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## Net Neutrality: A State[d] Approach

Katherine Grainger

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## *Notes*

# Net Neutrality: A State[d] Approach

KATHERINE GRAINGER<sup>†</sup>

*In 2018, the Federal Communications Commission ended federal net neutrality protections in its Restoring Internet Freedom Order. In response, many states introduced legislation to create their own state-level protections. States believe these protections are necessary, given the anti-competitive nature of broadband internet and the resulting lack of choice that consumers face today in the broadband internet market. However, state regulations are the wrong response to the issue, as these regulations are likely to be federally preempted. Additionally, state regulations are logistically difficult to enforce across different states, given the interstate character of modern broadband internet. Instead, this Note proposes several alternative actions on federal, state, and local levels, to ensure a more stable long-term net neutrality framework in the United States.*

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## INTRODUCTION

Imagine that you log into your computer to check your email. As you open your internet browser, you are greeted with a short list of websites that you are allowed to visit. When you sign up for home internet access, you have the option of several different choices of subscription plans—a cinema plan (Netflix, Hulu, HBO, Amazon Video), a social plan (Facebook, Twitter, Instagram, Tumblr, Gmail), a news plan (CNN, Reddit, Fox News, New York Times, Bloomberg), or a plan, for a higher price, which offers a combination of different websites based on your interests.

These practices, which allow internet providers to pick and choose what sites consumers can access and exempt some websites from data caps, is a combination of several practices, involve both blocking and zero rating.<sup>1</sup> In this hypothetical internet landscape, plans are limited on the back end as well—internet service providers charge websites for internet users to reach their website, or slow down website speeds if website owners do not pay a monthly fee to ensure faster network speeds. This is known as paid prioritization.

This was the scenario many feared when the Federal Communications Commission (FCC) indicated its plan to roll back Obama-era net neutrality regulations in 2016.<sup>2</sup> An internet without net neutrality is similar in some respects to the cable television industry—limited access based on a set subscription plan, rather than payment for a connection to access the internet as a whole. Many internet activists proclaimed that the FCC’s decision to remove the 2015 Obama-era regulations was the end of “a free and open internet.”<sup>3</sup> While it is true that the picture painted above justifies alarm, it is an unlikely outcome. Since the 2017 repeal, it is likely that the average internet user has not noticed any significant difference in their internet speed or content.

Part I of this Note will provide a brief background of net neutrality, including the history of the Telecommunications Act, the current classification of broadband internet as an information service versus telecommunications service, and an overview of the main arguments for and against net neutrality. Part II will discuss the preemption authority of the FCC, particularly in the context of the recent Restoring Internet Freedom Order and the lawfulness of recent state approaches to net neutrality. Part II will also generally discuss the role of markets in the telecommunications sector. Part III will offer several recommendations for state or local-focused alternatives for net neutrality in the absence of federal regulation mandating such requirements. This Note proposes that state net neutrality legislation is not the solution, as it is lawfully preempted

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1. Nisha K. De Lany, *From a Developing Country’s Perspective: Is Net Neutrality a Non-Issue for South Africa?*, 47 U. PAC. L. REV. 347, 348 (2016).

2. Erin Tiernan, *Here’s What the Internet Could Look Like Without Net Neutrality*, METRO (July 13, 2017), <https://www.metro.us/news/politics/internet-without-net-neutrality>.

3. Bill Moyers & Michael Winship, *Trump’s FCC Wants to Kill a Free and Open Internet*, HUFFINGTON POST (Dec. 11, 2017, 2:36 PM), [https://www.huffingtonpost.com/entry/trumps-fcc-wants-to-kill-a-free-and-open-internet\\_us\\_5a2ede17e4b0cf10effbaf6e](https://www.huffingtonpost.com/entry/trumps-fcc-wants-to-kill-a-free-and-open-internet_us_5a2ede17e4b0cf10effbaf6e).

and difficult to implement at the state level. Instead, Congress should enact regulations that can resist the changing tides of opposing partisan policy objectives, or, absent such regulation, communities should look to local-based solutions. This Note seeks to provide a neutral, comprehensive review of the FCC's preemption authority, an analysis of recent state-level net neutrality regulations, and a consideration of how broadband providers fall within markets more generally.

## I. BACKGROUND

### A. DEFINING NET NEUTRALITY

The term net neutrality (originally referred to as “network neutrality”) was first introduced in common usage by Columbia Law School Professor Tim Wu in 2003.<sup>4</sup> Wu defined net neutrality as an internet that does not favor any one application over another.<sup>5</sup> Wu's statement was significant because at the inception of the internet, net neutrality was the default framework—internet service providers were unable to distinguish between services and content being transmitted over their networks.<sup>6</sup> As technologies advanced, however, providers have now developed programs that can slow, block, or distinguish content based on its source.<sup>7</sup>

Although there is no one definition of net neutrality, it is generally understood to include three key components: (1) anti-zero rating, (2) anti-prioritization, and (3) the inability to block and “throttle” internet content. Zero rating is the practice that exempts some websites or services from data caps.<sup>8</sup> Opponents of zero-rating argue that it allows for potential abuse by a broadband service provider. For example, if a provider decided to zero-rate its own video streaming platform but include its competitors' platforms in a user's data cap, it may give an internet service provider an unfair advantage to enter the video streaming market.<sup>9</sup>

Paid prioritization is the ability for broadband service providers to charge website operators for users to access their websites at faster speeds than other websites.<sup>10</sup> This could be described as an internet “fast lane.”<sup>11</sup> Paid prioritization favors the status quo, as more established websites and service

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4. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 141 (2003).

5. *Id.* at 145.

6. Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 4 (2015).

7. *Id.* at 5.

8. Devin Coldewey, *WTF Is Zero Rating?*, TECH CRUNCH (Apr. 16, 2017, 7:20 AM), <https://techcrunch.com/2017/04/16/wtf-is-zero-rating/>.

9. *Id.*

10. Katharine Trendacosta, *Busting Two Myths About Paid Prioritization*, ELEC. FRONTIER FOUND. (Apr. 16, 2018), <https://www.eff.org/deeplinks/2018/04/busting-two-myths-about-paid-prioritization>.

11. See Klint Finley, *FCC Plans to Gut Net Neutrality, Allow Internet “Fast Lanes,”* WIRED (Nov. 21, 2017, 3:36 PM), <https://www.wired.com/story/fcc-prepares-to-unveil-plan-to-gut-net-neutrality/>.

providers can afford paying a monthly sum to broadband service providers, whereas newer startup services likely cannot afford these fees on top of other overhead costs.<sup>12</sup>

Finally, a net neutrality framework typically requires that broadband service providers be prevented from throttling and blocking internet content. Anti-throttling rules would prevent internet service providers from slowing down access to certain websites.<sup>13</sup> Throttling is related to paid-prioritization—throttling is experienced by an end user, whereas paid prioritization is a potential regime that would allow websites to pay broadband service providers a fee to prevent throttling on their sites. Blocking involves completely cutting off customer access to certain websites.

## B. HISTORY OF THE FEDERAL COMMUNICATIONS COMMISSION

The FCC was first established under the Communications Act of 1934 (the “1934 Act”).<sup>14</sup> Under the 1934 Act, Congress originally delegated authority to the FCC to “regulat[e] interstate and foreign commerce in communication by wire and radio.”<sup>15</sup> The creation of the FCC was a part of a larger effort of the federal government to incorporate additional consumer protections during the New Deal.<sup>16</sup> During the 1930s, the Roosevelt Administration sought to increase regulations in response to the strong monopolies and consolidation of wealth that had occurred throughout late 1800s and early 1900s under a predominantly deregulatory regime.<sup>17</sup> Against this backdrop, Congress created the FCC to regulate the infant telephone industry.

Six decades later, Congress passed the Telecommunications Act of 1996 (the “1996 Act”)—the first major overhaul of communications legislation since the 1934 Act. The stated purpose of the 1996 Act is “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>18</sup>

Although at the time the internet was in its burgeoning stages, the 1996 Act did not specifically direct the FCC how to regulate it. However, Congress did tangentially address regulation of the internet in section 230(b) of the

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12. *Id.*

13. Shawn Marcum, *Throttle Me Not: 2015 Open Internet Order Protects Unlimited Data Plan Users*, 5 AM. U. BUS. L. REV. 231, 242 (2016).

14. Communications Act of 1934 § 1, 47 U.S.C. § 151 (2018).

15. *Id.*

16. Will Rinehart, *The Early History of the FCC Doesn't Provide a Basis for Regulating Facebook and Google Now*, MEDIUM (Jan. 10, 2017), <https://medium.com/@willrinehart/the-early-history-of-the-fcc-doesnt-provide-a-basis-for-regulating-facebook-and-google-now-fe5fd2f07acf>.

17. Tyler Elliot Bettilyon, *Network Neutrality: A History of Common Carrier Laws 1884–2018*, MEDIUM (Dec. 12, 2017), <https://medium.com/@TebbaVonMathenstien/network-neutrality-a-history-of-common-carrier-laws-1884-2018-2b592f22ed2e>.

18. Telecommunications Act of 1996, 47 U.S.C. § 153 (2018) (amending 47 U.S.C. § 151 (1934)).

Communications Decency Act. This statute regulates pornographic material on the internet; it states that:

“It is the policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.”<sup>19</sup>

Although the 1996 Act expressed the broader congressional goal of promoting competition in the telecommunications industry, the majority of the FCC’s legal authority derives from the 1934 Act. For example, the 1934 Act includes several “substantive provisions”—Titles II, III, and VI.<sup>20</sup> Each section addresses the FCC’s rulemaking authority with respect to different forms of communications services. Title II of the 1934 Act covers telephone and telegraph companies, which are known as telecommunications services.<sup>21</sup> Title III covers radio transmission services including broadcast television, radio, and cellular phones.<sup>22</sup> Title VI covers cable television companies.<sup>23</sup> Title I defines key terms that apply to the other substantive provisions.<sup>24</sup> Title I also defines “information services” but does not subject information services to regulation under any of the substantive provisions.<sup>25</sup> Instead, Title I grants the FCC ancillary jurisdiction, which empowers it to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”<sup>26</sup>

Scholars have debated Congress’s intent regarding the power behind Title I’s general grant of authority, particularly in the context of regulating the internet. Some believe that Title I does not confer authority to enforce law, rather it only confers procedural rulemaking authority.<sup>27</sup> The Supreme Court read this delegation of authority broadly in *National Broadcasting Co. v. United States*. There, the Court held that even though the 1934 Act did not explicitly delegate power to the FCC to deal with practices contrary to the public interest, Congress acted swiftly in response to fears of monopoly control of the telecommunications industry, and the Act intended to give the Commission “expansive powers.”<sup>28</sup>

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19. 47 U.S.C. § 230(b)(1)–(3) (2018).

20. James B. Speta, *The Shaky Foundations of the Regulated Internet*, 8 J. ON TELECOMM. & HIGH TECH. L. 101, 106 (2010) (citing 47 U.S.C. §§ 201, 521 (2018)).

21. *Id.*

22. *Id.*

23. *Id.*

24. 47 U.S.C. § 153 (2018).

25. *Id.*

26. 47 U.S.C. § 154(i) (2018).

27. Speta, *supra* note 20, at 107.

28. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943).

However, others point out that the grant of authority to regulate the internet has been narrowed in a modern context. After all, the 1996 Act did not address how the internet should be regulated when Congress had the opportunity to modify it. Further, the Communications Decency Act, though it mentions the internet, states that it is Congress's policy to promote a vibrant open market "unfettered by Federal or State regulation."<sup>29</sup> The text does not read as a congressional delegation of power to implement an extensive internet regulatory scheme, but expresses a preference for the FCC to pursue a deregulatory agenda.

### C. EARLY REGULATION OF NET NEUTRALITY VIOLATIONS

In the early days of internet regulation, the FCC did not promulgate any rules regarding its stance on net neutrality, but instead, it dealt with violations through adjudication.<sup>30</sup> For example, in 2005, a small internet provider named Madison River Communications was accused of blocking ports used for Voice over Internet Protocol ("VoIP") services.<sup>31</sup> Vonage, a competitor of Madison River, filed a complaint with the FCC.<sup>32</sup> After an investigation, Madison River agreed to stop blocking VoIP ports, and paid a \$15,000 fine to the government.<sup>33</sup>

Another documented instance of the FCC regulating through adjudication occurred in 2005, when Comcast began blocking peer-to-peer networking technologies, most famously BitTorrent, that consumers were accessing through its network.<sup>34</sup> When Comcast was first confronted about the issue, it denied responsibility.<sup>35</sup> A Comcast spokesperson even stated, "[w]e're not blocking any access to any application, and we don't throttle any traffic."<sup>36</sup> The Associated Press later conducted tests to determine what was causing the interference and determined that Comcast was actively interfering with the use of these technologies by both throttling speeds and, in some instances, completely blocking customer access.<sup>37</sup> Comcast later admitted that the company interfered with around ten percent of peer-to-peer connections.<sup>38</sup> In 2008, the FCC enjoined this practice in an order, finding that Comcast's "selective interference

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29. 47 U.S.C. § 230(b) (2018) (emphasis added).

30. See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Memorandum Op. and Order, 23 FCC Red. 13028, 10344–45 (2008) [hereinafter BitTorrent Order].

31. Declan McCullagh, *Telco Agrees to Stop Blocking VoIP Calls*, CNET (Mar. 3, 2005, 6:26 PM), <https://www.cnet.com/news/telco-agrees-to-stop-blocking-voip-calls/>. VoIP is a technology that allows users to make voice calls using an Internet connection instead of a regular phone line. *Voice Over Internet Protocol (VoIP)*, FCC, <https://www.fcc.gov/general/voice-over-internet-protocol-voip> (last visited Jan. 24, 2020).

32. McCullagh, *supra* note 31.

33. *Id.*

34. BitTorrent Order, *supra* note 30, at 13031.

35. *Id.* at 13030–31.

36. *Id.*; see also Marguerite Reardon, *Comcast Denies Monkeying with BitTorrent Traffic*, CNET (Aug. 21, 2007, 8:09 PM), [http://www.news.com/8301-10784\\_3-9763901-7.html](http://www.news.com/8301-10784_3-9763901-7.html).

37. BitTorrent Order, *supra* note 30, at 13031.

38. *Id.* at 10351–52. Independent evidence, however, indicated that Comcast interfered with around half of these peer-to-peer connections. *Id.*



discourages the ‘development of technologies’ . . . that “maximize user control over what information is received by individuals . . . who use the Internet because that interference (again) impedes consumers from ‘running applications . . . of their choice,’ rather than those favored by Comcast.”<sup>39</sup>

In the Restoring Internet Freedom Order, the FCC stated that net neutrality throttling and blocking of content is not the problem the public perceives it to be, as there are very few documented instances of these neutrality violations occurring.<sup>40</sup> The Order in fact cites the Madison River and Comcast incidents as limited examples of these violations.<sup>41</sup> However, there are many more documented instances of net neutrality violations that have occurred that were not discussed in the Restoring Internet Freedom Order.<sup>42</sup> Further, it is entirely possible that hundreds or even thousands more violations have occurred that are currently undocumented—just because the public is unaware of more violations does not mean that the violations are not real.

#### D. PROPONENTS AND OPPONENTS OF NET NEUTRALITY

Generally, net neutrality has received bipartisan support from the public; a recent survey found that eight out of ten Americans support it.<sup>43</sup> However, at the Congressional level, support for net neutrality has been more partisan, with Democrat officials generally favoring net neutrality, and Republicans generally against the regulatory framework.<sup>44</sup>

##### 1. *Arguments in Favor of Net Neutrality*

There are a variety of arguments that support net neutrality. Some advocate based on free speech principles; these advocates believe that granting broadband service providers the ability to control the last mile of content delivery poses a risk of chilling free speech online.<sup>45</sup> The age of the internet has allowed people to connect easier and faster than ever before, and serves as a valuable platform for connecting people socially as well as politically. The Supreme Court has recognized the importance of free speech in the context of the internet, noting

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39. *Id.* at 10352–53 (citations omitted). The Court of Appeals for the D.C. Circuit later invalidated the FCC’s order, finding the FCC was not empowered to regulate Comcast’s conduct under its Title I ancillary authority. *See Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

40. Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Red. 311, 376 (2018).

41. *Id.* at 375–76.

42. Timothy Karr, *Net Neutrality Violations: A Brief History*, FREE PRESS (Jan. 24, 2018), <https://www.freepress.net/our-response/expert-analysis/explainers/net-neutrality-violations-brief-history>.

43. Trendacosta, *supra* note 10.

44. *See* Roger Cheng & Morgan Little, *Net Neutrality: These Are the Senators Who Voted to Save It*, CNET (May 16, 2018, 7:30 PM), <https://www.cnet.com/news/senate-votes-to-restore-net-neutrality-heres-how-every-senator-voted/>.

45. *See* Corynne McSherry, *An Attack on Net Neutrality Is an Attack on Free Speech*, ELEC. FRONTIER FOUND. (June 22, 2017), <https://www.eff.org/deeplinks/2017/06/attack-net-neutrality-attack-free-speech>.

that social media “can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”<sup>46</sup>

Others argue that broadband service providers engage in monopolistic and anti-competitive behavior, and consumers often lack the ability to choose among multiple providers.<sup>47</sup> These concerns are partly based on a documented history of past net neutrality violations, such as the Madison River and BitTorrent instances discussed above.<sup>48</sup>

Finally, some advocates argue that non-neutral networks are harmful to emerging companies. If broadband internet providers are allowed to charge websites and applications for customer access to these websites, it may deter innovation.<sup>49</sup> While technology giants such as Google and Facebook have no problem paying a fee to internet providers, additional costs to new small businesses may price them out of business.<sup>50</sup>

## 2. Arguments Against Net Neutrality

Opponents of net neutrality generally argue that regulations are unnecessary to protect consumers. Many point out that the internet functioned for nearly twenty years before the FCC implemented net neutrality rules in 2015.<sup>51</sup> Further, opponents argue that the best safeguard against anti-competitive practices by internet service providers is to ensure that the market remains competitive.<sup>52</sup> Some opponents agree that internet service providers should abide by net neutrality principles in the absence of FCC regulations,<sup>53</sup> though not all.<sup>54</sup>

Another popular argument against net neutrality is that it disincentivizes investment.<sup>55</sup> The FCC notes that in the period of time between the implementation of the Open Internet Order and the Restoring Internet Freedom

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46. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017); *see also id.* at 1735. (“While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace.”).

47. Amir Nasr & Joshua Stager, *The U.S. Broadband Market Is Deeply Anticompetitive*, NEW AM. (Aug. 21, 2018), <https://www.newamerica.org/oti/blog/us-broadband-market-deeply-anticompetitive/>.

48. *See* George S. Benjamin, *Internet Content Discrimination: The Need for Specific Net Neutrality Legislation by Congress or the FCC in Light of the Recent Anti Net-Neutrality Actions by Comcast Corporation*, 39 SW. L. REV. 155, 158–59 (2009) (discussing the documented instances of net neutrality violations by internet service providers).

49. *Id.* at 160–61.

50. *Id.*

51. Roslyn Layton, *We Don't Need a Government-Run Internet*, U.S. NEWS (Nov. 27, 2017, 3:45 PM), <https://www.usnews.com/opinion/economic-intelligence/articles/2017-11-27/the-fcc-is-right-to-toss-out-net-neutrality-rules>.

52. *Id.*

53. Yaël Ossowski, *The Internet Didn't Need Net Neutrality in 2015, and It Doesn't Now*, WASH. EXAM'R (Dec. 13, 2017, 4:25 PM), <https://www.washingtonexaminer.com/the-internet-didnt-need-net-neutrality-in-2015-and-it-doesnt-now>.

54. Layton, *supra* note 51.

55. Restoring Internet Freedom Order, *supra* note 40, at 312.

Order, investment in broadband infrastructure decreased on the whole, which opponents argue is a result of the 2015 net neutrality regulations.<sup>56</sup>

Finally, some claim that the FCC lacks the power to regulate internet service providers as telecommunications providers under the 1996 Act. However, this argument is circular. If broadband service providers were classified as information services, this claim would be true; under federal law, the FCC currently retains very little power to regulate information service providers. However, their classification is a choice that falls within the FCC's discretion.

#### E. INTERNET CLASSIFICATION AS AN INFORMATION VERSUS TELECOMMUNICATIONS SERVICE

The most significant change in the Restoring Internet Freedom Order was the re-classification of broadband internet providers as information service providers rather than telecommunications service providers. The change in classification is significant because it determines which section of the 1996 Act applies. In the 1996 Act, Congress distinguished between information services, which were largely unregulated, and telecommunications services, which were regulated.<sup>57</sup> The difference between the two is based on their function. Information services require some form of transformation – either a change to or processing of data. Telecommunications services, on the other hand, involve the transmission of user data without a transformation of the data itself.<sup>58</sup> However, as mentioned above, the 1996 Act did not specifically mention regulation of the internet itself, which left its classification ambiguous.<sup>59</sup>

Historically, courts have deferred to the FCC to classify broadband internet as a telecommunications service or an information service.<sup>60</sup> As the FCC is an independent agency, its interpretations of the 1934 Act and 1996 Act are typically entitled to *Chevron* deference.<sup>61</sup> Under *Chevron*, a court will assess if congressional intent is clear, and if the governing statute is silent or ambiguous on the question at issue, a court will uphold an agency's interpretation of law as long as it is reasonable.<sup>62</sup>

In 2000, in *AT&T v. City of Portland*, the Ninth Circuit held that cable broadband internet was a telecommunications service.<sup>63</sup> Relying on *City of Portland*, the Ninth Circuit struck down the FCC's decision to classify

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56. *Id.* at 364.

57. 47 U.S.C. § 153(24) (2018); *see also* John Blevins, *The Use and Abuse of "Light-Touch" Internet Regulation*, 99 B.U. L. REV. 177, 190 (2019).

58. 47 U.S.C. § 153(50).

59. *See* Speta, *supra* note 20, at 115.

60. Jon Brodtkin, *To Kill Net Neutrality Rules, FCC Says Broadband Isn't "Telecommunications,"* ARS TECHNICA (June 1, 2017, 10:20 AM), <https://arstechnica.com/information-technology/2017/06/to-kill-net-neutrality-rules-fcc-says-broadband-isnt-telecommunications/>.

61. *See, e.g.,* *Leyse v. Clear Channel Broad., Inc.*, 697 F.3d 360, 371 (6th Cir. 2012).

62. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

63. 216 F.3d 871, 878 (9th Cir. 2000). The FCC, however, was not a party to this case.

broadband internet as an information service in 2003.<sup>64</sup> In 2005, the Supreme Court reversed in *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, which upheld the FCC's classification, held that *Chevron* deference applied, and that prior inconsistent agency classifications are still entitled to *Chevron* deference.<sup>65</sup> *Brand X* was significant because it held that as long as congressional intent is ambiguous, an agency is not precluded from later, inconsistent classifications, as long as the later classification is within a zone of reasonableness.<sup>66</sup>

However, courts have given less deference to the FCC when it has tried to regulate the internet under its Title I ancillary authority. In 2010, the FCC promulgated the Open Internet Order in its first attempt to establish a net neutrality framework.<sup>67</sup> This order was, in large part, a reaction to *Comcast v. FCC*, where the Court struck down the FCC's 2008 decision to enjoin Comcast from blocking and throttling of internet traffic.<sup>68</sup> The 2010 order did not reclassify broadband service providers as telecommunications providers, but asserted that the FCC had the power to regulate these providers under its Title I ancillary authority.<sup>69</sup> However, the D.C. Circuit rejected this approach, finding that under Title I, the FCC did not have the authority to impose net neutrality restrictions on broadband service providers, since they were classified as information service providers.<sup>70</sup>

In 2015, the FCC promulgated another order, this time classifying broadband internet as a telecommunications service.<sup>71</sup> This order, unlike its predecessors, parsed different functions of broadband internet access, and the Commission stated that although some applications such as email, access to news, and webpage hosting were information services, the underlying service provided by internet service providers was a telecommunications service.<sup>72</sup> In 2016, the D.C. Circuit upheld the Commission's classifications under the 2015 Open Internet Order, finding that the FCC's reclassification of broadband internet as a telecommunications service was reasonable.<sup>73</sup>

In the Restoring Internet Freedom Order, the FCC once again re-classified internet service providers as information service providers.<sup>74</sup> As one of the several rationales for this decision, the FCC stated that a "light-touch information service framework will promote investment and innovation better

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64. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003).

65. *Nat'l Cable & Telecomm.'s Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 970–71 (2005).

66. *See id.* at 981–82.

67. Preserving the Open Internet, Report and Order, 25 FCC Rcd. 17905 (2010).

68. *See supra* Subpart I.C.

69. Preserving the Open Internet, *supra* note 67.

70. 600 F.3d 642, 661 (D.C. Cir. 2010).

71. Protecting and Promoting the Open Internet, Report & Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5757–58 (2015).

72. Scott Jordan, *Broadband Internet Access Service Is a Telecommunications Service*, 71 FED. COMM. L.J. 157, 222, 224 (2019).

73. *United States Telecomm.'s Ass'n v. FCC*, 825 F.3d 674, 727 (D.C. Cir. 2016).

74. Restoring Internet Freedom, *supra* note 40, at 312.

than applying costly and restrictive laws of a bygone era to broadband Internet access service.<sup>75</sup> The FCC also relied on precedent, noting that broadband internet was classified as an information service for almost twenty years prior to the 2015 Open Internet Order, and was upheld as a reasonable interpretation under *Brand X*.<sup>76</sup> The Restoring Internet Freedom Order also included a preemption clause to prevent states from enacting their own legislation that was inconsistent with the federal order.<sup>77</sup>

In 2018, various technology companies, state governments, and internet activist groups challenged the FCC's decision to reclassify broadband internet as an information service and remove net neutrality protection in *Mozilla Corp. v. FCC*.<sup>78</sup> Plaintiffs argued that the FCC's decision should not be entitled to *Chevron* deference, because the Commission did not consider whether some aspects of broadband internet service are telecommunications services severable from its information service functions. In October 2019, the D.C. Circuit held that, under *Brand X*, the FCC's decision to classify broadband internet as an information service was reasonable and entitled to *Chevron* deference.<sup>79</sup>

#### F. STATE APPROACHES THUS FAR

Despite the FCC's language preempting state action,<sup>80</sup> thirty-four states introduced bills concerning net neutrality, five of which enacted some form of regulation.<sup>81</sup> California passed the California Internet Consumer Protection and Net Neutrality Act of 2018 (the "California Act"), which prohibits broadband service providers from blocking lawful content, prioritizing traffic, engaging in paid prioritization, and zero-rating.<sup>82</sup> The California Act also requires disclosure by internet service providers about broadband network management practices and performance.<sup>83</sup> While some net neutrality advocates praised California's attempt to push for stronger regulations at the state level,<sup>84</sup> others felt that it went

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75. *Id.*

76. *Id.* at 312, 315.

77. *Id.* at 427–28.

78. Brief for Petitioner, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1051).

79. *Mozilla Corp. v. FCC*, 940 F.3d 1, 20 (D.C. Cir. 2019).

80. Restoring Internet Freedom, *supra* note 40, at 427–28.

81. See Heather Morton, *Net Neutrality Legislation in States*, NAT'L CONF. ST. LEGISLATURES (Jan. 23, 2019), <http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx>. The five states that have passed legislation to date are California, New Jersey, Oregon, Vermont and Washington. *Id.*

82. S.B. 822, 2017–2018 Leg. (Cal. 2018).

83. *California Fights Federal Government in Efforts to Regulate the Internet*, GREENBERG TRAURIG (Oct. 5, 2018), <https://www.gtlaw.com/en/insights/2018/10/california-fights-federal-government-in-efforts-to-regulate-the-internet>.

84. See Jacob Kastrenakes, *California Governor Signs Nation's Toughest Net Neutrality Bill into Law*, VERGE (Sept. 30, 2018, 8:35 PM), <https://www.theverge.com/2018/9/30/17913712/california-net-neutrality-bill-signed-law-jerry-brown>.

too far, calling the California Act a poorly drafted publicity stunt.<sup>85</sup> To date, the California Act has not gone into effect. Within one hour of California passing the California Act, the United States Justice Department sued, arguing that it violated federal law and was preempted by the Constitution.<sup>86</sup>

Other states have taken a different approach. New York, Montana, and Vermont have passed regulations requiring internet service providers holding state contracts to abide by net neutrality rules.<sup>87</sup> In 2018, Vermont's governor, in particular, issued an executive order that requires internet service providers to certify that they will abide by net neutrality principles as a pre-requisite to being awarded contracts with the state.<sup>88</sup>

## II. PREEMPTION AND ANALYSIS OF STATE NET NEUTRALITY RULES IN THE RESTORING INTERNET FREEDOM ORDER

### A. PREEMPTION LANGUAGE SPECIFICALLY CONTEMPLATES NO STATE ACTION

In the Restoring Internet Freedom Order, the FCC devoted several pages to discuss federal preemption.<sup>89</sup> The order cites several reasons for preempting state action. First, the order states that “[i]nternet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements.”<sup>90</sup> Relatedly, the order notes “it is impossible or impracticable for ISPs [internet service providers] to distinguish between intrastate and interstate communications over the internet or to apply different rules in each circumstance.”<sup>91</sup> Second, the order notes that state regulations “could impose far greater burdens than the federal regulatory regime, [which] could significantly disrupt the balance we strike here.”<sup>92</sup> The order also relies on the FCC precedent of preempting state authority, as the 2015 Open Internet Order also preempted state action on conflicting net neutrality regulations.<sup>93</sup>

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85. Larry Downes, *California's Net Neutrality Publicity Stunt Comes to an End*, FORBES (Oct. 29, 2018, 7:00 AM), <https://www.forbes.com/sites/larrydownes/2018/10/29/californias-net-neutrality-publicity-stunt-comes-to-an-end/#4f45ec3f7efc>.

86. *Id.*

87. Jon Brodtkin, *Entire Broadband Industry Sues Vermont to Stop State Net Neutrality Law*, ARS TECHNICA (Oct. 19, 2018, 10:19 AM), <https://arstechnica.com/tech-policy/2018/10/entire-broadband-industry-sues-vermont-to-stop-state-net-neutrality-law/>; Colin Lecher, *New York Governor Signs Executive Order to Keep Net Neutrality Rules After the FCC's Repeal*, VERGE (Jan. 24, 2018, 12:52 PM), <https://www.theverge.com/2018/1/24/16928494/new-york-governor-net-neutrality-cuomo-executive-order>.

88. Brodtkin, *supra* note 87.

89. Restoring Internet Freedom, *supra* note 40, at 426–432.

90. *Id.* at 426.

91. *Id.* at 430.

92. *Id.* at 426.

93. *Id.*

## B. LEGAL AUTHORITY IN THE PREEMPTION ORDER

Additionally, the Restoring Internet Freedom Order cited specific legal authority for its preemption decision. The main argument, known as the “impossibility exception” to state jurisdiction, holds that “the FCC may preempt state law when (1) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications and (2) the Commission determines that such regulation would interfere with federal regulatory objectives.”<sup>94</sup> The FCC also noted that its decision to preempt state action was consistent “with the longstanding federal policy of nonregulation for information services.”<sup>95</sup>

### 1. *The Commerce Clause*

The underlying preemption power for the impossibility exception is based in the Commerce Clause. Article I section 8 of the Constitution gives Congress the power to regulate commerce between states, as well as make any laws that are “necessary and proper” to execute this power.<sup>96</sup> The Commerce Clause applies to both interstate and intrastate activity, as long as the intrastate activity is not strictly internal.<sup>97</sup>

There are several Commerce Clause cases that address the FCC’s preemption authority. In *Nixon v. Missouri Municipal League*, Missouri enacted a statute which prohibited local governments from providing telecommunications services.<sup>98</sup> The 1996 Act provided that no state or local law could “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,” and also authorized the FCC to preempt state law that violated this provision.<sup>99</sup> Plaintiffs, including several municipally owned internet providers, sought a declaration from the FCC declaring the state statute unlawful.<sup>100</sup> The FCC upheld the statute, determining that “any entity” under the 1996 Act did not include municipal subdivisions of the state, only private parties subject to state regulation, as there was no clear statement from Congress as is required to preempt state regulation.<sup>101</sup> The Supreme Court agreed, holding that “federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power” in the absence of a clear congressional statement.<sup>102</sup>

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94. *Id.* at 429.

95. *Id.* at 431.

96. U.S. CONST. art. I, § 8.

97. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

98. 541 U.S. 125, 129 (2004).

99. 47 U.S.C. § 253 (2018); *see Nixon*, 541 U.S. at 128.

100. *Nixon*, 541 U.S. at 128.

101. *Id.*

102. *Id.* at 140.

Similarly, in *Tennessee v. FCC*, several states passed laws restricting the expansion of municipal telecommunications providers.<sup>103</sup> The FCC issued an order preempting the state laws, finding that preemption would promote and increase competition in the broadband marketplace, one of the goals of the 1996 Act.<sup>104</sup> The states sued, arguing that there was no clear statement from Congress for the FCC to preempt state regulations, and the Sixth Circuit ultimately agreed, holding that the FCC lacked the authority to preempt states.<sup>105</sup>

In both cases, courts ultimately reached the same result—the FCC lacked the authority to preempt state legislation, because the 1996 Act did not include a clear statement from Congress. However, unlike the state police power relied upon in those cases, the regulation of net neutrality and the internet more generally is clearly interstate and extends beyond the realm of simple police powers.<sup>106</sup> Several circuit courts have agreed, holding that even if information is transmitted over the internet within the same state, it is tantamount to moving information across state lines, and “thus constitutes transportation in interstate commerce.”<sup>107</sup> Treating the internet as interstate for the purpose of the Commerce Clause makes sense; it would be difficult or impossible to determine where each internet connection is being accessed, where the information is being transmitted to and from, and what legal regime applies to each connection. With the increased accessibility of the “world wide web,” which allows people to instantly communicate with others anywhere in the world, it is a strained argument to claim the internet can be regulated on an intra-state level.

## 2. *Impossibility Exception to State Action*

Even if some components of broadband internet are inherently interstate, states may argue that some components are intrastate and severable and can therefore be regulated at both the state and federal level. This argument was addressed under the impossibility exception in the Restoring Internet Freedom Order. The Supreme Court first recognized this principle in *Louisiana Public Service Commission v. FCC*,<sup>108</sup> and has since refined it in subsequent cases to clarify that the “FCC may preempt state law when (1) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications and (2) the Commission determines that such

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103. 832 F.3d 597, 600 (6th Cir. 2016).

104. *Id.*

105. *Id.* at 610. Interestingly, the opinion also noted that Commissioner Pai disagreed with the ruling, and that *Nixon* “compelled the conclusion that the FCC had no power to preempt the Tennessee and North Carolina laws without a clear statement from Congress,” which is somewhat contradictory to the preemption rationale the FCC relied upon in the Restoring Internet Freedom Order. See *City of Wilson v. Electric Power Bd. Of Chattanooga*, Memorandum and Op. on Order, 30 FCC Rcd. 2408 (2015); see also *Tennessee*, 832 F.3d at 609.

106. Charles J. Cooper & Brian Stuart Koukoutchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J. ON TELECOMM. & HIGH TECH. L. 293, 328; see also *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006).

107. *MacEwan*, 445 F.3d at 244 (citing *United State v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997)); *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002).

108. 476 U.S. 355, 375 n.4 (1986).



regulation would interfere with federal regulatory objectives.”<sup>109</sup> Here, the FCC’s decision to re-classify broadband as an information service rather than a telecommunications service likely satisfies both requirements.

In the Restoring Internet Freedom Order, the FCC concluded that it was impracticable to parse the inter- and intrastate functions of the internet under the first prong of the impossibility exception.<sup>110</sup> Whether it is actually possible is a highly technical issue that has not been extensively studied outside of the FCC itself. However, under the Administrative Procedure Act, the FCC’s fact-based conclusion would be reviewed under the highly deferential “arbitrary and capricious” standard, under which an agency’s decision on an issue of fact will not be overturned by a court unless it is wholly unreasonable.<sup>111</sup>

Additionally, an analogous case involving VoIP services supports the FCC’s factual conclusions. In *Minnesota Public Utilities Commission v. FCC*, the FCC preempted states from regulating VoIP based on the impossibility exception, claiming that it would be impracticable or impossible to separate interstate and intrastate aspects of the technology.<sup>112</sup> The Eighth Circuit held that based on the technical nature of the issue, the court deferred to the FCC’s factual finding that the components were not severable.<sup>113</sup> The court also acknowledged that “accessing different websites or IP addresses during the same communication and performing different types of communications simultaneously, none of which the provider has a means to separately track or record by geographic location,” justified applying the impossibility exception to VoIP services.<sup>114</sup>

In the absence of independent analysis, it is likely that broadband internet, similar to VoIP services in *Minnesota Public Utilities Commission*, will be preempted from state regulation based on the impossibility exception. Because many people use the internet to connect with others across state lines, and it is not feasible for internet providers to distinguish if a single connection is inter- or intrastate, the first prong is satisfied.

The second prong of the impossibility exception is also met. The FCC in the Restoring Internet Freedom Order stated that “[o]ur order today establishes a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act.”<sup>115</sup> As the FCC expressly stated, the order’s goal was to pursue deregulation of the internet as an information service. Therefore, inconsistent state regulations that regulate broadband internet under a telecommunications service regime are clearly in conflict with the Restoring Internet Freedom Order.

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109. Restoring Internet Freedom, *supra* note 40, at 429.

110. *Id.* at 430.

111. *Mages v. Johanns*, 431 F.3d 1132, 1139 (8th Cir. 2005) (quoting 5 U.S.C. § 706(2)(A) (2018)).

112. 483 F.3d 570, 574 (8th Cir. 2007).

113. *Id.* at 578–79.

114. *Id.* at 578.

115. Restoring Internet Freedom, *supra* note 40, at 426.

Under the Commerce Clause, the Constitution delegates the regulation of interstate commerce to the federal government. Given the interstate nature of the internet, state-level net neutrality regulations like California's are likely to be struck down under *Brand X*. Further, even if the state is able to argue that some aspects of the internet are interstate and severable from other intrastate components, the California Act would still fail the second prong of the impossibility exception, as it interferes with the FCC's decision to classify broadband internet as an information service.

### 3. *Market Participant Exception to the Dormant Commerce Clause*

In addition to federal preemption based on the Commerce Clause, the Dormant Commerce Clause also restricts state action in some circumstances. Under the Dormant Commerce Clause, states can be preempted from acting if state action conflicts with federal regulation,<sup>116</sup> or if a state regulation discriminates against out of state commerce, even in the absence of federal regulation.<sup>117</sup> However, courts have also recognized an exception to the Dormant Commerce Clause's effects on state action known as the market participant doctrine.

The Supreme Court first recognized this exception in *Hughes v. Alexandria Scrap Corp.*, when it addressed the question of "whether, when a State enters the market as purchaser for end use of items in interstate commerce, it may '(restrict) its trade to its own citizens or businesses within the State.'"<sup>118</sup> Today, the market participant doctrine is generally understood to mean that if a state is acting as a market participant, rather than a market regulator, the state is not bound by the Commerce Clause.<sup>119</sup>

For example, in *White v. Massachusetts Council of Construction Employers, Inc.*, Boston issued an executive order requiring that in all construction contracts funded by the city or state, at least fifty percent of the employees must be Boston residents.<sup>120</sup> Construction employers challenged the executive order, arguing that it violated the Commerce Clause because it prioritized hiring of Boston residents over out of state residents.<sup>121</sup> The Supreme Court upheld the executive order, holding that "when a state or local government enters the market as a participant [rather than a market regulator] it is not subject to the restraints of the Commerce Clause."<sup>122</sup>

However, courts have recently narrowed the market participant doctrine, particularly when a state claims to be acting as a market participant but is in effect imposing restrictions on private parties as a market regulator. For

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116. *Chamber of Commerce v. Lockyer*, 364 F.3d 1154, 1169 (9th Cir. 2004).

117. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

118. 426 U.S. 794, 821 (1976) (Brennan, J., dissenting) (quoting majority opinion, *id.* at 808).

119. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436–37 (1980).

120. 460 U.S. 204, 205–06 (1983).

121. *Id.* at 208–10.

122. *Id.* at 208.

example, in *Chamber of Commerce v. Lockyer*, a California statute forbade employers that received certain levels of state funds from using those funds to advocate for or against union activities, in conflict with the federal National Labor Relations Act.<sup>123</sup> Instead of the statute applying only to state projects, it applied to any employer that received a certain amount of funds from the state.<sup>124</sup> The Ninth Circuit struck down the statute, finding that based on its broad application, its scope “indicates a general state position, not a narrow attempt to achieve a specific goal,” and thus, the state was acting as a market regulator.<sup>125</sup>

The approach of some states, such as Vermont, requiring internet service providers to abide by net neutrality principles as a prerequisite to contracts with the state are likely preempted. As in *Lockyer*, although these states purport to be acting as a market participant, the intent and effect of their legislation is to impose regulations. To avoid this issue, these states could narrow the restriction, so that internet service providers agree to abide by net neutrality principles in the limited circumstance of providing services to the state, as in *White*. However, this approach is still likely to be challenged, as the FCC and internet providers may argue that it is not feasible to parse the internet services provided to the state versus other, non-restricted connections in the same or other states.

#### C. PREEMPTION ANALYSIS IN THE *MOZILLA V. FCC* DECISION

In October 2019, the D.C. Circuit made several key rulings regarding the Restoring Internet Freedom Order. First, the court held that based on the Supreme Court’s ruling in *Brand X*, the FCC’s decision to classify broadband internet as an information service was reasonable under Chevron.<sup>126</sup> The court noted that, at this point, “the [Brand X] Court made clear in its decision—over and over—that the Act left the [classification] to the agency’s discretion.”<sup>127</sup> Thus, it is unlikely that net neutrality advocates can make the same argument in future cases.

Second, the D.C. Circuit held that the FCC failed to show its legal authority to preempt *all* state legislation that is more stringent than the Restoring Internet Freedom Order.<sup>128</sup> The court began by discussing how, as the FCC re-classified broadband internet as an information service, it only has “ancillary authority” under Title I to regulate it.<sup>129</sup> As a result of reclassifying broadband internet from a Title II telecommunications service to a Title I information service, the court held that the FCC could not utilize the impossibility exception that was previously recognized in *Louisiana Public Service Commission v. FCC*.<sup>130</sup>

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123. 364 F.3d 1154, 1159 (9th Cir. 2004).

124. *Id.*

125. *Id.* at 1163.

126. *Mozilla Corp. v. FCC*, 940 F.3d 1, 20 (D.C. Cir. 2019).

127. *Id.* (citation omitted).

128. *Id.* at 18.

129. *Id.* at 76.

130. *Id.* at 77–78.

Even after the D.C. Circuit's decision, it is still not clear that state laws will be upheld. The D.C. Circuit held that the FCC's preemption directive went too far, and that the impossibility exception does not apply in circumstances where, as here, the FCC is relying on its ancillary authority under Title I, rather than its express authority to regulate under Titles II–IV of the 1934 Act.<sup>131</sup> However, the D.C. Circuit chose to reserve judgment on the FCC's authority to preempt *specific* state laws that conflict with federal law.<sup>132</sup> Further, states are still facing other legal battles over their net neutrality regulations from the federal government.<sup>133</sup>

Additionally, as the dissent explains, it is not clear that the impossibility exception does not apply in the context of information services.<sup>134</sup> For example, in *Minnesota Public Utilities Commission v. FCC*, the Eighth Circuit upheld an order preempting state regulation of VoIP before the FCC had classified VoIP as either an information service or a telecommunications service.<sup>135</sup> Instead, in *Minnesota Public Utilities Commission*, the court's impossibility exception analysis rested solely on whether or not it was practically possible to parse the inter- and intrastate aspects of VoIP.<sup>136</sup> Thus, despite the majority's holding in *Mozilla*, the Title I versus Title II classification is not always the deciding factor of whether the FCC is able to invoke the impossibility exception to preempt state action.

Finally, the court only addressed the arguments that the FCC raised in the Restoring Internet Freedom Order, namely the impossibility exception to state action, and the federal government's general policy of non-regulation of information services.<sup>137</sup> The court did not address the Commerce Clause or the market participant exception to the Commerce Clause. Therefore, the FCC will likely utilize other alternative arguments in future cases against individual states.

#### D. THERE IS A LACK OF COMPETITION IN THE BROADBAND INTERNET MARKET

Many of the concerns surrounding net neutrality would not be problematic in an open, fully competitive market for broadband internet. Although the intent of the 1996 Act was to increase competition in the telecommunications industry by forcing phone companies to open their phone lines to competitors, many

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131. *Id.* at 74, 78.

132. *Id.* at 86 (“[B]ecause no particular state law is at issue in this case and the Commission makes no provision-specific arguments, it would be wholly premature to pass on the preemptive effect, under conflict or other recognized preemption principles, of the remaining portions of the 2018 Order.”).

133. See Mallory Locklear, *California Delays Net Neutrality Law While Federal Lawsuit Plays Out*, ENGADGET (Oct. 26, 2018), <https://www.engadget.com/2018/10/26/california-delays-net-neutrality-law-for-federal-lawsuit/> (discussing how litigation between California and the Justice Department regarding California's net neutrality law was stayed pending resolution of the *FCC v. Mozilla* case).

134. *Mozilla*, 940 F.3d at 104.

135. 483 F.3d 570, 578 (8th Cir. 2007); see also *Mozilla*, 940 F.3d at 103–04.

136. *Minn. Pub. Util. Comm'n*, 483 F.3d at 577–79.

137. *Mozilla*, 940 F.3d at 76.

believe that the 1996 Act failed to foster competition, particularly with respect to internet service providers.<sup>138</sup>

Across the United States, there are over 2600 broadband internet service providers.<sup>139</sup> However, many of these providers are small networks that function in one city, or even parts of a single city. On a national level, a recent FCC report concluded that thirty percent of census blocks have one provider for high speed internet, and thirteen percent have no available provider for high speed internet.<sup>140</sup> Only twenty-six percent of census blocks in this survey reported having a choice between three or more high speed internet providers.<sup>141</sup> Even in cities, many consumers lack the ability to choose between internet service providers. A recent study by New York City found that thirteen-and-a-half percent of homes in New York City had one option for broadband internet services, fifty-five-and-a-half percent of homes had the choice between two providers, and around thirty percent had a choice between three or more providers.<sup>142</sup>

Even in areas where there are multiple competing providers, consumers face substantial costs and inconvenience when trying to change providers, including searching costs, uncertainty costs, compatibility costs, contractual costs and transaction costs.<sup>143</sup> Some of these costs are quantifiable—such as the costs to be relieved of existing contracts, but others, such as uncertainty and searching costs, are an investment of time and resources that many people are unwilling or unable to commit to.

In the United States, the market for broadband internet access in its current form is not competitive.<sup>144</sup> Although some claim that it is,<sup>145</sup> the telecommunications industry exhibits characteristics that traditionally define monopolies. For example, in natural monopolies, the up-front costs of servicing

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138. Sascha Segan, *Exclusive: Check Out the Terrible State of US ISP Competition*, PC MAG. (Dec. 15, 2017, 12:43 PM), <https://www.pcmag.com/news/357972/exclusive-data-shows-the-terrible-state-of-us-isp-competition>.

139. *The Complete List of Internet Providers in the US*, BROADBANDNOW, <https://broadbandnow.com/All-Providers> (last visited Jan. 24, 2020).

140. INTERNET ACCESS SERVICES: STATUS AS OF DECEMBER 31, 2016, WIRELINE COMPETITION BUREAU 6 fig.4 (2018), <https://docs.fcc.gov/public/attachments/DOC-355166A1.pdf>.

141. *Id.* Additionally, the FCC's method of gathering data on percentages of the population that have access to high speed internet has been criticized, as it considers an entire census block "served" even if only one home in the block has access to high speed internet through that ISP. See Rob Pegoraro, *The Problem with America's New National Broadband Map*, CITYLAB (Feb. 28, 2018), <https://www.citylab.com/life/2018/02/fcc-high-speed-broadband-internet-access-map/554516/>.

142. TRUTH IN BROADBAND: ACCESS AND CONNECTIVITY IN NEW YORK CITY, NYC MAYOR'S OFFICE OF THE CHIEF TECH. OFFICER, 27 tbl.2 (2018), <https://tech.cityofnewyork.us/wp-content/uploads/2018/04/NYC-Connected-Broadband-Report-2018.pdf>.

143. Robert Kenny & Aileen Dennis, *Consumer Lock-In for Fixed Broadband*, COMM'C'N CHAMBERS (2013), <http://www.ccianet.org/wp-content/uploads/2013/10/Consumer-Lock-In-For-Fixed-Broadband.pdf>.

144. SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE 17 (2013).

145. Ajit Ranade, *Is Telecom Still a Monopoly?*, LIVEMINT, <https://www.livemint.com/Opinion/h0qsnbqLytEKn1E1anyNAK/Is-telecom-still-a-monopoly.html> (last updated Sept. 7, 2016, 3:52 AM).

the public is high, and the marginal cost of serving each individual customer is low.<sup>146</sup> Telecommunications systems are expensive to set up in terms of up-front costs, as each provider sets up its own infrastructure, but adding each customer to the overall framework makes the cost of running this service more economically feasible.<sup>147</sup> As a result, it is not an attractive option for private competitors to enter the market. For broadband internet to continue to provide open access to consumers, it must become more competitive or have net neutrality protections in place.

### III. RECOMMENDATIONS

As discussed in Part II, state-level net neutrality regulation is the wrong approach to resolving the national net neutrality debate, as state regulations will likely be struck down as preempted and ignore the practical difficulties involved in distinguishing between interstate and intrastate communications. However, net neutrality principles have been almost uniformly viewed as valuable and necessary since these issues were first raised in the early 2000s. However, unlike the FCC and some advocates propose, the telecommunications industry as it presently exists is not sufficiently competitive to ensure that internet service providers will not violate net neutrality principles. In this final Part, several alternatives that will ensure that consumers are adequately protected against net neutrality violations are presented.

#### A. RE-DRAFTING THE TELECOMMUNICATIONS ACT

One possible solution is for Congress to re-draft the 1996 Act to provide more clarity and stability in its classification of broadband service providers. Since the FCC has switched between classifying broadband service as an information and telecommunications service and both classifications have been upheld as reasonable interpretations under the 1996 Act, Congress should resolve the issue by re-writing the regulations to explicitly address internet services. The FCC's governing statute was written in a time when the internet did not exist as it does today; Titles II, III, and IV classifications are all based on the 1934 Act. As a result, the regulation of the internet as an "information service" is a loose, undefined framework subject to the will and whims of each new administration. The inflexible choice between largely unregulated information services and heavily regulated telecommunications services is unworkable.<sup>148</sup> Since it is clear that broadband services should be subject to some form of oversight or regulation, Congress could clarify the FCC's role, as well as provide a clearer policy position for how the internet should be regulated.

A major downside of this approach is cost—rewriting a statute is costly and diverts Congress's attention away from other, often more pressing policy

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146. CRAWFORD, *supra* note 144, at 17.

147. *Id.*

148. Frieden, *supra* note 69, at 330.

matters. Further, this approach runs the risk of special interest groups, more specifically broadband service providers or lobbyists, ghostwriting the rules in a way that is beneficial to the broadband industry itself, but may not be in the best interest of the public more generally. Additionally, this solution may be unlikely, at least for the next few years. Political gridlock in Washington is difficult to overcome, and recent congressional statements indicate that legislators are avoiding the larger problem of rewriting the rules in favor of trying to re-classify broadband internet as a telecommunications service once again.<sup>149</sup>

#### B. EXPAND THE SCOPE OF CONGRESSIONAL DELEGATION TO ANOTHER ADMINISTRATIVE AGENCY

Another possible approach is to confer additional rulemaking and enforcement authority to another agency, such as the Federal Trade Commission (FTC). In the Restoring Internet Freedom Order, the FCC noted that “[i]n the unlikely event that ISPs engage in conduct that harms Internet openness,” the FTC can step in and protect consumers from “unfair or deceptive acts or practices.”<sup>150</sup> However, the federal government is often inefficient; one recent study calculated that less than one out of every one hundred dollars of government spending is actually used effectively.<sup>151</sup> Relatedly, many government agencies are unable to manage their own information databases, let alone effectively communicate that information to other agencies.<sup>152</sup> As the FCC is already responsible for regulating the telecommunications industry, it is likely that delegating authority to another agency to perform essentially the same tasks will increase government waste without meaningfully contributing to a better solution.

It is also unclear if the FTC has the authority to enforce net neutrality principles, or if it does, if it will be willing to do so. Recently, the FTC Chairman noted that “blocking, throttling, or paid prioritization would **not** be *per se* antitrust violations.”<sup>153</sup> Under the FTC Act, the agency is responsible for policing unfair, fraudulent, and deceptive practices.<sup>154</sup> However, as the FCC recently re-classified broadband providers as information service providers, the FTC’s authority extends only to policing if internet service providers are

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149. Molly Wood, *There’s Net Neutrality Legislation in Congress . . . but Don’t Get Too Excited*, MARKETPLACE (Mar. 8, 2019), <https://www.marketplace.org/2019/03/08/tech/theres-net-neutrality-legislation-in-congress-but-dont-get-too-excited>.

150. Restoring Internet Freedom, *supra* note 40, at 393–94 (citation omitted).

151. John Bridgeland & Peter Orszag, *Can Government Play Moneyball?*, ATLANTIC (2013), <https://www.theatlantic.com/magazine/archive/2013/07/can-government-play-moneyball/309389/>.

152. PETER H. SCHUCK, *WHY THE GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER* 166–67 (2014).

153. Joseph J. Simons, Chairman, Fed. Trade Comm’n, Prepared Remarks for Free State Foundation Speech at the Eleventh Annual Telecom Policy Conference 3 (Mar. 26, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1508991/free\\_state\\_foundation\\_speech\\_march\\_26.pdf](https://www.ftc.gov/system/files/documents/public_statements/1508991/free_state_foundation_speech_march_26.pdf).

154. *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do> (last visited Jan. 24, 2020).

accurately disclosing their policies.<sup>155</sup> As the Restoring Internet Freedom Order is unclear on if blocking, throttling, and paid prioritization practices are unlawful, the order delineates no clear pathway for the FTC to police these anti-competitive practices. Further, even if internet service providers disclose their blocking or throttling practices, this fails to increase consumer protections if consumers lack a choice between competing providers.

### C. MUNICIPAL BROADBAND MODEL

Communities that are unhappy with the current state of broadband may want to turn to local government networks as an alternative to services that are currently provided by national internet service providers. Instead of states drafting legislation that subjects private broadband providers to net neutrality principles, municipalities can create their own broadband networks for local customers. In 2015, close to 500 municipalities had implemented their own networks.<sup>156</sup> One of the most successful examples of this model is the city of Chattanooga, Tennessee.<sup>157</sup> The Electric Power Board of Chattanooga offers internet services to residents of the city for seventy dollars a month, and within four years of service the model was already turning a profit.<sup>158</sup> As further proof of its success, Chattanooga's publicly-owned service was the highest rated internet service provider in a recent consumer reports survey in terms of value, and also received high marks for speed and reliability.<sup>159</sup>

This approach, however, assumes that all local governments are well-equipped to build and integrate this type of infrastructure, many of which are not. Further, this approach has received strong opposition from private broadband service providers. In 2008, as Chattanooga was beginning to build its infrastructure to create its network, Comcast sued the Electric Power Board to enjoin its development; however, the city of Chattanooga prevailed in state

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155. Jon Brodtkin, *FTC Gives ISPs Green Light to Block Applications as Long as They Disclose It*, ARS TECHNICA (Apr. 1, 2019, 11:40 AM), <https://arstechnica.com/tech-policy/2019/04/ftc-confirms-isps-can-block-and-throttle-as-long-as-they-disclose-it/>.

156. COMMUNITY-BASED BROADBAND SOLUTIONS, EXEC. OFFICE OF THE PRESIDENT 13, 20–33 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/community-based\\_broadband\\_report\\_by\\_executive\\_office\\_of\\_the\\_president.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/community-based_broadband_report_by_executive_office_of_the_president.pdf).

157. Jon Brodtkin, *ISPs Say They Can't Expand Broadband Unless Gov't Gives Them More Money*, ARS TECHNICA (Aug. 16, 2018, 6:00 AM) [hereinafter Brodtkin, *ISPs Say They Can't Expand*], <https://arstechnica.com/tech-policy/2018/08/isps-want-to-be-utilities-but-only-to-get-more-money-from-the-government/>; John Brodtkin, *Skeptics Say LA's Free Fiber Plan as Plausible as Finding a Unicorn*, ARS TECHNICA (Nov. 11, 2013, 10:15 AM) [hereinafter Brodtkin, *Skeptics Say LA's Free Fiber Plan*], <https://arstechnica.com/information-technology/2013/11/skeptics-say-las-free-fiber-plan-as-plausible-as-finding-a-unicorn/>.

158. Brodtkin, *ISPs Say They Can't Expand*, *supra* note 157.

159. Tim Omarzu, *Consumer Reports Surveys Rate EPB Best in the Nation for TV, Internet*, CHATTANOOGA TIMES FREE PRESS (June 17, 2016), <https://www.timesfreepress.com/news/business/aroundregion/story/2016/jun/17/consumer-reports-surveys-rate-epb-best-natitv/371498/>.



court.<sup>160</sup> This municipal model may result in increased competition as well; Comcast began offering competitive rates and speeds in the Chattanooga area in 2015.<sup>161</sup>

Another roadblock to this model is the state itself. In the time since *Nixon v. Missouri Municipal League*, which held that states could prohibit municipalities, but not private actors, from providing telecommunications services,<sup>162</sup> many states have banned municipalities from creating their own broadband providers. As of 2019, twenty-five states have created significant roadblocks or outright banned municipal networks.<sup>163</sup> These laws are largely the product of lobbying efforts of the telecommunications industry.<sup>164</sup> As a result, this option is not available to all communities, but if municipal broadband networks are protected at a federal level, they could be a promising alternative to federal net neutrality protections.

#### D. OPEN ACCESS MODEL

Another possible modification on the local municipal model is the open access model. An open access model would function like a road, allowing multiple providers to operate on publicly or privately owned infrastructure, creating competition to improve speeds and lower prices.<sup>165</sup> This could be accomplished by state or local governments building the infrastructure, and then leasing out its use to internet service providers, or alternatively could be facilitated through the private sector. Under the current broadband model, internet service providers build and own the physical infrastructure as well as offer internet services to consumers. As the cost of duplicating the physical infrastructure required to provide broadband service is costly, there is little incentive for new providers to compete, especially in more rural areas. Under the open access model, allowing competitors to use existing infrastructure will create a more competitive broadband market, which will result in lower prices, higher quality of service, and increased service coverage for the population as a whole.<sup>166</sup>

There are several advantages to the open access model. In 2009, a FCC-sponsored study found that open access networks in other countries resulted in lower prices and faster service for customers than traditional broadband service

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160. Jon Brodtkin, *Comcast Brings Fiber to City that It Sued 7 Years Ago to Stop Fiber Rollout*, ARS TECHNICA (Apr. 30, 2015, 3:10 PM), <https://arstechnica.com/information-technology/2015/04/comcast-brings-fiber-to-city-that-it-sued-7-years-ago-to-stop-fiber-rollout/>.

161. *Id.*

162. 541 U.S. 125, 140 (2004).

163. Kendra Chamberlain, *Municipal Broadband Is Roadblocked or Outlawed in 26 States*, BROADBANDNOW (Apr. 17, 2019), <https://broadbandnow.com/report/municipal-broadband-roadblocks/>.

164. *Id.*

165. Brodtkin, *ISPs Say They Can't Expand*, *supra* note 157.

166. *Id.*

providers.<sup>167</sup> Further, if all internet service providers function on the same network and infrastructure, net neutrality would be a de facto rule, as providers who refused to abide by these principles would be less attractive to consumers.<sup>168</sup> However, as with the municipal broadband model, many existing internet service providers oppose open access, since they have already invested in building the physical infrastructure for their own networks and favor less competition.

#### CONCLUSION

Net neutrality is a complex issue that deserves ample time and attention from lawmakers. As seen in the *Brand X*, *Comcast*, and *Mozilla* decisions, federal courts have held that the FCC is permitted to classify broadband internet as an information service or telecommunications service. Given this flexibility, it is likely that in the immediate future, net neutrality will continue to be a partisan issue vulnerable to upheaval as a result of changes in the regulatory state.

Unless Congress significantly reforms the 1996 Act, we are unlikely to see permanent change on the federal level. State regulations, such as the California Act, that attempt to implement state-level net neutrality restrictions are likely to be struck down in court based on the federal government's preemption power of inconsistent state regulations. Vermont and other states that restrict broadband service providers from engaging in these anti-neutral practices may be able to effectuate change on a state level as market participants, but the obligations of broadband service providers would likely be limited to their contracts for internet services with state agencies, and not generally applicable to all customers in the state as a whole.

There are several viable alternatives that can accomplish the same goals as state or federal net neutrality legislation. Municipal governments may seek to protect net neutrality principles by creating their own broadband internet networks. This approach would give communities more control over the structure of the prices and regulations of their internet, as well as more control over net neutrality. However, internet providers are strongly opposed and have succeeded in lobbying many states to pass legislation that prohibits these models. Additionally, because private internet service providers have already built their own infrastructure, this method may be costly to duplicate. Nevertheless, all state and local efforts are not entirely futile. Even though regulations implementing state-level net neutrality rules are likely to be struck down, these attempts signal to the market and lawmakers that net neutrality is

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167. BERKMAN CTR. FOR INTERNET & SOC'Y AT HARV. UNIV., NEXT GENERATION CONNECTIVITY: A REVIEW OF BROADBAND INTERNET TRANSITIONS AND POLICY FROM AROUND THE WORLD 13 (2010), [https://cyber.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman\\_Center\\_Broadband\\_Final\\_Report\\_15Feb2010.pdf](https://cyber.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman_Center_Broadband_Final_Report_15Feb2010.pdf).

168. Andrew Cohill, *Open Access Model Explained*, ISE MAG. (Mar. 21, 2019), <https://www.isemag.com/2019/03/municipal-broadband-open-access-broadband-networks/>.

an issue that many states are concerned about and will not stop trying to protect net neutrality without a fight.