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An Ethical Position on the Principle of Internet Neutrality

An Application of Kantianism and Utilitarianism

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Ethical analysis of net neutrality provides strong evidence in support maintaining the policy into the future. Internet neutrality (or “net” neutrality) is described by the Federal Communications Commission as the principle that “broadband service providers cannot block or deliberately slow speeds for internet services or apps, favor some internet traffic in exchange for consideration, or engage in other practices that harm internet openness” (“The Open Internet”). In other words all data flowing through an Internet Service Provider’s (ISPs) network is treated equally as if one packet of data was indistinguishable from any other with respect to content. This principle has proven controversial in recent years as technologists, policy makers, and profit-seeking firms have expressed competing concerns. We evaluate the principle through the application of the ethical theories of Kantianism and Utilitarianism and find strong support under both frameworks that net neutrality should remain in place.

We apply Kant’s formula of the Universal Law of Nature with four commonly accepted steps: “First, formulate a maxim that enshrines your reason for acting as you propose. Second, recast that maxim as a universal law of nature governing all rational agents, and so as holding that all must, by natural law, act as you yourself propose to act in these circumstances. Third, consider whether your maxim is even conceivable in a world governed by this law of nature. If it is, then, fourth, ask yourself whether you would, or could, rationally will to act on your maxim in such a world. If you could, then your action is morally permissible” (“Kant’s Moral Philosophy” 13). We now attempt to formulate maxims related to net neutrality.

ISPs want to be able to restrict access to information by charging the maximum possible price the market will bear for certain kinds of data. We cast this as the maxim that “access to information should be restricted.” Universalizing this maxim proposes that individuals, governments, and organizations reduce access to information. Such a world is conceivable, resembling modern day North Korea in which interpersonal communication is highly self-censored, and official sources of information are highly restricted and selective about what information is available. In such a world, we would not will ourselves to act on this maxim, indeed just the opposite. Very often in societies where information is restricted we see individuals working to overcome such restrictions through any means at their disposal: illicit publications, virtual private networks, word-of-mouth networks, etc. Since this maxim does not pass the fourth test, we conclude that acting on it is not morally permissible.

To the extent that ending the policy of net neutrality contributes to restricting access to information, it is also, then, morally questionable dubious. It does seem likely that one outcome from ending the policy will be barriers to accessing information. Some consumers may be priced out of internet service, losing access. Some producers of information may not be able to pay fees to ensure maximum public access of their content. Additionally, ending net neutrality will drive investment capital to the most profitable markets. Decaying infrastructure in some markets may also limit content available to consumers in that area.

From a consumer’s perspective, then, it seems ending net neutrality is a morally questionable action. From a content producer’s perspective, let’s examine the following maxim: “the right of speech should be prioritized based on financial payment.” Universalizing this maxim proposes that platforms for speech including public space, broadcast and print media, and internet communication systems give special advantage to speech based on how much the speaker has paid to speak. Such a world can be conceived by extending forms of commercial speech such as print and TV advertisements to all other areas. The right to speech would be free initially. However any speaker willing to pay more would have their speech prioritized. Perhaps the public comment periods during city council meetings would proceed based on bid amounts for the floor. Voters might be able to pay to increase the weight of their vote. ISPs would be allowed or even required to prioritize the data traversing their networks based on how much the producer of the data paid them.

In such world, power would naturally accrete to the wealthiest citizens and companies. The beneficiaries could use their growing power to accumulate further wealth in a self-reinforcing cycle until both power and wealth is primarily held by a small minority of individuals and companies. History has shown that we cannot continue to act on this maxim under such circumstances. Civil discontent and widespread misery are ultimately created and upheaval including violence often ensues. This is an expression that individuals in such societies cannot will themselves to act on this maxim. Therefore it must be morally impermissible.

To the extent, then, that ending net neutrality would prioritize speech based on financial payment, it is morally impermissible. This is indeed a highly likely outcome of ending the policy. As profit maximizing firms operating as near monopolies, ISPs have strong motivation to extract Economic Rent from content producers (“speakers”) using their network. Indeed part of the desire of ISPs to end the policy of net neutrality is driven by their hope to negotiate deals with content providers such as Netflix and YouTube to provide preferential service to their content in exchange for fees. Such negotiations might be more aptly described as extortion. Likewise customers using speech platforms available over the internet could pay to have their form of speech travel at faster speed. Such content provider deals may not seem pernicious since entertainment is not a category of speech often threatened, but the possibility of the application of this tactic to news outlets, government websites, and communication platforms such as Facebook or WhatsApp is concerning.

From the examination of these maxims, it appears ending the ending the policy of net neutrality is at best morally dubious from a Kantian perspective. For another ethical viewpoint, we can appeal to Utilitarianism. Utilitarianism “is generally held to be the view that the morally right action is the action that produces the most good” (“The History of Utilitarianism”). Importantly, in “the Utilitarian view one ought to maximize the overall good – that is, consider the good of others as well as one's own good” (“The History of Utilitarianism”). From this perspective, the rightness of an action is understood entirely in terms of consequences produced, and this feature distinguishes Utilitarianism from Kantianism. Kantianism is focused duty or rules, Utilitarianism is focused on outcomes. Thus we now focus on likely outcomes of ending net neutrality, and consider whether ending net neutrality produces more good than preserving it.

ISPs principally contest net neutrality on the grounds that the FCC’s treatment of ISPs has, as Comcast Executive David Cohen expressed, “harmed broadband investment and innovation” (“FCC Takes Next Steps on Open Internet”). The policy is indeed a market hindrance that limits the choices of buyers and sellers of services and results in reduced options for consumers, so this position certainly has some validity based on economics. To the extent that ISPs can make profits from offering these choices to producers and consumers of content, they would make additional investments in infrastructure to deliver those choices. There are certainly consumers that would willingly pay a higher price for faster or more reliable access to Netflix or other streaming sites, and there are certainly companies willing to pay ISPs to give their content preferential treatment. In this sense, net neutrality is preventing fully voluntary transactions, making the market less free.

The argument that net neutrality reduces innovation may be compelling as well. Clearly a market exists for non-neutral communication networks, and market forces in free societies are perhaps the central driver of innovation in free societies. Innovation is especially tricky in that world-altering innovation often comes from unpredictable places and thrives on freedom of individuals and organizations making their own choices on a microeconomic level. Net neutrality is certainly a reduction that freedom on some level.

Taking the above into account, the overall good produced by relaxing net neutrality is that doing so allows individuals and organizations greater freedom to enter into voluntary transactions that benefit both sellers and buyers. Additionally, the consequences of allowing this freedom may be unpredictable but history has shown that allowing individuals and companies freedom to make their own choices produces valuable innovation, adding to overall good, whereas onerous regulation stifles it.

We accept the claim that net neutrality harms broadband investment and innovation without dispute and find the additions to the overall good noticeable and credible. However we stress that these claims of harm, i.e. reduction in good, are claims of kind and not of degree. In addition the qualification is necessary that net neutrality most directly harms *ISP* investment and *ISP* innovation. Considering the question to what degree it harms the overall investment and innovation is enlightening.

Certainly ISPs are the largest investors in network infrastructure, but part of that has been driven by regulation and tax policy granting licenses, financial arrangements, competitive rights, and public assets leases and right of ways encouraging such investment. Moreover, the US election cycle in 2017 showed that in at least one municipality, Fort Collins, CO, there is appetite to explore direct public investment in network infrastructure. Given that the massive investments made in infrastructure by current ISPs already occurred under the policy of net neutrality, and that there is evidence that such investment would be made by entities other than existing ISPs, even as the policy is still in place, the harm in maintaining net neutrality appears rather reduced.

That net neutrality reduces the incentives for *ISP* innovation is a credible claim, but the *extent* of this harm seems limited as well. The innovation that produced current networks took place under the policy of net neutrality just as the infrastructure investments did. Perhaps unlike investments in infrastructure, it is unsurprising that this was so for innovation. The innovation that makes current networks possible is based on basic research done by scientists going back more than 200 years and conducted often without a clear commercial purpose, often without commercial funding, and often driven by other than purely commercial motives of the individual scientists.

In the 20th century, corporations were certainly vital contributors to research and engineering innovations. Bell Labs, of which AT&T, a very large contemporary ISP, is a descendant, is notably among them, but we must ask the specific question to what degree a policy affecting only ISPs will harm network innovation overall. In responding, it is first worth noting that during the most fruitful period of Bell Labs existence, its partial owner, AT&T was regulated under Title II, the same regulatory regime ISPs now claim harms innovation. Second, there is a great deal of publicly funded academic research in computer networking. Such research is not directly tied to ISP profits. Additionally there are a variety of non-ISP commercial enterprises such as Cisco, Level 3 Communications, and Corning Inc. that heavily invest in networking innovation and are primarily incentivized by competition between them. Taking all these consideration into account, we conclude that the harm to innovation in computer networks, though possible, is likely to be limited and potentially offset by other factors.

The addition to the overall good of eliminating net neutrality appears somewhat muted. To examine the harm in eliminating the policy, economics provides the most enlightening perspective on how ISPs will behave in the absence of this policy and the overall effects their actions will produce.

ISPs are special kinds of firms in two senses: they are natural monopolies, and their product is, we argue, a public utility. According to Harvard economist Greg Mankiw, “an industry is a natural monopoly when a single firm can supply a good or service to an entire market at a lower cost than could two or more firms” (Mankiw 316). Natural monopolies occur when the average cost of production declines as output rises over the entire range of relevant output. In the case of ISPs, this situation arises from the enormous infrastructure costs required to initially build and then maintain communication networks, yet, once built, the marginal cost of delivering service to an additional customer is very small.

Though ISPs often claim not to be monopolies, we do see this in practice. Many markets only have a single ISP delivering internet service. According to a US Department of Commerce report from December 2014 only 37% of the US population has access to two or more providers offering download speeds of at least 25 Mbps (Beede 4), and most markets that do have at least two providers have that good fortune due to telephone and cable companies building infrastructure for two formerly distinct industries, both natural monopolies, and then adopting that infrastructure to deliver network services.

Ending net neutrality would make existing problems with these monopolies worse. Economics tells us that an unrestrained profit maximizing monopolist “produces less than the socially efficient quantity of output” (Mankiw 326). Monopolies sell their services for more than it costs to produce them. ISPs are certainly profit maximizing, so the very fact that they favor eliminating net neutrality indicates that this will increase their profits, capturing higher economic rent than they do now. Moreover, ending the policy would allow them to charge different prices to different customers, capturing economic surplus even beyond the additional rent by charging some customers closer to the maximum they are willing to pay for their service.

In modern society, we also claim, broadband service is a public utility. A public utility is defined as “a business that furnishes an everyday necessity to the public at large” (“Public Utilities”). Telephone service has long been recognized as a public utility, and internet service was initially and is still partially delivered using telephone services, so in this sense it is self-evident that internet service is a public utility serving very much the same role in modern society that the telephone did in the past. It is also apparent in modern life that access to the internet at broadband speed is essential to conducting the ordinary affairs of life and participating in society and democracy. Without access to reliable and reasonably fast access to the internet, an individual lacks *equal* access to government institutions, public debate, news and other information, education, the banking system, and markets for goods and services including the labor market. These concerns make broadband service both more important and more clearly a public utility than modern telephone service. We note, finally, that natural monopolies such as ISPs tend to be public utilities with other examples being gas, electricity, roads, sewage, and telephone services, and that public utilities have perhaps most significantly and directly increased the overall good over the last several hundred years.

With general insights from economics about natural monopolies and how they behave and the recognition that internet service is arguably a public utility, we may examine more specifically the consequences of ending net neutrality and their impact on the overall good. As Baase notes, net neutrality has “two different but related issues…(1) whether the companies that provide the communications networks should be permitted to exclude or give different treatment to content based on the content itself, on the category of content, or on the company or organization that provides it, and (2) whether the companies that provide the communications networks should be permitted to offer content providers and individual subscribers different levels of speed and priority at different price levels” (Baase 179). Ending net neutrality has implications for both concerns.

With respect to the first issue, ISPs would extract greater economic rent without net neutrality from content producers and consumers. The ISP argument that net neutrality prevents voluntary transactions from taking place was previously discussed. However, ISPs possess a near extortion level of market power given their near monopoly position making such transactions appear less than voluntary. In maximizing profits, they are likely to extort large content providers like Netflix and YouTube for a preferred or even similar level of service. Prima facie this has no impact on the overall good since it makes ISPs better off to the same extent it harms content providers. However, this develop has the further insidious consequence of raising a significant barriers to smaller firms that cannot pay such fees, discouraging new firms from forming, and reinforcing the market position of content producers that can pay the fees.

Over the long term the harm to the overall good is likely to be high. While net neutrality has a small potential to decrease network innovation from *ISPs*, this barrier has a high likelihood of reducing many other kinds of innovation over time. The most vigorous innovation often comes from new and small firms most directly hurt by this barrier. Google can pay such fees now, but would the firm have closed early on if ISPs demanded fees from all the search traffic they were generating? Would Netflix still be mailing DVDs after finding it not profitable to stream video? What innovative new company will not be created or not succeed because of the cost barrier imposed by ISPs? This harm is incalculable, but assuredly high.

As a profit maximizing strategy, ISPs that are also content producers such as Comcast will face strong incentives to use their ISP business to make it easier and/or cheaper for customers to access their content and less convenient or more expensive for customers to access the content of competitors. Such a tactic would benefit ISP parent companies and their shareholders to be sure, but would also likely result in reduced production of competing content, hurting those content produces and reducing choice for consumers, a definite harm.

In the extreme, ISPs would be able to discriminate against content, a category of content, or the organization that produces it in any arbitrary way of their choosing. What if unfavorable news coverage is reducing profits or encouraging a call for strict regulation? What if the owner of an ISP is also a political candidate? or if the owner has strongly held religious beliefs as in the cases of Hobby Lobby or Chick-fil-a? The owners of those companies are permitted to not offer birth control coverage as part of their health plans. Would similar owners of an ISP be permitted to block pornography or same-sex dating websites? Such extreme scenarios are unlikely but nevertheless possible without the principle of net neutrality.

Clearly with respect to Baase’s first issue there is a high potential for real harm through lost non-ISP innovation of all sorts and the reduction in choice for consumers. The second issue of whether ISPs should be permitted to offer content providers and individual subscribers different levels of speed and priority at different price levels is likely to cause more harm than good as well. On the content producer side, offering such options will not present the same kind of extortionary opportunities as in the first issue, however it will have the deleterious effect of reinforcing winners and losers among content producers. Whoever can pay the most for the highest speed or priority will do so, making their goods or services more attractive to consumers only by virtue of their ability to pay ISPs more. This competitive advantage, obtained through no innovation on the content producer’s part, will stifle new disruptive innovation that history has shown produces unpredictable and large gains to the common good, and tend to concentrate power among successful firms in a self-reinforcing way.

On the ISP customer side, a profit maximizing ISP with the ability to charge customers different prices for different speeds or priority will heavily invest in infrastructure in markets where customers are willing to pay high prices and neglect investment where customers are not. Because of the nature of such infrastructure, over time we would expect wealthy neighborhoods and business districts, willing to pay more for broadband speed, would generally have faster and more reliable service, while poorer neighborhoods and business districts would generally have slower less reliable service overall. This may seem like a neutral rearrangement of overall good, but due to declining marginal utility, this actually reduces it. The value of faster, more reliable internet is greater in poor communities than it is in wealth communities.

Weighing all the additions to and subtractions from the overall good caused by ending the policy of net neutrality, it is apparent that the harm caused generally by ending the policy is much greater than the benefits to the relatively few citizens that would benefit. Preserving the policy does not radically hurt investment and innovation in networking infrastructure and technology. However, without net neutrality, ISPs are likely to operate even more like unregulated monopolies, and the benefits are likely to accrue to ISPs, their shareholders, and those wealthy enough to pay for more tailored services. Ending the policy would tend to preserve or even strengthen the current distribution of power and wealth, benefiting the few at the expense of the many, and hurting many kinds of innovation in fields other than networking.

The harm from ending the policy, however, will be spread broadly. In modern life, broadband speed internet access is a public utility essential to the daily activities of life just as telephone services was in the past. Ending net neutrality encourages ISPs to move away from offering their services as essential services and further resist regulation that we apply to most other industries that are both natural monopolies and public utilities on behalf of the public good. As a consequence, those least well off are mostly likely to be harmed because they most benefit from the leveling effects of cheap and available information, education, platforms for speech and activism, employment, news, and government services. All of these goods and services are likely to become less level across society if data can be treated differently based on who is sending it and who is requesting it.

One of the ideals at the core of American society is equality of opportunity but not of outcomes. Though this ideal is not realized, ending net neutrality erodes the sizeable gains to equality of opportunity that the open internet has demonstrably produced. In light of all these concerns, ending net neutrality would materially reduce the overall good and so is unethical from the Utilitarian perspective.

From both Kantian and Utilitarian perspectives, the ethical course of action is to preserve net neutrality. We cannot will ourselves to act on maxims that would be sympathetic to ending the policy. The worlds we conceive of under such maxims are unstable and unhappy. When we contemplate the consequences of ending the policy, the world is a less equal and less free place benefiting the few and harming the many. From both perspectives keeping net neutrality in place is the ethical choice.

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