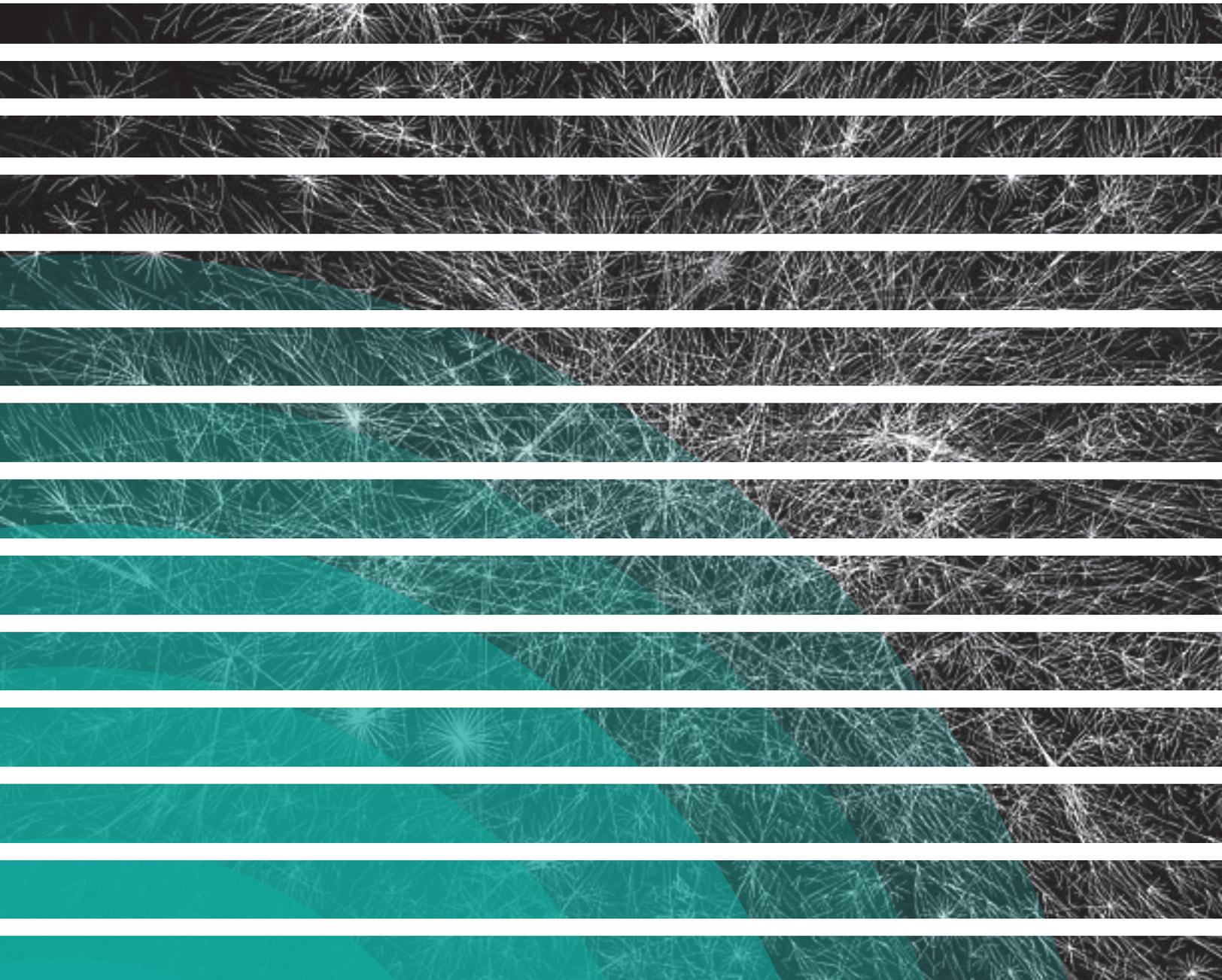




# Regulate, Repeal, Repeat: Net Neutrality and the Future of the Internet

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## INTRODUCTION

If you are tired of Zoom calls, spend too much time on TikTok, or are reading this on your computer screen, we have good news: The Internet still works. For most Americans, this is unsurprising. But three years ago there was an uproar as many politicians, tech advocates, and journalists warned the Internet would soon only load one word at a time or simply that the whole endeavor as we knew it was coming to an end.<sup>1</sup> These intense reactions were evoked by a concept called “net neutrality,” an idea that has diverse definitions but generally refers to regulations that would require Internet service providers (ISPs) to deliver traffic without unfair discrimination.<sup>2</sup>

Net neutrality sloganeering causes a frenzy every time the Federal Communications Commission (FCC) changes political hands. After the ruckus subsides, however, the actual regulatory issue on the table is far less dramatic. The real question of the hour is whether net neutrality (however defined) should be enforced under Title II of the Communications Act or Title I of the Communications Act (in combination with Section 5 of the Federal Trade Commission Act). And if this sounds like a mundane and boring question, you are correct. But this is not to say that the choice between the two options is unimportant. There are significant differences between the two potential classifications of broadband service and the accompanying regulatory regimes. Though I consider Title I the better approach, once the costs and benefits of each possibility are considered, there still remains enough common ground between supporters of each classification for compromise, not division.

## THE CURRENT APPROACH: TITLE I + THE FEDERAL TRADE COMMISSION

The Internet grew and developed in a Title I world. Even as insiders began to discuss the regulatory future of the Internet, Title I was the go-to option for “enhanced services” that exceeded the

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<sup>1</sup> Editorial Board, “Don’t Forget the ‘Net Neutrality’ Panic,” *Wall Street Journal*, June 14, 2019, <https://www.wsj.com/articles/dont-forget-the-net-neutrality-panic-11560553157>.

<sup>2</sup> See generally, Tim Wu, “Network Neutrality, Broadband Discrimination,” *Journal on Telecommunications and High Technology Law* 2:141 (2003), pp. 141–80, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=388863](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=388863).

capabilities of traditional telephone service.<sup>3</sup> (In contradistinction, the heavy hand of Title II was recognized from the beginning as the wrong tool for regulating Internet service.)

A Title I regime does not, however, mean we have to just trust Internet service providers (ISPs) to always act in ways that benefit consumers. Indeed, some ISPs choose to act in ways that harm consumers or the competitive marketplace. It has happened before.<sup>4</sup> But, broadband is a Title I service, and we already have an agency equipped to go after bad actors in such circumstances: the Federal Trade Commission (FTC).

Under Section 5 of the statute that created the FTC, the agency was granted authority to bring enforcement actions against companies that engage in “Unfair methods of competition...and unfair or deceptive acts or practices.”<sup>5</sup> If an ISP, for example, slowed down the content of competitors’ websites in order to drive traffic to its own, that would be grounds for the FTC to bring an unfair competition case. They could also bring an enforcement action if, for example, an ISP tells customers they will offer access to the full range of online content on equal terms only to throttle speeds on certain sites.

And the enforcement power of the FTC is no empty threat. In 2014, for example, the FTC sued AT&T for throttling speeds despite promising “unlimited” data.<sup>6</sup> This case resulted in a settlement agreement in which AT&T paid \$60 million to consumers.<sup>7</sup> This remedy stands in contrast to what consumers could hope to get from rules enforced by the FCC. Title II fines for violating FCC rules go to the United States Treasury, not back to the customers who were harmed.

Furthermore, if the FCC were to classify ISPs under Title II, that would make them common carriers, and their common carriage activities would be exempt from FTC jurisdiction.<sup>8</sup> Thus, in a Title I world there is a cop on the beat to protect consumers from bad behavior by ISPs. This cop gets kicked off his beat if the FCC decides to reclassify ISPs under Title II.

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3 Tom Struble, “The FCC’s Computer Inquiries: The Origin Story Behind Net Neutrality,” *Morning Consult*, May 23, 2017, <https://morningconsult.com/opinions/fccs-computer-inquiries-origin-story-behind-net-neutrality/>.

4 In 2005, ISP Madison River blocked Voice Over IP service to benefit its own voice service. *In re Madison River Comm’cns LLC*, 20 FCC Rcd. 4295, <https://transition.fcc.gov/eb/Orders/2005/DA-05-543A2.html>.

5 15 U.S.C. § 45(a).

6 “AT&T Mobility LLC (Mobile Data Service),” *Federal Trade Commission*, Nov. 5, 2019, <https://www.ftc.gov/enforcement/cases-proceedings/122-3253/att-mobility-llc-mobile-data-service>.

7 “AT&T to Pay \$60 Million to Resolve FTC Allegations It Misled Consumers with ‘Unlimited Data’ Promises,” *Federal Trade Commission*, Nov. 5, 2019, <https://www.ftc.gov/news-events/press-releases/2019/11/att-pay-60-million-resolve-ftc-allegations-it-misled-consumers>.

8 15 U.S.C. § 45(a)(2).

Title I classification of broadband with FTC oversight has served the Internet and its users well. It was the framework in place since the dawn of the Internet until the FCC imposed Title II regulations in 2015. Indeed, though examples of unambiguous violations of net neutrality principles are few and far between, the FTC easily could deal with the quintessential examples.<sup>9</sup> The Title I framework was put back in place in 2018 when the FCC reversed course and, instead of Title II regulations, imposed a modified transparency rule.<sup>10</sup> Now the FCC works with the FTC to ensure that ISPs are clear with consumers about what service they are agreeing to, and the FTC is then empowered to hold ISPs to their word.<sup>11</sup> To remind, there were frantic claims such a system would destroy the Internet<sup>12</sup> (or even worse).<sup>13</sup> Instead, the Internet has thrived to the benefit of consumers.<sup>14</sup>

## BUT WHY NOT TITLE II?

As the Biden administration takes office, we should expect another net neutrality proceeding.<sup>15</sup> Whomever President Joe Biden designates as permanent chair of the Commission will likely attempt to reverse course again and place broadband back under Title II. While the short-term effects of such a change would be unnoticeable in most Americans' lives, there are still significant long-term costs outweighing any benefits of a Title II regime.

What is important to understand is that Title II is a broad statutory framework. Designed to regulate the twentieth-century telephone monopoly, it contains robust authority to regulate prices and behavior of firms designated as “telecommunications” providers. The full weight of Title II is

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9 The FTC likely could have had a strong case to punish Madison River's behavior as an unfair method of competition and an unfair trade practice. Instead, the FCC asserted jurisdiction, leading to the sort of jurisdictional ambiguity that still animates net neutrality debates. *In re Madison River*; See also the Comcast-BitTorrent case: *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd 13028, Aug. 1, 2008 (Later vacated for lack of jurisdiction).

10 *In re Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 437-438, para. 215

11 Restoring Internet Freedom FCC-FTC Memorandum of Understanding, FTC and FCC, 2018, [https://www.ftc.gov/system/files/documents/cooperation\\_agreements/fcc\\_ftc\\_mou\\_internet\\_freedom\\_order\\_1214\\_final\\_0.pdf](https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_ftc_mou_internet_freedom_order_1214_final_0.pdf).

12 Joe Concha, “CNN headline declares ‘end of the Internet as we know it’ after net neutrality vote,” *The Hill*, Dec. 14, 2017, <https://thehill.com/homenews/media/364959-cnn-headline-declares-end-of-the-internet-as-we-know-it-after-net-neutrality>.

13 Joe Kane, “Does the Internet Still Exist!?!? Fact-checking net neutrality doomsday predictions,” *R Street Institute*, June 11, 2018, <https://www.rstreet.org/2018/06/11/fact-checking-net-neutrality-doomsday-predictions/>.

14 Isla McKetta, “U.S. Internet Speeds Increase 15.8% on Mobile and 19.6% on Fixed Broadband,” *Speedtest*, July 8, 2020, <https://www.speedtest.net/insights/blog/announcing-us-market-report-q2-2020/>.

15 John Hendel, “Biden to bring new wave of Washington scrutiny for tech giants,” *Politico*, Nov. 9, 2020, <https://www.politico.com/news/2020/11/09/biden-scrutiny-tech-giants-434979>.

meant to operate against a monopoly utility service, and markets are shaped by the regulations that govern them. This means—surprise, surprise—that a regulatory regime meant for monopolies is likely to produce monopolies.

It makes sense, therefore, that virtually no one wants to apply the entirety of Title II and all its intricacies to the Internet. Even the 2015 Order classifying broadband under Title II (“Title II Order”) contained extensive “forbearance” provisions. This means that while the 2015 rules were grounded in Title II as a source of authority, the Commission could decline to enforce, for example, rate regulation of broadband service.<sup>16</sup> For proponents of the Title II Order, this approach was seen as a way of tailoring Title II for the Internet age. Since opponents of the Order cautioned against regulating the Internet as though it were the twentieth-century telephone monopoly, they would simply refrain from applying the most onerous provisions of Title II. And to a certain extent, this approach works: When you take away the most disruptive and burdensome provisions from Title II, the remaining statute is less controversial.

The downside of the forbearance approach is that it is inherently discretionary: if the FCC may forbear, it may later un-forbear. The Internet is such a capital-intensive project that reliance on the goodwill of revolving-door FCC Commissioners is simply not a conducive environment for expanding broadband deployment.

And there is significant evidence that the enormous investments necessary to actually provide Internet access would be hampered by a reapplication of Title II. Investment effects are notoriously difficult to measure because they require comparison not just of investment before and after a change in regulations, but a hypothetical estimation of what investment *would have looked like* but for the regulatory change.<sup>17</sup>

Both sides in this debate have been guilty of oversimplifying the impact of alternative regulatory paths on investment, though there were some attempts to rigorously analyze the impact of Title II regulations the first time they were imposed. The best study analyzed the period from 2011 to 2015, i.e., the period from when ISPs began girding for Title-II regulations up to when they were actually imposed, and found that investment in broadband networks fell by \$160 to 200

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<sup>16</sup> *In Re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5612, para. 37 <https://www.fcc.gov/document/fcc-releases-open-internet-order>.

<sup>17</sup> Joe Kane, “Net neutrality’s effect on investment: It’s complicated,” *R Street Institute*, Dec. 12, 2017, <https://www.rstreet.org/2017/12/12/net-neutralitys-effect-on-investment-its-complicated/>.

billion.<sup>18</sup>

These findings should make us think twice about whether Title II will really accomplish what its advocates hope. Many people have understandably negative opinions of their ISPs. In too many places there is insufficient competition, which drives up prices and reduces the incentives for companies to provide adequate customer service. We all want more competition, faster speeds, and lower prices for broadband, but to solve these problems requires more deployment, more investment in both fiber and wireless broadband infrastructure so that more Americans have their choice of ISPs. Regulations that hamper investment are counterproductive to this goal. The looming specter of Title II, subject to the goodwill of the FCC to forbear from its more onerous possible application, would thus be an ineffective policy lever.

It should also be noted that the structure of the carveouts in the 2015 Title II Order would have likely undermined their effectiveness. The heart of the rules applied only to “Broadband Internet Access Service,” defined as a service that provides access to all or substantially all Internet endpoints.<sup>19</sup> There is substantial reason to think that exceptions for “specialized services” that don’t meet that definition would have applied so broadly as to hamper the efficacy of the rules. When defending the rules in court, the Commission had to concede that “If [ISPs] filter the Internet and don’t provide access to all or substantially all endpoints, then they drop out of the definition of Broadband Internet Access Service and the rules don’t apply to them.”<sup>20</sup> In other words, if an ISP chose to engage in blocking, the rules didn’t apply to them. This appears to render the rules essentially voluntary, potentially leaving consumers vulnerable to unscrupulous practices and incentivizing the carving up of online content that net neutrality advocates want the FCC to prevent.

Moreover, compared with using FTC authority to protect consumers, the 2015 Order’s “bright line rules” were a rigid approach that could hamper long-run innovation. There are few, if any, legitimate reasons for a broadband provider to block or unfairly throttle certain types of content. It is less clear, however, that the third “bright-line” ban from the 2015 Title II Order against paid prioritization targets such unambiguous harms. The presumptive banning of any creative priori-

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18 George S. Ford, “Net Neutrality, Reclassification and Investment: A Counterfactual Analysis,” *Perspectives: Phoenix Center for Advanced Legal and Economic Public Policy Studies*, p. 10, April 25, 2017, <https://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf>.

19 *In Re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5696 paras. 207-13. <https://www.fcc.gov/document/fcc-releases-open-internet-order>.

20 *United States Telecom Assoc. v. FCC* Oral Argument, Dec. 4, 2015. <https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?OpenView&count=100&SKey=201512> See also, Brent Skorup, “Why the FCC’s net neutrality rules could unravel,” *Plain Text*, March 1, 2016. <https://readplaintext.com/why-the-fcc-s-net-neutrality-rules-could-unravel-cc26c6b96418>

tization of traffic simply because money changed hands will hamper the development of services that might need a higher standard of service and are willing to pay the higher costs it entails. Banning such practices would tend to freeze the Internet in time. The Internet of today is dramatically different than it was a decade ago. In 2011, the ease of streaming HD video, even to mobile phones, was a slow, expensive, and often impossible feat. Now, millions of terabytes of data fly over the Internet every day.<sup>21</sup> At the same time, services such as live, multiplayer gaming have been enabled as high-speed, low-latency service spreads to more people. This broadband ecosystem is a far cry from the world where the Internet was mostly text and online communication mostly email. We should prepare and seek to encourage the next revolution of Internet applications that could entail creative engineering feats that do not fit within fundamentalist definitions of net neutrality. Even on today's Internet, it should be clear that waiting a fraction of a second longer for an email in order to prioritize the smoothness of more latency sensitive applications, such as a live video call, is an improvement over inflexible "neutral" treatment of such traffic. Put another way, there is value in optimizing the Internet for quality of users' experience, not just rigid equal treatment of all traffic.<sup>22</sup>

Prioritizing traffic is only an issue when there is congestion in the network. Otherwise, all traffic can flow as fast as the infrastructure allows. When congestion occurs, we shouldn't assume that random dropping is better than a more intelligent protocol. We also should not assume that intelligent dropping is anti-consumer just because latency sensitive services can pay to be prioritized over less urgent traffic. It should make sense that very bandwidth-hungry, latency-sensitive types of service might get more priority but also might need to pay for the greater burden that puts on networks. As in other markets, properly designed congestion pricing can make everyone better off.<sup>23</sup> The regulatory approach to paid prioritization demands far more nuance and flexibility than the Title II Order allowed.

Now, to be fair, the Title II Order did not ban paid prioritization with no recourse, but it did saddle companies with the burden of convincing the FCC that a given service should be allowed. This ex-ante scrutiny even cast a disapproving glance at zero-rating plans, a type of service related to paid prioritization in which certain types of content does not count against a mobile

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21 "Cisco Annual Internet Report (2018-2023)," Cisco, March 9, 2020, <https://www.cisco.com/c/en/us/solutions/collateral/executive-perspectives/annual-internet-report/white-paper-c11-741490.html>.

22 See Thomas W. Struble, "On the Relationship Between QoS & QoE: Why Differential Traffic Management on the Internet Is Not a Zero-Sum Practice," *TPRC* 44, Aug. 31, 2016, [http://docs.techfreedom.org/Paid\\_Prioritization\\_TPRC\\_2016.pdf](http://docs.techfreedom.org/Paid_Prioritization_TPRC_2016.pdf).

23 See generally, William S. Vickrey, "Pricing in Urban and Suburban Transport," *American Economic Review*, Vol. 53, No. 2, May 1963, pp. 452-465, <https://www.jstor.org/stable/1823886?seq=1>.

user's monthly data limit. T-Mobile's Binge-On program is one good example.<sup>24</sup> Case-by-case review of these types of services did result in the FCC's eventually blessing some of them, but this approach has significant shortcomings. Seeking FCC approval is not a cheap or simple task. It is telling that only major carriers got approval under this mother-may-I regime. If a smaller company wants to compete with the big guys by offering to pay to prioritize or zero-rate certain content, they may find themselves without the resources to navigate the maze of FCC approval. It would be a tragedy if the next generation of networking innovations die in the cradle as the quest for government approval looms too large for any but established players to scale.

It is true that the early Internet was more of a "dumb pipe" that couldn't make such distinctions. But it is not obvious that we should want to declare any given traffic routing protocol the final one. *The Internet is an ongoing project*, and it is too soon to call it finished and freeze traffic management practices in time. We need not let ISPs connive against consumers, but we should recognize that even if regulations prevent some bad behavior, they may also have hidden costs by suppressing beneficial behavior down the road. If a practice turns out to be harmful, the government can address it. But it is a taller order to rely on every new batch of regulators to correctly judge the costs and benefits of new networking practices before they are even implemented, while also making those decisions rapidly and cheaply enough to not chill innovation.<sup>25</sup> An institutional structure that enshrines a more flexible system in which innovation is allowed while harms are addressed as they arise will better serve Internet users in the long run.

In short, simply reapplying the 2015 Title II Order in its entirety would be detrimental to long-term regulatory certainty needed to promote broadband deployment, compromise the strength of the bright line rules net neutrality advocates desire, and render the future of the Internet stagnant rather than innovative. We need a more thoughtful and durable approach.

## A BETTER WAY FORWARD: COMPROMISE LEGISLATION

The real lesson of the constant back-and-forth of classifying broadband service is the limitations

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<sup>24</sup> "Unlimited video streaming with Binge On," *T-Mobile*, <https://www.t-mobile.com/offers/binge-on-streaming-video>.

<sup>25</sup> See Ben Thompson, "Pro-Neutrality, Anti-Title II," *Stratechery*, Nov. 28, 2017, <https://stratechery.com/2017/pro-neutrality-anti-title-ii/>.

of the current Communications Act. The Internet has changed so much since the last major update of the Act in 1996, and the regulatory silos of Titles I and II go back to the early twentieth century. Both categories are incompatible with the Internet as it exists today. A legislative compromise would be strong where the reimposition of Title II regulations would be weak. The actual regulatory regime would not measure up to anyone's ideal, but the virtue of an end to regulatory ping-pong based on common ground should outweigh marginal disagreements.

Legislation that mandates a pro-consumer regulatory regime would not be subject to changing winds at the FCC, from the left or right. A compromise that largely codified the 2015 Order with its forbearance provisions would likely garner widespread support, though the ideal bill would couple the 2015 forbearance with a flexible approach to services that involves intelligent prioritization, even when money changes hands. Such a bill could give the FCC clear authority to impose only the "good" parts of Title II-based rules while making permanent the forbearance from the application of more onerous regulations. It could also cement clear affirmative protections that some advocates worry would be inadequately enforced under the FTC's Section 5 authority. A similar bill was proposed before by South Dakota Senator John Thune, along with former U.S. Rep. Greg Walden and current member Fred Upton during fight about the 2015 rules (a fight later resumed).<sup>26</sup> That bill, like other legislative efforts, has been unsuccessful because each side of the debate seems to believe that its bargaining position is just on the verge of becoming insurmountable.

In 2018, the non-partisan Internet Society convened a group of experts with diverse and often conflicting views of net neutrality. Nevertheless, the group produced a "Framework for Consensus" that shows the broad agreement on the central issues to the net neutrality debate.<sup>27</sup> These include blanket disapproval of blocking and throttling and a willingness to wrestle with the balance between paid prioritization that is detrimental to consumers and network management or specialized services that can provide pro-consumer prioritization. Of course, the wiggle room in that last sentence means that interested parties are by no means in lock step about all issues. One lingering matter, for example, is how the FCC should directly regulate peering agreements between ISPs and larger edge providers that load tons of data onto their networks.<sup>28</sup> At the end of the day, however, the Framework demonstrates that even the disagreements intricate sub-is-

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26 Thune-Upton-Walden Discussion Draft, [https://www.washingtonpost.com/blogs/the-switch/files/2015/01/CBO\\_333\\_xml.pdf?tid=a\\_inl\\_manual](https://www.washingtonpost.com/blogs/the-switch/files/2015/01/CBO_333_xml.pdf?tid=a_inl_manual).

27 "Net Neutrality Legislation: A Framework for Consensus," *Internet Society*, May 29, 2019, <https://www.internetsociety.org/resources/doc/2019/net-neutrality-legislation-a-framework-for-consensus/>.

28 See e.g., Ben Thompson, "Netflix and Net Neutrality," *Stratechery*, Feb. 27, 2014, <https://stratechery.com/2014/netflix-net-neutrality/>.

sues are still nestled under a larger umbrella of agreement.

In short, we need not contort the Internet into unwieldy regulatory silos. There is broad agreement on the basic shape of a better legal basis for Internet regulation. Instead of trying to make net neutrality a political blood sport in which the goal is ever stronger ping-pong volleys whenever the FCC changes partisan alignment, policymakers and advocates should seek to build on the common ground.

## CONCLUSION

Whether new legislation is technically housed under Title I, II, or an altogether new statute, it would break the stalemate and put the Internet on sound footing to develop for decades to come. Regardless of our path forward, the right course is to lower the temperature of the debate. None of the above scenarios would bring our Internet crashing down tomorrow. On the contrary, the Internet's future is bright, and measured compromise, rather than shrill sloganeering, is our best bet to keep it this way.



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