required to do so in a net neutral world. This leaves incumbent edge providers with little incentive to reduce the costs and impediments of overall network congestion.<sup>88</sup> On the other hand, upstart edge providers that set out to provide innovative services that can only exist if they can guarantee above average-quality service—and are willing to pay for such service—cannot do so.<sup>89</sup> For instance, a new company seeking to provide high quality, instantaneous three-dimensional communications might be willing to pay for faster and higher quality content transmission.<sup>90</sup> Yet if paid prioritization is absolutely banned, they are stymied from guaranteeing such services.

Critics argue that if broadband providers are deprived of these potential sources of profit from edge providers, they are unable to pass on the gains to the consumer in the form of cheaper Internet access. By decreasing overall potential profits, absolute protection of net neutrality discourages new players from entering the saturated broadband market, which requires significant capital infrastructure, contributing to density in the already concentrated broadband and telephone services industries.<sup>91</sup> In this fashion

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Loten, *Search for Doctor Leads to Yelp*, WALL ST. J. (Nov. 14, 2012 7:26 PM), <http://www.wsj.com/articles/SB10001424127887324595904578117512589717352>.

86. See *U.S. Telecom*, 825 F.3d at 694–701 (Williams, J., dissenting).

87. *Id.* at 720.

88. See Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 20–21 (2005).

89. *U.S. Telecom*, 825 F.3d, at 756 (Williams, J., dissenting).

90. *Id.* at 756–57.

91. See ZITTRAIN, *supra* note 75, at 179.

For example, market conditions might bring about a situation in which an Internet Service Provider (ISP) could charge Google for access to that ISP's customers: without payment from Google, those customers would not be allowed to get to Google. If Google elected to pay—a big “if,” of course—then some of Google's profits would go to subsidizing Internet access. Indeed, one could imagine ISPs then offering free



and in others, net neutrality critics argue that requiring all content to be treated equally discourages investment in the Internet, inhibiting broadband providers' profits, and capacity to innovate, thereby limiting economic growth.<sup>92</sup>

### B. The FCC's Authority to Regulate the Internet

The FCC has regulated interstate communications for over eighty years.<sup>93</sup> The FCC originally regulated "communications by wire and radio," and later acquired regulatory authority over telephone services.<sup>94</sup> In 1996, Congress overhauled the FCC's organic statute, the Communications Act of 1934 (the Communications Act), and implemented the Telecommunications Act.<sup>95</sup> The Telecommunications Act required the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."<sup>96</sup> The 1996 overhaul also aimed to lower barriers to entry and foster competition in the communications industry.<sup>97</sup>

In the Telecommunications Act, Congress provided the FCC with distinct regulatory authority over two categories of entities.<sup>98</sup> Title II of the

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Internet access to their customers, with that access paid for by content providers like Google that want to reach those customers. Of course, there is no guarantee that extra profits from such an arrangement would be passed along to the subscribers, but, in the standard model of competition, that is exactly what would happen: surplus goes to the consumer.

*Id.*

92. See Yoo, *supra* note 88, at 11 ("Even worse, by reducing investment incentives, network neutrality can itself become the means through which market concentration is cemented into place. Indeed, one of the principal drawbacks about regimes of mandatory interconnection and interface standardization is that they implicitly presuppose that regulation will continue indefinitely. Network diversity, in contrast, is better at facilitating competitive entry."); Timothy B. Lee, *The Durable Internet: Preserving Network Neutrality Without Regulation*, POL'Y ANALYSIS, (Nov. 12, 2008), <http://www.cato.org/pubs/pas/pa-626.pdf> (arguing that "too much centralization and bureaucracy is detrimental to innovation").

93. See 47 U.S.C. § 151 (1934) (creating the FCC and noting its purpose).

94. See *id.*; *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 355 (1986).

95. See Telecommunications Act of 1996, Pub. L. No. 104-28, § 160, 110 Stat. 771-72 (1996).

96. 47 U.S.C. § 1302(a) (2012).

97. See *id.*; see also FCC, *Telecommunications Act of 1996*, <http://www.fcc.gov/telecom.html> ("The goal of [the Telecommunications Act] is to let anyone enter any communications business—to let any communications business compete in any market against any other.").

98. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005); see also 47 U.S.C. § 153(24), (51) (2012) (defining "information service" and "telecommunications carrier").

Act provides the FCC with broad authority to regulate *telecommunications* providers, defined as providers of “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received,” as common carriers.<sup>99</sup> To foster deregulation, Title II also “provided the FCC with the unusual authority to forbear from enforcing provisions of the Act as well as its own regulations.”<sup>100</sup> This “forbearance power” imbued the FCC with unique regulatory autonomy over telecommunications providers.<sup>101</sup> In contrast, Title I subjects *information service* providers, defined as providers of “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,”<sup>102</sup> to the FCC’s ancillary jurisdiction.<sup>103</sup> After the overhaul, an impassioned debate over whether various Internet Service Providers (ISPs) were telecommunications or information service providers—including cable modem and DSL providers—forged on within the FCC,<sup>104</sup> the communications industry,<sup>105</sup> and the federal courts.<sup>106</sup>

### C. The 2010 Open Internet Rules

The FCC’s first effort to compel net neutrality took place in 2008, when it ordered the broadband provider Comcast to adhere to certain open Internet practices after it interfered with end users’ peer-to-peer networking applications.<sup>107</sup> The D.C. Circuit struck down the FCC’s order, holding that the FCC could not rely on its ancillary authority—i.e., its authority to demonstrate that its action is “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities”—to justify its

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99. 47 U.S.C. § 153(50) (2012).

100. *Verizon v. FCC*, 770 F.3d 961, 964 (D.C. Cir. 2014) (citing 47 U.S.C. § 160).

101. *See id.* at 963–64.

102. 47 U.S.C. § 153(24).

103. *Id.* § 154(i).

104. *See, e.g.*, Daniel A. Lyons, *Technology Convergence and Federalism: Who Should Decide the Future of Telecommunications Regulation?*, 43 U. MICH. J.L. REFORM 383, 404 n.94 (2010) (describing internal changes in the FCC as to the classification of cable modem and telecommunication services).

105. *See* Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1255–57 (2007) (describing the debate between providers over whether ISPs should be classified as information service or telecommunications providers).

106. *See* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 987–1003 (2005) (deferring to the FCC’s ruling that broadband cable modem companies are information service providers exempt from mandatory common-carrier regulation, while DSL providers are telecommunications carriers subject to common-carrier regulation).

107. *See* *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

action.<sup>108</sup>

In response to the D.C. Circuit's ruling, the FCC adopted an order entitled "Preserving the Open Internet" that imposed a number of requirements on broadband providers in an effort to "preserve the Internet as an open platform for innovation, investment, job creation, economic growth, competition, and free expression."<sup>109</sup> The regulations imposed (1) an "antidiscrimination" rule that prohibited "unreasonable discrimination" in the transmission of lawful network traffic,<sup>110</sup> (2) an "antiblocking" rule that forbade blocking of lawful online content,<sup>111</sup> and (3) a "transparency" rule that required ISPs to adhere to transparency norms by disclosing network management practices, performance characteristics, and terms and conditions of their network processes.<sup>112</sup> The FCC relied on § 706 of the Telecommunications Act as providing its statutory authority to issue the rules.<sup>113</sup>

The broadband provider Verizon challenged the order in federal court, arguing that the FCC exceeded its powers in adopting the Open Internet rules.<sup>114</sup> Verizon contended that the rules violated the APA, the Communications Act, the Telecommunications Act, and the First and Fifth Amendments to the Constitution.<sup>115</sup> In January 2014, the D.C. Circuit rejected Verizon's challenge to the FCC's statutory authority, holding that § 706 of the "Telecommunications Act of 1996 vests it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure."<sup>116</sup> The court further held that the FCC reasonably interpreted the Telecommunications Act "to empower it to promulgate rules governing broadband providers' treatment of Internet traffic."<sup>117</sup> However, the court rejected the FCC's anti-blocking and anti-discrimination rules, holding that the FCC had unreasonably interpreted the Telecommunications Act and had regulated broadband providers as "common carriers" while simultaneously classifying them as "information

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108. *Id.*

109. *See* Preserving the Open Internet, 76 Fed. Reg. 59,192 (Sept. 23, 2011) (codified at 47 C.F.R. pts. 0, 8 (2013)).

110. 47 C.F.R. § 8.7.

111. *Id.* § 8.5.

112. *Id.* § 8.3.

113. Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

114. *Id.* at 628–29.

115. *Id.* at 628, 632–34.

116. *Id.* at 628.

117. *Id.*

service” providers, in violation of the Communications Act’s prohibition on common carrier regulations for information services.<sup>118</sup>

#### *D. The 2014 Open Internet E-Rulemaking*

##### *1. Notice of Proposed Rulemaking*

Although the D.C. Circuit rejected the FCC’s 2010 anti-blocking and anti-discrimination rules, its decision created a roadmap for the FCC in drafting and implementing net neutrality rules that could survive judicial review.<sup>119</sup> In May 2014, the FCC sought to do just that by issuing a notice of proposed rulemaking (NPRM) to “find the best approach to protecting and promoting Internet openness.”<sup>120</sup> Among other things, the NPRM proposed (1) enhancing the transparency rule, (2) reinstituting the anti-blocking rule, and (3) enacting a non-discrimination rule that “would bar commercially unreasonable actions from threatening Internet openness” pursuant to its authority under § 706 of the Telecommunications Act.<sup>121</sup> The agency also sought comments on a potential reclassification of broadband services as telecommunications services, which would allow it to use the powerful common carrier regulatory authority under Title II in regulating broadband providers.<sup>122</sup>

The FCC’s proposal to prohibit “commercially unreasonable” discrimination practices in the provision of broadband Internet access service was particularly controversial.<sup>123</sup> The NPRM proposed allowing broadband providers to manage traffic in “commercially reasonable ways,” opening the door to negotiations between broadband providers and edge providers willing to pay for prioritized, faster content transmission—slowing down other Internet traffic in the process. Proponents of net neutrality expressed concern that the open-ended commercially reasonable standard would open the door to discriminatory practices, most

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118. *Id.*

119. *In re Protecting & Promoting the Open Internet*, 29 FCC Rcd. 5561, 5647 (2014) (“In response [to the Verizon decision, Chairman Wheeler] promptly stated that we would reinstate rules that achieve the goals of the 2010 Order using the Section 706-based roadmap laid out by the court. That is what we are proposing today.”).

120. *Id.* at 5563–64.

121. *Id.* at 5563–67.

122. *Id.* at 5563–64.

123. *See id.*; *see also* Edward Wyatt, *FCC, in a Shift, Backs Fast Lanes for Web Traffic*, N.Y. TIMES (Apr. 23, 2014), [http://www.nytimes.com/2014/04/24/technology/fcc-new-net-neutrality-rules.html?\\_r=0](http://www.nytimes.com/2014/04/24/technology/fcc-new-net-neutrality-rules.html?_r=0); Grant Gross, *Contentious Net Neutrality Proposal Gets FCC Green Light, Public Comments Wanted*, PCWORLD (May 15, 2014, 9:38 AM), <http://www.pcwold.com/article/2155720/fcc-moves-forward-with-controversial-net-neutrality-proposal.html>.

significantly by paving the way for so-called “fast lanes” and “slow lanes” on the Internet.<sup>124</sup>

Of particular concern was the notion that commercially reasonable practices would include “network nepotism,” which is the “possibility that carriers would use this power to accord special treatment to other members of its corporate family: Comcast might, for example, favor Hulu (which it partially owns) at the expense of other online video services.”<sup>125</sup> In response to these concerns, FCC Chairman Wheeler explained that the “commercially unreasonable” provision would protect against “harm to competition and consumers stemming from abusive market activity.”<sup>126</sup> To determine whether a service was commercially reasonable, the FCC proposed a totality-of-the-circumstances approach that would assess the impact of a practice on present and future competition, consumers, speech and civic engagement, as well as technical characteristics.<sup>127</sup>

## 2. Public Comments

### a. The Comment Period

The intensity of public interest in the net neutrality rulemaking was apparent at the outset. The FCC began accepting public comments on May 15, 2014, and by June 1st the agency had received over 28,000 comments through ECFS.<sup>128</sup> The FCC had also set up an email account to receive comments on the rulemaking before the proposed rules were released; the address received nearly 300,000 messages between April 30th and June 4th.<sup>129</sup>

Intense media coverage and bipartisan support for the net neutrality principle fueled early public participation in the net neutrality rulemaking.<sup>130</sup> The steady stream of public comments transformed into a

124. See *In re Protecting & Promoting the Open Internet*, 29 FCC Rcd. at 5602–10.

125. Tejas N. Narechania, *Network Nepotism and the Market for Content Delivery*, 67 STAN. L. REV. ONLINE 27 (2014).

126. Tom Wheeler, *Setting the Record Straight on the FCC's Open Internet Rules*, FCC BLOG, (Apr. 24, 2014, 11:15 AM), <http://www.fcc.gov/blog/setting-record-straight-fcc-s-open-internet-rules>.

127. See *In re Protecting & Promoting the Open Internet*, 29 FCC Rcd. at 5604, 5608.

128. *Dataset: Count of Total ECFS Comments Received by Hour*, FCC BLOG, <http://transition.fcc.gov/files/data/ecfs-stats-hourly-blog-07142014.csv> [hereinafter *Dataset*]; see also David A. Bray, *Keeping Track of the Open Internet Comments Submitted to the FCC*, FCC BLOG (July 14, 2014, 3:04 PM), <https://www.fcc.gov/news-events/blog/2014/07/14/keeping-track-open-inter-net-comments-submitted-fcc>.

129. See *Dataset*, *supra* note 128; Bray, *supra* note 128.

130. A 2014 study conducted by the University of Delaware's Center for Political

deluge after the comedian John Oliver released a segment endorsing the net neutrality principle and calling attention to the 2014 Open Internet rulemaking.<sup>131</sup> After explaining that ending net neutrality “allows big companies to buy their way into the fast lane, leaving everyone else in the slow lane,” Oliver implored listeners to submit comments to the FCC.<sup>132</sup> The day Oliver’s segment aired, nearly 10,000 public comments were submitted, and within five days the FCC received over 78,000 public comments.<sup>133</sup> Although the net neutrality rulemaking was on track to break public participation records before the segment aired,<sup>134</sup> the “John Oliver effect” solidified and galvanized the prevailing public opinion.<sup>135</sup>

In the reply comment period, a similar “John Oliver effect” took place—this time from the other side of the debate. The conservative activist group American Commitment,<sup>136</sup> an organization that pledged to protect the “free-market Internet,” organized a bulk submission of anti-net neutrality comments.<sup>137</sup> Over half of the 1.67 million comments made available by the FCC from the reply comment period adhered to American Commitment’s template.<sup>138</sup>

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Communication showed that Republicans and Democrats overwhelmingly oppose allowing ISPs to charge websites for faster speeds. Press Release, Univ. of Del. Ctr. for Political Comm’n, *National Survey Shows Public Overwhelmingly Opposes Internet “Fast Lanes”* (Nov. 10, 2014), [https://www.cpc.udel.edu/content-sub-site/Documents/UD-CPC-NatAgenda2014PR\\_2014NetNeutrality.pdf](https://www.cpc.udel.edu/content-sub-site/Documents/UD-CPC-NatAgenda2014PR_2014NetNeutrality.pdf).

131. See Bray, *supra* note 128.

132. Last Week Tonight with John Oliver: Net Neutrality (HBO television broadcast June 1, 2014), <https://www.youtube.com/watch?v=fpbOEoRrHyU> [hereinafter John Oliver].

133. See *id.*; Scola, *supra* note 2; Bray, *supra* note 128.

134. See Hu, *supra* note 11.

135. Ben Brody, *How John Oliver Transformed the Net Neutrality Debate Once and For All*, BLOOMBERG NEWS (Feb. 26, 2014, 10:00AM), <http://www.bloomberg.com/politics/articles/2015-02-26/how-john-oliver-transformed-the-net-neutrality-debate-once-and-for-all>; Gautham Nagesh, *How HBO’s John Oliver Helped Move the Needle on Net Neutrality*, WALL ST. J. (Feb. 5, 2015, 5:05 PM), <http://blogs.wsj.com/washwire/2015/02/05/how-hbos-john-oliver-helped-move-the-needle-on-net-neutrality/>. Today, John Oliver’s viral segment has over 8 million views on YouTube. See John Oliver, *supra* note 132.

136. *Protect the Free-Market Internet*, AM. COMMITMENT, <http://www.americancommitment.org/issues/protect-free-market-internet>. (last visited July 29, 2016).

137. See Andrew Pendleton & Bob Lannon, *One Group Dominates the Second Round of Net Neutrality Comments*, SUNLIGHT FOUNDATION, (Dec. 16, 2014, 1:23 PM) [hereinafter Sunlight Analysis Round 2], <http://sunlightfoundation.com/blog/2014/12/16/one-group-dominates-the-second-round-of-net-neutrality-comments/>.

138. See *id.*

*b. Empirical Analysis of Public Comments*

The FCC made public XML datasets of over 800,000 public comments, making it possible for independent members of the public to conduct empirical analyses.<sup>139</sup> Indeed, the FCC relied heavily on two external data analyses of the public comments in formulating its net neutrality rules.<sup>140</sup> The Sunlight Foundation,<sup>141</sup> a nonpartisan, nonprofit organization, conducted one of the analyses, utilizing natural language processing techniques to analyze the entire corpus of data released by the FCC.<sup>142</sup> Additionally, the Knight Foundation,<sup>143</sup> hired Quid, a data analysis firm, to conduct a “sentiment analysis” of a sample of 250,000 public comments submitted to the FCC.<sup>144</sup> Part (c) of this Section describes key results from the empirical findings from the initial comment period, which spanned May 15, 2014 to July 18, 2014, and Part (d) analyzes the comments submitted in the reply period, which spanned July 19, 2014 to September 15, 2014.

*c. The Initial Comment Period*

In promulgating the final net neutrality rules, the FCC noted that “while there has been some public dispute as to the percentage of comments taking one position or another, it is clear that the majority of comments support Commission action to protect the open Internet.”<sup>145</sup> Both empirical analyses of the public comments support the FCC’s conclusion.<sup>146</sup> Of the 800,000 comments from the initial comment period that the FCC made available, only 1% of the comments were “clearly opposed to net

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139. See Bob Lannon & Andrew Pendleton, *What Can We Learn from 800,000 Public Comments on the FCC’s Net Neutrality Plan*, SUNLIGHT FOUNDATION, (Sept. 2, 2014, 9:49AM) [hereinafter Sunlight Analysis Round 1], <https://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan/>.

140. See Sohn, *supra* note 1.

141. SUNLIGHT FOUNDATION, <http://sunlightfoundation.com> (last visited Oct. 18, 2016).

142. Sunlight Analysis Round 1, *supra* note 139.

143. See *About the Knight Foundation*, KNIGHT FOUNDATION, <http://www.knightfoundation.org/about> (last visited July 29, 2016) (indicating it is a private nonprofit organization).

144. See *Decoding the Net Neutrality Debate: Media, Public Comment, and Advocacy on the Open Internet*, KNIGHT FOUNDATION, <http://www.knightfoundation.org/features/netneutrality/> [hereinafter Knight Foundation Analysis]; see also Hu, *supra* note 11.

145. See Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,742 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, and 20); Sohn, *supra* note 1.

146. Sunlight Analysis Round 1, *supra* note 139; Knight Foundation Analysis, *supra* note 144.

neutrality.”<sup>147</sup> Independent, non-form-letter “comments were overwhelmingly pro-net neutrality,” though the rationales offered were quite diverse.<sup>148</sup> In its analysis of approximately one-quarter of the public comments submitted in the initial comment period, Quid found one anti-net neutrality comment.<sup>149</sup>

Egalitarianism and fairness were the most prevalent themes conveyed in the comments.<sup>150</sup> A sizeable two-thirds of the public comments “objected to the idea of paid priority for Internet traffic, or division of Internet traffic into separate speed tiers.”<sup>151</sup> Such comments typically included the words “slow/fast lane,” “pay to play,” “wealthy,” “divide,” and “Netflix.”<sup>152</sup> Half of the comments submitted in the first round of comments discussed Internet access as an essential freedom, and half addressed potential negative economic impact of ending net neutrality.<sup>153</sup> Nearly as prevalent as appeals to equality was support for Title II authority: two-thirds of commentators advocated reclassification of ISPs as common carriers under the Communications Act.<sup>154</sup> Competition was another major theme, as forty percent of comments emphasized the importance of consumer choice and one-third of comments discussed the importance of fostering competition among ISPs.<sup>155</sup> Approximately five percent of the comments submitted opposed regulation, many of which simultaneously emphasized freedom for consumers and freedom for ISPs—an inconsistent policy.<sup>156</sup>

60% of the total comments were “form letters” originally created by organized commenting campaigns.<sup>157</sup> Twenty organized campaigns drove the form letters submitted in the first round of comments.<sup>158</sup> Though form letters stem from the same template, not all form letters were the same—many commenters inserted their own rationale or personalized their submission in some way.<sup>159</sup> Independent submissions accounted for a higher percentage of the total public comments than is typical. In other high volume dockets, it is “not unusual for form letter contributions to make up in excess of 90% of a docket’s total submissions, with the

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147. See Sunlight Analysis Round 1, *supra* note 139.

148. Knight Foundation Analysis, *supra* note 144, at 14.

149. *Id.* at 13; see also Hu, *supra* note 11.

150. Knight Foundation Analysis, *supra* note 144, at 13–14.

151. Sunlight Analysis Round 1, *supra* note 139.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Knight Foundation Analysis, *supra* note 144.

159. Sunlight Analysis Round 1, *supra* note 139.



percentage of comments coming from form letter campaigns being well-correlated with the total number of comments received.”<sup>160</sup>

*d. The Reply Comment Period*

The number of comments opposing net neutrality skyrocketed to 60% in the reply period.<sup>161</sup> The American Commitment form letter writing campaign is credited with the shift: form letters stemming from the anti-net neutrality campaign accounted for over half of the total comments submitted in the reply comment period.<sup>162</sup> Nearly all of the American Commitment form letters used one of thirty variant rationales that were inserted between the second and third paragraph of the submission.<sup>163</sup> Of all the independent, non-form-letter submissions, the weight of the comments remained substantially the same as the first round, with over 85% in favor of net neutrality, approximately 14% unclear, and less than 1% opposed to net neutrality.<sup>164</sup>

*E. The 2015 Open Internet Rules*

In February 2015, the FCC promulgated its 2015 Open Internet Order.<sup>165</sup> The order included three primary actions. First, the FCC reclassified fixed and mobile “broadband Internet access services” as telecommunications services, subjecting broadband Internet access services to common carrier regulation under Title II of the Communications Act.<sup>166</sup> For purposes of the order, the FCC defined broadband Internet access as “mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service,” and any service the FCC finds to provide a functional equivalent of such service.<sup>167</sup> This definition encompasses “interconnection arrangements” that broadband providers make with edge providers or

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160. *Id.*; see Kimberly D. Krawiec, *Don't 'Screw' Joe the Plummer': The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 73 (2013) (observing that 80% of public comments derived from form letters in a financial regulation rulemaking).

161. Sunlight Analysis Round 2, *supra* note 137.

162. *Id.*

163. *Id.*

164. *Id.*

165. *In re Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) (codified at 47 C.F.R. Part 8).

166. *Id.* at 5743–44.

167. *Id.* at 5745–46.

backbone networks to exchange traffic in order to guarantee that their end users can access edge provider content anywhere on the Internet.<sup>168</sup> The FCC included mobile broadband services in the reclassification, removing their former designation as a “private mobile service” not subject to common carrier regulation and deeming them a “commercial mobile service” that was a telecommunications service subject to Title II.<sup>169</sup>

Second, the FCC exercised its statutory authority to forebear extensively from applying twenty-seven provisions of Title II of the Communications Act and over seven hundred FCC rules and regulations to broadband service.<sup>170</sup> The FCC noted that it is required to forbear “from applying any regulation or any provision of the Communications Act” if it determines that enforcement of that regulation or provision is unnecessary to ensure just and reasonable service or protect consumers and determines that forbearance is “consistent with the public interest.”<sup>171</sup> The FCC did not forbear from §§ 201, 202, and 208, along with key enforcement authority under the Communications Act, or from certain provisions in the context of broadband Internet access service to protect customer privacy, advance access for persons with disabilities, and foster network deployment.<sup>172</sup> However, it did forbear from applying many Title II provisions to broadband service, including § 251 and § 252’s requirement that local exchange carriers provide competitors with access to network elements on an unbundled basis.<sup>173</sup>

Third, the FCC promulgated five rules to protect and promote Internet openness. It adopted a new transparency rule, expanding the transparency rule it promulgated in its 2010 Open Internet Order and that was sustained by the D.C. Circuit in *Verizon*.<sup>174</sup> It also adopted three “bright-line rules” prohibiting blocking, throttling, and paid prioritization.<sup>175</sup> The anti-blocking and anti-throttling rules prohibit broadband providers from slowing down or blocking the delivery of content. Specifically, the anti-blocking rule prohibits broadband providers from “block[ing] lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”<sup>176</sup> The anti-throttling rule bans

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168. See *Id.* at 5686; see also *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 710–11 (D.C. Cir. 2016).

169. See *In re Protecting & Promoting the Open Internet*, 30 FCC Rcd. at 5778.

170. *Id.* at 5805.

171. *Id.* at 5804–05, 5849–51; see also 47 U.S.C. § 160(a) (1996).

172. See *In re Protecting & Promoting the Open Internet*, 30 FCC Rcd. at 5804–05.

173. *Id.* at 5849–51; see also 47 U.S.C. § 251(c)(3) (2012).

174. See *In re Protecting & Promoting the Open Internet*, 30 FCC Rcd. at 5669–82.

175. *Id.* at 5647.

176. *Id.* at 5607.

broadband providers from “impair[ing] or degrad[ing] lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.”<sup>177</sup> The paid prioritization rule prohibits broadband providers from managing their network “to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.”<sup>178</sup> In addition, the FCC instituted a “General Conduct Rule” that bans broadband providers from unreasonably interfer[ing] with or unreasonably disadvantage[ing] (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, prohibits broadband providers from services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users.<sup>179</sup>

Three groups of broadband providers and their associations challenged the FCC’s order in *United States Telecom Association v. FCC* (U.S. Telecom).<sup>180</sup> The petitioners argued that the FCC lacks statutory authority to reclassify broadband as a telecommunications service, and that even if the FCC has such authority, its decision was arbitrary and capricious.<sup>181</sup> They also contended that the FCC impermissibly classified mobile broadband as commercial mobile service falling within the order’s definition of telecommunications service.<sup>182</sup> They claimed that the FCC unlawfully forbore from certain provisions of Title II.<sup>183</sup> Finally, they argued that some of the rules in the FCC’s order violate the First Amendment.<sup>184</sup>

In a split decision, the D.C. Circuit upheld the FCC’s order in full, rejecting each of the petitioners’ challenges.<sup>185</sup> The ethos of the majority opinion was *deference to agency expertise*. Writing for the majority, Judge Tatel and Judge Srinivasan upheld the FCC’s authority to enforce the net neutrality rules by reclassifying broadband providers as telecommunications services.<sup>186</sup> In accordance with Supreme Court precedent permitting the FCC to take into account “the end user’s perspective” in classifying

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177. *Id.*

178. *Id.* at 5608.

179. *Id.* at 5660.

180. 825 F.3d 674, 689 (D.C. Cir. 2016).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *See id.* at 697–712.

telecommunications and information services, the court concluded that the FCC's reclassification was premised on its examination of consumer perception of the broadband providers' services as a standalone offerings of telecommunications service.<sup>187</sup> It determined that the FCC permissibly based its reclassification on the fact that end users primarily view the broadband provider's role as the transmission of third-party content to and from Internet endpoints—its telecommunications-based role.<sup>188</sup> End users do not, in contrast, perceive broadband providers primarily as purveyors of various "add-on" applications, content, and services such as email or cloud-based storage programs—its information-based role.<sup>189</sup> The court further upheld the FCC's decision to regulate interconnection arrangements under Title II as necessary to ensure that broadband providers do not manipulate terms of interconnection to advantage their own interests at the expense of edge providers or end users.<sup>190</sup>

The court rejected petitioners' procedural challenges to reclassification. It ruled that the reclassification was a "logical outgrowth" of the NPRM and that the NPRM provided sufficient notice to interested parties to comment meaningfully on the reclassification and the possibility that the FCC would look to consumer perception in formulating its reclassification decision.<sup>191</sup> It also rejected petitioners' substantive challenges, granting *Chevron* deference to the FCC's decision that it has the statutory authority to reclassify broadband as a telecommunications service and concluding that the FCC adequately explained why it reclassified broadband as a telecommunications service.<sup>192</sup> Applying a "highly deferential" standard, the court deferred to the FCC's judgment as a reasonable one that was "precisely the kind of predictive judgment within the agency's field of discretion and expertise"—and thus the FCC did not second guess.<sup>193</sup> The panel majority declined to consider whether the FCC's reclassification decision would decrease future investment in broadband by increasing regulatory uncertainty or whether the FCC failed to adequately consider competitive conditions, finding the prior argument waived by the petitioners and the latter unnecessary.<sup>194</sup>

The court then upheld the FCC's decision to regulate mobile broadband

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187. *See id.* at 697–98.

188. *Id.* at 698–99.

189. *Id.*

190. *See id.* at 711–13.

191. *See id.* at 700.

192. *See id.* at 700–11.

193. *Id.* at 707.

194. *Id.* at 708.

alongside wireline broadband in a single regulatory class.<sup>195</sup> It found permissible the FCC's decision that "mobile broadband—like all broadband—is a telecommunications service subject to common carrier regulation under Title II of the Communications Act," effectively authorizing the FCC to coordinate its regulatory actions for both forms of broadband delivery.<sup>196</sup> Further, it approved the FCC's decision to forbear from numerous provisions of the Communications Act.<sup>197</sup> Notably, the court held that the FCC did not act arbitrarily and capriciously in forbearing from the mandatory network connection and facilities unbundling requirements contained in §§ 251 and 252.<sup>198</sup>

The D.C. Circuit approved the specific rules promulgated in the 2015 Open Internet order over petitioners' objections.<sup>199</sup> The court upheld the FCC's authority to enact a ban on paid prioritization, a decision it grounded in Titles II and III of the Communications Act and § 706 of the Telecommunications Act.<sup>200</sup> The court reaffirmed its prior decision that § 706 vests the FCC with independent rulemaking authority, holding that the FCC's "section 706 authority extends to rules 'governing broadband providers' treatment of internet traffic'—including the anti-paid-prioritization rule," in reliance on the theory that such rules spurn a "virtuous cycle" of investment and innovation.<sup>201</sup> The court also held that the General Conduct rule was not unconstitutionally vague.<sup>202</sup>

*U.S. Telecom* was issued with a partial dissent from Judge Williams.<sup>203</sup> The spirit of the dissent lied in questioning the FCC's *economic judgment*.<sup>204</sup> The dissent pointedly declined to apply the same deference to the FCC's decisionmaking as the panel majority, instead diving deeply into the content of the rules and determining that they were "arbitrary and capricious."<sup>205</sup> The dissent agreed with the majority that the FCC's reclassification "may not" violate the Telecommunications Act, but concluded that the reclassification failed to "show that there are good reasons for the new policy" as required under *Fox Television* because the FCC (1) disregarded the record in concluding that the regulatory status of

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195. *See id.* at 713–24.

196. *See id.* at 713.

197. *Id.* at 726–27.

198. *See id.* at 728–32.

199. *Id.* at 712–18.

200. *Id.* at 733.

201. *Id.* at 734.

202. *Id.* at 736.

203. *Id.* at 744–78 (Williams, J., concurring in part and dissenting in part).

204. *Id.*

205. *Id.* at 744–78.

broadband access appears to have an indirect effect on investment, (2) failed to identify changed facts that would support the new regulatory regime, and (3) provided inadequate reasoning to depart from its prior regulatory approach, i.e. by making no finding on market power or otherwise considering competitive conditions.<sup>206</sup> It then contended that the rules were not statutorily authorized, reasoning (1) the FCC failed to offer a reasonable basis for its interpretation of the Communications Act to sustain its ban on paid prioritization and (2) the reach of § 706 of the Telecommunications Act was far more limited than the FCC suggested.<sup>207</sup> The dissent argued that there was “an irony” to the FCC’s decision to subject broadband to Title II and its reliance on § 706, as Title II “has no inherent provision for evolution to a competitive market” where § 706 “seeks to facilitate a shift from regulated monopoly to competition.”<sup>208</sup> The dissent similarly concluded that the FCC “invokes something very like market power to justify its broad imposition of regulatory burdens, but then finesses the issue of market power in justifying forbearance.”<sup>209</sup>

#### IV. LESSONS OF EXPERIENCE

At this point, it is clear what e-rulemaking can achieve, what was at stake in the net neutrality rulemaking, and how the public weighed in on the debate. To discover whether e-rulemaking has succeeded in enhancing democratic participation and informing better regulations, the next question is this: what did the FCC *do* with the 3.9 million comments received because of e-rulemaking? This Part explores that question and extrapolates three key lessons from the FCC’s net neutrality e-rulemaking. It also notes how public comments may play a different role in executive and independent agencies.

##### *A. Comments Matter*

The sophisticated wisdom in administrative law has long been that public comments do not meaningfully affect the regulatory process, that the notice-and-comment process is nothing more than “kabuki theater.”<sup>210</sup>

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206. *Id.* at 744–56.

207. *Id.* at 773–77.

208. *Id.* at 770.

209. *Id.* at 744.

210. Cass Sunstein, Address at the Brookings Institute, 27–29 (Apr. 5, 2013), [https://www.brookings.edu/wp-content/uploads/~/media/events/2013/4034/05-simplersunstein/20130405\\_simpler\\_government\\_transcript.pdf](https://www.brookings.edu/wp-content/uploads/~/media/events/2013/4034/05-simplersunstein/20130405_simpler_government_transcript.pdf) (“In the world of administrative law professors it’s long been thought that the process of notice and comment is basically a kabuki theater . . . . The agency makes its view in a kind of top-

Indeed, when asked whether he thought the net neutrality comments would make a difference in FCC net neutrality rulemaking, George Washington University Law School Professor Richard Pierce replied, “the vast majority of the comments are utterly worthless.”<sup>211</sup> Members of the public, too, expressed concern that the FCC was not reviewing and considering the public comments on the net neutrality rulemaking.<sup>212</sup>

The FCC’s processing and attribution of value to the comments submitted in the net neutrality rulemaking shows that this widespread skepticism deviates from practice. In reality, public comments matter tremendously to the FCC, which adheres to a process that ensures that every comment submitted in a rulemaking is reviewed in some capacity.<sup>213</sup> From the FCC’s perspective, public comments generally fall into one of three categories.<sup>214</sup> First, many comments fall into the “short-form” category.<sup>215</sup> Short-form comments generally include (1) form letters, (2) slight modifications to a preexisting comment, and (3) individualized restatements of another comment.<sup>216</sup> Second, some comments fall into the “long-form” category.<sup>217</sup> Long-form comments seek to advance a position by relying upon some form of legal, technical, and economic analyses.<sup>218</sup> Third, some comments fall in a “middle ground,” closer in format to short-form comments, but including valuable first-person experiences.<sup>219</sup>

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down way, maybe in some cases it engages with people before it proposes the rule, but there is no action in the notice and comment process.”); *see also* Krawiec, *supra* note 160, at 56 (“The informal notice and comment process seeks a pluralist goal of facilitating engagement opportunities for broad segments of society, including individuals and firms, as well as public and private interest groups. Though technically open to all, administrative law scholars forcefully debate the extent to which this ideal is met in practice.”).

211. Elise Hu, *1 Million Net Neutrality Comments Filed, But Will They Matter?*, NPR (July 21, 2014, 4:54PM), <http://www.npr.org/sections/alltechconsidered/2014/07/21/332678802/one-million-net-neutrality-comments-filed-but-will-they-matter>.

212. *See, e.g.*, Mignon Clyburn, *I Am FCC Commissioner Mignon Clyburn. Ask Me Anything!*, REDDIT (Nov. 21, 2014), [https://www.reddit.com/r/IAMa/comments/2n0co6/i\\_am\\_fcc\\_commissioner](https://www.reddit.com/r/IAMa/comments/2n0co6/i_am_fcc_commissioner) (documenting FCC Commissioner Mignon Clyburn’s question-and-answer session, in which users broadly lamented that the FCC was not reading their comments or considering their perspectives).

213. *See* Gigi B. Sohn, *FCC Makes Open Internet Comments More Accessible to the Public*, FCC Blog, (Aug. 5, 2014, 12:29 PM) (assuring the public that “every comment will be reviewed as part of the official record of this proceeding”).

214. Telephone Interview with Henning Schulzrinne, Chief Technology Officer, FCC (Apr. 2, 2015).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

There is no set formula for how the different categories of comments impact the FCC's final regulations, though the meticulousness of the review depends on the content and sophistication of the comment.<sup>220</sup> For net neutrality rulemaking, like all other rulemaking, the FCC relied on human processing to sort through all three categories of comments submitted.<sup>221</sup> Staff members at the FCC invested less time reviewing short form comments, which are chiefly useful to provide a sense of the public's thinking on an issue.<sup>222</sup> Staff members tended to spend more time reviewing middle-ground comments, which the agency values for lending a human face to the themes conveyed in the comments.<sup>223</sup> The FCC also used data analyses conducted by independent entities scrutinizing the agency's publicly available datasets.<sup>224</sup> To aid its understanding of short-form and middle-ground comments in the net neutrality rulemaking, the FCC utilized both the Sunlight Foundation's data analysis and the Knight Foundation's sentiment analysis.<sup>225</sup> Long-form comments, on the other hand, received careful attention from the FCC. Junior staff members read each long-form comment, extracting and summarizing the most interesting and pertinent information in "Comment Summaries" that were circulated to drafters.<sup>226</sup> The Comment Summaries are then topically ordered by argument to aid staff members in writing the final regulations and senior staff in formulating policy options.<sup>227</sup>

The final net neutrality rules suggest that the agency's diligent review of the public comments heavily impacted its ultimate regulatory judgments. The final regulations reference a diverse set of comments in support of its decisions on no fewer than 238 pages of the 313 pages issuing the final regulations.<sup>228</sup> To name just a handful of examples, the FCC relied on: (1) the National Arts and Cultural Organizations for the proposition that broadband Internet service "has inspired tremendous innovation, which has in turn enabled individual artists and arts organizations to reach new audiences, cultivate patrons and supporters, collaborate with peers, stimulate local economies and enrich cultural and civic discourse;"<sup>229</sup>

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220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. See *In re Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) (codified at 47 C.F.R. Part 8).

229. *Id.* at 4 n.1.



(2) Assistant Professor at the University of Nebraska College of Law, Justin Hurwitz, for the proposition that “allowing for the purchase of priority treatment can lead to degraded performance—in the form of higher latency, increased risk of packet loss, or, in aggregate, lower bandwidth—for traffic that is not covered by such an arrangement;”<sup>230</sup> (3) AT&T for the idea that “U.S. investment in broadband networks shows no signs of slowing;”<sup>231</sup> and (4) the American Civil Liberties Union for the suggestion that “given the oligopolistic nature of the local broadband market, many providers can collect the overcharge represented by a paid prioritization or similar agreement while not taking the hit from lowered demand flowing from poorer or more expensive internet service.”<sup>232</sup> The FCC often cited multiple commenters for a given principle, some of which stemmed from a remarkable range of participants. For example, in expressing concern about the “potential for anticompetitive behavior on the part of broadband Internet access service providers that serve as gatekeepers to the edge providers, transit providers, and content delivery networks seeking to deliver Internet traffic to the broadband providers’ end users,” the FCC relied on comments from at least eleven unique commenters, including the AARP, a law professor, Netflix, and the Writers Guild of America.<sup>233</sup>

As forecasted in its NPRM, which asked for comments on reclassification and the actual proposed rules, the final regulations incorporated significant modifications to the FCC’s initial proposals.<sup>234</sup> The FCC accepted the recommendation of two-thirds of commenters in subjecting broadband providers to mandatory common-carrier regulation.<sup>235</sup> Moreover, the FCC justified its ultimate bans on blocking, throttling, and paid prioritization as grounded in the “overwhelming consensus on the record.”<sup>236</sup> While the final blocking rule did not differ substantially from the proposed rule,<sup>237</sup> the FCC’s throttling and paid prioritization rules included significant changes from their proposed counterparts that reflected the bulk of the public comments. On throttling, the proposed rules included only a mandatory

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230. *Id.* at 54 n. 287.

231. *Id.* at 26 n.115.

232. *Id.* at 33 n.148.

233. *Id.* at 5601, 5691 n. 509.

234. See Sunlight Analysis Round 1, *supra* note 139. Compare *In re* Protecting & Promoting the Open Internet, 29 FCC Rcd. at 5561 (2014), with Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,742 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, and 20).

235. See Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,739–40, 19,744, 19,786–95.

236. *Id.* at 19,738.

237. Compare *In re* Protecting & Promoting the Open Internet, 29 FCC Rcd. at 5563–65, with Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,752–53.

disclosure requirement.<sup>238</sup> This disclosure requirement would have required broadband providers to disclose instances of throttling to end users and edge providers.<sup>239</sup> Consistent with the public comments, the anti-throttling rule ultimately adopted was more expansive, enacting a per se bar on impairing or degrading of Internet traffic based on source, destination, or content.<sup>240</sup> The FCC reasoned that:

The ban on throttling is necessary both to fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet, and to avoid gamesmanship designed to avoid the no-blocking rule by, for example, rendering an application effectively, but not technically, unusable.<sup>241</sup>

The rule “also specifically prohibits conduct that singles out content competing with a broadband provider’s business model.”<sup>242</sup>

The anti-paid-prioritization rule included significant substantive changes from its proposed counterpart.<sup>243</sup> Because two-thirds of the public comments voiced objections to the idea of paid priority for Internet traffic, the FCC eliminated the proposed rules’ inclusion of the “commercially reasonable” standard for content discrimination.<sup>244</sup> Instead, the FCC opted for an absolute prohibition on paid prioritization.<sup>245</sup> Designed to eradicate Internet “fast lanes,” the paid prioritization rule prohibited “the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management.”<sup>246</sup> Moreover, unlike the bans on blocking and throttling, the paid prioritization rule does not have a “reasonable network management” exception.<sup>247</sup> The public comments

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238. See *In re Protecting & Promoting the Open Internet*, 29 FCC Rcd. at 5584 (“A person engaged in the provision of broadband Internet access service shall publicly disclose in a timely manner to end users, edge providers, and the Commission when they make changes to their network practices as well as any instances of blocking, throttling, and pay-for-priority arrangements, or the parameters of default or ‘best effort’ service as distinct from any priority service.”).

239. *Id.* at 5584–85.

240. See *Protecting and Promoting the Open Internet*, 80 Fed. Reg. at 19,740.

241. *Id.*

242. *Id.*

243. Compare *In re Protecting & Promoting the Open Internet*, 29 FCC Rcd. at 5565, 5582, 5602–10, with *Protecting and Promoting the Open Internet*, 80 Fed. Reg. at 19,738, 19,740, 19,745, 19,754–59.

244. *Protecting and Promoting the Open Internet*, 80 Fed. Reg. at 19,738, 19,740, 19,745, 19,754–59.

245. *Id.* at 19,754–55.

246. *Id.* at 19,740.

247. *Id.*

were integral to the bright-line nature of this rule: the FCC explained that the “record demonstrate[d] the need for strong action.”<sup>248</sup>

*B. The FCC Attributes Participatory and Epistemic Values to Public Comments*

The FCC’s process for distilling and reviewing public comments demonstrates that the agency attributed both participatory and epistemic value to the comments in forming its ultimate regulations. From a participatory standpoint, the agency’s consideration of the Sunlight Foundation and Knight Foundation sentiment analyses suggests that the agency utilizes public comments at least in part to gauge public opinion on various issues. In a telling passage, the FCC justified its final regulations in part on the following assessment:

It is clear that the majority of comments support Commission action to protect the open Internet. Comments regarding the continuing need for open Internet rules, their legal basis, and their substance formed the core of the overall body of comments. In particular, support for the reclassification of broadband Internet access under Title II, opposition to fast lanes and paid prioritization, and unease regarding the market power of broadband Internet access service providers were themes frequently addressed by commenters.<sup>249</sup>

Indeed, as set forth above, the tight nexus between the FCC’s changes to proposed rules and the themes expressed in the public comments underscores the impact of the public comments.<sup>250</sup> The net neutrality case study demonstrates that mass comments, while value-laden rather than technical, can meaningfully impact final regulations—in particular in independent agencies like the FCC, which are subject to less rigorous empirical cost–benefit analysis requirements.<sup>251</sup>

From an epistemic standpoint, the FCC’s internal processes suggest that its attribution of participatory value to public comments does not defeat the information-sharing form of democratic participation. In compiling Comment Summaries, focusing resources on substantive long-form comments, paying special attention to middle-ground comments that conveyed valuable first-person experiences, and formulating final rules based on information gleaned in the process, the FCC seemed to consider the public comments not solely as an opinion poll, but as a method to learn more from the public about the potential effects of the proposed rules. In

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248. *Id.*

249. *Id.* at 19,746.

250. *Compare In re Protecting & Promoting the Open Internet*, 29 FCC Rcd. at 5564–65, and *Protecting and Promoting the Open Internet*, 80 Fed. Reg. at 19,746, with Sunlight Analysis Round 2, *supra* note 137, and Knight Foundation Analysis, *supra* note 144.

251. See Exec. Order No. 13,579, *supra* note 60.

another passage, the FCC explained:

The Commission has listened and it has learned. Its expertise has been strengthened. Public input has improved the quality of agency rulemaking by ensuring that agency regulations will be “tested” by exposure to diverse public comment. There is general consensus in the record on the need for the Commission to provide certainty with clear, enforceable rules. There is also general consensus on the need to have such rules. Today the Commission, informed by all of those views, makes a decision grounded in the record. The Commission has considered the arguments, data, and input provided by the commenters, even if not in agreement with the particulars of this Order; that public input has created a robust record, enabling the Commission to adopt new rules that are clear and sustainable.<sup>252</sup>

By substantively reviewing and learning from the public comments, the FCC captured the information-sharing potential of e-rulemaking. Even when widespread, public participation through e-rulemaking has important epistemic effects.

Many proponents of the participatory, direct democracy e-rulemaking ideal would applaud the FCC for taking into account short form comments and the attendant sentiment analyses in formulating its final regulations. For example, Professor Nina Mendelson argues that agencies should incorporate suggestions in public comments not just on questions of expertise, but also questions of value, in making regulatory decisions.<sup>253</sup> She contends that agencies ought to engage with the “comments of lay persons submitted in large numbers,” even if such comments are value-laden rather than technical.<sup>254</sup>

Yet the FCC’s attribution of value to the sentiments conveyed in public comments may disappoint those who advocate for a Hayekian, epistemic view of e-rulemaking’s democratic potential.<sup>255</sup> For one, treating public comments like an opinion poll to enhance democratic participation is internally inconsistent: the sample of the population commenting on a given rule, even one garnering widespread interest, is not necessarily representative of the populace. More fundamentally, over-politicization of the notice-and-comment process can subvert the very purpose of modern

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252. Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,739–40.

253. See Mendelson, *supra* note 3, at 1347–49; Mendelson, *supra* note 8, at 175–77.

254. Mendelson, *supra* note 3, at 1380.

255. See, e.g., STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 55–56 (1993) (“A depoliticized regulatory process [that is based in expertise, rationalization, and insulation] might produce better results, hence increased confidence, leading to more favorable public and Congressional reactions.”); LANDIS, *supra* note 13, at 1 (“The administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.”).

administrative agencies. Agencies are, at bottom, institutions of experts seeking to bring expertise to bear to enhance the general welfare of an increasingly complex society.<sup>256</sup> Critical to this essential function is the agencies' insulation from certain kinds of political pressure.<sup>257</sup> The politically insulated, technocratic agency ideal is entirely consistent with "small-p" politics, whereby an agency might actively seek out and learn from affected members of the public about their experience with a particular rule. But this technocratic archetype is at odds with "capital-P" politics, the sort of media-sensitive, partisan political pressure that touches so much of modern governance. The net neutrality e-rulemaking suggests that, if left unchecked by structural incentives like cost-benefit analysis, e-rulemaking can embolden "capital-P" politics in the regulatory process, drowning out e-rulemaking's capacity to inform regulations with valuable information gleaned from "small-p" politics. Requiring agencies to justify regulations empirically can foster the beneficial epistemic influence of "small-p" politics, while simultaneously mitigating the effect of harmful "capital-P" politics.

### *C. Cost-Benefit Analysis Requirements Incentivize Epistemic Values*

The FCC issued its final net neutrality rules without conducting a cost-benefit analysis.<sup>258</sup> The final rules mentioned the "costs" and "benefits" of various aspects of the proposed rule, but its conclusions lacked empirical rigor.<sup>259</sup> For example, the FCC stated any negative effects of the new legal framework on investment incentives "are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that our core broadband policies will promote," but it did not offer any quantitative justification for the decision.<sup>260</sup> Nor did the FCC offer an assessment of the costs of reclassifying ISPs as telecommunication services, eliminating the reasonable network management exception to the paid prioritization rule, or adopting a stricter anti-throttling rule than originally proposed.<sup>261</sup>

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256. See LANDIS, *supra* note 13; see also David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 271 (2013).

257. See BREYER, *supra* note 255, at 55–56; David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1490 (2015).

258. See Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,742, 19,738–19,846 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, and 20); see also John W. Mayo & Larry Downes, *Obama Administration Embraces Cost-Benefit Analysis: Why Can't the FCC?*, THE HILL, (Oct. 2, 2015, 11:30 AM), <http://thehill.com/blogs/congress-blog/the-administration/255681-obama-administration-embraces-cost-benefit-analysis>.

259. See Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,738–19,846.

260. *Id.* at 19,804.

261. See *id.* at 19,738–19,846.

If challenged in court, the FCC's decision not to issue empirical justifications for the final net neutrality rules would likely withstand judicial review. As an independent agency, the FCC is subject to Executive Order 13,579, which states that independent agencies "*should*" make regulatory decisions "only after consideration of their costs and benefits (both quantitative and qualitative)," but does not strictly require cost-benefit analysis.<sup>262</sup> If the FCC were an executive agency, however, its incorporation of the value-laden attributes of mass comments in forming final regulations would not pass muster. As set forth above, under Executive Order 13,563, executive agencies may only adopt a regulation when its benefits justify its costs, and may proceed only if the chosen approach maximizes net benefits.<sup>263</sup> Executive agencies are required "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."<sup>264</sup> While Executive Order 13,563 does acknowledge that some benefits and costs would be difficult to quantify, an executive agency that wished to incorporate the public's comments in some form of a sentiment would have to do so in a quantifiable, technical fashion.<sup>265</sup> The more rigorous cost-benefit analyses requirements imposed on executive agencies means that the participatory, "capital-P" political values furthered by e-rulemaking are less likely to impact the regulations an agency ultimately adopts, as it is difficult, if not impossible, to quantify popular opinion in an empirical fashion.

### CONCLUSION

In the wake of the watershed net neutrality rulemaking, FCC Commissioner Jessica Rosenworcel wrote:

This is a big deal. What is also a big deal is 4 million voices. Four million Americans wrote this agency to make known their ideas, thoughts, and deeply-held opinions about Internet openness. They lit up our phone lines, clogged our e-mail in-boxes, and jammed our online comment system. That might be messy, but whatever our disagreements on network neutrality are, I hope we can agree that's democracy in action . . . .<sup>266</sup>

The detailed review of the net neutrality rulemaking suggests that Commissioner Rosenworcel's optimism about the democratic capacity of e-rulemaking finds its roots in actual governance. E-rulemaking has given the

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262. Exec. Order No. 13,579, *supra* note 60 (emphasis added).

263. Exec. Order No. 13,563, *supra* note 43.

264. *Id.*

265. *Id.*

266. FCC Commissioner Jessica Rosenworcel, *FCC Adopts Strong, Sustainable Rules to Protect the Open Internet*, 2015 WL 851229, at \*12 (Feb. 26, 2015).

American public a voice in the highly technical, highly consequential regulatory process, breathing new life into the democratic promises of the notice-and-comment process that for decades languished in crowded docket rooms in Washington.

The net neutrality rulemaking illustrates how the Internet has enabled the participatory postulate of notice-and-comment rulemaking, long relegated to the realm of democratic potential, to become a democratic reality. Yet in order for the experiment of e-rulemaking to succeed in not only narrowing the juncture between the public and the regulatory process, but also in capturing the widely held information power of the public in order to facilitate the kind of depoliticized decisionmaking needed to improve regulations and ultimately enhance social welfare, the epistemic democratic capacity of e-rulemaking must be protected vigilantly. Rigorous cost-benefit analysis requirements like those placed on executive agencies in Executive Order 13,563 may be the best guarantor of those epistemic democratic values.

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