FINDING THE MIDDLE GROUND: A PROPOSED SOLUTION TO THE NET NEUTRALITY DEBATE

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INTRODUCTION

The internet is one of the world's most vital resources, one that touches all aspects of daily life. From shopping to sports, from streaming video to applying for jobs, the internet is truly pervasive. Thus, the choice of whether and how to regulate the internet is a legal matter of supreme importance.

Over the last several years, the debate over internet regulation has become an extremely important and divisive political and policy debate, referred to colloquially as "net neutrality."[1] But what really is net neutrality? This isn't the easiest question to answer. While most people profess to have an opinion on net neutrality, defining the term with more specificity than the "free and open Internet" is challenging[2]—especially because many of the writings on the subject are not focused on analyzing the issue at a sufficiently granular level.

The reality of the internet regulation legal debate centers on certain practices of internet Service Providers ("ISPs"), specifically the practices of blocking, throttling, and paid prioritization.[3] Blocking occurs when an ISP blocks consumers' access to certain websites that they desire to visit.[4] Throttling occurs when an ISP slows down consumers' connection speeds when they visit certain sites or use too much bandwidth.[5] And paid prioritization represents an agreement between a content provider and an ISP to favor some

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[1] The term *net neutrality* was coined by Columbia Law School Professor Tim Wu in a well-known 2003 paper. *See generally* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

[2] *See, e.g.*, *Free & Open Internet*, FREE PRESS, https://www.freepress.net/issues/free-open-internet (last visited July 13, 2018).

[3] James K. Willcox, *How You'll Know Net Neutrality Is Really Gone*, CONSUMER REP., http://www.consumerreports.org/net-neutrality/end-of-net-neutrality-what-to-watch-for (last updated June 11, 2018).

[4] *See* Ferras Vinh, *Rules of the Road: Net Neutrality's Bright Line Protections*, CTR. FOR DEMOCRACY & TECH. (May 11, 2017), https://cdt.org/blog/rules-of-the-road-net-neutralitys-bright-line-protections.

[5] *See id.*

content, with the implication that other content will be disfavored.[6] The debate centers on whether, and the extent to which, these practices should be regulated.

The basis for any legal regulation of the internet is found in the Telecommunications Act of 1996, which provides two clear regulatory options. The first option is regulation under Title I, which provides for a light-touch regulation scheme.[7] "Light-touch" regulation describes a regulatory approach in which the government tries to reduce the breadth of legal regulations by regulating only when there is a market failure, thus reducing the costs of compliance.[8] The goal of light-touch regulation is to let the free market function by allowing businesses to operate without interference from government regulations. The second option is regulation under Title II, a utility-style regulation that allows for more stringent government regulation designed to regulate only common carriers.[9]

Over the last twenty years, the applicable regulatory framework has shifted several times starting with Title I, then shifting to Title II, and then reverting back to Title I again.[10] As of the publication of this Comment in 2018, the current legal framework is Title I.[11] This pendulum-like effect has occurred because Congress has never affirmatively provided guidance to the federal agencies on how the internet should be regulated.[12] Thus, the shifts have paralleled the political tide and have taken place only at the agency level. Historically, Democratic administrations have advocated for Title II, while Republican administrations have advocated for Title I.[13]

Despite an abundance of discourse on this issue over a period of years, no proposed solutions have succeeded in gaining bipartisan support. This Comment attempts to ideate that middle ground. Part I traces the history of internet regulation over the last fifty years and summarizes the administrative law cases that have guided the various regulatory schemes. Part II evaluates the economics of vertical agreements and weighs the pros and cons of ex ante Federal Communications Commission ("FCC") regulation versus ex post

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6 *See id.*

7 *See Restoring Internet Freedom*, 82 Fed. Reg. 25,568, 22,568–69 (proposed June 2, 2017) (to be codified at 47 C.F.R. pts. 8, 20) [hereinafter 2017 NPRM].

8 *See generally Light Touch No More*, THE ECONOMIST (Dec. 1, 2012), https://www.economist.com/britain/2012/12/01/light-touch-no-more.

9 *See* 2017 NPRM, *supra* note 7, at 25,576. Common examples of common carriers are railroads, water, and electricity.

10 *See id.* at 22,570.

11 Restoring Internet Freedom, 33 FCC Rcd. 311, 312 (2017) (declaratory ruling).

12 *See* Larry Downes, *A Legislative Solution for Net Neutrality Is at Hand*, FORBES (Dec. 19, 2017, 4:08 PM), http://www.forbes.com/sites/larrydownes/2017/12/19/a-legislative-solution-for-net-neutrality-is-at-hand/#7d8d56573ac3.

13 *See* John Eggerton, *On Eve of Vote, House Republicans, Dems Talk Title II*, MULTICHANNEL NEWS (Feb. 25, 2015), https://www.multichannel.com/news/eve-fcc-vote-house-republicans-democrats-talk-net-neutrality-388349.

Federal Trade Commission ("FTC") regulation and concludes that the 2017 FCC Order was correct in repealing the 2015 Title II regulations.

Part III proposes two mechanisms to augment the newly passed regulatory framework. First, the FTC should adopt a mandatory pre-agreement filing so that when ISPs wish to enter agreements, the FTC is notified and has an ex ante chance to analyze and challenge the agreement if the agency believes it will be anticompetitive. Second, the FTC should install a special administrative law judge to hear only net neutrality–related cases, so if the government wishes to bring a case alleging an ISP's anticompetitive activity, or if the parties to an agreement wish to dispute the challenge, it can be litigated in a timely and efficient manner. This hybrid of ex ante and ex post regulation will provide firms with the incentives to innovate and enter procompetitive agreements, while protecting consumers from realizing the harms stemming from any anticompetitive activity.

I. THE HISTORY OF INTERNET REGULATION

To properly contextualize the current net neutrality debate, one must examine the history of internet regulation over the last fifty years. In this section, these years are split into four time periods: (1) the period before the passage of the 1996 Telecommunications Act, a period when the FCC and federal courts were attempting to define and distinguish between "telecommunications services" and "information services";[14] (2) the Title I era from 1996 to 2010, when the internet was regulated under the light-touch framework first established by the 1996 Telecommunications Act; (3) the years from 2010 to 2017, when the internet was regulated in an increasingly rigid fashion culminating in the 2015 Title II common carrier classification; and (4) the final era starting in May 2017 when the FCC proposed, and then successfully repealed, the Title II regulations to return to Title I.

A. *The Genesis of Internet Regulation—Before Passage of the 1996 Telecommunications Act*

Even before the internet was a commercial resource available to the general public, the FCC was considering how it should be regulated. The initial distinction was drawn between heavily regulated common carriers, which historically had been solely voice and data transmission services, and more lightly regulated services that did more than simply transmit.[15] In 1966 with the *Computer Inquiries*, and again in 1980 with the *Second Computer*

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[14] *See Restoring Internet Freedom*, 33 FCC Rcd. at 313–14.

[15] *See* 2017 NPRM, *supra* note 7, at 22,570.

Inquiry, the FCC distinguished between basic and enhanced services.[16] Basic services, regulated under Title II, offered "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."[17] Enhanced services were defined as "any offering over the telecommunications network which is more than a basic transmission service" and included applications that "act[ed] on the content, code, protocol, and other aspects of the subscriber's information."[18] After the *Second Computer Inquiry* in 1980, the FCC differentiated enhanced services and concluded they should not be regulated under Title II.[19]

In the 1982 antitrust case against AT&T, the U.S. District Court for the District of Columbia followed the FCC's theory and distinguished between "telecommunications services" and "information services."[20] At the time, AT&T was regulated as a common carrier under Title II and was restricted to offering "telecommunications services" that were "actually regulated by tariff."[21] The court distinguished "information services," which were "[d]ata [p]rocessing and [o]ther [c]omputer-[r]elated [s]ervices," and "[e]lectronic [p]ublishing [s]ervices," and the court prohibited AT&T from offering "information services."[22]

This precedent served as the framework for the Telecommunications Act of 1996, where lawmakers drew a similar distinction between the more heavily regulated "telecommunications services" and the more lightly regulated "information services." The Telecommunications Act also specifically noted that the internet and computer industry generally "flourished, to the benefit of all Americans with a minimum of government regulation."[23] In other words, the Telecommunications Act asserted that the internet flourished under the Title I light-touch regulatory framework. This bipartisan effort, between President Clinton and a Republican Congress, further stressed the need to "promote competition and reduce regulation."[24] There was nothing in the 1996 campaign that suggested that Congress intended to expand telephone common-carrier regulations to the internet or make any drastic change to the classification of the internet.

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16 *Id*.

17 Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384, 420, para. 96 (1980) (final decision).

18 *Id.* para. 97.

19 *Id.* at 428, para. 114.

20 United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 179 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

21 *Id.* at 143.

22 *Id.* at 179–80, 225.

23 47 U.S.C. § 230(a)(4) (2012).

24 Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The purpose of the 1996 Act was to secure lower prices and higher-quality services for American consumers and spur continued innovation in this area.

B. *The Title I Era: 1996–2010*

Over the next fourteen years, the FCC considered the internet's classification in the 1998 Stevens Report, 2002 Cable Modem Order, 2006 BPL-Enabled Broadband Order, and 2007 Wireless Broadband Internet Access Order.[25] Each of these orders considered and reaffirmed the "information service" classification and the benefits of light-touch regulation. The Stevens Report actually considered the matter de novo but reached the same conclusion that the internet was and should remain an "information service."[26] The Stevens Report also specifically found that "the broad range of Title II constraints" would "seriously curtail the regulatory freedom that the Commission concluded . . . was important to the healthy and competitive development of the enhanced-services industry."[27]

In 2005, the Supreme Court ruled on the 2002 Cable Modem Order and agreed that the internet should be regulated under the light-touch Title I "information service" framework.[28] In 2007, an FTC Staff Report predicted that a heavy-handed regulatory approach "could result in a long-term decline in investment and innovations in broadband networks."[29] The FCC language in the 2007 Wireless Broadband Internet Access Order was remarkably similar and noted that a "minimal regulatory environment" best promoted the "ubiquitous availability of broadband to all Americans."[30] The FCC further added that the internet "offers a single, integrated service to end users . . . that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications."[31]

In 2005, the FCC released a four-part policy statement expressing the agency's net neutrality position:

> (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the

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25 2017 NPRM, *supra* note 7, at 25,570.

26 *Id.*

27 Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11,501, 11,524, para. 46 (Apr. 10, 1998) (report to Congress).

28 Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 992 (2005). This case is the last time the Supreme Court has commented on this issue.

29 Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Comment on *Restoring Internet Freedom*, FCC, WC Docket No. 17-108, at 5 (July 17, 2017).

30 *See* Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, 22 FCC Rcd. 5901, 5902 (Mar. 22, 2007) (declaratory ruling). This order is often referred to as the Wireless Broadband Internet Access Order.

31 *Id.* at 5911, para. 26.

> network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.[32]

Although the FCC never codified this policy statement, it demonstrated that even under the light-touch regulatory approach, the FCC was cognizant of, and active in, protecting the principles of a free and open internet.[33]

The same year, the FCC took action against Madison River Communication, which allegedly blocked ports for Voice over Internet Protocol ("VoIP") on its network.[34] After receiving a complaint, the FCC and Madison River entered a consent decree whereby Madison River paid a fine and agreed not to engage in any similar conduct in the future.[35] The Madison River consent decree demonstrates that even under a light-touch regime, government regulators can be active in rectifying anticompetitive wrongs.

The FCC also took action against Comcast in 2008 when Comcast allegedly interfered with customers' peer-to-peer networking applications.[36] Even though Comcast claimed that it had limited bandwidth and was trying to manage it accordingly, the FCC ruled that Comcast had "significantly impeded Internet users' ability to use applications and access content of their choice."[37] The case was appealed to the D.C. Circuit, which held that because the internet was classified as an "information service," the FCC did not have the proper statutory authority to bring the case.[38]

During the period from 1996 to 2010, the "information service" classification was the law, and the internet flourished. ISPs invested over $1.5 trillion in the internet ecosystem, paving the way for the internet as it is today.[39] This is also the era that gave rise to the major internet companies that are part of the fabric of society like Amazon, Facebook, Google, and Netflix. It is impossible to determine whether the light-touch regulatory approach helped these companies grow, or whether this growth would have happened anyway. What is certain is that during the Title I era, the internet grew at an unprecedented rate.

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32 Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,986, 14,988, para. 4 (2005) (policy statement).

33 The FTC also demonstrated this careful approach under its consumer protection mandate.

34 Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5628, para. 65 n.69 (Feb. 26, 2015).

35 Madison River Commc'ns, LLC & Affiliated Cos., 20 FCC Rcd. 4295, 4297 (2005).

36 Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008), *vacated sub nom.* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

37 *Id.* at 13,058.

38 *Comcast Corp.*, 600 F.3d at 661.

39 *Broadband Investment*, USTELECOM, https://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment (last visited Aug. 6, 2018). These data are through 2016 and report $76 billion in capital expenditures in 2016.

C. *The Road to Title II and the Title II Era: 2010–17*

The first movement away from the light-touch Title I classification came in 2010 with the adoption of the 2010 Open Internet Order. Though the Open Internet Order specifically rejected "heavy-handed regulation" of the internet, it shifted regulatory authority from Title I to Section 706 of the Telecommunications Act.[40] Perhaps with the D.C. Circuit's opinion in *Comcast* in mind, the Open Internet Order gave the federal agencies additional power to regulate where they were unable to do so before.[41]

The Open Internet Order established rules to ban blocking and throttling, set a nondiscrimination standard to police paid prioritization, and required broadband ISPs to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services."[42] The FCC stated, "as a general matter, it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard."[43] The Open Internet Order was not without consequence. With ISPs wary that the Open Internet Order was merely the first step toward Title II classification, overall investment by ISPs decreased by twenty to thirty percent between 2011 and 2015.[44]

The nondiscrimination standard purported to individually evaluate paid prioritization agreements and not make them per se unlawful, but the burden of proof was placed on the parties making the agreement, and not the party wishing to challenge the agreement.[45] This "guilty-before-proven-innocent presumption" had the effect of making paid prioritization agreements per se unlawful.[46] This seemingly backward standard was the result of a political compromise between the Democratic commissioners, who wanted all paid prioritization agreements to be illegal, and the Republican commissioners, who wanted the complainant to bear the burden of proof.[47]

In 2014, the D.C. Circuit got to weigh in, and it vacated the Open Internet Order's no-blocking and no-discrimination rules, finding that these rules

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40 *See* Restoring Internet Freedom, 33 FCC Rcd. 311, 316–17 (2017) (declaratory ruling).

41 *See* Preserving the Open Internet, 25 FCC Rcd. 17,905, 17,907 (2010), *vacated and remanded sub nom.* Verizon v. FCC, 740 F.2d 623 (D.C. Cir. 2014).

42 *Id.* at 17,992.

43 *Id.* at 17,947.

44 *See* George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, PHOENIX CENTER PERSPECTIVES, at 1, 2 (2017), http://www.phoenix-center.org/perspectives/Perspective 17-02Final.pdf. The twenty to thirty percent decrease represented a decrease of approximately $30 to $40 billion per year. *Id.*

45 *See* Hal J. Singer, *My Remarks at the Catholic Law School Symposium on Net Neutrality*, HAL SINGER (Mar. 17, 2018, 4:31 PM), https://haljsinger.wordpress.com/2018/03/17/my-remarks-at-the-catholic-law-school-symposium-on-net-neutrality.

46 *See id.*

47 Sam Gustin, *FCC Passes Compromise Net Neutrality Rules*, WIRED.COM (Dec. 21, 2010, 1:58 PM)https://www.wired.com/2010/12/fcc-order/.

regulated the internet as a common carrier and therefore conflicted with the FCC's longstanding classification of the internet as an "information service."[48] However, the D.C. Circuit found that the FCC did have the authority to regulate ISPs under Section 706 of the Telecommunications Act.[49]

Even though the D.C. Circuit was very clear about the "information service" classification, this case helped pave the way for more stringent net neutrality regulations. Some net neutrality advocates wanted to use this new authority under Section 706 to justify a formalized set of net neutrality regulations.[50] Other advocates wanted the FCC to be even more aggressive and reclassify the internet as a "telecommunications service" under Title II and to regulate the internet like a common carrier.[51] Title II, enacted in 1934 to regulate telephone monopolies (or natural monopolies more generally), "imposes some duties that are archaic and ill-suited to the realities of the modern Internet."[52] Clearly, though, this latter group of advocates won out.

In November 2014, President Obama called on the FCC to reclassify internet regulation under Title II of the Telecommunications Act. Three months later, the FCC adopted the Protecting and Promoting the Open Internet Order ("Title II Order" or "2015 Order"), which reclassified the internet from an "information service" to a "telecommunications service."[53] The explicit purpose of the 2015 Order was to promote "Internet openness" that "fosters the edge provider innovation that drives the virtuous cycle."[54] The 2015 Order espoused the belief that net neutrality "promotes innovation, competition, free expression," and "infrastructure development."[55]

In passing the 2015 Order, the Obama-era FCC found it necessary to refrain from enforcing over "30 statutory provisions" and to render "over 700 codified rules inapplicable."[56] The 2015 Order reinstituted the no-blocking, no-throttling, and no-paid-prioritization rules and implemented a general internet conduct standard.[57] The internet conduct standard was a broad rule that gave the FCC the power to regulate the internet based on a list of seven

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48 Verizon v. FCC, 740 F.3d 623, 655–58 (D.C. Cir. 2014). The no-blocking rules "would appear on their face to impose *per se* common carrier obligations" on ISPs. Ditto for placing the burden of proof on the parties making paid prioritization agreements to prove that their conduct was legal. *Id.*

49 *Id.* at 657 ("The Commission has provided no basis for concluding that in permitting 'reasonable' network management, and in prohibiting merely 'unreasonable' discrimination, the *Order'*s standard of 'reasonableness' might be more permissive than the quintessential common carrier standard." (citing Cellco P'ship v. FCC, 700 F.3d 534, 549 (D.C. Cir. 2012))).

50 Maureen K. Ohlhausen, *Antitrust over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119, 127 (2016).

51 *Id.*

52 *Id.*; *see also* 47 U.S.C. § 151 (2012). This section codified the 1934 Telecommunications Act, which was untouched until the 1996 Telecommunications Act modernized the legal framework.

53 Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5618, para. 59 (Feb. 26, 2015).

54 *Id.* at 5625, para. 75.

55 *Id.* at 5625–26, paras. 75–76.

56 *Id.* at 5616, para. 51.

57 *Id.* at 5607–09, paras. 15–24.

nonexhaustive factors, which essentially functioned as a catch-all rule allowing the FCC to regulate any part of the internet it deemed necessary.[58]

The 2015 Order imposed common carrier regulation so the government had the power "to set rates, impose equal treatment obligations, require unbundling of network elements, and otherwise deprive private firms of the ability to operate as they would in a free market."[59] The 2015 Order's bright-line rule against blocking and throttling was qualified to allow ISPs to block or throttle to reasonably manage their networks.[60] However, there was no similar exception for the ban on paid prioritization, rendering this conduct virtually per se unlawful.[61]

Another major implication of the Title II shift is that the FTC could no longer regulate the internet under its consumer-protection mandate because the FTC is not permitted to regulate common carriers.[62] This left the FCC as the only cop on the internet beat. And, in ideating this new Title II framework, the 2015 FCC rejected using market forces and antitrust law as a regulatory framework for the internet.[63] Antitrust law typically requires the presence of market power to find consumer harm.[64] By abandoning the antitrust framework, the 2015 FCC dictated that harm could exist in the absence of market power, or the powers to raise price, reduce output, reduce quality, or reduce innovation. This was the regulatory gap the FCC was trying to fill by shifting from Title I to Title II.

The 2015 Order states: "We therefore need not consider whether market concentration gives broadband providers the ability to raise prices . . . . [T]hreats to Internet-enabled innovation, growth, and competition do not depend on broadband providers having market power with respect to their end users."[65] The Order continues: "[C]ompetition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness."[66]

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58 *Id.* at 5661–64, paras. 138–45. The seven factors are (1) end-user control; (2) competitive effects; (3) consumer protection; (4) effect on innovation, investment, or broadband deployment; (5) free expression; (6) application agnosticism; and (7) standard practices.

59 *See* Ohlhausen, *supra* note 50, at 127.

60 *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5607, paras. 15–16.

61 *Id.* at 5607–08, paras. 18–19, 5611, para. 32.

62 *See* 15 U.S.C. § 45(a)(2) (2012). Common carriers are exempt from FTC regulation.

63 *See Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5633, para. 84, 5665 para. 148 ("We find that . . . competition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness.").

64 *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [hereinafter 2010 HORIZONTAL MERGER GUIDELINES]. The Horizontal Merger Guidelines define market power as the power to "raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts." *Id.*

65 *See Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5633, para. 84 (footnote omitted).

66 *Id.* at 5665, para. 148.

And by shifting regulatory jurisdiction from the FTC to the FCC, the FTC's consumer protection and unfairness authority could no longer bring actions to remedy harm. Exclusive jurisdiction resided with the FCC.

The 2015 Order highlights the same examples of net neutrality violations cited above—specifically, Madison River Communication and Comcast (with BitTorrent)—and includes parentheticals in a single footnote citing violations by AT&T and Comcast (a second alleged violation with Xbox).[67] Even though the 2015 Order cited a very small number of concrete net neutrality violations over more than a decade, it added several layers of additional regulation to ensure no future violations would occur.[68]

In 2016, a divided D.C. Circuit upheld the Title II Order in *U.S. Telecom Association v. FCC*.[69] The D.C. Circuit denied rehearing of this case en banc because of the uncertainty regarding the future of the Title II Order under the Trump administration.[70]

Proponents of the Title II shift cited the bright-line prohibitions on blocking and throttling and the nondiscrimination standard applied to paid prioritization as necessary to keep a level and competitive playing field, one that is strictly protected from any nefarious activity by ISPs.[71] Critics of this change cited the decrease in ISPs' capital expenditures of anywhere between five and thirty percent after the adoption of the 2015 Order, which served as evidence that because of additional regulations, there was less of an incentive for companies to innovate.[72] Critics also cited heavy restrictions on vertical agreements and paid prioritization between ISPs and content providers as further evidence of overburdensome and harmful regulation.

D. *Restoring Internet Freedom: 2017*

In 2017, under the leadership of Chairman Ajit Pai, the FCC issued a Notice of Proposed Rulemaking ("NPRM") to end the Title II regulations and return to the Title I light-touch approach.[73] The NPRM claimed the return

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67 *Id.* at 5620 para. 65 n.69, 5628 para. 79 n.123.

68 *Id.*

69 825 F.3d 674 (D.C. Cir. 2016).

70 U.S. Telecom Ass'n v. FCC, 855 F.3d 381 (2017) (mem.) (per curiam); *id.* at 382 (Srinivasan, J., concurring in the denial of rehearing en banc).

71 *See* Vinh, *supra* note 4.

72 *See Broadband Investment*, *supra* note 39; Hal J. Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era*, HAL SINGER (Mar. 1, 2017, 6:59 PM), https://haljsinger.wordpress.com/?s=2016+Broadband+Capex. Investment decreased for eight of the twelve major ISPs discussed in Singer's study. The largest decrease was $3.4 billion or 16.2 percent by AT&T and $2.4 billion or 62.7 percent by Sprint. *Id.*; *see* Thomas W. Hazlett & Joshua D. Wright, *The Effect of Regulation on Broadband Markets: Evaluating the Empirical Evidence in the FCC's 2015 "Open Internet" Order*, 50 REV. INDUS. ORG. 487, 489 (2017).

73 *See* 2017 NPRM, *supra* note 7, at 25,570.

to Title I will "reverse the decline in infrastructure investment, innovation, and options for consumers put into motion by the FCC in 2015."[74] The NPRM proposed to return to the "information service" classification and specifically cited returning to "the light-touch regulatory framework first established on a bipartisan basis during the Clinton Administration."[75] An obvious implication of the return to Title I is the return of regulatory jurisdiction to the FTC.

The NPRM posed a wide variety of questions and sought public comment to create a Title I framework that would fully protect consumers. The NPRM also proposed a cost–benefit analysis to determine whether, economically, the Title I or Title II framework is preferable, and whether there is an economic basis for the no-blocking and no-throttling rules and the ban on paid prioritization.[76] The 2017 NPRM cited all the FCC precedent that classified the internet as an "information service" between 1996 and 2010.[77] The 2017 NPRM also claimed that a direct result of the Title II reclassification was reduced expenditures by ISPs and posited that a return to Title I classification would reverse the decline in broadband investment.[78]

Following the publication of the NPRM, this issue became one of the hottest topics—the subject of countless editorials and media articles full of more rhetoric than substance.[79] The official record contained an unprecedented 22 million comments, the vast majority of which were form letters.[80]

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74 *Id.* at 25,570

75 *Id.*

76 *Id.* at 25,581. The 2017 NPRM references a "cost-benefit analysis" or "CBA" seventeen times total. The 2015 Order did not mention a "cost-benefit analysis" or "CBA" a single time. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (Feb. 26, 2015).

77 *See* 2017 NPRM, *supra* note 7, at 25,570.

78 *Id.* at 25,574; *see generally* Hazlett & Wright, *supra* note 72, at 489. Data from Hazlett & Wright indicate the decline of investment was due to Title II reclassification, and they advocate for the benefits to investment that would result from a return to Title I.

79 *See, e.g.*, Paul Blumenthal, *What Net Neutrality Really Means for You (and for Us)*, HUFFPOST (Dec. 25, 2017, 4:43 PM), https://www.huffingtonpost.com/entry/net-neutrality-good-bad_us_5a396d07e4b0860bf4ab9e6f; Kaleigh Rogers, *The FCC Just Killed Net Neutrality—Now What?*, VICE (Dec. 14, 2017, 1:12 PM), https://motherboard.vice.com/en_us/article/qvz3vd/the-fcc-just-killed-net-neutralitynow-what.

80 *See generally* Lorenzo Franceschi-Bicchierai, *More Than 80% of All Net Neutrality Comments Were Sent by Bots, Researchers Say*, VICE (Oct. 3, 2017, 4:24 PM), https://motherboard.vice.com/en_us/article/43a5kg/80-percent-net-neutrality-comments-bots-astroturfing ("Of all the more than 22 million comments submitted to the FCC website and through the agency's API found that only 3,863,929 comments were 'unique,' according to a new analysis by Gravwell, a data analytics company."). A check of the FCC Record at www.fcc.gov/ecfs on September 15, 2017 by the author showed 22,149,679 comments, of which 22,125,244 or 99.89 percent are Express Filings absent any attached documents, PDFs, or exhibits. Many of these Express Comments were from international commenters, and still more were sourced from bots. Two specific form letter comments were sent over 1.2 million and 1.1 million times, respectively. *Id.*

The NPRM and efforts to return to Title I also resulted in death threats to Chairman Pai and his family.[81]

On December 14, 2017, the FCC publicly issued the text of a Declaratory Ruling and Report and Order.[82] The Declaratory Ruling restored the classification of internet access as an "information service" under Title I of the 1996 Communications Act,[83] found that the shift to Title II reduced ISP investment in networks and hurt innovation,[84] found that the return to Title I will help better bridge the digital divide,[85] and restored regulatory jurisdiction to the FTC.[86] The Report and Order found the 2015 Order's internet-conduct standard to be against the public interest, eliminated it,[87] and adopted a new transparency rule that requires ISPs to disclose any blocking, throttling, paid prioritization, and affiliated prioritization to consumers.[88] The Report and Order concluded that this transparency rule, when combined with "antitrust and consumer protection laws, obviates the need for [bright-line] conduct rules by achieving comparable benefits at lower cost."[89]

On December 14, 2017, the FCC commission passed the Declaratory Ruling by a vote of three to two fully along party lines.[90] This Declaratory Ruling is the final word on regulating the internet unless either Congress chooses to pass legislation or a future FCC chair (likely a Democrat) decides to shift the regulatory framework back to Title II.

II. HOW SHOULD THE INTERNET BE REGULATED? VERTICAL AGREEMENTS AND THE REGULATORY SCHEMES

To fully comprehend the net neutrality battleground, one must examine the economics and regulatory arguments that underpin both the Title I and Title II classifications. Under the 1996 revisions to the Telecommunications Act, Congress believed that the internet best functioned with minimal regulation: the light-touch scheme.[91] Thus, in adding extra layers of regulation,

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81 Nick Statt, *California Man Arrested for Threatening to Kill FCC Chairman Ajit Pai's Family over Net Neutrality*, THE VERGE (June 29, 2018, 6:18 PM), https://www.theverge.com/2018/6/29/17519742/fcc-chariman-ajit-man-death-threats-markara-man-arrested-net-neutrality.

82 *See Restoring Internet Freedom*, 33 FCC Rcd. 311 (2017) (declaratory ruling).

83 *Id.* at 320–22.

84 *Id.* at 362–66.

85 *Id.* at 424–25.

86 *Id.* at 393–98, 419–423.

87 *Id.* at 313, 369, 450.

88 *Restoring Internet Freedom*, 33 FCC Rcd. at 434–45.

89 *Id.* at 452.

90 *See* Press Release, Fed. Commc'ns Comm'n, FCC Acts to Restore Internet Freedom (Dec. 14, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1214/DOC-348261A1.pdf. Chairman Ajit Pai and Commissioners Michael O'Reilly and Brendan Carr voted for the repeal. Commissioners Mignon Clyburn and Jessica Rosenworcel voted against the repeal.

91 *See* 47 U.S.C. § 230(b)(2) (2012).

the shift to Title II presumes that there were market failures, such that the government needed to step in to ensure consumers are not harmed.[92] Typically, regulation is used to correct market failure when there is (1) a natural monopoly; (2) monopoly power; (3) a market plagued by externalities; or (4) a market plagued by imperfect information.[93] The desire to preserve an open internet and the shift to Title II "reflects a concern about externalities rather than natural monopoly or monopoly power more generally."[94]

A key component of the net neutrality battleground and this concern about externalities is what to do about paid prioritization. As stated above, paid prioritization is a financial arrangement in which a content owner pays a broadband provider to "cut to the front of the line," or where a broadband provider "engages in 'vertical prioritization' by favoring its own content."[95] If the broadband and content providers do not internalize all costs of the priority use of the ISP's network, and society internalizes some of these costs, then the concern about externalities is justified.[96] In shifting to Title II, the 2015 FCC believed that "a one-size-fits-all contract between broadband providers and content providers" was superior and that "the marketplace [could not be trusted] to reach this outcome without regulatory intervention."[97]

This Part first undertakes a brief examination of the economics of vertical agreements. This Part then examines the FCC's ex ante framework and the FTC's ex post framework and discusses the situations in which each would be the optimal regulatory framework. This Comment analogizes the FCC's ex ante framework to an antitrust per se framework to best compare and contrast the two approaches and courts' treatment of the two. After weighing the pros and cons of both the ex ante and ex post frameworks, this Comment agrees with the FCC's 2017 Order that between these two options, the ex post framework is preferred. This Part assumes that the regulatory choice is between only a pure ex ante or a pure ex post scheme and does not consider whether a hybridized middle-ground approach would be better (Part III argues that it is).

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92 *See* Joshua D. Wright, Commissioner, Fed. Trade Comm'n, *Net Neutrality Meets Regulatory Economics 101*, Remarks at the Federalist Society Media & Telecommunications Practice Group Event, at 5 (Feb. 25, 2015), https://www.ftc.gov/system/files/documents/public_statements/626591/150225 wrightfedsoc.pdf. "The standard economic answer is that a market failure [is] necessary, but not sufficient, for regulation. Market failure – that is, an identifiable reason an unfettered free market may result in the misallocation of resources . . . . If market failure exists, an important second question arises concerning the relative efficiency of alternative solutions, including regulation." *Id.* at 5.

93 *See id.* at 11.

94 *Id.*

95 *Paid Prioritization: The Antithesis of Openness on the Internet*, FREEPRESS.NET, https://www.freepress.net/sites/default/files/legacy-policy/Paid_Prioritization.pdf (last visited Jan 4, 2019),

96 *See* Wright, *supra* note 92, at 12.

97 *Id.*

A. *The Economics of Vertical Agreements*

Antitrust law has considered the implications of vertical agreements for more than 120 years.[98] Modern academic literature on vertical agreements is very consistent: vertical agreements are typically either beneficial or welfare neutral to consumers.[99] The canon suggests "a fairly strong prior belief that these practices [vertical agreements] are unlikely to be anticompetitive in most cases."[100] Vertical agreements can "reduce double marginalization, prevent free riding on manufacturer-supplied investments, and align incentives of manufacturers and distributors," thereby creating efficiencies that will benefit consumers.[101] In the internet context, "[v]ertical restraints can spur capital investment, coordinate optimal network usage, deter free riding, and reduce Cournot competition problems that increase price and suppress output."[102]

The Supreme Court acknowledged the academic canon in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[103] by overruling the old per-se ban on vertical restraints and instead subjecting them to a more analytical

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[98] A vertical agreement is an agreement between firms at different levels of a supply chain. *Vertical Agreement*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/vertical%20agreement (last visited Oct. 12, 2018). In the Internet and paid prioritization context, a vertical agreement is one between an ISP and a content provider. From a competition standpoint, this is different than an agreement between two content providers, or two ISPs.

[99] Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007) ("[U]nder most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms' but also from the consumers' points of view . . . . [W]e have found clear evidence that restrictions on vertical integration . . . are usually detrimental to consumers. Given the weight of the evidence, it behooves government agencies to reconsider the validity of such restrictions."); *see also* Staff of the Fed. Trade Comm'n, Comment Letter on Proposed Rule on Restoring Internet Freedom, at 28 (July 17, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-bureau-competition-bureau-economics-federal-trade/ftc_staff_comment_to_fcc_wc_docket_no17-108_7-17-17.pdf ("Most forms of vertical integration can generate procompetitive efficiencies, thus antitrust analysis generally regards them as harmless or even beneficial to consumer welfare.") [hereinafter FTC Comment Letter].

[100] Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in* THE PROS AND CONS OF VERTICAL RESTRAINTS, 40, 76 (Konkurrensverket 2008). There is a consensus among empirical economists that vertical agreements are procompetitive.

[101] Joshua D. Wright, *Antitrust Provides a More Reasonable Regulatory Framework than Net Neutrality*, at 7–8 (Geo. Mason L. & Econ. Research Paper Series, No. 17-35, 2017), https://ssrn.com/abstract=3020068. Double marginalization takes place when Firm A sells to Firm B, and then Firm B sells to the final consumer. Both Firm A and Firm B will mark up the price to earn a profit, which results in a higher price paid by the consumer than if Firm A had just sold directly to the consumer.

[102] *See* Ohlhausen, *supra* note 50, at 135 (citing generally to James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference,* 23 INT'L J. INDUS. ORG. 639, 662 (2005)).

[103] 551 U.S. 877 (2007)

case-by-case approach.[104] By overruling the per-se standard, the Court acknowledged that many vertical agreements are beneficial or welfare neutral, because otherwise there would be no need to depart from a per se standard.

Consumers interact with vertical agreements via paid prioritization on a daily basis. For example, manufacturers and distributors pay for preferred delivery of goods; food companies pay for better shelf location in supermarkets; and stores pay for premium locations in shopping malls.[105] In the internet context, the most prevalent vertical agreements are agreements between an ISP and a content provider. The classic (albeit extreme) example given by net neutrality proponents is a content provider, say Netflix, signing an exclusive contract with an ISP, say Comcast (paid prioritization). Then, all consumers who access the internet using a different ISP, say Verizon rather than Comcast, are unable to access Netflix content (blocking), are forced to pay extra, or are forced to watch at diminished speeds (throttling). However, during the fourteen years when Title I was the dominant regulatory framework from 1996 to 2010, there was scant evidence of any anticompetitive vertical agreements, and the existing legal frameworks were sufficient to provide the wronged parties a remedy.[106]

Whatever standard to evaluate vertical agreements is adopted, it should be informed by the logic of error cost analysis. There are four possible outcomes: two successful outcomes and two erroneous outcomes. The two successful outcomes involve either allowing a procompetitive agreement or prohibiting an anticompetitive agreement. The possible errors are a false positive error, where a procompetitive agreement is prohibited, and a false negative error, where an anticompetitive agreement is allowed.[107] Often, regulatory frameworks focus on false negatives, since they are obviously harmful to

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104 *Id.* (reversing Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)); *see also* Cont'l T.V. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (reversing United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), which held that all nonprice vertical restraints warrant rule-of-reason analysis).

105 *See* Ohlhausen, *supra* note 50, at 136.

106 *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5620 para. 65 n.69, 5628 para. 79 n.123 (Feb. 26, 2015). The 2015 Order's concrete examples of net neutrality violations were Madison River Communications in 2005 and Comcast/BitTorrent in 2007. The 2015 Order also cites violations by AT&T (blocking Apple's FaceTime application in 2012) and Comcast ("exempt[ing] its own online video service from data caps when streamed to an Xbox," also in 2012) in a single footnote. *Id.* at 5628 n.123. *But see* Wright, *supra* note 101, at 5. Vertical agreements notwithstanding, there was also scant evidence of concrete net neutrality violations during the same fourteen years of Title I regulation from 1996 to 2010. These few violations (as cited) do not sufficiently show that left unregulated, ISPs will engage in a pattern of anticompetitive behavior or that the competitive market process is failing or inapplicable such that the FCC was forced to step in and install new and broad ex ante bright-line net neutrality rules. *See also* Ohlhausen, *supra* note 50, at 132 ("Yet the FCC did not concede that its order targets a hypothetical problem . . . . Of course, had there been pervasive evidence of neutrality violations by ISPs, the FCC would have cited it as support for its rules.").

107 *See* Wright, *supra* note 101, at 6–7.

consumers.[108] However, it is similarly important to evaluate the false positives, because they also harm consumers, though in a less quantifiable way.[109]

The Title II framework included a stipulation in the internet-conduct standard that ISPs and content providers are prohibited from entering vertical agreements with one another.[110] This framework focuses entirely on false negatives—by banning all agreements entirely. A byproduct of this categorical ban, however, is that a substantial number of false positives, beneficial vertical agreements, are prohibited.

B. *Ex Ante: FCC Regulation Under Title II*

The Title II Order is a bright-line ex ante regulatory scheme because it regulates on the front end prior to the consummation of any agreement, thus prohibiting all agreements. A bright-line ex ante regulatory scheme is best when all agreements are anticompetitive, or if there is a worry about a large number of false negatives.[111] An ex ante framework is also appropriate in antitrust when the regulated conduct constitutes a per se violation.[112] Under the 2015 Title II Order's internet-conduct standard, all vertical agreements in the internet space were per se illegal.[113] The worry was that ISPs and content providers would create agreements whereby ISPs can prevent certain content from freely reaching the public.[114]

One implication of the ex ante framework is that all internet traffic must be treated entirely equally. Generally, this seems to make sense—especially when envisioning an ISP maliciously blocking content to favor only content it has been paid to promote. But Acting FTC Chairman Maureen Ohlhausen points out that all internet traffic is not implicitly equal, since some traffic such as vital telemedicine is obviously of a higher priority than entertainment content such as cat videos.[115] While this is obviously an extreme comparison, should there be room in an internet regulatory framework to identify

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108 *See* Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?,* 23 HARV. J.L. & PUB. POL'Y 5, 8 (1999).

109 *See id.*

110 *See* Wright, *supra* note 101, at 5.

111 *Id.* at 7.

112 *See* 15 U.S.C. § 1 (2012); Jonathan Kim, *Antitrust*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/antitrust (last updated July 2017) ("A per se violation requires no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice.").

113 *See* Wright, *supra* note 101, at 5.

114 *See, e.g.*, Katharine Trendacosta, *Busting Two Myths About Paid Prioritization,* ELECTRONIC FRONTIER FOUNDATION (Apr. 16, 2018), https://www.eff.org/deeplinks/2018/04/busting-two-myths-about-paid-prioritization.

115 *See* Ohlhausen, *supra* note 50, at 137.

supremely important traffic such as telemedicine, and give it some sort of priority? Under the Title II ex ante framework, the answer was no.

In choosing to ban vertical agreements, the 2015 Title II Order did not use economic evidence to examine the effect these restrictions would have on consumer welfare.[116] The 2010 Order cited a paper from University of Chicago economist Austan Goolsbee as the basis for the ban on vertical agreements.[117] This citation was removed before the 2015 Order was enacted, suggesting the questionable usefulness of this source in this context.[118] This suggests that the 2015 FCC either could not find, or chose not to find, additional economic evidence to justify the ban on vertical agreements.

Title II proponents have often cited noneconomic factors to suggest that the necessity of the Title II classification is not fully explained by economic analysis or by antitrust generally.[119] Professor Tim Wu, who originally coined the term "net neutrality" in an article published in 2003, stated that "the Internet implicates a whole host of noneconomic values, which are simply not well-captured by antitrust processes," such as "media policy, social policy, oversight of the political process, issues of free speech."[120] As such, Professor Wu argues that Title I is insufficient as a regulatory framework because he does not believe antitrust law can cover all possible harms posed by such a complicated internet ecosystem.

In a broader sense, ex ante frameworks are used often in antitrust law. Even though the 2015 Order rejected the validity of antitrust to regulate the internet,[121] it is perhaps the best support for the imposition of an ex ante approach. For example, under section 1 of the Sherman Act, price fixing between horizontal competitors (competitors competing in the same market) is per-se illegal.[122] Typically, antitrust law allows a defendant to provide a

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116 *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5632 (Feb. 26, 2015).

117 *See* Preserving the Open Internet, 25 FCC Rcd. 17,905, 17,918, n.60 (2010), *vacated and remanded sub nom.* Verizon v. FCC, 740 F.2d 623 (D.C. Cir. 2014).

118 *See Preserving the Open Internet*, 25 FCC Rcd. at 17,918, n.60 (citing Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming* (2007), https://apps.fcc.gov/edocs_public/attachmatch/DA-07-3470A10.pdf). The 2010 Order claims "the Goolsbee Study provides empirical evidence that cable providers have acted in the past on anticompetitive incentives to foreclose rivals, supporting our concern that these and other broadband providers would act on analogous incentives in the future." *Id. But see* Hazlett & Wright, *supra* note 72, at 491 (noting that Goolsbee found "operators have discriminated against the programming services that they owned—the opposite of [harms stemming from] vertical foreclosure").

119 *See, e.g.*, *Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?*: *Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 70 (2014) (statement of Tim Wu, Professor, Columbia University Law School) [hereinafter *2014 Net Neutrality Hearing*].

120 *Id.*

121 *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5633, para. 84, 5665, para. 148 (Feb. 26, 2015) ("We find that . . . competition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness.").

122 ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE 109–15 (3d ed. 2017).

justification, an efficiency, for anticompetitive conduct by showing that procompetitive conduct outweighs the anticompetitive conduct.[123] However, under a per-se standard, the defendant is not given such an opportunity because the conduct is recognized as universally bad, and thus an ex ante bright-line ban is appropriate.[124] Other examples of per-se antitrust violations under the Sherman Act are collusive bidding, horizontal group boycotts, and tying arrangements that shut out a substantial amount of commerce.[125] But even though many antitrust per-se frameworks endure, the more recent trend has been to move away from per se rules and focus more on a case-by-case analysis called the "rule of reason."[126] Current economics suggests that our antitrust frameworks can make fewer regulatory mistakes analyzing on a case-by-case basis vis-à-vis the rule of reason rather than through per-se rules.[127]

C. *Ex Post: Antitrust Law and the Rule-of-Reason Framework*

The antitrust framework is an ex post regulation scheme that seeks to regulate after the fact. Under such framework, vertical agreements would be allowed and later evaluated one by one to determine whether they should endure. This framework would cull through the existing agreements and, specifically, prohibit the anticompetitive agreements, while allowing the procompetitive agreements to survive.[128] The antitrust framework, better known as the "rule of reason," is an ex post regulatory tool that regulates on a case-by-case basis rather than by establishing any sort of bright-line standard.[129] The rule of reason examines vertical agreements by "weigh[ing] costs and benefits, and recogniz[ing] possible losses from enforcement errors that go in either direction."[130] FTC staff defined the rule of reason as a framework "weighing potential anticompetitive effects against the procompetitive effects and efficiencies that drive business practices in fast-growing industries."[131]

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123 *Id.* at 850–60; 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 64, § 10.

124 *See* GAVIL ET AL., *supra* note 122, at 121–23.

125 *See* Kim, *supra* note 112. As discussed in Part II.A, vertical agreements were per-se illegal in the early 1900s. More recent cases no longer consider vertical agreements per se violations, and courts now evaluate them under the rule of reason, discussed more fully in Part II.C.

126 *See, e.g.*, J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, *Vertical Restraints & Sherman Act § 2*, Remarks at the Conference on Current Topics in Antitrust Economics & Competition Policy, at 3–4, 10 (June 13, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/vertical-restraints-sherman-act-%C2%A7-2/070613verticalrestraints_0.pdf.

127 *See id.* at 12–13.

128 *See* Wright, *supra* note 101, at 5.

129 *See generally* Bd. of Trade of City of Chicago v. United States, 246 U.S. 231 (1918); *see also* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 122–24 (2018).

130 *See* Hazlett & Wright, *supra* note 72, at 489.

131 *See* FTC Comment Letter, *supra* note 99, at 24.

The first movement away from per-se rules toward the more analytical rule-of-reason analysis was initiated by *Board of Trade of City of Chicago v. United States*.[132] The rule of reason outlines a burden-shifting framework that is commonly used in antitrust law. First, the plaintiff has a prima facie rebuttable burden to show that conduct is anticompetitive. This can be done in three ways: (1) direct evidence of anticompetitive effects; (2) circumstantial evidence of anticompetitive effects inferred from market power; or (3) a facial inference in which anticompetitive effects are intuitively obvious from extrinsic learning.[133] Common examples of facial inferences are (1) judicial learning, whereby an agreement has a close resemblance to another agreement already known to be anticompetitive;[134] or (2) common economic learning that makes the anticompetitive effects intuitively obvious.[135]

If the plaintiff satisfies his prima facie burden, then the burden shifts to the defendant to show that despite the anticompetitive effects, there is some sort of procompetitive justification to allow the agreement to endure.[136] Some ways the defendant can do this are (1) by arguing that there is no agreement because both parties are the same legal entity, and a party cannot enter an agreement with itself;[137] (2) by arguing that the firm does not have market power;[138] or (3) by arguing that the agreement has procompetitive efficiencies.[139] After the defendant attempts to rebut the presumption, the court weighs the body of evidence and determines whether the procompetitive justification outweighs the anticompetitive effects. With some rare exceptions, if the efficiencies are greater than the anticompetitive effects, then the defendant should win; if the anticompetitive effects are greater than the efficiencies, then the plaintiff should win.[140]

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132 246 U.S. 231 (1918); *see id.* at 238–39; Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978).

133 *See* GAVIL ET AL., *supra* note 122, at 101–32.

134 *E.g.*, Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36–37 (D.C. Cir. 2005) ("[T]he rebuttable presumption of illegality arises not necessarily from anything 'inherent' in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare.").

135 *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98–113 (1984); *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692.

136 *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998).

137 *E.g.*, Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984); *see also* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195–202 (2010) (limiting the single entity defense, though not overruling *Copperweld*).

138 *See, e.g.*, *Polygram Holding, Inc.*, 416 F.3d at 36; United States v. Apple Inc., 952 F. Supp. 2d 638, 708 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

139 *See, e.g.*, Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 351–55 (1982); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978). *Maricopa* sets forth a pretextual screen that an efficiency justification is invalid as a matter of fact. And *Engineers* sets forth a cognizability screen that an efficiency justification is invalid as a matter of law.

140 *See* GAVIL ET AL., *supra* note 122, at 258–75.

An ex post regulatory scheme is optimal when there are many procompetitive agreements or an abundance of false positives.[141] The ex post framework regulates with an eye to the consumer welfare standard because consumer welfare is maximized when consumers can derive the benefits from procompetitive agreements while also being protected from the harms resulting from anticompetitive agreements. In the context of vertical agreements, where the majority are procompetitive, the rule-of-reason framework would evaluate but, ultimately, allow most agreements.

D. *Ex Ante vs. Ex Post—A Conclusion*

When deciding which framework is optimal for regulating the internet, one should also consider the state of the current ISP market. In a national sense, there are many ISPs and edge providers, such that the market is not concentrated.[142] However, for ISPs, it makes more sense to evaluate the market with a more localized approach. While data for localized markets across the country are challenging to accurately compile, 2014 data suggest that eighty-eight percent of American households have access to two or more ISPs, sufficient to allow consumers the ability to switch ISPs if one ISP behaves improperly.[143] Concerns that those major ISPs would work together are nonstarters, because existing antitrust law prohibits collusion, anticompetitive horizontal restraints of trade, and exclusionary conduct.[144]

When evaluating the best system for regulating vertical agreements, an ex ante scheme should be used if most agreements are anticompetitive, to protect consumers from harm on the front end. An ex post scheme should be used if many agreements are procompetitive, such that the only agreements that require regulation are those specifically found to be anticompetitive. Because the economic literature is so consistent and clear that vertical agreements are so often procompetitive (or welfare neutral), it is important for the chosen internet regulatory framework to allow these procompetitive vertical agreements. The ex post rule-of-reason framework does exactly this. The ex ante Title I framework carries a very large false positive error cost, since currently all procompetitive vertical agreements are prohibited.[145]

A notable example of a false-positive error, and why it is so significant (and harmful), is the T-Mobile Music Freedom program. In 2014, T-Mobile

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141 *See* Wright, *supra* note 92, at 19.

142 *See* U.S. Telecom. Ass'n v. FCC, 825 F.3d 674, 751–53 (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part).

143 *See* Patrick Brogan, *Broadband Investment Gains Continued in 2014*, US TELECOM, THE BROADBAND ASS'N, at 1 (July 24, 2015), https://www.ustelecom.org/wp-content/uploads/2019/01/Broadband-Investment-Gains-Continued-in-2014.pdf; DAVID N. BREEDE, U.S. DEP'T OF COMMERCE, COMPETITION AMONG U.S. BROADBAND SERVICE PROVIDERS (2014).

144 *See* 15 U.S.C. §§ 1, 2, 18, 45 (2012).

145 *See* Ohlhausen, *supra* note 50, at 139–40.

endeavored to provide free streaming music to its subscribers that would not count against a monthly data allowance.[146] At first glance, there seems to be little wrong with providing consumers something they desire for free. And nothing is wrong with T-Mobile making a unilateral business decision that it preferred to offer customers free music rather than, say, free streaming video. However, this program posed a net neutrality problem because T-Mobile arbitrarily decided which data should count against a cap, and which data should not, thereby not treating all data equally.[147] Under the ex ante bright-line scheme that was the law at the time, the Music Freedom program was per se unlawful, and T-Mobile abandoned the program. Under the ex post scheme, the program would be allowed and condemned only if analysis dictated that consumers were harmed. In this case, the ex post scheme would allow consumers the benefits of free music, while still leaving the door open for regulation if this program turned out not to benefit consumers.

Also, because there is widespread concern that ISPs will try to take advantage of consumers, the rule of reason is an especially good fit because of its careful case-by-case analysis, which, when applied, can successfully allow procompetitive agreements while prohibiting anticompetitive agreements. This approach is consistent with prevailing antitrust law, which attempts to maximize consumer welfare. Furthermore, allowing antitrust to have jurisdiction over net neutrality violations allows private litigants the option of treble damages under the Clayton Act and allows the government to bring cases under section 5 of the FTC Act.[148]

For all of these reasons, the 2017 FCC found the ex post framework superior to the ex ante bright-line rules. By repealing the 2015 Order, the FCC allowed the FTC to regain regulatory jurisdiction and apply the rule of reason to weigh the validity of vertical agreements.[149]

III. FINDING THE MIDDLE GROUND: IMPROVING THE ANTITRUST FRAMEWORK

Even though antitrust's rule-of-reason framework is superior to the ex ante prohibition in a one-to-one comparison as it applies to internet regulation, there are some drawbacks to the antitrust approach. This Part discusses these critiques and briefly evaluates how serious they are. Then, in an attempt to assuage these concerns, this Part proposes some additions to the FTC's internet regulation framework. First, because of the importance of preserving the internet as it is today, there should be a mandatory pre-agreement filing

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146 *See* Chris Ziegler, *T-Mobile's 'Music Freedom' Is a Great Feature — And a Huge Problem*, THE VERGE (June 18, 2014, 9:42 PM), https://www.theverge.com/2014/6/18/5822996/t-mobile-music-freedom-net-neutrality.

147 *See id.*

148 15 U.S.C. §§ 15, 45 (2012).

149 *See* Press Release, *supra* note 90.

giving the government an ex ante chance to challenge an agreement it perceives to be questionable. Second, the FTC should install a special administrative law judge, selected based on subject-matter expertise to rule on agreements and any net neutrality violations. As such, consumers will be properly protected by allowing the FTC some ex ante regulatory power, in addition to its broader and current ex post regulatory power.

A. *Noneconomic Harms*

As noted above, Professor Wu's definition of internet regulation also encompasses "media policy, social policy, oversight of the political process, and issues of free speech."[150] These "non-economic values" might appear to be far afield from antitrust's efforts to regulate competition and market power. If an ISP inhibits the media, oversight of politics, innovation, or free speech generally, it is providing a product that is of a lower quality than an ISP that does not do so. For example, say an ISP decided that it wanted to prevent its users from accessing Fox News, or any other content created by Right-leaning bloggers or writers, and only would allow access to the Left-leaning media outlets and content creators. This ISP is now providing a product that has less breadth than an ISP that does not inhibit content. Someone who prefers to access only Left-leaning content might not care, but someone who also wants access to Right-leaning content would certainly be unhappy and might want to switch to a different ISP. At a high level, this restrictive ISP is providing a lower-quality good than is an ISP that does not restrict content. Thus, these noneconomic values are areas where ISPs can compete with each other, and these values can still be boiled down to product quality arguments, which are clearly well covered by existing antitrust law.[151] The same can be said for any "product characteristics" of an ISP's product offering.

So if consumers, for instance, desire not to be blocked (like in the restrictive ISP example in the preceding paragraph) or throttled (those who often watch Netflix and don't want their connection speed slowed after they watch a certain number of hours of a show), and enough consumers would switch ISPs if an ISP did block or throttle, then competition would produce the optimal outcome, and ISPs would not block or throttle. The more consumers there are who care about these issues, the more consumers there are who would switch. And more consumer switching provides a stronger and stronger business case for an ISP to refrain from blocking or throttling.

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[150] *See 2014 Net Neutrality Hearing*, *supra* note 119.

[151] *See, e.g.*, 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 64, § 1 ("Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence.").

Simply put, an ISP would not act in a way that would drive market share to a competitor. If, on the other hand, ISPs collude by agreeing to block or throttle as a group, then this is a very serious antitrust violation that the FTC would certainly act on.[152] Either way, one cannot ignore the business case of a group of consumers who care about blocking and throttling and would switch ISPs in the face of this conduct.

B. *Harm to Innovation*

Professor Hal J. Singer, one of the more outspoken critics of applying the antitrust framework to internet regulation, highlights two other criticisms: (1) to the extent that there are cognizable innovation harms, they are very difficult to prove because of the burden and standard placed on the plaintiff in current antitrust law; and (2) the length of time and resources required for a private litigant to prevail in an antitrust case is virtually insurmountable and will almost certainly have a chilling effect on innovation due to the rapid rate of growth in the internet space.[153]

Even though they are difficult cases to bring, the FTC and the Department of Justice ("DOJ") have both brought a large number of innovation cases, most often in the merger context.[154] Between 2004 and 2014, the FTC referred to "innovation" or "research and development" harm in fifty-four cases, or just shy of one-third of the overall cases that were litigated by the FTC during this period.[155]

The focus on innovation is evident in the *Horizontal Merger Guidelines*, as the 1992 Guidelines (and their 1997 revision) only loosely allude to innovation as a potential theory of harm, but the 2010 Guidelines feature an entire section and formally mention it as a cognizable harm.[156] Harm to innovation

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152 *Anticompetitive Practices¸* FED. TRADE COMM'N, https://www.ftc.gov/enforcement/anticompetitive-practices (last visited Oct. 2, 2018).

153 Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, ANTITRUST SOURCE (Aug. 2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf; *see also* Hal J. Singer, *My Comment on Wright's "Antitrust Provides a More Reasonable Framework for Net Neutrality Regulation"*, HAL SINGER (Aug. 17, 2017, 3:16 PM), https://haljsinger.wordpress.com/2017/08/17/my-comment-on-wrights-antitrust-provides-a-more-reasonable-framework-for-net-neutrality-regulation.

154 Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1931–33 (2015).

155 *Id.* at 1933; *see, e.g.*, Complaint ¶ 50, United States v. Bazaarvoice, Inc., No. 3:13-cv-00133 (N.D. Cal. 2014), 2013 WL 127168; Complaint ¶¶ 2, 28–36, United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011) (No. 11-00948), 2011 WL 1944202; Complaint ¶¶ 20–21, 27, *In re* Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009), https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf.

156 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 64, §§ 6.4, 10; *see also* Wright, *supra* note 101, at 11 ("[T]he 2010 HMGs, like all Merger Guidelines, do not initiate new policies, but describe what is already happening inside the agencies.").

can also be the theory of harm for monopolization under Section 2 of the Sherman Act.[157] However, harm to innovation is often combined with other effects such as an increase in price or decrease in output, given the difficulty of proving standalone harm to innovation.[158]

Even though harm to innovation is often cited, there is a lack of usable precedent. This is because very few antitrust cases actually proceed to litigation, let alone go through the appeals process to arrive at a final verdict.[159] This is a feature of antitrust law rather than a deficiency. The agency goal in an antitrust case is an equitable remedy to compensate for anticompetitive conduct, or an injunction to prevent further harm to consumers, rather than a focus on creating usable precedent for future plaintiffs. Furthermore, because the internet is still a relatively new invention, the legal discourse on the subject is not as broad as other areas of law that have been around for one hundred–plus years.

C. *Antitrust's Lengthy Litigation Process*

A typical antitrust case requires many months of agency investigation before a case can be brought, a long and complicated discovery process during actual litigation, and multiple levels of appeal.[160] Often, it takes five to seven years for a case to be fully litigated from start to finish.[161] A large chunk of this time is discovery, which can often take a year or more because of the breadth of documents (often millions) typically involved.[162] Thus, if the government or a private party wishes to bring an antitrust case alleging harm stemming from a vertical agreement, it will likely be many years before any remedy can be enforced. When compared to a bright-line ex ante prohibition that offers an immediate resolution, this litigation process is quite slow and

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157 U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 8 (2008), https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1.

158 *See, e.g.*, United States v. Microsoft Corp, 253 F.3d 34, 65 (D.C. Cir. 2001). *Microsoft* is one of the rare cases where a company was found to be a monopolist, and the effects harmed innovation.

159 John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 IOWA L. REV. 1997, 1998 (2015).

160 *See* Singer *Comment on Wright*, *supra* note 153.

161 *See DAMITT: How Long Does It Take to Conduct Significant U.S. Antitrust Merger Investigations?*, DECHERT LLP (2018), https://www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s--antitr.html; Washington Bytes, *The Future of Antitrust Enforcement: Innovation, Wage Inequality and Democracy*, FORBES (June 15, 2017, 2:05 PM), https://www.forbes.com/sites/washingtonbytes/2017/06/15/the-future-of-antitrust-enforcement-innovation-wage-inequality-and-democracy/#7975bd9f145d.

162 Edward D. Cavanagh, *The 2015 Amendments to the Federal Rules of Civil Procedure: The Path to Meaningful Containment of Discovery Costs in Antitrust Litigation?*, ANTITRUST SOURCE (Apr. 2014), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr14_cavanagh_4-8f.authcheckdam.pdf.

is especially damaging in fast-paced innovation spaces such as the internet. Because the 2017 FCC has shifted regulatory jurisdiction back to the FTC, the ex post framework should be augmented so cases can be litigated without such a lengthy process.

D. *Applying Hart-Scott-Rodino & Mergers to ISP Vertical Agreements*

First, the ex post framework evaluating vertical agreements should be augmented by the theory underlying the Hart-Scott-Rodino Act, a regulatory tool already used to analyze merger approval. The Hart-Scott-Rodino Act requires a premerger notification form, so companies proceeding toward a merger above a threshold $84.4 million valuation can inform the FTC that a merger is in progress.[163] Upon receiving notification, either the FTC or DOJ will begin a preliminary investigation to determine whether the merger will "substantially lessen competition."[164] After merging companies file the form, they are prohibited from closing the merger for thirty days while the agencies undertake a preliminary investigation.[165]

There are three possible actions the FTC or DOJ can take during this thirty-day period: (1) terminate the waiting period, and allow the merger; (2) let the thirty-day period lapse, which allows the merger to be consummated; or (3) extend the review by requesting additional information to further evaluate the effects on competition (this is called a second request).[166] If an agency proceeds with a second request, then it has an additional thirty days to investigate. During this period, the agency can close the investigation, take legal action in federal court or through the FTC's administrative process, or enter a settlement with the companies.[167] The FTC's website notes that the "vast majority of deals . . . are allowed to proceed after the first, preliminary review" or after the first thirty-day investigative period.[168]

This premerger notification form has been successful because it hybridizes the benefits of an ex ante scheme while retaining the benefits of an ex post scheme.[169] By allowing the government to step in at an early stage, the enforcement agencies can prohibit anticompetitive mergers, thus ensuring

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163 *See How Mergers Are Reviewed*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review (last visited Jan. 4, 2019).

164 *Id.*; *see* 15 U.S.C. § 18 (2012).

165 *How Mergers Are Reviewed*, *supra* note 163.

166 *Id.*

167 *Id.*

168 *Id.*

169 *See generally* William J. Baer, Former Dir., Bureau of Competition, Fed. Trade Comm'n, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, Remarks at the 35th Annual Corporate Counsel Institute (Oct. 31, 1996), https://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act.

that consumers never realize these negative effects.[170] It allows the merging parties to proactively work with the enforcement agencies to try to alleviate any concerns the agencies have, or work together to come up with a creative solution via a divestiture or a behavioral remedy.[171] It also allows the FTC to evaluate a merger on a case-by-case basis, rather than by applying any sort of bright-line rule.[172] This addition to the ex post enforcement power offers a solution to waiting several years to take ex post enforcement action. But the FTC retains its ex post regulatory power and always can challenge a merger after it has been consummated and any effects have actually been realized.

This hybrid of ex ante and ex post enforcement power and the benefits of a notification form can be directly applied to vertical agreements in the internet space. ISPs that intend to enter vertical agreements with content providers should be required to make a filing to the government akin to the pre-merger notification form. Like with a merger, this filing will allow the government an early look at all agreements, and if there are concerns, the government can request additional information or take legal action to enjoin the agreement altogether. If there are no concerns, then the agreement should be allowed to proceed.

Even though such an agreement is only hypothetical, the FTC can use existing antitrust tools to determine the likely impact that agreement will have on consumer welfare. The FTC has used these tools and accrued this experience evaluating mergers for over one hundred years and, more specifically, since 1976 when the Hart-Scott-Rodino Act was passed.[173] The filing is a reasonable middle ground because under the 2015 Order, entering these agreements would be a per se net neutrality violation, and after the 2017 repeal, the FTC focuses only on its ex post regulatory power. Requiring ISPs entering vertical agreements to submit a filing to the government allows some of the benefits of an ex ante scheme, while avoiding the pitfalls of a bright-line standard that functions to prevent all agreements.

E. *Expansion of the FTC's Part III Decisions*

While adding a pre-agreement notification form is a useful step to augment the FTC's enforcement scheme in a post–net neutrality world, it does not alleviate the concern surrounding the length of time to litigate an antitrust case—especially since the pre-agreement form provides the FTC an additional enforcement mechanism. If the government or, for that matter, a competitor, edge provider, or independent third party wishes to challenge a vertical agreement or take action to remedy an ISP's anticompetitive practice,

170 *See id.*
171 *Id.*
172 *Id.*; *see also* Rosch, *supra* note 126, at 3.
173 *See* Pennsylvania v. Mid-Atlantic Toyota Distrib., Inc., 704 F.2d 125, 131–32 (4th Cir. 1983).

and the ISP wants to dispute that the agreement or action is anticompetitive, then there should be a system in place to get these parties in front of a judge in a timely manner. The best solution is to add an additional FTC administrative law judge with special expertise in the internet space who can adjudicate and determine whether the agreement or practice is procompetitive or anticompetitive.[174]

When President Woodrow Wilson and Congress first established the FTC in 1914, they envisioned the FTC as an agency that could prosecute, but also adjudicate cases, and issue legal decisions.[175] Congressman J. Harry Covington, who authored the original bill founding the FTC, stated that "the Commission will exercise power of a judicial nature."[176] This function was codified in Part III of the FTC's rules of practice.[177] The FTC's administrative hearing process is similar in formality and process to trials in federal court, but with the notable exception that "the Commission's policy is to conduct such proceedings expeditiously."[178] FTC administrative law judges are required to issue their initial decisions within one year of a complaint being filed.[179] An administrative law judge also has the power to limit the length of discovery or the available discovery tools; however, in practice, administrative hearings typically permit wide-ranging discovery that is simply expedited to comply with the time frame of the Part III process.[180] Thus, an expansion of Part III allows the benefits of antitrust's rule-of-reason analysis, while ameliorating the length of time an antitrust case would take in federal court.

Part III appeals take a case from the administrative law judge to the entire FTC commission, and appeals from the full FTC commission are elevated to the circuit courts of appeal. However, unlike challenged mergers that are often appealed because companies have invested so much time and money negotiating and agreeing to a merger, vertical agreements seem less likely to constantly be appealed because companies will have expended less time and money negotiating the agreement.

Furthermore, in a 1989 Report, the American Bar Association identified several characteristics of cases that are particularly well suited for Part III

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174 *See* Singer, *Paid Prioritization, supra* note 153, at 12. Professor Singer advocates for a special FCC tribunal to hear net neutrality disputes, but he acknowledges that the current legality of such a tribunal is unclear and that Congress likely would have to pass legislation to empower the FCC to create such a tribunal.

175 *See* D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319, 319 (2003).

176 *See* 51 CONG. REC. 15, 14,933 (1914).

177 FTC Rules of Practice, 16 C.F.R. § 3.1 (2018).

178 *Id.*

179 *See* Hoffman & Royall, *supra* note 175, at 323 (citing 16 C.F.R. § 3.51 (2018)). An administrative law judge can extend this deadline by up to thirty days with good cause, *id.*, but this is typically done only in extenuating circumstances.

180 *See id.* at 324.

litigation, including "cases [that] require application of the rule of reason," "industries . . . in which restraints arguably are justified by the need to further technological innovation or to advance other public purposes," and "industries about which there is substantial public concern."[181] Even though the internet was in its infancy at the time this ABA report was originally published, its Part III guidance seem particularly well suited for evaluating vertical agreements in the twenty-first century internet market. Thus, an expansion of Part III power to add an administrative law judge to decide the legality of vertical agreements and net neutrality violations seems well suited to the internet landscape, is legal, and is consistent with the ideals of the formation of the FTC.

These two simple solutions—(1) adding a pre-agreement notification form and (2) adding a special administrative law judge to preside over internet agreements and violations—should be sufficient to give the FTC additional regulatory tools to ensure the internet remains the "free and open" resource all parties desire, without creating a regulatory burden to chill innovation. This middle-ground solution should be a welcome addition to the regulatory scheme in the eyes of net neutrality proponents, without being overly burdensome in the eyes of net neutrality critics.

CONCLUSION

The net neutrality debate has raged for almost a decade as the designated agency to regulate the internet vacillates with the political tide. All parties are waiting for Congress to definitively comment via formal legislation. However, given that this seems unlikely to occur anytime soon, a hybrid and centrist solution that can satisfy both political parties is vitally needed.

There is an abundance of research to suggest that Title I is the preferable regulatory scheme: it aligns incentives for ISPs to finance additional innovation; it allows regulatory jurisdiction to stay with the FTC; and it enables an ex post antitrust framework to be applied to attempt to maximize consumer welfare. More so, because of the 2017 FCC repeal of the 2015 Title II Order, Title I again is the regulatory framework that agencies will apply for at least the next several years.

However, Title I and existing antitrust law are not a perfect solution. The optimal solution is to make a few minor changes to the antitrust framework to ensure that the internet space is properly regulated and ensure that consumers are fully protected. The FTC should implement a mandatory filing such that any vertical agreements in the internet space are first examined ex ante but are allowed to proceed if they do not seem anticompetitive. The FTC should also expand Part III power so that an administrative law judge can, in

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181 Miles W. Kirkpatrick et al., *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 62–63 (1989).

a timely manner, review the government's findings regarding these filings and issue opinions with the force of law. These additional regulatory steps should ensure that the internet is regulated appropriately and remains "free and open," while also ensuring that the incentives to innovate endure and that the operating standard is one that attempts to maximize consumer welfare.