

# THE RISKS AND REWARDS OF NETWORK NEUTRALITY UNDER § 706

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## INTRODUCTION

The past year has been the most contentious one yet for network neutrality. In early 2014, a federal appeals court invalidated most of the Federal Communications Commission (FCC)'s Open Internet rules.<sup>1</sup> The FCC responded by proposing a controversial set of new rules.<sup>2</sup> This action, in turn, generated an unprecedented public response of nearly four million filed comments.<sup>3</sup> Unsurprisingly, opinions of these proposals varied widely. Some observers—including the comedian John Oliver<sup>4</sup> and even President Obama<sup>5</sup>—

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

2. Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,448, 37,467-69 (proposed July 1, 2014) (to be codified at 47 C.F.R. pt. 8) [hereinafter 2014 Open Internet NPRM].

3. Jacob Kastrenakes, *FCC Received a Total of 3.7 Million Comments on Net Neutrality*, VERGE (Sept. 16, 2014, 6:06 PM), <http://www.theverge.com/2014/9/16/6257887/fcc-net-neutrality-3-7-million-comments-made>.

4. Elise Hu, *John Oliver Helps Rally 45,000 Net Neutrality Comments to FCC*, NPR (June 3, 2014, 11:56 AM), <http://www.npr.org/blogs/alltechconsidered/2014/06/03/318458496/john-oliver-helps-rally-45-000-net-neutrality-comments-to-fcc>.

felt the FCC's initial proposals were too weak. Others argued strenuously that the rules were overbroad.<sup>6</sup> In short, the debate seems as unsettled as it has ever been.

The reality, however, is somewhat different. Although the past year's disagreements have been intense, network neutrality actually enjoys more consensus than ever. Indeed, the past year's controversies obscure just how much progress network neutrality has made since the mid-2000s. If anything, these recent controversies have made the open Internet even more secure. The outpouring of public support has demonstrated to policymakers just how strongly our society values the norms of Internet openness and nondiscrimination.<sup>7</sup>

In other words, network neutrality is winning. At the policy level, there is virtually no disagreement about the benefits of an open Internet.<sup>8</sup> Parties on all sides of the issue adopt the rhetoric of the open Internet to justify their positions.<sup>9</sup> Further, the fundamental questions that network neutrality faced a decade ago have largely been answered in its favor. For instance, the question is no longer *whether* the FCC will adopt nondiscrimination protections but instead how such rules will look. Similarly, the question is no longer whether the FCC has statutory authority to adopt rules but instead *which* statute provides the most appropriate foundation for those rules. There is even significant agreement about the ultimate *content* of the FCC's rules. Many access providers—such as AT&T and Comcast—have acknowledged that the FCC has sufficient authority

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5. Edward Wyatt, *Obama Tells F.C.C. to Ensure Open Internet*, N.Y. TIMES, Nov. 11, 2014, at A1, B2, available at <http://www.nytimes.com/2014/11/11/technology/obama-net-neutrality-fcc.html>.

6. Jon Brodtkin, *Republican Lawmakers Tell FCC It Can't Treat Broadband as a Utility*, ARS TECHNICA (Nov. 13, 2014, 11:30 AM), <http://arstechnica.com/tech-policy/2014/11/republican-lawmakers-tell-fcc-it-cant-treat-broadband-as-a-utility>.

7. *Id.* at 3-8 (noting the high volume of comments that both supported Open Internet rules and were non-template in form).

8. *Id.* at 5.

9. See, e.g., COMCAST CORP., COMMENTS OF COMCAST CORPORATION 11 (2014) [hereinafter COMMENTS OF COMCAST], available at <http://apps.fcc.gov/ecfs/document/view?id=7521479245> (“[N]o company has been more committed to the openness of the Internet than Comcast.”); SPRINT CORP., REPLY COMMENTS OF SPRINT CORPORATION 3-4 (2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7522665225> (stating that “Sprint is a longstanding advocate of Internet openness” (capitalization omitted)).

to adopt clear rules prohibiting both blocking and even paid prioritization.<sup>10</sup>

Today's debates are therefore narrower than the current rhetoric might suggest. The single most contentious issue centers on a fairly technical question of statutory authority—specifically, should the FCC have use § 706 or Title II of the Communications Act as the authority for its new rules?<sup>11</sup> In this Article, I argue that the FCC's ultimate choice is less consequential than it seems. Either way, network neutrality wins. While I support rules based on Title II reclassification (or hybrid plans that partially reclassify<sup>12</sup>), I believe that § 706 would have provided strong protections for the open Internet as well.

One key assumption is that the FCC's discretionary enforcement decisions is far more important than the substance of the ultimate statutory foundation and regulations. In a context where technologies and business practices evolve in rapid and unpredictable ways, detailed *ex ante* rules will inevitably lag behind market realities. In practice, the FCC will likely rely more heavily on high-profile adjudicatory proceedings and “raised eyebrow” pressure to protect the open Internet and to guide business practices in ways that preserve traditional norms of nondiscrimination.<sup>13</sup>

Under this assumption, the key question is not so much which legal foundation is broader but whether each legal foundation provides *sufficient* authority to make credible enforcement threats to preserve norms.<sup>14</sup> Viewed from this perspective, network neutrality can't lose. On the one hand, reclassification will provide a strong foundation. This Article argues, however, that § 706 would have also been sufficient in practice. In fact, the statute provides several pragmatic benefits that are often overlooked by network neutrality supporters. Specifically, it would have allowed the FCC to adopt rules at lower political and legal cost, thereby preserving the FCC's resources and political capital for more immediate and concrete

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10. See *infra* note 84.

11. The most relevant Title II statutes are 47 U.S.C. §§ 201-202 (2012). Section 706 is codified at 47 U.S.C. § 1302.

12. Howard Buskirk, *FCC Moving to Reclassify Broadband as a Title II Service, Wheeler Tells CES*, COMM. DAILY, Jan. 8, 2015, available at Factiva, Doc. No. COMD000020150113eb1800001.

13. For examples of informal “raised eyebrow” regulation, see *Writers Guild of America, West, Inc. v. American Broadcasting Co.*, 609 F.2d 355, 365 n.8 (9th Cir. 1979) (quoting *Consolidated Edison Co. v. Federal Power Commission*, 512 F.2d 1332, 1341 (D.C. Cir. 1975)).

14. See *infra* note 77 and accompanying text.

priorities. Using § 706 would have also preserved the option of reclassification, thus allowing the FCC to invoke the “shadow” of reclassification as leverage to deter discriminatory practices.<sup>15</sup> Accordingly, Part I provides a brief overview of the current statutory authority debate. Part II outlines some of the potential benefits of § 706 as a statutory foundation.

## I. STATUTORY AUTHORITY—AN OVERVIEW

One basic principle of administrative law is that agencies must have statutory authority to adopt regulations.<sup>16</sup> The FCC has two potential sources of authority within the Communications Act for its proposed rules. The candidates are known as Title II and § 706.<sup>17</sup> Each statute has its own costs and benefits, and the FCC’s choice was the central question in the rulemaking proceeding.<sup>18</sup>

To understand this debate, some history is necessary. In 2010, the FCC adopted formal regulations to protect the open Internet.<sup>19</sup> These rules prevented Internet Service Providers (ISPs)<sup>20</sup> from blocking or unreasonably discriminating against edge services (e.g., websites and video streams).<sup>21</sup> Under the rules, for example, the ISP Comcast could not block the edge provider Netflix nor single it out for slower transmission. The rules also imposed transparency requirements that required ISPs to disclose network-management practices.<sup>22</sup> In adopting these rules, the FCC relied most heavily on § 706.<sup>23</sup>

The D.C. Circuit partially invalidated these rules in 2014 in *Verizon v. FCC*.<sup>24</sup> For purposes here, the court’s opinion made two key conclusions. First, it expressly recognized—for the first time in history—that the FCC has statutory authority to adopt Open Internet

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15. See *infra* Section II.B.

16. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 5-6 (6th ed. 2013).

17. See *supra* note 11.

18. See 2014 Open Internet NPRM, *supra* note 2, at 37,467-68.

19. Preserving the Open Internet, 25 FCC Rcd. 17,905, 17,906, 2010 WL 5281676 (Dec. 21, 2010) (adopting formal network neutrality regulations).

20. Although I use “ISP” for brevity, I am referring only to providers of local broadband *access*—the physical last-mile transmission service that connects end users to the Internet.

21. Preserving the Open Internet, 25 FCC Rcd. at 17,906.

22. *Id.*

23. *Id.* at 17,971-72.

24. 740 F.3d 623, 628 (D.C. Cir. 2014).

regulations.<sup>25</sup> The court thus blessed § 706 as an acceptable foundation.<sup>26</sup> Second, the court held that the FCC's rules—though valid under § 706—violated a separate statute.<sup>27</sup> That other statute prohibits the FCC from imposing “common carrier” regulations upon non-common carrier services.<sup>28</sup> In *Verizon*, the court found that the FCC's rules were functionally common carrier regulations because they imposed broad and indiscriminate requirements upon all ISPs.<sup>29</sup> Because the FCC had not classified Internet access service as a “common carrier” service, the rules were therefore invalid.<sup>30</sup> In short, the court found that the FCC was applying common carrier rules to non-common carrier services.

The FCC responded by proposing revised rules.<sup>31</sup> Its notice also sought comment on the appropriate source of statutory authority for those new rules.<sup>32</sup> Many network neutrality supporters argued that the FCC should rely primarily on Title II of the Communications Act.<sup>33</sup> This approach required the FCC to “reclassify” broadband *access* (the physical transmission component—not content and applications) as a common carrier service.<sup>34</sup> Reclassification avoids the problem in *Verizon* by formally defining Internet access as a Title II common carrier service.<sup>35</sup> Advocates argued that reclassification would therefore enable stronger regulations, provide greater certainty, and withstand legal challenges.<sup>36</sup> The industry, however, strongly

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25. *Id.* at 635.

26. *Id.* at 628.

27. *Id.* at 655-59.

28. 47 U.S.C. § 153(51) (2012).

29. *Verizon*, 740 F.3d at 655-56.

30. *Id.* at 650, 655-59.

31. 2014 Open Internet NPRM, *supra* note 2, at 37,448.

32. *Id.* at 37,467-69 (requesting comment on reclassification authority for network neutrality rules).

33. FREE PRESS, COMMENTS OF FREE PRESS 2-3 (2014) [hereinafter COMMENTS OF FREE PRESS], available at <http://apps.fcc.gov/ecfs/document/view?id=7521701227>; PUB. KNOWLEDGE, BENTON FOUND. & ACCESS SONOMA BROADBAND, COMMENTS OF PUBLIC KNOWLEDGE BENTON FOUNDATION ACCESS SONOMA BROADBAND 1 (2014) [hereinafter PUBLIC KNOWLEDGE COMMENTS], available at <http://apps.fcc.gov/ecfs/document/view?id=7521480282>.

34. See COMMENTS OF FREE PRESS, *supra* note 33, at 149; PUBLIC KNOWLEDGE COMMENTS, *supra* note 33, at 4-9.

35. NETFLIX, INC., COMMENTS OF NETFLIX, INC. 20-22 (2014) [hereinafter COMMENTS OF NETFLIX] (citing *Verizon*, 740 F.3d at 649-50), available at <http://apps.fcc.gov/ecfs/document/view?id=7521491186>.

36. *Id.*

opposes reclassification, which it views as both excessive and anachronistic.<sup>37</sup>

The second option is § 706 of the Communications Act, which authorizes the FCC to promote advanced network (broadband) infrastructure.<sup>38</sup> Although phrased in terms of infrastructure deployment, the FCC successfully argued in *Verizon* that § 706 authorizes nondiscrimination protections under the “‘virtuous circle’” theory.<sup>39</sup> The idea is that nondiscrimination rules promote innovative content and applications. These “edge” innovations, in turn, increase customer demand for Internet infrastructure.<sup>40</sup> For instance, the development of the World Wide Web drove demand for Internet access, which in turn increased deployment of advanced infrastructure. Blocking and discrimination, however, arguably lower demand and thus impede infrastructure deployment.

In its initial May 2014 notice, the FCC proposed using § 706 instead of reclassification.<sup>41</sup> This proposal, however, generated significant controversy—including a now infamous sketch from comedian John Oliver.<sup>42</sup> The primary critique of § 706 is that it cannot provide sufficiently strong and clear rules to protect the open Internet. In particular, skeptics fear that § 706 will legitimize certain forms of discrimination.<sup>43</sup> The most pressing concern is that ISPs will introduce a practice known as “paid priority,” which would allow ISPs to charge edge providers for faster delivery.<sup>44</sup> With paid priority, companies such as Netflix or Google could pay higher prices for faster and better transmission.<sup>45</sup> Smaller startups—and thus innovation more generally—would be disadvantaged because they

37. See, e.g., VERIZON & VERIZON WIRELESS, COMMENTS OF VERIZON AND VERIZON WIRELESS 4 (2014) [hereinafter COMMENTS OF VERIZON], available at <http://apps.fcc.gov/ecfs/document/view?id=7521507614> (“The arcane regulatory framework . . . was crafted for 19<sup>th</sup> Century railroad monopolies and the early 20<sup>th</sup> Century one-wire telephone world.”).

38. 47 U.S.C. § 1302 (2012).

39. *Verizon v. FCC*, 740 F.3d 623, 628, 634 (D.C. Cir. 2014) (quoting *Preserving the Open Internet*, 25 FCC Rcd. 17,905, 17,910-11, 2010 WL 5281617 (Dec. 21, 2010)).

40. *Id.* at 644-49.

41. 2014 Open Internet NPRM, *supra* note 2, at 37,448-49 ¶ 4.

42. Hu, *supra* note 4.

43. See, e.g., COMMENTS OF FREE PRESS, *supra* note 33, at 134-39.

44. Todd Shields & Chris Strohm, *FCC Stirs Pot in Pitching Paid Internet Fast Lanes*, BLOOMBERG BUS. (Apr. 24, 2014, 2:39 PM), available at <http://www.bloomberg.com/news/2014-04-24/fcc-plan-would-let-web-companies-pay-for-priority-service.html>.

45. *Id.*

could not afford prioritized transmission.<sup>46</sup> Further, ISPs might have incentives to keep broadband speeds low in order to make priority service more appealing.<sup>47</sup> These practices are thus the source of fears regarding Internet “fast lanes” and “slow lanes.”<sup>48</sup>

To many reclassification advocates, § 706 cannot prevent paid priority. In *Verizon*, the court had emphasized that, to avoid the common carrier restriction, the FCC’s rules must allow for individualized negotiations with edge providers.<sup>49</sup> Thus, § 706, by its very nature, *must* allow ISPs to treat edge providers differently. Reclassification, by contrast, would avoid this problem and allow the FCC to adopt clearer, broader rules.

A related concern is that § 706 would give rise to difficult enforcement issues. In its proposed rules, the FCC did not propose to ban all discrimination.<sup>50</sup> Instead, the proposed rules required these practices to be “commercially reasonable.”<sup>51</sup> One critique is that this standard is too unclear to provide sufficient protection.<sup>52</sup> A second critique is that enforcement would be individualized and adjudicatory—and that individual parties would lack the resources to challenge large access providers such as Verizon and Comcast.<sup>53</sup> Collectively, these various concerns have driven many network neutrality advocates to strongly prefer Title II reclassification.

Reclassification supporters received a boost from President Obama, who announced his support for strong Title II-based rules after the 2014 midterm election.<sup>54</sup> As a result, FCC Chairman Wheeler publicly suggested in February 2015 that the agency would pursue reclassification.<sup>55</sup> To be clear, I support a Title II based approach, which offers the strongest legal foundation for clear,

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46. *Id.*

47. Letter from Staci L. Pies, Senior Legal Counsel, Google, Inc., to Marlene H. Dortch, Sec’y, FCC (Sept. 15, 2014), available at [http://assets.fiercemarkets.net/public/sites/onlinevideo/google\\_fcc\\_netneutrality\\_sept15.pdf](http://assets.fiercemarkets.net/public/sites/onlinevideo/google_fcc_netneutrality_sept15.pdf) (noting that paid prioritization would “create incentives for providers to maintain scarcity and congestion”).

48. Michael Weinberg, *How the FCC’s Proposed Fast Lanes Would Actually Work*, PUB. KNOWLEDGE (May 16, 2014), <https://www.publicknowledge.org/news-blog/blogs/how-the-fccs-proposed-fast-lanes-would-actually-work>.

49. *Verizon v. FCC*, 740 F.3d 623, 658-59 (D.C. Cir. 2014).

50. See 2014 Open Internet NPRM, *supra* note 2, at 37,449 ¶ 10.

51. *Id.*

52. See, e.g., COMMENTS OF FREE PRESS, *supra* note 33, at 134-39.

53. *Id.* at 134-42.

54. See Wyatt, *supra* note 5, at A1.

55. Buskirk, *supra* note 12.

bright-line rules. Reclassification, however, will generate both strong legal opposition and unanswered questions about implementation. Accordingly, the next Part explores the question of whether § 706 could have achieved the same practical results with less costs. In short, would network neutrality be safer by at least *beginning* with § 706?

## II. THE COSTS AND BENEFITS OF § 706

This Part explores some of the potential costs and benefits of using § 706 as the statutory foundation for new rules. First, it contends that the primary benefit of using § 706 is pragmatic. Second, it argues that § 706 has sufficient substantive authority to protect the open Internet. Indeed, the statute becomes particularly effective if one assumes that the FCC is more likely to protect the open Internet *in practice* through discretionary adjudicatory proceedings than through detailed *ex ante* rules. At the same time, it recognizes that § 706 creates more uncertainty than Title II-based rules.

### A. Pragmatic Considerations

Doctrine aside, the strongest argument for § 706 is that it will be more politically accepted. Access providers will therefore be less likely to challenge rules under § 706. In fact, several of the largest ISPs are already on the record stating that the FCC has the power to adopt open Internet protections under § 706.<sup>56</sup> The companies have not only endorsed rules in general, they have stated specifically that § 706 provides sufficient authority to prevent the types of paid prioritization that is at the heart of skeptics' concerns.<sup>57</sup>

And even assuming some ISPs challenge rules under § 706 (which is likely), the challenge will be far weaker. For one, the FCC's theory of § 706 authority has already been approved by the D.C. Circuit.<sup>58</sup> Given the FCC's historical troubles establishing statutory authority in this area (and the risks of drawing a hostile panel in a federal appeals court), the importance of this precedent

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56. For specific examples, see *infra* note 84.

57. See, e.g., COMMENTS OF FREE PRESS, *supra* note 33, at 134-36; PUBLIC KNOWLEDGE COMMENTS, *supra* note 33, at 34-42.

58. See *Verizon v. FCC*, 740 F.3d 623, 643 (D.C. Cir. 2014).



should not be understated.<sup>59</sup> The ISPs' public statements about the strength of § 706 would also constrain the types of arguments they could credibly raise in litigation. In addition, fewer providers would likely join the challenge in the first place. Many providers might fear, quite rationally, that striking down rules under § 706 would ultimately make reclassification more likely. In this respect, § 706 rules would split and weaken the ISP coalition.

For similar reasons, § 706 would also preserve political capital and resources. An agency has only a finite amount of time and resources. To the extent reclassification triggers massive resistance, it will lead to significant opportunity costs if the FCC lacks the time to act or if it expends all its capital on the reclassification fight.<sup>60</sup> With § 706 by contrast, the FCC could move on to more pressing matters immediately. To take municipal broadband restrictions as an example,<sup>61</sup> it is arguable that preempting these restrictions would do more to promote broadband deployment than any other policy lever. The fear of competition is the single best incentive for ISPs to lower prices and improve speed. If the FCC, however, is spending all its political capital to defend reclassification, it will be more difficult for the agency to devote sufficient resources to end municipal restrictions.<sup>62</sup> It could therefore crowd out other priorities.

In addition, questions exist about how reclassification would interact with other provisions of law. For instance, Title II advocates urge the FCC to forbear from most of the traditional Title II obligations.<sup>63</sup> The problem, however, is that forbearance puts supporters of regulation in a difficult spot.<sup>64</sup> In the context of network

59. The two previous cases in which the FCC lost are *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010), and *Verizon*, 740 F.3d at 628.

60. Kevin Werbach & Phil Weiser, *The Perfect and the Good on Network Neutrality*, HUFFINGTON POST (Apr. 27, 2014, 6:03 PM), [http://www.huffingtonpost.com/kevin-werbach/network-neutrality\\_b\\_5221780.html](http://www.huffingtonpost.com/kevin-werbach/network-neutrality_b_5221780.html) (“The surest way to stop progress . . . is if the FCC’s work grinds to a halt in a miasma of political and legal opposition.”).

61. Jon Brodtkin, *ISP Lobby Has Already Won Limits on Public Broadband in 20 States*, ARS TECHNICA (Feb. 12, 2014, 7:00 AM), <http://arstechnica.com/tech-policy/2014/02/isp-lobby-has-already-won-limits-on-public-broadband-in-20-states/>.

62. See Werbach & Weiser, *supra* note 60.

63. The 1996 Act grants the FCC authority to forbear from applying regulatory requirements if it finds forbearance would further competition. Telecommunications Act of 1996, Pub. L. No. 104-104, § 10(a), 110 Stat. 56, 128 (codified as amended at 47 U.S.C. § 160(a) (2012)).

64. See Kery Murakami, *Despite Wheeler’s Title II Comments, Questions About Details Remain*, COMM. DAILY, Jan. 9, 2015, available at Factiva, Doc. No. COMD000020150114eb1900005.

neutrality, it is tempting to argue that courts should defer broadly to the FCC's forbearance findings. However, that same principle in the hands of a more deregulatory FCC could threaten important regulatory provisions. There are also questions about whether reclassification would trigger federal and state obligations to make universal service payments and, more generally, to be subject to new taxes and regulations.<sup>65</sup> Some of these concerns could be handled with preemption and forbearance<sup>66</sup>—but such a precedent could also empower future FCC officials to avoid regulatory obligations. In addition, reclassification also potentially excludes the Federal Trade Commission from enforcement actions because the FCC's jurisdiction does not extend to “common carriers.”<sup>67</sup>

Finally, the FCC may have to open new proceedings to reduce the risks of an arbitrary and capricious challenge.<sup>68</sup> For instance, it might have to open additional proceedings to establish a new factual record to support segregating the transmission service from the higher-layer information services. It might also have to open additional proceedings on the questions relating to forbearance and universal service. The 2016 election could come and go before these issues are finalized, potentially threatening the existence of *any* rules whatsoever if a new administration takes power.

## B. Substantive Considerations

Practical considerations aside, the ultimate policy goal is to protect the open Internet.<sup>69</sup> If the § 706 rules are insufficient to achieve this goal, then reclassification is the superior option regardless of the legal and political backlash that may accompany it. And admittedly, § 706 provides more narrow substantive protections than reclassification. The statute, however, provides more substantive authority than it first appears. In fact, § 706 is

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65. See Kery Murakami, *Wheeler Says Title II Raises Questions About Whether Broadband Should Pay into USF*, COMM. DAILY, Nov. 17, 2014, available at Factiva, Doc. No. COMD000020141120eabh00001.

66. See *id.*

67. Murakami, *supra* note 64.

68. Howard Buskirk, *Wheeler Under Pressure to Seek Additional Comment Before Reclassifying Broadband Under Title II*, COMM. DAILY, Dec. 15, 2014, available at Factiva, Doc. No. WWID000020141218eacf00002.

69. See *supra* note 7 and accompanying text.

sufficiently broad to prevent the practices that network neutrality advocates currently worry about.<sup>70</sup>

One important premise is that § 706 is adequate for the type of enforcement the FCC is most likely to undertake. Under either statute, the final rules will be written broadly and will likely be defined over time in an evolutionary, common law fashion.<sup>71</sup> And if history is any guide, the FCC's network neutrality rules will not be enforced very often. Instead, their primary benefit will be to preserve and protect the strong preexisting norms of openness and nondiscrimination. Given how fast technology moves in this context, the ability to craft clear *ex ante* rules is likely impossible (and possibly harmful)—particularly when we remember that we may not even be aware of what technologies will develop in the future.

Consider, for instance, the problem of data caps. It is difficult to say that data caps should be prohibited in all circumstances.<sup>72</sup> Data caps could represent an efficient form of price discrimination for users who consume low volumes of data.<sup>73</sup> Other data-cap regimes, however, could be designed to stifle competitive video-streaming services (particularly if there is no “unlimited” option available).<sup>74</sup> It would therefore be difficult to craft *ex ante* rules in this context.

The larger point is that the open Internet will ultimately depend on the FCC's willingness to apply traditional norms to new technologies and business practices as they emerge. In practice, this means the FCC will be regulating through a “raised eyebrow” approach in most contexts. When discriminatory practices emerge, it will initially resist them through oversight, investigations, hearings, and credible threats of enforcement actions. In many instances, the mere existence of an FCC proceeding could provide adequate deterrence. The FCC's proceeding against Comcast in 2008 illustrates how such enforcement actions could both deter harmful practices and raise public awareness even in the absence of clear

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70. See *infra* Section II.B.

71. For instance, even though the FCC has adopted clear rules on paid prioritization, it will not be able to clearly define *ex ante* many other forms of unreasonable discrimination that might arise in the future.

72. See Howard Buskirk & Matthew Schwartz, *Public Knowledge May Seek Formal Investigation into Usage-Based Data Caps*, COMM. DAILY, Mar. 1, 2012, available at Factiva Doc. No. COMD000020120302e83100004.

73. See *id.*

74. See *id.* (internal quotation marks omitted).

rules.<sup>75</sup> Despite the FCC's ultimate loss in court,<sup>76</sup> the mere existence of that proceeding arguably did more to preserve openness norms than any other specific action the FCC has taken.

From this perspective, the content of the FCC's statutory authority may be less important than whether the statutory authority allows the agency to make credible threats in response to harmful conduct.<sup>77</sup> Reclassification, of course, clearly provides sufficient authority. I argue, however, that § 706 provides sufficient substantive authority as well.

Although it is often overlooked, § 706 authority is quite expansive in scope, assuming the FCC has the political will to use it. Under the virtuous circle theory, the FCC can regulate any discriminatory action by ISPs that potentially lowers demand by threatening innovation.<sup>78</sup> With the D.C. Circuit decision in hand, the FCC could immediately initiate investigations and enforcement actions for a wide range of conduct, such as discriminatory data caps, interconnection and peering agreements, municipal broadband restrictions, and overbroad congestion-management practices.<sup>79</sup> In contrast to the potential fast-lane fears, access providers have already introduced these practices, and they demand immediate attention.

As noted earlier, however, the primary critique of § 706 is that it cannot prevent paid priority.<sup>80</sup> And to be clear, paid prioritization should be prohibited. ISP-directed priority directly threatens innovation by inverting the Internet's end-to-end architecture.<sup>81</sup> This practice also distorts markets by displacing users as the ultimate arbiters of market success. At the same time, it must be remembered that paid priority does not currently exist. No ISPs currently offer such a service, and many have claimed that they lack both the desire and technical ability to introduce it.<sup>82</sup>

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75. Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13,028, 2008 WL 3862114 (Aug. 1, 2008).

76. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

77. Werbach & Weiser, *supra* note 60 ("The effectiveness of the FCC proposal in protecting the open Internet thus depends on how it's enforced . . .").

78. *See supra* text accompanying notes 38-40.

79. *See* Werbach & Weiser, *supra* note 60.

80. *See supra* note 57 and accompanying text.

81. *See* PUBLIC KNOWLEDGE COMMENTS, *supra* note 33, at 34-35.

82. *See, e.g.*, COMMENTS OF COMCAST, *supra* note 9, at 22 ("For its part, Comcast has not entered into a single 'paid prioritization' arrangement, has no plans to do so in the future, and does not even know what such an arrangement would entail as a practical matter."); COMMENTS OF VERIZON, *supra* note 37, at 37-38.

Assuming, however, that such practices did emerge, § 706 provides the FCC with sufficient authority to prevent it. For one, the FCC proposed that any individually negotiated transmission speeds be “commercially reasonable.”<sup>83</sup> ISPs such as AT&T, Comcast, and Verizon have all publicly stated that the FCC could adopt either *per se* or presumptive rules that ban paid prioritization as commercially unreasonable.<sup>84</sup> In practice, such presumptions would not be that different from bright-line rules given that the agency would always be free to waive or forbear from enforcing them in certain circumstances.<sup>85</sup>

Critically, however, the FCC can only ban such practices so long as other types of negotiations remain possible. The existence of these other potential negotiations is thus the crux of the issue. In the public comments, the leading ISPs have outlined some of the types of individualized negotiations that would still be allowed the rule.<sup>86</sup> For instance, ISPs could negotiate with edge providers to facilitate “*user-directed*” priority.<sup>87</sup> These practices, which are already common in the enterprise market, do not violate end-to-end principles and are generally unobjectionable to most network neutrality supporters.<sup>88</sup> Other arrangements might include hosting or peering agreements (which are also already happening) or even allowing edge providers to pay for some of the users’ bandwidth costs.<sup>89</sup> The larger point is that paid prioritization is not likely to happen under § 706 unless the FCC wants it to. And if paid prioritization is no longer a problem, many of the critiques of § 706 become less compelling.<sup>90</sup>

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83. 2014 Open Internet NPRM, *supra* note 2, at 37,461 ¶ 95, 37,464-65 ¶¶ 116-21.

84. These statements can be found in the comments filed in the current rulemaking proceeding. *See, e.g.,* AT&T SERVS., INC., COMMENTS OF AT&T SERVICES, INC. 30-37 (2014) [hereinafter COMMENTS OF AT&T], available at <http://apps.fcc.gov/ecfs/document/view?id=7521679206> (arguing that paid priority could be “*per se* commercially unreasonable”); COMMENTS OF COMCAST, *supra* note 9, at 24 (supporting a “rebuttable presumption that ‘paid prioritization’ arrangements are commercially unreasonable”); COMMENTS OF VERIZON, *supra* note 37, at 38 (noting that the FCC could adopt a “rebuttable presumption” with an appropriate record of harmful effects).

85. *See* 47 U.S.C. § 160(a) (2012).

86. COMMENTS OF AT&T, *supra* note 84, at 27-30, 34-35.

87. *Id.* at 34.

88. *Id.* at 27-30, 34-35.

89. COMMENTS OF VERIZON, *supra* note 37, at 70-71.

90. AT&T SERVS., INC., REPLY COMMENTS OF AT&T SERVICES, INC. 4 (2014), available at <http://apps.fcc.gov/ecfs/document/view;ECFSSSESSION=>

Section 706 also provides the FCC with sufficient authority to prevent blocking. In *Verizon*, the D.C. Circuit implied that requiring a baseline of minimum service guarantees (i.e., preventing blocking) would not violate the common carrier prohibition so long as individualized negotiations remain possible.<sup>91</sup> Following this guidance, the FCC proposed regulations requiring ISPs to offer a minimum transmission speed for all content, while preserving space for “commercially reasonable” negotiations.<sup>92</sup> The FCC would thus be free to gradually increase this minimum baseline speed to protect innovation and open entry.<sup>93</sup> An alternative option for preventing blocking would be to require ISPs to guarantee their subscribers “best effort[s]” access to their desired destinations.<sup>94</sup> In this respect, “no blocking” rules could simply be rephrased as an end-user guarantee to the ISPs’ customers.<sup>95</sup>

Further, § 706 would not have foreclosed Title II reclassification. In fact, § 706 could work in parallel with reclassification to protect the open Internet. For instance, if § 706 authority proved insufficient, the FCC could always have reclassified in the future. The FCC could therefore regulate in the shadow of reclassification to deter ISPs from violating open Internet principles. In fact, the political and legal case for reclassification would be even stronger with a more developed factual record of abuse. This “raised eyebrow” approach would have thus given the FCC the best of both worlds with respect to reclassification. It could have used the expansive authority of Title II as leverage, without subjecting itself to a time-consuming court challenge. The FCC’s leverage, however, would be significantly diminished if it chooses reclassification and a hostile court rejects it entirely.<sup>96</sup>

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1thQJbCVK3g8T2GpLY16MTxcdl5QTJy6fn2KzFcWp2fnGRpSdkBQ!195790622611175060748?id=7522635879 (“If the Commission does restrict paid prioritization as AT&T proposes, that should fundamentally reframe consideration of the remaining open Internet issues.”).

91. *Verizon v. FCC*, 740 F.3d 623, 658 (D.C. Cir. 2014).

92. 2014 Open Internet NPRM, *supra* note 2, at 37,461-62 ¶¶ 97-102.

93. *Id.* at 37,461 ¶¶ 97-99.

94. *Id.* at 37,462 ¶ 102 (internal quotation marks omitted).

95. Letter from Emily Sheketoff, Exec. Dir., Am. Library Ass’n, & Prue Adler, Exec. Dir., Ass’n of Research Libraries, to Tom Wheeler et al., Chairman, FCC 9 (Nov. 6, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=60000979297>.

96. Some of the potential legal challenges to reclassification are that “telecommunications service” cannot be interpreted to apply only to physical broadband transmission. See TECHFREEDOM & INT’L CTR. FOR LAW & ECON., IN THE

## CONCLUSION

My ultimate policy goal is to create sufficient substantive protections for the open Internet. My Article therefore shares the policy goals of Title II advocates. My purpose, then, is not to refute reclassification but simply to raise the question of whether these policy goals could have been attained at lower costs—and been solidified more securely—through § 706 as an *initial* measure that preserved the option of Title II in the future. Regardless of what the FCC chooses, protecting the open Internet will ultimately depend on the willingness of the FCC to enforce whatever it enacts.

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MATTER OF PROTECTING AND PROMOTING THE OPEN INTERNET 48-51 (2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521706377> (quoting BARBARA S. ESBIN, THE PROGRESS & FREEDOM FOUND., COMMENTS OF BARBARA S. ESBIN, SENIOR FELLOW AND DIRECTOR OF THE CENTER FOR COMMUNICATIONS AND COMPETITION POLICY AT THE PROGRESS AND FREEDOM FOUNDATION (2009), available at <http://www.pff.org/issues-pubs/filings/2010/011410-FCC-network-neutrality-esbin-filing.pdf>). A separate challenge is that reclassification necessarily requires significant forbearance, which requires strong showings by the FCC. See, e.g., *id.* at 32-35.

