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Congressmen, corporations, entrepreneurs, and ordinary citizens of the United States are currently engaged in a fight for and against the FCC's most recent Net Neutrality regulations. The controversial regulations, based in hundreds of pages of legal justification, are accurately represented by the so-called "clear, bright-line" rules of no blocking, no throttling, and no paid prioritization.[1] Some, such as John Boehner, argue that the new Net Neutrality regulations are "a textbook example of the kind of Washington regulations that destroy innovation and entrepreneurship."[2] Others, such as President Obama, argue that the "FCC decision will protect innovation and create a level playing field for the next generation of entrepreneurs."[3] In the face of such diametrically opposed viewpoints, it is necessary to use available evidence to explore the issue and whether or not Net Neutrality will indeed lead to more innovation and competition. The FCC appears to answer with a resounding "Yes," but it is necessary to prove beyond such a partisan decision (3 Democrats to 2 Republicans in the vote), that the new Net Neutrality regulations will truly encourage and protect innovation and competition.

To contextualize the issue, it is necessary to first establish the exact meaning of "no blocking," "no throttling," and "no paid prioritization." The FCC presents three "clear, bright-

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[1] Office of the Secretary, United States of America. *Protecting and Promoting the Open* Internet by Federal Elections Commission.12 Mar. http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf (retrieved April 23, 2015) 7.

[2] Boehner, John. "Speaker.gov | Boehner: Net Neutrality Hurts Private-Sector Job Creation." Boehner: Net Neutrality Hurts Private-Sector Job Creation. http://www.speaker.gov/press-release/boehner-net-neutrality-hurts-private-sector-job-creation (retrieved April 30, 2015).: 1

[3] Obama, Barack. "Net Neutrality: A Free and Open Internet." The White House. https://www.whitehouse.gov/net-neutrality (retrieved April 19, 2015) 1.

line" rules that represent the general aims of the new regulations.[4] Concerning the first rule, regarding that of "no blocking," the FCC states that "Consumers who subscribe to a retail broadband Internet access service must get what they paid for - access to all (lawful) destinations on the Internet."[5] The FCC means that any Internet Service Provider (ISP) must be faithful to their claim that they provide customers with access to ALL legal parts of the Internet. For example, in light of these regulations, if Comcast decided to ban access to ISP competitor Verizon's website, then Comcast would be in violation of the regulation against blocking. Furthermore, the FCC states, through the second rule of "no throttling," that ISPs "shall not impair or degrade lawful Internet traffic on the basis of Internet content, applications or service."[6] The FCC means that Internet websites, applications, and services cannot be made to load slowly or pushed down (harder to find when searched for, essentially) by ISPs. Essentially, the "no throttling" rule prevents broadband companies from only technically allowing Internet websites, applications, and services to exist, but in reality, this all but renders them useless. For example, if Verizon suddenly decided that the company would pursue a conservative policy regarding same-sex marriage, they would not be allowed to purposefully slow, or make it harder to find websites, applications, or services that support or defend same-sex marriage. The FCC states in the final rule that broadband companies "shall not engage in paid prioritization," which is "the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic,"[7] the FCC means that ISPs cannot make access to websites, applications, or services that they are friendly or affiliated with easier to find or access than to those with which

[4] Office of the Secretary, United States of America. *Protecting and Promoting the Open* Internet by Federal Elections Commission.12 Mar. http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf (retrieved April 23, 2015) 7.
[5] Ibid: 7
[6] Ibid: 7
[7] Ibid: 7-8

they disagree, nor can broadband companies boost (or make obscure) any company that pays (or does not pay) for priority. For example, Verizon cannot run Google faster than Yahoo! if Google tried to pay for priority. These expanded "clear, bright-line rules" are meant to keep the Internet unbiased and open.

Before jumping to the effects on innovation and competition, it is necessary to regard the legal process through which the FCC has arrived at their current legal justifications. It is necessary to understand the history of the debate as well as whether or not the current justification breathe new, promising life and longevity into the new regulations. Attempts by the FCC to create and enforce Net Neutrality regulations have faced much resistance in recent years. The first attempt at Net Neutrality reform in the United States was the Internet policy statement passed by the FCC in 2005. The FCC created four principles within this statement which were as follows: ability to access any and all lawful content, ability to use any application or service of their choice, ability to connect any legal device to the Internet, and ability to choose amongst competing ISPs.[8] In 2008, the FCC attempted to enforce these rules when Comcast had "selectively blocked peer-to-peer connections in an attempt to manage its traffic."[9] While leading to no monetary discipline, Comcast was ordered to stop blocking access to certain websites because such actions violated the regulations.[10] Comcast acceded to the demands, but also followed with a lawsuit, stating that "the FCC did not have the authority to enforce its Internet policy statement."[11] The case went to the Washington, D.C. Court of Appeals, which in 2010, ruled in a 3-0 decision, that, in the case of *Comcast v. FCC*, the FCC did not "tie its assertion of ancillary authority over Comcast's Internet service to any ['statutorily mandated

[8] Gilroy, Angele A. "Access To Broadband Networks: The Net Neutrality Debate." Journal Of Current Issues In Media & Telecommunications 5 (2013): 333.
[9] Ibid: 334
[10] Ibid: 334
[11] Ibid: 334

responsibility']."[12] The court had struck down the law based on rejection of FCC power based on Title I of the 1934 Telecommunications Act.[13] It is important to note that the courts *did not* state that there was *no* way in which these regulation could be enforced, but that the ways through which the FCC tried to enforce the regulations was outside of their delegated authority. This left the door open for a modification of the FCC's legal basis from the use of Title I of the Communications Act of 1934 to other sources of power to enforce the regulations.[14]

The immediate predecessor to the current regulations is the Open Internet Order, passed by a 3-2 vote in 2010. The Open Internet Order regulations established transparency of company information to customers, prevented blocking, and prevented unreasonable discrimination when deciding which websites, applications, and services to run faster or slower.[15] The FCC continued to justify these regulations by classifying ISPs as information services through Title I of the 1934 Communications Act.[16] The ability to enforce the regulations was based in Section 706 of the 1996 Communications Act.[17] Thus, the FCC attempted to implement *similar* regulations to those of 2005, except using a different source of authority. Although the basis for future source of authority was upheld, many important parts of the 2010 Open Internet Order were struck down following the *Verizon v. FCC* court decision.[18] More precisely, the U.S. Court of Appeals for the District of Columbia's Circuit ruled that Section 706 of the Telecommunications Act of 1996 "affirmatively grants the FCC the authority to broadband providers' treatment of Internet

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[12] Ibid: 334
[13] Ibid: 334
[14] Federal Communications Commission. United States of America. NEWS. By Neil Grace. N.p.: n.p., n.d. Fcc.gov. United States Government, 31 July 2012. <https://apps.fcc.gov/edocs_public/attachmatch/DOC-315501A1.pdf>.: 2
[15] Gilroy, Angele A.. "Access To Broadband Networks: The Net Neutrality Debate." Journal Of Current Issues In Media & Telecommunications 5 (2013): 335
[16] Ibid: 336
[17] Ibid: 336
[18] Yoo, Christopher S.. "Wickard For The Internet? Network Neutrality After Verizon V. FCC." Federal Communications Law Journal 66 (n.d.): 417.

traffic," while also ruling that "the Order's nondiscrimination and anti-blocking rules represented an invalid exercise of that authority because they contravened other express statutory mandates."[19] Essentially, the courts ruled that the FCC had a legitimate source of power through which to justify their authority, but also created regulations that were contrary to existing statutory laws regarding *information services*. The courts said that the FCC could not apply "common carrier obligations to non-carriers" and the regulations "were therefore impossible."[20] After the *Verizon* case, the FCC briefly considered adopting a "fast lane" policy to allow for paid prioritization and throttling, but quickly reversed course following criticism from entrepreneurs, "edge" providers (such as Google), and even the president. As a result, the FCC started to create a new set of Net Neutrality regulations that would be wholly legitimate.

The recent Net Neutrality regulations, implemented on February 26, 2015, rely on the above mentioned three "clear, bright-line" rules of no blocking, no throttling, and no paid prioritization. The FCC used the *Verizon v. FCC* court decision to reinforce the authority given to the commission through Section 706 of the 1996 Communications Act.[21] Promising to uphold the new law, the FCC used Title II of the 1934 Telecommunications Act to reclassify ISPs as *common carriers*, not information services.[22] The FCC used the *Brand X* decision, a Supreme Court case, to justify reclassification of ISPs as common carriers.[23] The Supreme Court had ruled that "the Commission can return to that classification if it provided an adequate justification."[24] The FCC believes that times have changed significantly since 2002, when ISPs were classified as information services, to justify reclassifying ISPs as common carriers because

[19] Ibid: 417
[20] Speta, James B.. "Unintentional Antitrust: The FCC's Only (and Better) Way Forward with Net Neutrality After the Mess of Verizon v. FCC." Federal Communications Law Journal 66 (2014): 491-.
[21] Ibid: 417
[22] Federal Communications Commission. United States of America. NEWS. By Neil Grace. N.p.: n.p., n.d. Fcc.gov. United States Government, 31 July 2012. https://apps.fcc.gov/edocs_public/attachmatch/DOC-315501A1.pdf: 1
[23] Ibid: 14
[24] Ibid: 14

of the vastly different Internet that is currently in use.[25] If the common carrier section stays, which the vastly different landscape of the Internet between 2002 and 2015 seems to support, then the legal groundwork appears to be in place to justify and maintain the FCC's new Net Neutrality regulations. As a result, it is necessary to look at the implications of the most recent and promising FCC Net Neutrality regulations on innovation and competition.

Innovation is vital to keeping up in the rapidly changing digital world of the Internet. Being able to adapt to new competitors and technologies has generally defined how long a company will last on the Internet. Recently, more and more cases have arisen over issues such as blocking, throttling, and paid prioritization because of the overwhelming increase in data that the Internet has come to include. In fact, between 1990 and 2010, the monthly global Internet traffic has increased to become "over 10 million times larger-from one terabyte per month to 10 exabytes per month."[26] In essence, the Internet has become one of the most innovative and expanding areas of the economy, which may also add to the reclassification argument posited by the FCC. Internet-based industries represents 4.1%, or $2.1 trillion, of the GDP of G-20 countries.[27] If the entirety of the Internet is taken into account, it would have an economy larger than that of Germany.[28] As a result, maintaining high levels of innovation is necessary to be able to prosper and grow in such a rapidly changing environment.

The three "clear, bright-line" rules created by the FCC will maintain these levels of innovation, and ensure that ISPs do not discriminate against, and subsequently harm, innovation. First, ISPs have the potential to "hold-up new innovations, thereby excluding competitors in

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[25] Ibid: 14
[26] Korotky, Steven K.. "Semi-Empirical Description And Projections Of Internet Traffic Trends Using A Hyperbolic Compound Annual Growth Rate." Bell Labs Technical Journal 18 (2013): 8
[27] Ammori, Marvin. "The Case For Net Neutrality." Foreign Affairs 93 (2014): 62-73.
[28] Ibid

those new markets and extracting additional revenue."[29] In essence, ISPs have the potential power to throttle, block, and force payment from Internet-based companies that are not affiliated, while simultaneously promoting their own promoted products. For example, between December 2013 and January 2014, Comcast throttled the popular and innovative Netflix causing major disruptions in internet speed for Comcast customers that *also* use Netflix.[30] Since Netflix started to lose customers and revenue because the throttled streaming was slowed by as much as 24%, Netflix had no choice but to make a deal with Comcast.[31] The result was that Netflix having to pay Comcast an undisclosed amount to allow users to recover streaming rates, which suddenly rose by 24% after the deal.[32] Comcast claimed that Netflix had been taking up so much data that they should help pay for it.[33] Meanwhile, Hulu, a popular streaming service similar to Netflix, but owned partly by Comcast, was not at all affected by the throttling.[34] The new FCC regulations explicitly ban such throttling by ISPs.[35] As a result, the new "clear, bright-line" rules will prevent ISPs from stifling innovative companies to promote their own products and get rid of more innovative competitors.

Furthermore, start-ups benefit along with larger "edge" companies, such as Google and Netflix, from the new Net Neutrality regulations. Following the *Verizon v. FCC* decision that again opened the Internet to blocking, throttling, and paid prioritizations, the FCC briefly considered explicitly allowing for Internet fast lanes based on ISP claims that it was "necessary"

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[29] Narechania, Tejas N."Network Nepotism And The Market For Content Delivery." Stanford Law Review 67 (n.d.): 29
[30] Goldman, David. "Slow Comcast Speeds Were Costing Netflix Customers." CNNMoney. http://money.cnn.com/2014/08/29/technology/netflix-comcast/ (retrieved April 25, 2015).: 1
[31] Ibid: 1
[32] Narechania, Tejas N.. "Network Nepotism And The Market For Content Delivery." Stanford Law Review 67 (n.d.): 30
[33] Ibid: 30
[34] Ibid: 30
[35] Ammori, Marvin. "The Case For Net Neutrality." Foreign Affairs 93 (2014): 62-73.

to ensure fast Internet.[36] In response, Ammori says that "One hundred and fifty leading technology companies, including Amazon, Microsoft, and Kickstarter" as well as "over 100 of the nation's leading venture capital investors wrote that the proposal, if adopted as law, would 'stifle innovation,' since many start-ups and entrepreneurs wouldn't be able to afford to access a fast lane."[37] In essence, these leading companies in the United States argued that paid prioritization and the inevitable throttling (because to create fast lanes there need to be slow lanes) would suppress innovative start-ups because they would not be able to afford the expensive fees that would be required to allow for reasonable access, and even larger "edge" providers could be pushed aside for ISP-affiliated programs.[38] These frustrated startups would not get into the market, discouraging innovation because potential innovators are turned off from entering an environment where innovation would not make a difference.[39] Even without such a proposal legitimizing such practices, having no regulations will produce the same "stifling of innovation" because ISPs will have no reason *not* to create such "lanes," essentially amounting to implicit approval. As a result, the most recent Net Neutrality regulations, which prevent the creation of exclusive "fast lanes" and "slow lanes," will lead to greater innovation than that which would otherwise occur without such regulations because all Internet-based companies will be guaranteed the opportunity to succeed by creating innovation on the neutral platform that is the Internet.

Closely linked to the impact on innovation is the impact that the regulations will have on competition. It is important to note that competition and innovation have similar arguments, but

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[36] Prasad, Rohit, V. Sridhar. "The Economics Of Net Neutrality." Economic & Political Weekly 49 (2014): 55
[37] Ammori, Marvin. "The Case For Net Neutrality." Foreign Affairs 93 (2014): 62-73.
[38] Narechania, Tejas N.. "Network Nepotism And The Market For Content Delivery." Stanford Law Review 67 (n.d.): 27-36.
[39] Choi, Jay P. and Byung-Cheol Kim. "Net neutrality and investment incentives." The RAND Journal of Economics (n.d.): 2015: 46

are viewed, and argued, from different angles. Tejas Narechania says that "Preventing carriers from using paid prioritization to advantage affiliated applications mitigates the risk that they will leverage their gatekeeper power in the content markets."[40] In essence, the "clear, bright-line" rules that the FCC has most recently established prevent monopolistic ISPs (carriers) from using paid prioritization to advance their own applications for a greater profit margin at the expense of start-ups and "edge" providers, such as Google and Amazon. For example, between 2011 and 2013 AT&T, Verizon, and Sprint agreed to block access of their customers to "edge" provider Google's application, Google Wallet, "likely because all three providers are part of a joint venture called Isis."[41] The FCC protested against Verizon based on the Open Internet Order in 2010, which would have allowed Google Wallet to appear on Verizon phones.[42] In part, the *Verizon v. FCC* court decision struck down this claim based on improper framework by the FCC to enforce such a policy.[43] The most recent Net Neutrality regulations will successfully prevent Verizon from blocking access to "edge" provider services, applications, and websites such as Google Wallet. The results of such regulations will force Verizon to create *better*, more competitively priced products to compete with Google and other companies, instead of simply blocking. If a powerful "edge" provider, such as Google, *could not* get equal access from certain companies, most potential innovator, competitors, and entrepreneurs would certainly be dissuaded to enter content markets that ISP-affiliated products penetrate. In turn, it stands to reason that the new Net Neutrality regulation will not only allow, but encourage new competitors to enter the market because they have an equal chance of succeeding. This leads to fairer, more

[40] Narechania, Tejas N.. "Network Nepotism And The Market For Content Delivery." Stanford Law Review 67 (n.d.): 30
[41] Ammori, Marvin. "The Case For Net Neutrality." Foreign Affairs 93 (2014): 62-73.
[42] Office of the Secretary, United States of America. *Verizon Wireless to Pay* by Federal Elections Commission. 31 July 2012. https://apps.fcc.gov/edocs_public/attachmatch/DOC-315501A1.pdf (retrieved April 5, 2016).
[43] Yoo, Christopher S.. "Wickard For The Internet? Network Neutrality After Verizon V. FCC." Federal Communications Law Journal 66 (n.d.): 47

open competition between ISP-affiliated applications, services, and websites to compete with those of startups and "edge" providers because ISPs cannot use their power to manipulate access and prevent competing technologies from being accessed. Finally, Reggiani and Valletti say, that Net Neutrality creates "an increase in the participation at the edge, also translating in higher overall profits for the fringe."[44] The promising Net Neutrality regulations will encourage potential startups and investors to pursue and compete with new, innovative technology instead of being hesitant because of ISP domination. The safety provided by Net Neutrality regulations guarantee the equal opportunity in competition, creating more competition. As a result, the new Net Neutrality regulations will create and encourage competition because it will prevent ISPs and their affiliates from blocking, throttling, and using paid prioritization, ensuring fair competition, which also encourages innovators and entrepreneurs to enter into the fair, competitive market.

The Internet has become one of the most important sites of innovation, competition, and economic growth in contemporary times. Marvin Ammori says that "the Internet is just the latest and perhaps most impressive of what economists call "general-purpose technologies."[45] The Internet is properly a platform through which any (legal) innovator, competitor, or entrepreneur can enter into very easily. Would Facebook have been able to grow into company that it is today if MySpace had paid ISPs to throttle or block access around 2005? What about Yahoo! doing the same with Google around 2000? Fortunately, the most recent Net Neutrality regulations adopted by the FCC provide a legally promising removal of such questions, and their subsequent risks of limited competition and innovation. The three "clear, bright-line" rules prevent the legal throttling, blocking, or paid prioritization that could have strangled any of these innovative

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[44] Reggiani, Carlo, and Tommaso Valletti. 2016. Net neutrality and innovation at the core and at the edge. *International Journal of Industrial Organization* 45 (3): 14

[45] Ammori, Marvin. "The Case For Net Neutrality." Foreign Affairs 93 (2014): 62-73.

"edge" providers and startups. In turn, innovation cannot be stifled by ISPs because the ISP-affiliated products have to innovate, not use throttling, blocking, or paid prioritization to compete with rival companies. Similarly, the new Net Neutrality regulations ensure fair competition by removing discrimination, and thus unfairness, in Internet speeds and access through anti-throttling and anti-paid prioritization rules, while also giving prospective competitors, innovators, and entrepreneurs incentive to compete in such a fair, open market. As a result, the most recent Net Neutrality regulations, based on promising legal grounds, will ensure, and create innovation and competition on the truly free, open, and fair Internet.