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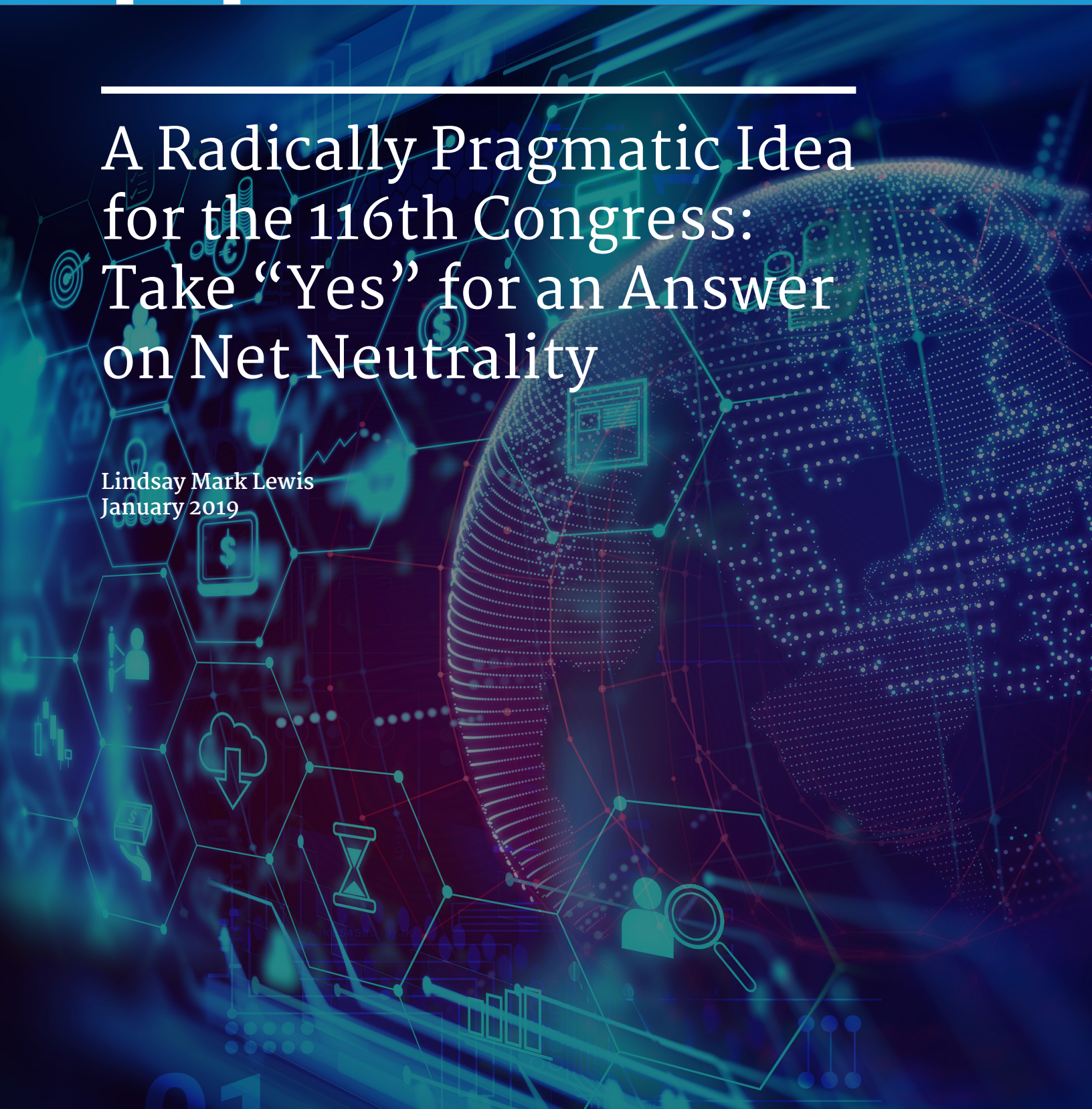

A Radically Pragmatic Idea for the 116th Congress: Take "Yes" for an Answer on Net Neutrality

Lindsay Mark Lewis
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INTRODUCTION

Net neutrality is the basic idea that all internet traffic must be treated equally on the network and no company should be able to block or throttle online traffic in order to gain a competitive leg-up. This is a pro-competitive, prophylactic policy to ensure internet providers don't unfairly become gatekeepers for online services. It's a sound bi-partisan pragmatic public policy agreement.

For the last two decades, different versions of net neutrality have bounced between Congress, the Federal Communications Commission, the courts – and most recently the states – but the issue remains unresolved. Even today, the FCC's most recent "Restoring Internet Freedom" order and local net neutrality rules in California and Vermont remain mired in court while Congress considers several different legislative approaches – none of which have been able to gain majority support.

This chaotic and uncertain approach drags down our economy, undermines investment needed to connect new communities and close the digital divide, and sucks up all the oxygen in the room so that other issues like increasing rural connectivity and reducing the digital divide, protecting elections from foreign interference, and finding ways to bring new competition to digital markets get crowded out. Economists estimate that the overhang of this debate drives away nearly $35 billion a year in network investment and consumer upgrades.

It is time for Congress to solve this problem for good by enacting a strong, pro-consumer net neutrality law – an outcome that is politically possible even in this era of maximalist gridlock and deeply divided government, given the broad consensus that has formed around the vital issue of ensuring an open internet.

Nearly everyone – including the biggest internet providers and "edge" technology platforms – agrees on core protections against blocking lawful websites, throttling consumer traffic, or manipulating users' access to different internet services in discriminatory or anticompetitive ways. Progressives have fought for these principles for years, while most conservatives have reflexively opposed any regulation of the internet. But even conservatives have come around more recently, citing the need for certainty and predictability to strengthen competition and keep innovation and investment flowing.

Meanwhile, internet providers, perhaps in part because of customer pressure, have effectively embraced net neutrality as a core business practice necessitated by consumer demand, and have urged Congress to codify this market reality by passing permanent net neutrality legislation.

While internet providers continue to object to overreaching "bait and switch" proposals that use neutrality as a stalking horse for rate regulation or network unbundling, there appears to be little industry opposition to "clean" net neutrality proposals in the tradition of those previously supported by liberal champions such as Congressman Henry Waxman and President Obama's first FCC Chairman Julius Genachowski. The providers have made clear that strong permanent legislative rules are preferable to the endless and untenable policy ping pong between Congress, the FCC, the courts, and the states that has dragged on for years with no end in sight.

Legislation along those lines would accomplish the original aims of net neutrality and win permanent statutory protections progressives have pursued for over fifteen years. It would deliver reliable, certain, and effective protection to everyone who uses the internet and keep the internet open and free for all. It would be an unabashed win for the left – and a vindication of the trust voters placed in Democrats in the recent midterm wave.

And legislation that confirms the rules for all the players in the internet ecosystem would provide the needed boost to competition and certainty for continued investment and innovation, instead of the lack of clarity that undermines these objectives.

As explained below, however, the main obstacle to this achievement is a small group of holdouts who argue that passing a law that codifies the well understood and broadly supported core net neutrality protections noted above using the Waxman/Genachowski framework isn't a "pure enough" victory unless it also reclassifies broadband service as a "Title II" utility, which would grant the FCC far more expansive authority to micromanage broadband under an antiquated central planning model. But these claims are not made in good faith – they are cover for political partisans who simply want to keep this issue alive as a "controversy" to fuel fundraising and election mobilization rather than pass a strong, enforceable policy that resolves the issue for good.

To be completely clear – "Title II" is not needed for Congress to pass binding, enforceable, permanent protections for the internet. It is a jurisdictional red herring that has nothing to do

with net neutrality at all. And while there is a vast groundswell of grassroots voices demanding strong net neutrality protections, there is no organic constituency for "utility reclassification" or "Title II" jurisdiction. And no member of Congress should reject strong, enforceable, permanent net neutrality legislation simply because it does not also include a bigger wish list of items that have less support and greater potential for harm or tick off certain jurisdictional buzz words that have swallowed up the substance of this debate.

It is time for Democrats to be bold, principled, and radically pragmatic – by taking "yes" for an answer on net neutrality.

I. NET NEUTRALITY 101

"Net neutrality" stands for the basic idea of a free and open internet where everyone can participate and no company can use "gatekeeper" power to dictate what users can and cannot do online or to strangle competition or threaten continued innovation.

While CRS notes[1] "there is no single accepted definition of net neutrality," the core principles have always included the basic idea that no company should be able to block access to lawful websites, "throttle" (slow down) traffic for anti-competitive or anti-consumer purposes, or discriminate against or harmfully "prioritize" different content providers, services, or viewpoints online.

These requirements, in turn, are all subject to an exception that allows "reasonable network management" to deal with problems like congestion, data integrity and reliability, and mechanical failures. This "reasonable network management" debate was particularly heated in the internet's earlier days, when limited bandwidth created challenges for more bandwidth-intensive uses like streaming video. The rapid advances in technology, capacity, and network speeds (as evidenced by the rapidly spreading availability of Gigabit-speed connections in many areas of the country including the cable industry's "10G" initiative to supercharge the nation's broadband system with 10 gigabit per second service) has eased many of these technical challenges.

A. Prioritization of Traffic

While the requirements of no blocking and no throttling are relatively straightforward, proposed rules limiting "prioritization" or "unfair discrimination" online are more nuanced and complex.

Virtually everyone agrees no company should be able to give its own products and services unfair priority over those of existing or emerging competitors – and that this would breach any reasonable understanding of net neutrality as well as potentially violate the antitrust laws. And at the other end of the spectrum, most would agree that it is wise to allow some "public interest" traffic such as first responder communications or emergency alerts to receive priority or a heightened level of service without breaching net neutrality.

And then in the middle lie the harder cases where compromise will need to be struck.

Some believe net neutrality requires an absolute ban on any deal where a content or broadband provider contracts for faster or more reliable service for their traffic – arguing that allowing well-heeled companies to pay for better service will put new competitors and smaller businesses at a disadvantage.

Others argue that, as long as the option to pay for faster service is available on equal terms to

all comers, it is not discriminatory and should be allowed. They point out that some applications like driverless cars or remote surgery might require dedicated connections with higher speeds or lower latency. They argue that, just as the post office can charge more for express delivery (while making that option available to all users), internet providers should be able to do the same if they are not favoring or disfavoring particular competitors.

These are difficult questions with good arguments on both sides – and importantly, where lawmakers of good faith should be able to support a final deal that encompasses any approach that meets the fundamental threshold of protecting consumers and promoting competition and innovation.

B. Technology Platforms

The idea of net neutrality was originally developed as a way to ensure that internet providers kept the basic movement of data on their networks fair and open and did not abuse their control over network access for anti-competitive or anti-consumer purposes.

In recent years, however, many experts have argued that, to be effective, these same principles must also apply to the large technology platforms that have as much or more power to shape and control our experience online.

Newspaper publishers, for example, have explained[2] how the tech platforms engage in conduct that raises the same openness and non-discrimination questions traditional net neutrality is designed to address. PPI Fellow and former Under Secretary of Commerce Ev Ehrlich has similarly argued[3] that if "the purpose of 'net neutrality' is to stop any internet company from getting a leg up over others" then "allowing [technology platforms] to prioritize, discriminate and mine users' data at will threatens democracy and makes the internet neither open nor free."

These concerns echo those of antitrust enforcers in Europe who have aggressively policed the platforms, and they animate questions raised by members of Congress[4] such as Rep. David Cicilline (D-RI), the top Democrat on the Antitrust Subcommittee.

This issue remains an open and not fully explored question, and cannot be ignored in the net neutrality debate.

On the one hand, controversies like the Cambridge Analytica scandal and Facebook's continued, repeated breaches of its promises to users have led to a new consensus that self-regulation is not likely to mitigate the risks that arise from the platforms' operations.

On the other, while net neutrality principles should apply to these platforms as gatekeepers, it's also clear that questions of platform accountability, responsibility, privacy, and others that concern policymakers go far beyond the narrower fairness and discrimination concerns raised by net neutrality.

C. Do We Really Need a Net Neutrality Law?

While the core principles of net neutrality are clearly sound and address a vital goal – keeping the internet open, accessible, and fair – some argue a law isn't needed since the internet has thrived over a period of many years during which formal neutrality rules have not consistently been in place.

It is true that there have been very few credible allegations of net neutrality violations in recent years. Some charges – such as the claim that Verizon "throttled" internet access for

California firefighters – clearly have nothing to do with neutrality (this seems to have been a communication and billing/customer service matter, not a "neutrality" violation). A handful of other examples have been wrenched out of context, or pertain to consumer bandwidth limitations that have ceased to apply to the internet as it has grown more robust, or have nothing to do with U.S. internet providers (such as widely-circulated and bogus claims about Portugal's internet system).

But even more fundamentally, all the major internet providers have already adopted strong net neutrality policies of their own and published them in a way that ensures they can be effectively enforced as consumer protections by the Federal Trade Commission.

But there is a legitimate view that fair and open access to the internet is too important to be left to the vagaries of politics or company policies or to the uncertainty of market forces. Without permanent legislation, net neutrality will always be unstable, and can be put in play again every time the Administration and FCC leadership changes.

Internet companies and users need the clarity, certainty, and predictability only a Congressional statute can provide. This is why groups as varied as the U.S. Chamber of Commerce, the National Urban League, the Telecommunications Industry Association, LULAC, LGBT Tech, MMTC, the U.S. Hispanic, Black, and Gay and Lesbian Chambers of Commerce, Americans for Prosperity, the American Enterprise Institute, and dozens of others across the political spectrum have called for net neutrality legislation.

II. PAST ATTEMPTS TO PROTECT NET NEUTRALITY

Net neutrality proposals have taken different forms over the past 15 years, moving through Congress, the FCC, and the courts and never coming to rest.

A. The 1996 Telecommunications Act

The incredibly rapid deployment and expansion of America's high speed internet ecosystem seen over the last two decades was largely put in motion by the 1996 Telecommunications Act – bipartisan legislation that relied on market competition and permissionless innovation to drive the internet forward, while putting in place a clear backstop of regulation to ensure fair competition and access for all.

As PPI's Will Marshall reflected[5]:

> **In steering a pragmatic course between ideological poles, the 'digital policy pioneers' [who designed the 1996 Telecommunications Act] showed not only foresight, but a quality even rarer in Washington: humility. Instead of trying to direct the Internet's evolution, they relied on competition to set prices and they let consumers decide which devices, technologies and services would thrive in the digital marketplace.**

Massachusetts Senator Ed Markey echoed this point[6] just two years ago when he urged internet policy to stay true to the pro-market, pro-consumer principles embodied in the 1996 Act:

> **The '96 Act unleashed nearly 1.4 trillion dollars of private sector investment over the next decade that laid the fiber and built the networks that enabled the ecosystem of devices, services and applications that fuel our daily lives…**

The '96 Act continues to be our communications constitution because we passed it with strong bipartisan support. It's no wonder that the tenets of the Act – promoting competition, expanding consumer choice, spurring economic growth – are principles that both Republicans and Democrats agree on to this day. These goals remain as vital today as they were in 1996 when President Bill Clinton signed the bill into law.

The 1996 Telecommunications Act divided digital communications services into two categories – "information services" that were relatively lightly regulated and left to market forces under Title I of the Act, and "telecommunications services" that were subject to public utility style regulation under Title II of the Act. As the FCC subsequently clarified, under this rubric internet access was properly classified and regulated as a Title I information service, a decision upheld by the Supreme Court in the 2005 Brand X[7] case.

B. Early Attempts at Net Neutrality

As the internet grew and became ever more essential to Americans' daily lives under this regime, the idea of net neutrality slowly emerged. The term "net neutrality" was first coined by law professor Tim Wu in 2002 in a proposal[8] that focused primarily on the risk that broadband operators would block or throttle competitive products and services. The idea eventually came to embrace a broader notion of unfettered online participation and free and open access to the entire internet both for users and for competitive applications, products, and services.

In a series[9] of speeches[10] in 2004, FCC Chairman Michael Powell announced his concept of "Net Freedom" bolstered by four specific "internet freedoms." In 2005, the FCC issued a formal policy statement[11] along similar lines.

During the early years of the Obama Administration, the issue was even more concretely joined. In fall of 2010, longtime consumer advocate Rep. Henry Waxman (D-CA), then Chairman of the House Energy and Commerce Committee, championed a legislative proposal[12] that would have barred internet providers from blocking lawful content or unjustly or unreasonably discriminating against anyone's traffic online.

When the Waxman proposal failed to win enough Republican support to make it through Congress, the FCC moved quickly to enact its own rules on net neutrality[13] under the leadership of Julius Genachowski in December 2010. These rules forbade blocking or unreasonable discrimination and included robust transparency requirements as well. For the first time, the FCC had binding rules in place addressing core net neutrality concerns.

Unfortunately, that accomplishment did not withstand legal challenge. In 2014, a federal appeals court struck down the Genachowski rule[14] – not based on objection to the policy, but because of uncertainty about the source of statutory authority on which the FCC had relied to enact it. In short, the court questioned whether Congress had granted the FCC authority to impose these kinds of restrictions on a Title I information service like broadband, regardless of their merits; in the absence of clear authority from Congress, the FCC rules were invalidated.

C. The Wheeler Net Neutrality Rules and the Debate Over Title II

The court's action returned this issue to the FCC, where Genachowski's successor, Tom Wheeler, announced plans to pass a new set of net neutrality rules.

There still remained, however, a serious question about whether the FCC had the power to pass the rules. Some experts argued that the FCC could pass net neutrality under its broad "Section 706" authority to promote the deployment of new high-speed broadband networks. The court had hinted at this solution in its decision, and many believed FCC rules adopted pursuant to Section 706 authority could ensure the internet was protected and survive court challenges.

Others argued that the only way for the FCC to pass enforceable net neutrality rules would be to change the underlying classification of broadband under the 1996 Telecommunications Act – to abandon the "Title I" classification that the Supreme Court had upheld in 2005 and instead declare broadband a "Title II" telecommunications service. Using Title II would empower the FCC to more aggressively regulate net neutrality, but also extend its reach into a host of other business issues like broadband pricing and deployment.

The idea of "reclassifying" broadband as a Title II service was deeply controversial – because it meant abandoning the massively successful model of the 1996 Telecommunications Act that relied on market-based regulation, the model under which the internet had thrived and grown so quickly. A broad array of groups from across the spectrum, from labor unions and civil rights organizations to academic and telecommunications policy experts, warned this Title II approach amounted to throwing the baby out with the bath water – putting the thriving internet ecosystem at risk with a buckshot approach that was unnecessary to address the specific issues of net neutrality.

The Wheeler FCC ultimately took what it felt was the strongest path to ensure its net neutrality rules could survive in court, choosing in a party-line decision in 2015 to reclassify broadband under Title II and then using that authority to pass net neutrality rules. But once again, this order proved short-lived; Donald Trump's election gave control of the FCC back to a Republican majority, and in 2017, the FCC under new Chairman Ajit Pai overturned the controversial Wheeler rules and restored the original Title I classification for broadband.

Thus, what is often overlooked is that the crux of the debate at the FCC and in the courts over Title II had nothing to do with "strong" or "weak" net neutrality, or with the content of net neutrality at all. It really boiled down to a debate over whether the FCC had the power to enact net neutrality rules and what was the best way for the agency to pass rules that would survive challenge in court.

But that debate is completely irrelevant to the contents of net neutrality legislation being considered in Congress. Congress does not face the limits that constrain the FCC at all.

Under the Constitution, Congress unambiguously has the power to enact strong, enforceable, binding net neutrality rules that will survive court challenge – without the unpopular, unnecessary, and innovation-hampering baggage of Title II.

That means bipartisan legislation that steers clear of the problems of Title II can protect net neutrality and ensure the strength and health of the internet, promote the growth of the internet,

and drive continued innovation and faster and more reliable broadband – while avoiding the endless court battles and political shifts that have bedeviled FCC efforts.

It means anyone claiming that only Title II net neutrality can be "real" or "strong" or "effective" is simply trying to confuse and muddy the issues – playing politics to keep the controversy alive for fundraising and campaign purposes instead of working to find real solutions and protect consumers online for good.

And it means Democrats who refuse to support non-Title II net neutrality legislation are not staying true to their own principles and are giving up the chance to score a genuine progressive win that protects the internet..

III. TITLE II AND THE THREAT TO BROADBAND DEPLOYMENT AND INVESTMENT

What should our concerns be about Title II? By changing the regulatory classification of broadband internet service, Title II would clamp a whole new regime of massively intrusive utility-style regulations on the broadband system – potentially covering pricing, network access and unbundling, and service options. That kind of overreach is costly because it would drive away new investment in broadband, increase the economic challenge of wiring rural communities and closing the digital divide, and slow down innovation and the development of new products, tools, and services.

That slowdown and concern over lost jobs and and the expanding digital divide is what originally drove groups like the Communications Workers of America and the NAACP to question Title II[15] and urge the FCC to protect net neutrality *without* going down this Title II road.

PPI has studied domestic private sector investment for years, issuing annual "Investment Heroes" reports that document the critical role telecom investment has played in ushering in the modern digital economy and creating high-skill high-wage jobs to offset the loss of manufacturing work across the fifty states. In 2017, that trend continued as this chart shows that, of the top 5 nonfinancial companies based on estimated U.S. capital expenditures, 3 are broadband providers:[16]

Figure 1. U.S. Investment Heroes: Top 5 Nonfinancial Companies by Estimated U.S. Capital Expenditure

COMPANY	ESTIMATED 2017 U.S. CAPITAL EXPENDITURES (MILLIONS USD)
1. AT&T	**18,972**
2. Verizon	**15,435**
3. Amazon.com	**12,021**
4. Comcast	**10,880**
5. Alphabet	**9,606**

Data: PPI

The fear that overbearing Title II regulations would kill this golden goose of job-creating private sector investment was borne out by the "natural experiment" that occurred when Title II was in place for roughly two years under the Wheeler Title II Order.

While all the data are not yet in, it is clear that Wheeler's Title II decision acted as a major drag on investment while it was under consideration and once it was adopted. One analyst found that the overhang of Title II led to a 5.6% drop in broadband investment[17] during this time; another found that the threat of Title II resulted in roughly $35 billion a year less in broadband investment[18] than would otherwise have occurred.

This is especially costly to rural and low-density communities where the challenge of building out broadband networks is especially severe. In early 2017, a group of small internet providers serving these communities complained to the FCC of the damage being done by the Wheeler Order's imposition of Title II[19]:

> **Two years ago, many of us urged the Commission to refrain from subjecting our broadband Internet access service to Title II "utility style" regulation because that approach was not justified by sound economics or market realities for smaller ISPs and would impose onerous burdens on our operations. Unfortunately, the Commission ignored this evidence . . . . In the wake of this decision, our businesses have suffered. . . .**
>
> **The 2015 Open Internet rules hang like a black cloud over us. Each of us has spent substantial time and resources, including for advice from outside consultants and lawyers, to ensure that our practices are consistent with the rules. . . . [B]ecause the Commission's reach under the Open Internet rules appears to be virtually unlimited, each of us has slowed, if not halted, the development and deployment of innovative new offerings which would benefit our customers. In brief, for us and our customers, the rules have been all cost and no benefit.**

The same is true more broadly of the imposition of Title II. It brought with it onerous FCC rules, a new requirement for government "permission slips" or advance approval before introducing new products and services, and the overhang of price regulation and other more invasive demands. Title II is all cost and no benefit to the internet ecosystem and everyone that uses or depends upon it.

IV. OPTIONS FOR THE 116TH CONGRESS

We expect the debate to unfold quickly in the 116th Congress, and we urge members of both parties to work together on a straightforward bill that captures the core principles of net neutrality but keeps broadband networks free of Title II-style regulation.

Bi-partisan federal legislation would be both progressive and pro-consumer. And it would eliminate once and for all the ping pong between the courts and the FCC that has left matters unsettled for over a decade.

While consumers will remain protected in the short-term by the internet providers' net neutrality pledges (violations of which would expose them to FTC enforcement sanctions), we still need a permanent legislative solution.

As former Democratic Congressman Rick Boucher explained[20]:

> **The sooner the debate over net neutrality is resolved the better, and a straightforward solution is within reach if Democrats and Republicans are willing to put political considerations aside and adopt a statute that allows both sides to achieve their core objectives.**
>
> **Democrats would realize their long-held goal of strong net neutrality protections through a codification of the core principles of the 2010 Open Internet Order, adopted during the tenure of Democratic FCC Chairman Julius Genachowski. Republicans would realize their long-held goal of the statutory designation of broadband as a Title I information service—the way that broadband was treated for the 20-year period from the Clinton administration.**

That view is echoed by a host of progressives and labor leaders including Bill Lucy[21], former Secretary-Treasurer of AFSCME, Pat Ford[22], former executive vice president of the SEIU, and civil rights leaders like Amy Hinojosa[23] of MANA. This is also the kind of bill that can pass Congress on a bipartisan basis.

But if Democratic leaders in the House instead squander their limited time and resources to push an overreaching bill with Title II-type intrusions into the marketplace, we will once again be at an impasse. The Republican controlled Senate is certainly not going to entertain such a bill, and the President wouldn't sign it. Democrats will have given up an opportunity for a concrete progressive win, and their promise to voters to deliver on net neutrality will remain unfulfilled.

CONCLUSION

Like Dickens's interminable lawsuit of Jarndyce v. Jarndyce, the net neutrality issue has dragged on so long and in so many conflicting and contradictory forms that many can barely remember what problem it was originally intended to solve. Too many stakeholders have come to see the issue not as a policy question that must be solved to protect consumers, but as a political weapon they can use to raise funds and energize their voters.

That "winner take all" mindset is a recipe for failure and an affront to the core values of the American political system. Under our Constitution, effective policymaking depends on reasonable compromise in which political leaders "give" in some places and "get" in others. When stakeholders hold out for absolutist proposals and put short-term politics ahead of long-term solutions, nothing gets done and consumers and citizens end up even more disillusioned by their government.

This is not what Americans want. Polls consistently show that voters feel the country is on the wrong track and massively disapprove of the job being done in Congress. Voters may elect firebrands and partisans, but they also demand results and solutions. Indeed, research[24] shows that a majority of Americans believe "compromise is necessary in politics, as in other parts of life." It's quite clear that doubling down on fringe positions rather than cutting smart deals and getting things done for the American people is no way to win or keep a majority. The recent midterms show how well living at the political fringe worked out for Donald Trump and his Tea Party allies in Congress.

On net neutrality, then, the lesson is clear. Rather than yet another round of infighting and extremist rhetoric, voters want results. If there's a strong pro-consumer option on the table (and the analysis above makes clear that core net neutrality protections without the unnecessary baggage of Title II is exactly that), the right thing to do from a moral, policy, and political perspective is to take it.

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