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The Four Horsemen of the Internet Apocalypse: The Relevation of State Net Neutrality Laws

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THE FOUR HORSEMEN OF THE INTERNET APOCALYPSE: THE REVELATION OF STATE NET NEUTRALITY LAWS

*Zachary P.T. Lundgren**

In 2018, on the heels of intense debate and widespread media campaigns, the FCC repealed its 2015 regulations protecting net neutrality. The repeal continued to stoke controversy after it was announced, facing congressional and legal challenges almost immediately. The most interesting response, however, has been the passage of state net neutrality laws in California, Oregon, Vermont, and Washington. The first of their kind, these four laws largely purport to reinstate the 2015 net neutrality rules within state lines.

Rather than take sides in the net neutrality debate, this Note focuses on these novel state laws and, principally, whether they will survive. Interesting creatures they may be, the states encounter a difficult federal preemption problem right off the bat. Straightforward application of the law seems to squarely preempt them. This law, however, depends on precedent and a statutory framework established well before the existence of the modern Internet. Accordingly, this Note proposes a reevaluation of the preemption question and the legal background.

Setting preemption aside, this Note explores another obstacle to state net neutrality regulation: the dormant Commerce Clause. Because the Internet has traditionally been regulated by the federal government, the states must be careful not to discriminate against or otherwise offend the interstate market for Internet provision. Nevertheless, applying the Pike balancing

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test, this Note concludes that the state laws—insofar as they only regulate Internet provision and ISPs acting within the state—do not unduly burden the flow of interstate commerce, and are justified by the state’s interest in consumer safety and welfare. Moreover, traditional federalism policies support state Internet regulation. At the very least, the state net neutrality laws warrant a closer look, and this Note argues that they present a viable alternative to federal regulation.

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I. INTRODUCTION

On June 11, 2018, the Federal Communications Commission (FCC) officially repealed its 2015 regulations protecting net neutrality with the Restoring Internet Freedom Order (RIFO).¹ Net neutrality is the principle that Internet Service Providers (ISPs) should treat all Internet traffic the same, granting consumers equal access to all legal content and applications without favoring or blocking sources.² To “preserve the future of Internet freedom,” the FCC found it “necessary” to repeal net neutrality regulation that “stifles innovation and deters investment.”³ According to FCC Chairman Ajit Pai, this policy “will protect consumers and promote better, faster internet access and more competition.”⁴

Net neutrality has stirred controversy over the last few years, and unsurprisingly, RIFO incited challenges soon after it was published.⁵ Alongside litigation and congressional efforts to overturn the repeal,⁶ four states—California, Oregon, Vermont, and Washington—promulgated legislation of their own.⁷ Predominantly

¹ See Restoring Internet Freedom, 33 FCC Red. 311, para. 1 (Jan. 4, 2018) [hereinafter RIFO] (“We reverse the Commission’s abrupt shift two years ago to heavy-handed utility-style regulation of broadband Internet access service . . .”).

² See Tim Wu, *Network Neutrality, Broadband Regulation*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 145 (2003) (defining net neutrality).

³ RIFO, *supra* note 1, paras. 1–2.

⁴ Ajit Pai, *FCC Chairman: Our Job Is to Protect a Free and Open Internet*, CNET (June 10, 2018, 9:01 PM), <https://www.cnet.com/news/fcc-chairman-our-job-is-to-protect-a-free-and-open-internet/>.

⁵ See John Hendel & Ashley Gold, *Democrats Introduce Resolution to Reverse FCC Net Neutrality Repeal*, POLITICO (Feb. 27, 2018, 11:38 AM), <https://www.politico.com/story/2018/02/27/democrats-fcc-reverse-net-neutrality-426641> (noting the congressional challenge to the FCC repeal); Hamza Shaban & Brian Fung, *More than 20 States Are Suing the FCC over Its Net Neutrality Decision*, WASH. POST (Jan. 16, 2018, 6:49 PM), https://www.washingtonpost.com/news/the-switch/wp/2018/01/16/more-than-20-states-are-suing-the-federal-communications-commission-over-its-net-neutrality-decision/?utm_term=.99e6abf5d651 (noting the combined effort of states and public interest groups to block the FCC repeal).

⁶ See, e.g., Hendel & Gold, *supra* note 5 (describing the congressional challenge to RIFO); Shaban & Fung, *supra* note 5 (describing the lawsuit filed by multiple states and interest groups to block RIFO).

⁷ See Cecilia Kang, *States Push Back After Net Neutrality Repeal*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/technology/net-neutrality-states.html> (“Lawmakers in at least six states, including California and New York, have introduced bills in recent weeks that would forbid internet providers to block or slow down sites or online services.”); *Net Neutrality Legislation in States*, NAT’L CONF. ST. LEGISLATURES (Aug. 27, 2018), <http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx> (listing states that have pursued net neutrality measures).

resurrecting the language of the 2015 FCC rules, these state initiatives prohibit specific ISP actions within the state.⁸ These efforts have elicited praise and criticism,⁹ but both camps are skeptical about whether states may wield such authority in light of RIFO.¹⁰

At a minimum, these state laws are in jeopardy.¹¹ The assertive language of RIFO facially prohibits such laws,¹² and Pai has openly rebuked them.¹³ Moreover, the U.S. Department of Justice has already sued California over its net neutrality law,¹⁴ and a group of

⁸ *E.g.*, S.B. 822, 2017–2018 Reg. Sess., at 6447 (Cal. 2018) (“This act would prohibit fixed and mobile Internet service providers, as defined, that provide broadband Internet access service, as defined, from engaging in specified actions concerning the treatment of Internet traffic.”); H.B. 4155, 79th Leg. Assemb., 2018 Reg. Sess., at 2 (Or. 2018) (“A public body may not contract with a broadband Internet access service provider that, at any time [performs one of the specified acts].”); S.289, No. 169, 2018 Sess., at 571 (Vt. 2018) (“A certificate of net neutrality compliance shall be granted to an [ISP] that demonstrates and the Secretary finds that the [ISP], insofar as the provider is engaged in the provision of broadband Internet access service: (1) Does not engage in any of the following practices in Vermont”); H.B. 2282, 65th Leg., 2018 Reg. Sess., at 156 (Wash. 2018) (“A person engaged in the provision of broadband internet access service in Washington state, insofar as the person is so engaged, may not [perform one of the specified acts].”).

⁹ See Jon Brodtkin, *California’s Net Neutrality Bill Is Vulnerable to Legal Attack*, EFF Says, ARS TECHNICA (Feb. 1, 2018, 1:10 PM), <https://arstechnica.com/tech-policy/2018/02/californias-net-neutrality-bill-is-vulnerable-to-legal-attack-eff-says/> (praising California’s regulatory efforts but noting the looming legal hurdles); Fred Campbell, *State Net Neutrality Regulations Are an Exercise in Futility*, FORBES (Aug. 13, 2018, 8:30 AM), <https://www.forbes.com/sites/fredcampbell/2018/08/13/state-net-neutrality-regulations-are-an-exercise-in-futility/#6f638f004742> (arguing that state net neutrality efforts will be “short-lived” as preemption is a “slam dunk”).

¹⁰ See GRAHAM OWENS, FEDERAL PREEMPTION, THE DORMANT COMMERCE CLAUSE & STATE REGULATION OF BROADBAND: WHY STATE ATTEMPTS TO IMPOSE NET NEUTRALITY OBLIGATIONS ON INTERNET SERVICE PROVIDERS WILL LIKELY FAIL 1–2 (2018) (arguing that state net neutrality regulations are preempted and violate the Dormant Commerce Clause).

¹¹ This Note was written predominantly during the fall of 2018 and winter of 2018–19; thus, its commentary and collected materials reflect the current law at that time. The cases, commentary, and events that have materialized since then are not discussed or included in this Note.

¹² See RIFO, *supra* note 1, para. 195 (“We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.”).

¹³ See Ajit Pai, Chairman, Fed. Comm’ns Comm’n, Remarks at the Maine Heritage Policy Center 4 (Sept. 14, 2018) (“[T]he California state legislature passed a radical, anti-consumer Internet-regulation bill”).

¹⁴ See Brian Fung, *The Battle Lines Are Already Taking Shape in California’s Legal Fight with DOJ over Net Neutrality*, WASH. POST (Oct. 1, 2018, 11:53 AM), <https://www.washingtonpost.com/technology/2018/10/01/battle-lines-are-already-taking-shape-californias-legal-fight-with-doj-over-net-neutrality/> (“The battle over the future of the Internet just got a little more complicated as the Justice Department sued California on Sunday to block the state’s new law targeting Internet providers and their treatment of Web content.”).

ISPs have sued Vermont over its law.¹⁵ Independent of the FCC's claims to express preemption, the states will likely be preempted by the "longstanding federal policy of nonregulation for information services."¹⁶ This Note suggests, however, that the inevitability of this conclusion should raise concern. To illuminate this concern, this Note will momentarily suspend preemption and perform two analyses. First, this Note will reevaluate the federal policy of nonregulation for information services. Second, it will consider the validity of state net neutrality regulation against traditional principles of constitutional law and federalism. The object of this Note is to illustrate the federal government's failure to present a cogent, comprehensive framework for Internet regulation and argue that state regulation is a desirable alternative.

Over the last twenty years, the Internet has grown from a niche, complicated apparatus to a streamlined, ubiquitous engine powering the United States.¹⁷ The Internet's rise has been meteoric, yet federal Internet regulation has remained static. Although the FCC has confronted the Internet with years of rulemaking, all regulation has been shackled by the statutory silos of the Communications Act of 1934 and Telecommunications Act of 1996,¹⁸ neither of which anticipated the modern Internet.¹⁹ Therefore, to earnestly tackle Internet regulation and quell the net neutrality debate, this Note proposes a reappraisal of the congressional backbone and its attendant policy.

Considering the gnarl woven by the federal government, this Note argues that state regulation of the Internet is a practicable option. Presently, such state efforts are almost certainly preempted, but this should not remove them from consideration. A review of dormant Commerce Clause jurisprudence reveals that the U.S.

¹⁵ See David Shepardson, *Internet Provider Groups Sue Vermont over Net Neutrality Law*, REUTERS (Oct. 18, 2018, 3:48 PM), <https://www.reuters.com/article/us-usa-internet/internet-provider-groups-sue-vermont-over-net-neutrality-law-idUSKCN1MS2ZU> (describing the first legal challenge to Vermont's net neutrality law).

¹⁶ RIFO, *supra* note 1, paras. 202–03.

¹⁷ See *Internet/Broadband Fact Sheet*, PEW RES. CTR. (June 12, 2019), <http://www.pewinternet.org/fact-sheet/internet-broadband/> (documenting the enormous growth of the Internet in various aspects).

¹⁸ Communications Act of 1934, 47 U.S.C. § 151 (2018); Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (1996).

¹⁹ See JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE* 231 (2d ed. 2013) ("In revising the Communications Act of 1996, Congress left intact each of those statutory silos . . .").

Constitution likely tolerates some state Internet regulation.²⁰ Further, traditional federalism principles demonstrate that state Internet regulation may be preferable to a federal scheme.

Part II of this Note begins with an overview of the Internet's operation and the concept of net neutrality. An understanding of how the Internet works is critical to apprehending its intersection with the law. Next, Part II will review the regulatory history of the Internet and net neutrality. Part II will end with a summary of the various state regulatory approaches taken thus far. Part III will first evaluate the preemption of state net neutrality regulation and conclude that preemption is inevitable. Then, Part III will reexamine the congressional scheme for Internet regulation and argue that it should either be updated to comport with the present Internet market or abrogated. Finally, Part III will consider state net neutrality regulation apart from the strictures of telecommunications law and against the dormant Commerce Clause and federalism principles. Part III will conclude that state net neutrality regulation is not proscribed by the dormant Commerce Clause and is encouraged by federalism principles. Part IV will summarize and conclude the Note.

II. BACKGROUND

A. THE INTERNET

1. *How Does the Internet Work?*

To appropriately consider Internet regulation, it is critical to first understand, at a surface level, how the Internet operates.²¹ Further, to appreciate the concept of net neutrality, it is imperative to understand the operation of the Internet's most popular component: the World Wide Web.²²

²⁰ See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787 (2001) (“[T]he dormant Commerce Clause, properly understood, leaves states with much more flexibility to regulate Internet transactions than is commonly thought.”).

²¹ See Michael W. Loudenslager, *Allowing Another Policeman on the Information Superhighway: State Interests and Federalism on the Internet in the Face of the Dormant Commerce Clause*, 17 B.Y.U. J. PUB. L. 191, 195 (2003) (“One must understand how the Internet operates to appreciate fully the issues posed by state regulation . . .”).

²² See *id.* at 201 (noting that the World Wide Web “is the most widely used part of the Internet”).

Fundamentally, the Internet is an “interconnected network of networks.”²³ This network consists of connected computers and devices, each of which has a unique Internet Protocol (IP) address.²⁴ An Internet communication occurs when one device requests data from another device, and the queried device correspondingly transmits the data back in the form of *packets*.²⁵ Packet transport is made possible by network *routers*, which are specialized computers between a source and destination that discern a packet’s destination address and help carry the packet toward it.²⁶ Successful communication further depends upon an Internet protocol suite, labeled the Transmission Control Protocol/Internet Protocol (TCP/IP), which helps routers coordinate with one another and ensure that packets arrive in the proper form.²⁷

Though a direct connection to the Internet is possible,²⁸ most users rely on *access networks* to “bridge the ‘last-mile’ gap between them and the rest of the Internet.”²⁹ These access networks are typically operated by ISPs, who supply users with a modem.³⁰ There are many different ISPs connecting users to the Internet, but users typically want access to the entire Internet—not just connections directly provided by their ISP.³¹ Hence, the Internet requires

²³ NUECHTERLEIN & WEISER, *supra* note 19, at 165.

²⁴ *See id.* at 166 (noting the function of IP addresses); Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1838 (2011) (“[A]n IP address is assigned to a specific computer or internet device in order to allow it access to the Internet.”).

²⁵ *See* NUECHTERLEIN & WEISER, *supra* note 19, at 166–67 (discussing the transmission of Internet packets between IP addresses); David D. Clark & Susan Landau, *Untangling Attribution*, 2 HARV. NAT’L SECURITY J. 323, 326 (2011) (“The data transport service of the Internet is based on *packets*—small units of data prefixed with delivery instructions. The analogy often used to describe a packet is an envelope, with an address on the outside and data on the inside.”).

²⁶ *See* NUECHTERLEIN & WEISER, *supra* note 19, at 167 (describing routers as “packet switches” that ensure efficient transmission); Clark & Landau, *supra* note 25, at 326 (describing the integral relay role routers play in an Internet communication).

²⁷ *See* NUECHTERLEIN & WEISER, *supra* note 19, at 166–67 (“[A]ll ‘computers’ connected to the Internet speak the same IP-based logical-layer language. . . . The ‘TCP’ part of the TCP/IP suite governs the assembly and reassembly of the data at each end . . . and the ‘IP’ part is responsible for routing data from one node to another.”).

²⁸ *See* Jonathan Bick, *Implementing E-Commerce Tax Policy*, 13 HARV. J.L. & TECH. 597, 611 (2000) (“Although it is possible to have a direct connection to the Internet, most users gain access to the Internet through ISPs.”).

²⁹ NUECHTERLEIN & WEISER, *supra* note 19, at 178.

³⁰ *See id.* at 178–80 (noting the ISP operation of access networks and provision of Internet access via modems).

³¹ *See id.* at 178 (“Whenever you use the Internet, you expect your ISP to provide access to the entire Internet, including all public websites and email addresses.”).

extraordinary interconnection and cooperation among ISPs to function properly.³² Accordingly, ISPs typically engage in *peering* or *transit* agreements, which allow for mass interconnection.³³

The most popular feature of the Internet is the World Wide Web (Web).³⁴ The Web and the Internet are not synonymous;³⁵ rather, the Web is a particular application which “rides on top of the Internet’s lower-layer TCP/IP protocols and serves as a platform in its own right.”³⁶ The Web consists of *clients*, the devices of end users who request information from websites, and *servers*, the computers responsible for hosting websites.³⁷ To view websites, client devices have specific software, known as *browsers*, which translate client requests into code that servers can understand, and then translate server responses into “sights, words, and sounds” clients can understand.³⁸

Like any device connected to the Internet, servers have their own IP addresses which appear on the Web textually in the form of *domain names*, and all IP address and domain name pairings reside on a computer called a *domain name server* (DNS).³⁹ To access a particular website, a user must type the server’s *uniform resource locator* (URL), which contains a website’s domain name, into their browser.⁴⁰ Then, the client computer contacts the DNS to retrieve the server’s IP address and sends packets containing the user’s

³² See Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1299 (2010) (“[F]or content generated by affiliated or unaffiliated ventures located elsewhere, the ISP must interconnect with other ISPs to secure access via their networks that eventually reach the source of content and establish a complete link.”).

³³ See NUCHECHTERLEIN & WEISER, *supra* note 19, at 178 (“To satisfy that expectation, your ISP enters into various *peering* and *transit* arrangements with other IP networks”); Frieden, *supra* note 32, at 1299, 1309 (“Unaffiliated ISPs agree to reciprocal traffic routing duties, commonly referred to as *peering* ISPs interconnect their networks with the networks of other ISPs, a process that collectively makes it possible to provide all subscribers with access to any other subscriber and sources of content within the Internet cloud.”).

³⁴ See NUCHECHTERLEIN & WEISER, *supra* note 19, at 170–73 (profiling the Web’s origins and meteoric rise to popularity).

³⁵ See *id.* at 171 (“Some people still confuse the Internet with the Web, but this is a bit like confusing the Windows operating system with the Microsoft Word program that runs on top of it.”).

³⁶ *Id.*

³⁷ See *id.* at 167 (explaining the roles of clients and servers on the Web).

³⁸ *Id.* at 167, 171.

³⁹ See *id.* at 166 (describing website domain names and domain name servers).

⁴⁰ See Loudenslager, *supra* note 21, at 202 (explaining URLs in a Web transmission).

request to the server.⁴¹ After receiving the client's inquiry, the server sends back a burst of packets which contain the website's information.⁴² To fashion the desired webpage out of the received packet, clients rely on *hypertext mark-up language* (HTML),⁴³ which tells devices "how to display a document."⁴⁴ Finally, like other Internet communications, Web transmissions rely on protocols known as *hypertext transport protocols* (HTTP), which establish the transmission procedures between a Web server and its clients.⁴⁵

Altogether, these processes yield the Internet. While the above is only a cursory outline of this complex mosaic, it serves to unveil the concrete skeleton supporting the Internet. As later discussion will bear out, this physical dimension materially affects jurisdiction over the Internet.

2. What Is Net Neutrality?

By serving as a conduit for Internet connectivity, ISPs inherently act as Web content providers.⁴⁶ ISPs provide some content of their own, predominantly in the form of information contained on an ISP "home page."⁴⁷ In addition, by entering into and maintaining agreements with other telecommunications providers, ISPs deliver content hosted by other servers.⁴⁸ Therefore, whether actualized or not, ISPs have the capacity to control most of the user Web experience.⁴⁹

Fear of totalitarian ISPs engendered the concept of net neutrality.⁵⁰ "Network neutrality," a term coined and popularized

⁴¹ See NUECHTERLEIN & WEISER, *supra* note 19, at 166 (describing how users request information from websites).

⁴² See *id.* at 167 (describing how a Web server responds to a client's request).

⁴³ See *id.* at 170–71 (noting the role of HTML in the presentation of a webpage).

⁴⁴ Loudenslager, *supra* note 21, at 262 (footnote omitted).

⁴⁵ See NUECHTERLEIN & WEISER, *supra* note 19, at 170 (explaining the function of HTTP).

⁴⁶ See Frieden, *supra* note 32, at 1286 (describing ISPs as both conduits and content providers).

⁴⁷ See *id.* at 1299 (discussing direct Internet content provided by ISPs).

⁴⁸ See NUECHTERLEIN & WEISER, *supra* note 19, at 178 (explaining how access to all of the Internet's content is made possible only through ISP agreements with one another).

⁴⁹ See Frieden, *supra* note 32, at 1300 ("Because of the close integration of content and conduit, ISPs increasingly have incentives and opportunities to provide any of the component elements of so-called Internet access in a non-neutral manner.")

⁵⁰ See Wu, *supra* note 2, at 142 ("Government regulation in such contexts invariably tries to help ensure that the short-term interests of the owner do not prevent the best products or applications becoming available to end-users.")

by Professors Tim Wu and Lawrence Lessig,⁵¹ espouses that the Internet should remain an open, Darwinian space where the best content and applications emerge as a result of user preference rather than provider favoritism.⁵² Net neutrality is grounded in the *end-to-end* design principle that shaped the original development of the Internet.⁵³ This principle is responsible for the Internet's open architecture, and "means that packets are delivered on a first-come, first-served basis without regard to their content, origin, or destination and are free from any intermediate error checking or filtering."⁵⁴ In other words, end-to-end proclaims that the Internet's various IP networks should remain "dumb," in that they do not "know" packet contents, treat all packets the same, and leave the "intelligence" to the end users.⁵⁵

Most would agree that the Internet should be competitive and consumer-driven, yet there is broad disagreement over whether net neutrality regulation advances these objectives.⁵⁶ The Pai FCC, for one, believes that net neutrality regulation stifles Internet investment, innovation, and options for consumers.⁵⁷ Further, from a technical perspective, absolute ISP agnosticism toward packet contents would be ludicrous; some Internet content requires special

⁵¹ See NUCHESTERLEIN & WEISER, *supra* note 19, at 197 (noting the pivotal role that Wu and Lessig played in the genesis of net neutrality).

⁵² See Wu, *supra* note 2, at 141–45 (explaining the concept of net neutrality).

⁵³ See NUCHESTERLEIN & WEISER, *supra* note 19, at 197 ("These early advocates based the net neutrality concept loosely on the *end-to-end* design principle . . ."); Wu, *supra* note 2, at 146 ("Internet Darwinians argue that their innovation theory is embodied in the 'end-to-end' design . . .").

⁵⁴ NUCHESTERLEIN & WEISER, *supra* note 19, at 168.

⁵⁵ *Id.* at 197.

⁵⁶ See RIFO, *supra* note 1, para. 117 ("ISPs have strong incentives to preserve Internet openness, and these interests typically outweigh any countervailing incentives an ISP might have. Consequently, [net neutrality] regulation is an unduly heavy-handed approach to what, at worst, are relatively minor problems." (footnote omitted)); Rob Frieden, *Rationales for and Against Regulatory Involvement in Resolving Internet Interconnection Disputes*, 14 YALE J.L. & TECH. 266, 269 (2012) ("The variability of competitiveness in the market for upstream and downstream Internet access has motivated some stakeholders to claim that national regulatory authorities . . . should intervene to remedy market failures and existing or potential anticompetitive practices." (footnote omitted)).

⁵⁷ See Restoring Internet Freedom Notice of Proposed Rulemaking, 32 FCC Rcd. 4434, para. 5 (May 23, 2017) ("By proposing to end the utility-style regulatory approach that gives government control of the Internet, we aim to restore the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for consumers put into motion by the FCC in 2015."); Rob Frieden, *Freedom to Discriminate: Assessing the Lawfulness and Utility of Biased Broadband Networks*, 20 VAND. J. ENT. & TECH. L. 655, 678–79 (2018) (discussing the FCC's conclusion that net neutrality regulation imposed "substantial marketplace harms").

handling to function properly.⁵⁸ For example, ISPs that offer a bundle of voice, video, and Internet service over a single IP platform routinely mark the IP packets associated with “video” services separately from other packets to ensure a high quality video stream.⁵⁹ Without this special handling, the video IP packets would no longer be prioritized and video service would “vary radically with the degree of network congestion.”⁶⁰ Hence, wholly blind packet control would hamstring some of the Internet’s most valuable features.

The public spotlight is centered on this debate;⁶¹ thus, it merits acknowledgement. Nevertheless, this Note will not take sides; it only concerns whether states possess authority to enact net neutrality regulations. To complete the framing of this question, this Note will next present a brief rundown of Internet regulation.

B. REGULATION OF THE INTERNET

1. Federal Regulation.

Unfortunately, Internet regulation is no less enigmatic than the operation of the Internet itself. This complexity flows from the laws governing federal Internet regulation: the Communications Act of 1934 and Telecommunications Act of 1996.⁶² The Telecommunications Act amended the Communications Act,⁶³ the FCC’s enabling statute.⁶⁴ When the Telecommunications Act was drafted, broadband Internet was in its infancy and Congress did not anticipate the Internet explosion that followed.⁶⁵ As a result, the

⁵⁸ See NUECHTERLEIN & WEISER, *supra* note 19, at 197 (“[N]o one familiar with engineering realities would seriously argue that all IP networks should always be oblivious to the types of content contained in IP packets; some content requires special handling to function properly and some does not.”).

⁵⁹ See *id.* at 206–07 (describing the “*managed or specialized IP services*” employed by ISPs to deliver high quality service, like reliable video streams).

⁶⁰ *Id.* at 207.

⁶¹ See, e.g., Cecilia Kang, *Net Neutrality Hits a Nerve, Eliciting Intense Reactions*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/technology/net-neutrality-reaction.html> (describing the public debate over net neutrality).

⁶² See NUECHTERLEIN & WEISER, *supra* note 19, at 231–32 (noting the “legal and political quagmire” created by the Acts).

⁶³ Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (1996).

⁶⁴ See 47 U.S.C. § 151 (2012) (“[T]here is created a commission to be known as the ‘Federal Communications Commission,’ which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.”).

⁶⁵ See NUECHTERLEIN & WEISER, *supra* note 19, at 230–32 (discussing the 1996 Act’s premature treatment of the Internet).

Acts constitute an awkward vehicle for modern Internet regulation.⁶⁶

Central to understanding Internet regulation under the Acts is the distinction between *telecommunications services* and *information services*.⁶⁷ Telecommunications are *basic* services, meaning there is pure transmission “without change in the form or content of the information.”⁶⁸ Telecommunications services offer those basic services at common carriage.⁶⁹ Information services, on the other hand, are *enhanced* services, meaning there is significant provision or manipulation of data involved in the transmission.⁷⁰ Telecommunications services are subject to common carrier regulation under Title II of the Communications Act, whereas Title I takes a deregulatory approach toward information services.⁷¹

Given the contrast between Title I and Title II, the form of Internet regulation materially depends on whether the Internet is

⁶⁶ See *id.* at 231 (“If Congress had waited just two or three years past 1996 to codify its core definitional concepts, it presumably would have been clearer about exactly where such ‘broadband Internet access’ fits within the larger statutory framework.”).

⁶⁷ See *id.* at 189–90 (noting this distinction is central to regulatory debates about the Internet).

⁶⁸ 47 U.S.C. § 153(50) (2012); see also NUECHTERLEIN & WEISER, *supra* note 19, at 190 (describing telecommunications as basic services). Common carriage refers to communications by a “common carrier,” which is “a commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee.” *Carrier*, BLACK’S LAW DICTIONARY (11th ed. 2019). This term is a holdover from centuries-old transportation law, charging certain transportation businesses, like port operators and trains, with “a duty to serve all comers and serve them equally.” Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 878 (2009). The label found its way into communications law because of railroads—Congress tasked the Interstate Commerce Commission (ICC) with regulating railroads, telephones, and telegraphs and elected to treat all industries under the same framework. *Id.* at 880. The significance of common carrier designation is found in the non-discrimination rules that apply to them. *Id.* Namely, common carriers must “grant access to their property on equal terms without discriminating among applications.” Thomas B. Nachbar, *The Public Network*, 17 J. COMM. L. & POL’Y 67, 70 (2008) (citing *Interstate Commerce Comm’n v. Balt. & Ohio R.R. Co.*, 145 U.S. 263, 275 (1892)). As Professor Crawford writes: “Operators of physical transportation networks (for both tangible and intangible goods) have been traditionally been subjected to non-discrimination obligations because of their ‘public,’ transportation-related character. Under the [Acts], communications network providers came to be understood as ‘common carriers.’” Crawford, *supra*, at 882.

⁶⁹ 47 U.S.C. § 153(53) (2012); see also NUECHTERLEIN & WEISER, *supra* note 19, at 190 (describing telecommunications services).

⁷⁰ 47 U.S.C. § 153(24) (2012); see also NUECHTERLEIN & WEISER, *supra* note 19, at 190 (describing information services and the “significant provision or manipulation of data” occurring therein).

⁷¹ See NUECHTERLEIN & WEISER, *supra* note 19, at 190 (describing the Title I and Title II regulatory distinctions).

classified as a telecommunications or information service.⁷² Accordingly, to circumvent Title I impotence, the foundation of past net neutrality initiatives has been the classification of broadband Internet service as a telecommunications service.⁷³ The FCC initially remained mute on the issue, but broke silence in 2002 with its Cable Broadband Order.⁷⁴ In this Order, the FCC concluded that cable modem service is an information service under Title I,⁷⁵ and further, that information services and telecommunications services are “mutually exclusive categories of service.”⁷⁶

The heart of the Internet regulation debate spanning the past twenty years has been whether broadband Internet service should be classified as a Title I information service or a Title II telecommunications service.⁷⁷ Much like the validity of net neutrality regulations themselves, the classification of broadband Internet is dispositive on the question of federal preemption of state law.⁷⁸ Information services have long been accompanied by a federal policy of deregulation, and courts have consistently read this policy to preempt conflicting state and local law.⁷⁹ This policy predates the modern Internet and emanates from the *Computer Inquiries*, a series of three FCC initiatives in the 1970s and 1980s.⁸⁰

In *Computer I*, the FCC bifurcated “pure communications” (basic telecommunications services) from “pure data processing” (enhanced/information services),⁸¹ and mandated that data

⁷² See Frieden, *supra* note 56, at 287 (discussing the dispositive importance of this “threshold determination”).

⁷³ See NUCHESTERLEIN & WEISER, *supra* note 19, at 193–94 (noting attempts by net neutrality advocates to classify broadband services as telecommunications services subject to common carrier regulation under Title II).

⁷⁴ Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798 (2002) [hereinafter Cable Broadband Order]; see also NUCHESTERLEIN & WEISER, *supra* note 19, at 194 (describing the FCC silence prior to the Cable Broadband Order).

⁷⁵ Cable Broadband Order, *supra* note 74, para. 38.

⁷⁶ *Id.* para. 41.

⁷⁷ See NUCHESTERLEIN & WEISER, *supra* note 19, at 236–41 (profiling the persistent fight over broadband classification).

⁷⁸ See *id.* at 190 (noting the stark contrast in policies for information services and telecommunications services).

⁷⁹ See, e.g., *Minn. Pub. Util. Comm’n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (“[A]ny state regulation of an information service conflicts with the federal policy of nonregulation.”).

⁸⁰ See NUCHESTERLEIN & WEISER, *supra* note 19, at 190 (“The origins of the government’s deregulatory approach to information services go back to the *Computer Inquiries*.”).

⁸¹ See Tentative Decision of the Commission, 28 F.C.C.2d 291, para. 15 (Apr. 3, 1970) [hereinafter Computer I Tentative Decision] (describing how data processing services are distinct from other communications services); Robert Cannon, *The Legacy of the Federal*

processing services be free from common carrier regulation.⁸² The FCC installed this deregulatory policy because the threat of monopolies in the 1970s data processing market was low, and providers were largely responsible for technological innovation in the field; thus, the Commission concluded that “the market for these services will continue to burgeon and flourish best in the existing competitive environment.”⁸³ This policy was reaffirmed by the FCC in *Computer II*, noting that “the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network.”⁸⁴ The FCC made several structural changes in *Computer III* but still retained this deregulatory policy for enhanced services, and at any rate, this policy has been read to preempt state regulation that obtrudes such deregulation.⁸⁵

Under Title II, it appears that states have slightly more—but still narrow—regulatory space.⁸⁶ The language of sections 230 of the Communications Act and 706 of the Telecommunications Act suggest a cooperative federalist approach to Internet regulation,⁸⁷

Communications Commission’s Computer Inquiries, 55 FED. COMM. L.J. 167, 174 (2003) (describing the difference between pure communications and pure data processing).

⁸² See *Computer I* Tentative Decision, *supra* note 81, paras. 20–24 (explaining the deregulatory policy for data processing services); Final Decision and Order, 28 F.C.C.2d 267, paras. 29–31 (Mar. 18, 1971) (affirming the deregulatory policy for data processing services).

⁸³ *Computer I* Tentative Decision, *supra* note 81, paras. 21–22.

⁸⁴ *Second Computer Inquiry*, 77 F.C.C.2d 384, paras. 7, 127–32 (May 2, 1980) [hereinafter *Computer II*].

⁸⁵ See *California v. FCC*, 39 F.3d 919, 931–33 (9th Cir. 1994) (finding that the FCC has authority under *Computer III* to preempt state regulation of enhanced services by communications common carriers); NUECHTERLEIN & WEISER, *supra* note 19, at 191–92 (“[P]erhaps the most enduring legacy of *Computer III* is the FCC’s decision to maintain federal jurisdiction over enhanced services under Title I . . . and to preempt state regulation of most such services to ensure a deregulatory environment for the fledgling Internet industry.” (footnote omitted)).

⁸⁶ See Tejas N. Narechania, *Federal and State Authority for Broadband Regulation*, 18 STAN. TECH. L. REV. 456, 492 (2015) (“[W]hether a statute so capricious and broadly worded as section 706 authorizes the Commission to preempt state laws is subject to debate.” (footnote omitted)).

⁸⁷ See 47 U.S.C. § 230 (2012) (“It is the policy of the United States . . . to promote the continued development of the Internet . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . to encourage the development of technologies which maximize user control over what information is received by individuals *Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.*” (emphasis added)); Telecommunications Act of 1996, Pub. L. No. 104–104, § 706(a), 110 Stat. 56, 153 (1996) (“The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap

but courts have routinely found state laws preempted by Title II.⁸⁸ Some have read this Title II language as a grant for states to enact net neutrality regulation,⁸⁹ but after the RIFO reclassification, these arguments are moot.

The FCC made several attempts to impose net neutrality rules in the 2000s,⁹⁰ but all were struck down by the U.S. Court of Appeals for the D.C. Circuit in 2010 because the FCC lacked the requisite regulatory authority under Title I.⁹¹ The FCC responded to this ruling by issuing the *Open Internet Order* later that year, which imposed three basic rules on Internet providers: (1) “transparency,” (2) “no blocking,” and (3) “no unreasonable discrimination.”⁹² Just before the *Open Internet Order* was released, many commenters pushed for the reclassification of broadband Internet access as a Title II telecommunications service.⁹³ Others, including some within the FCC, proposed a “third way,” whereby the FCC would reclassify only the transmission components of broadband Internet as a Title II telecommunications service, and use its forbearance authority to ensure that only a handful of Title II regulations

regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” (emphasis added)).

⁸⁸ See Narechania, *supra* note 86, at 492–96 (explaining the expansive preemptive reach granted to the FCC under section 706); Jonathan Jacob Nadler, *Give Peace a Chance: FCC-State Relations After California III*, 47 FED. COMM. L.J. 457, 487, 498 (1995) (noting the willingness of courts to support FCC preemption of state law under Title II, insofar as the FCC is acting within the scope of its specifically delegated authority).

⁸⁹ See, e.g., Narechania, *supra* note 86, at 495 (“[T]he grant of power to state commissions might be used to promulgate network neutrality-like regulations at the state level.”).

⁹⁰ E.g., Memorandum Opinion and Order, Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Red. 13028, paras. 41–48 (Aug. 20, 2008); Notice of Inquiry, Broadband Industry Practices, 22 FCC Red. 7894, paras. 2–4 (Apr. 16, 2007); Policy Statement, 20 FCC Red. 14986, paras. 4–5 (Sept. 23, 2005).

⁹¹ See *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010) (“[I]n its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a ‘telecommunications service’ covered by Title II . . . nor a ‘cable service’ covered by Title VI.”).

⁹² Preserving the Open Internet, Report and Order, 25 FCC Red. 17905, para. 1 (Dec. 23, 2010) [hereinafter *Open Internet Order*].

⁹³ See, e.g., Statement of Julius Genachowski, FCC Chairman, *The Third Way: A Narrowly Tailored Broadband Framework 5* (May 6, 2010) [hereinafter *Genachowski Speech*] (“Recognize the transmission component of broadband access service . . . as a telecommunications service.”); see also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005) (“[T]he Commission is free within the limits of reasoned interpretation to change course . . .”).

applied to broadband.⁹⁴ This alternative met harsh criticism,⁹⁵ and was dismissed by the FCC in the 2010 Order.⁹⁶ Instead of classifying ISPs as common carriers, the FCC imposed net neutrality principles under section 706.⁹⁷ The FCC read section 706 as a directive to “promote the deployment of advanced services, including by means of the open Internet rules.”⁹⁸ Section 706 appears within Title II of the 1996 Act, but the FCC assured commenters that the fulfillment of an obligation under Title II did not entail common carrier treatment for ISPs.⁹⁹

This assurance was not the palliative the FCC had envisioned,¹⁰⁰ and in 2014, the D.C. Circuit struck down all but the transparency requirement of the Open Internet Order.¹⁰¹ Echoing prior decisions, the court in *Verizon* vacated the no-blocking and no unreasonable discrimination requirements because the FCC, due to broadband Internet’s information service classification, could not regulate ISPs as common carriers.¹⁰² Afterward, the FCC declined to appeal *Verizon* and opened a new proceeding to pursue net neutrality regulations.¹⁰³ The FCC solicited comments on, inter alia, whether it should reclassify broadband Internet service as a Title II

⁹⁴ See NUECHTERLEIN & WEISER, *supra* note 19, at 236 (discussing this “third way” approach); Framework for Broadband Internet Service, 25 FCC Rcd. 7866, paras. 28–30 (July 15, 2010) (discussing the “third way”); Genachowski Speech, *supra* note 93, at 5 (describing the narrow broadband reclassification and forbearance authority).

⁹⁵ See NUECHTERLEIN & WEISER, *supra* note 19, at 236–38 (noting the comments and litigation opposing this approach).

⁹⁶ See *id.* at 239–41 (noting the FCC’s decision to suspend its “third way” initiative in the Open Internet Order).

⁹⁷ See Open Internet Order, *supra* note 92, paras. 117–23 (“Section 706 of the 1996 Act Provides Authority for the Open Internet Rules.”); NUECHTERLEIN & WEISER, *supra* note 19, at 239 (“[T]he *Open Internet Order* relied heavily on section 706(a) of the 1996 Act.”).

⁹⁸ Open Internet Order, *supra* note 92, para. 122.

⁹⁹ See *id.* para. 79 n.250 (“Just because an obligation appears within Title II does not mean that the imposition of that obligation or a similar one results in ‘treating’ an entity as a common carrier.”).

¹⁰⁰ See NUECHTERLEIN & WEISER, *supra* note 19, at 238–41 (discussing the controversy sparked by the Open Internet Order).

¹⁰¹ *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014) (“[W]e vacate both the anti-discrimination and the anti-blocking rules.”).

¹⁰² See *id.* at 628 (“Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the *Open Internet Order*.”).

¹⁰³ New Docket Established to Address Open Internet Remand, 29 FCC Rcd. 1746(3) (Feb. 19, 2014).

telecommunications service.¹⁰⁴ Broad public debate followed, and certain websites collectively participated in an “Internet slowdown” to simulate the Internet without net neutrality.¹⁰⁵ Perhaps the most notable commenter was then-President Obama, who released a video urging the FCC to reclassify broadband Internet as a Title II telecommunications service.¹⁰⁶ In response, future President Donald J. Trump tweeted, “Obama’s attack on the internet is another top down power grab. Net neutrality is the Fairness Doctrine. Will target conservative media.”¹⁰⁷

On March 12, 2015, the FCC, led by Chairman Tom Wheeler, issued its final rule, titled *Protecting and Promoting the Open Internet*.¹⁰⁸ In this Order, the FCC reclassified broadband Internet access service as a telecommunications service under Title II common carrier control.¹⁰⁹ To the chagrin of ISPs and the delight of many others, this move empowered the FCC to impose more exacting net neutrality requirements on ISPs.¹¹⁰ With this newfound authority, the FCC promulgated three rules to restrict ISP behavior: no blocking, throttling, or paid prioritization.¹¹¹ First, blocking occurs when an ISP prohibits a user from accessing a

¹⁰⁴ See Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Red. 5561, para. 148 (May 15, 2014) (explaining the FCC’s desire for public comments on potential reclassification).

¹⁰⁵ See Simone A. Friedlander, *Net Neutrality and the FCC’s 2015 Open Internet Order*, 31 BERKELEY TECH. L.J. 905, 909 (2016) (noting the Internet slowdown effort by sites such as Reddit and Netflix).

¹⁰⁶ See Edward Wyatt, *Obama Asks F.C.C. to Adopt Tough Net Neutrality Rules*, N.Y. TIMES (Nov. 10, 2014), <https://www.nytimes.com/2014/11/11/technology/obama-net-neutrality-fcc.html> (noting Obama’s drive for reclassification).

¹⁰⁷ Donald Trump (@realDonaldTrump), TWITTER (Nov. 12, 2014, 10:58 AM), https://twitter.com/realDonaldTrump/status/532608358508167168?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E532608358508167168&ref_url=https%3A%2F%2Fwww.recode.net%2F2016%2F11%2F9%2F13570340%2Ftrump-president-policy-regulation-net-neutrality-fcc.

¹⁰⁸ *Protecting and Promoting the Open Internet*, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, 20) [hereinafter 2015 Open Internet Order].

¹⁰⁹ See *id.* at 19,786 (“[W]e . . . conclude that broadband Internet access service is a telecommunications service subject to our regulatory authority under Title II of the Communications Act regardless of the technological platform over which the service is offered.”).

¹¹⁰ See Marguerite Reardon, *What You Need to Know About the FCC’s 2015 Net Neutrality Regulation*, CNET (Mar. 14, 2015, 5:00 AM), <https://www.cnet.com/news/13-things-you-need-to-know-about-the-fccs-net-neutrality-regulation/> (describing the FCC’s reclassification as a “lightning rod for controversy”).

¹¹¹ See 2015 Open Internet Order, *supra* note 108, at 19,738 (“[W]e adopt carefully-tailored rules that would prevent specific practices we know are harmful to Internet openness—blocking, throttling, and paid prioritization . . .”).

lawful destination on the Internet.¹¹² Second, throttling refers to the “degrading of Internet traffic based on source, destination, or content,” and “conduct that singles out content competing with a broadband provider’s business model.”¹¹³ Third:

“Paid prioritization” refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.¹¹⁴

Altogether, the 2015 rules restricted ISP behavior to an unprecedented degree, and ISPs were appalled by the FCC’s judgment.¹¹⁵ USTelecom challenged the Order in the D.C. Circuit soon after it was published,¹¹⁶ arguing that the agency’s action was “arbitrary, capricious, and an abuse of discretion.”¹¹⁷ In a victory for net neutrality, the court upheld the FCC’s reclassification of broadband,¹¹⁸ but this did little to quell the controversy.¹¹⁹

The 2016 presidential election placed the net neutrality debate front and center: Hillary Clinton vowed to protect net neutrality, and, though Donald Trump did not have a clear plan, the established GOP position was anti-regulation.¹²⁰ Shortly after his

¹¹² *Id.* at 19,740 (describing blocking and the blocking ban).

¹¹³ *Id.* (footnote omitted).

¹¹⁴ *Id.*

¹¹⁵ See Don Reisinger, *Net Neutrality Rules Get Published – Let the Lawsuits Begin*, CNET (Apr. 13, 2015, 1:52 PM), <https://www.cnet.com/news/fccs-net-neutrality-rules-hit-federal-register-lawsuit-underway/> (describing the fury of ISPs in response to the 2015 rules).

¹¹⁶ The U.S. Telecommunication Association is a representative trade association for the telecommunications industry. See Friedlander, *supra* note 105, at 925 n.144 (explaining USTelecom).

¹¹⁷ See *id.* at 925 (describing USTelecom’s challenge to the 2015 rules).

¹¹⁸ See *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (“[T]he Commission has statutory authority to classify broadband as a telecommunications service.”).

¹¹⁹ See Alina Selyukh, *U.S. Appeals Court Upholds Net Neutrality Rules in Full*, NPR (June 14, 2016, 10:42 AM), <https://www.npr.org/sections/thetwo-way/2016/06/14/471286113/u-s-appeals-court-holds-up-net-neutrality-rules-in-full> (“[T]he telecom industry is expected to continue battling the regulations in Congress and before the nation’s higher court . . .”).

¹²⁰ See Jon Brodtkin, *Hillary Clinton vs. Donald Trump on Broadband: She Has a Plan, He Doesn’t*, ARS TECHNICA (Oct. 10, 2016, 8:30 AM), <https://arstechnica.com/tech-policy/2016/10/hillary-clinton-vs-donald-trump-on-broadband-she-has-a-plan-he-doesnt/> (noting the partisan split on net neutrality); Adrienne LaFrance, *Will Donald Trump*

inauguration, President Trump appointed Ajit Pai as the head of the FCC, a move that placed the 2015 net neutrality rules in clear jeopardy.¹²¹ Pai, who was appointed to the FCC in 2012 by then-President Obama, dissented in the passing of the 2015 rules¹²² and vowed to take a “weed whacker” to the regulations after President Trump took office.¹²³

On May 18, 2017, the FCC moved forward with Pai’s Notice of Proposed Rulemaking on *Restoring Internet Freedom*.¹²⁴ In this proposal, the FCC posited a rescission of the 2015 Title II reclassification, a return to Title I classification, the imposition of 2010-esque transparency rules, and the elimination of ISP conduct rules.¹²⁵ The plethora of public comments evinced the controversy of the FCC’s proposal, though the authenticity of the comments also faced controversy.¹²⁶ Nevertheless, the FCC voted along party lines to approve RIFO and the decision officially took effect on June 11, 2018.¹²⁷

Dismantle the Internet as We Know It?, ATLANTIC (Dec. 5, 2016), <https://www.theatlantic.com/technology/archive/2016/12/trump-net-neutrality-mystery/509564/> (discussing the position of the Republican platform).

¹²¹ See Harper Neidig, *GOP Expects Sweeping Change at Trump’s FCC*, HILL (Jan. 26, 2017, 6:00 AM), <https://thehill.com/policy/technology/316203-gop-expects-sweeping-change-at-trumps-fcc> (describing the likely outlook of net neutrality in light of Pai’s appointment).

¹²² Dissenting Statement of Commissioner Ajit Pai, 30 FCC Rcd. 8072 (July 10, 2015).

¹²³ See Jon Brodtkin, *FCC’s Ajit Pai Says Net Neutrality’s “Days Are Numbered” Under Trump*, ARS TECHNICA (Dec. 8, 2016, 12:19 PM), <https://arstechnica.com/information-technology/2016/12/fccs-ajit-pai-says-net-neutralities-days-are-numbered-under-trump/> (describing Pai’s fierce opposition to the net neutrality rules previously in place).

¹²⁴ Notice of Proposed Rulemaking, *Restoring Internet Freedom*, 32 FCC Rcd. 4434 (May 23, 2017).

¹²⁵ See RIFO, *supra* note 1, paras. 2–4 (describing RIFO’s objectives).

¹²⁶ See Jon Brodtkin, *FCC Explains Why Public Support for Net Neutrality Won’t Stop Repeal*, ARS TECHNICA (Nov. 22, 2017, 4:08 PM), <https://arstechnica.com/tech-policy/2017/11/why-the-fcc-ignored-public-opinion-in-its-push-to-kill-net-neutrality/> (“While most of the 22 million public comments on the plan were spam and form letters, a study funded by the broadband industry found that 98.5 percent of unique comments supported the current rules.”).

¹²⁷ See Keith Collins, *Net Neutrality Has Officially Been Repealed. Here’s How That Could Affect You*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/technology/net-neutrality-repeal.html>; see also Brian Fung, *The FCC Just Voted to Repeal Its Net Neutrality Rules, in a Sweeping Act of Deregulation*, WASH. POST (Dec. 14, 2017, 1:12 PM), https://www.washingtonpost.com/news/the-switch/wp/2017/12/14/the-fcc-is-expected-to-repeal-its-net-neutrality-rules-today-in-a-sweeping-act-of-deregulation/?noredirect=on&utm_term=.820b0898008e (recounting the FCC’s final decision to repeal the 2015 rules despite public opposition).

2. State Backlash and Regulation.

The controversy surrounding RIFO continued after enactment, and the FCC's new rule was challenged almost immediately.¹²⁸ These challenges included a congressional effort to overturn RIFO,¹²⁹ and a lawsuit filed by more than twenty states against its enforcement.¹³⁰ The most interesting development—the subject of this Note—has been the respective attempts by four states to pass net neutrality laws of their own.¹³¹

So far, California,¹³² Oregon,¹³³ Vermont,¹³⁴ and Washington have passed such laws.¹³⁵ These laws largely mirror the 2015 FCC rules with a few individual differences.¹³⁶ All regulate the ISP provision of Internet service within state lines,¹³⁷ and Oregon limits its regulation to ISPs that have contracted with state “public bodies.”¹³⁸ Further, all prohibit ISPs from engaging in blocking, throttling, and paid prioritization.¹³⁹ California goes one step further and explicitly proscribes “zero-rating,” a practice whereby ISPs exempt certain content or applications from counting toward a user’s data cap, thus granting users unlimited access to specified content and limited access to all other content.¹⁴⁰

¹²⁸ See *supra* note 5 and accompanying text.

¹²⁹ See Hendel & Gold, *supra* note 5 (reporting the congressional challenge to the FCC repeal).

¹³⁰ See Shaban & Fung, *supra* note 5 (noting the combined effort of states and public interest groups to block the FCC repeal).

¹³¹ See Kang, *supra* note 7 (detailing the trend of state net neutrality legislation).

¹³² S.B. 822, 2017–2018 Reg. Sess. (Cal. 2018).

¹³³ H.B. 4155, 79th Leg. Assemb., 2018 Reg. Sess. (Or. 2018).

¹³⁴ S.289, No. 169, 2018 Sess. (Vt. 2018).

¹³⁵ H.B. 2282, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

¹³⁶ See Harper Neidig, *States Defy FCC Repeal of Net Neutrality*, HILL (June 5, 2018), <https://thehill.com/regulation/technology/390674-states-defy-fcc-repeal-of-net-neutrality> (describing the similarities between the state laws and the 2015 FCC rules).

¹³⁷ See S.B. 822, 2017–2018 Reg. Sess., at 6447 (Cal. 2018) (“Internet service provider’ means a business that provides broadband Internet access service to an individual, corporation, government, or other customer in California.”); H.B. 4155, 79th Leg. Assemb., 2018 Reg. Sess., at 2 (Or. 2018) (prohibiting ISPs who contract with a state “public body” from engaging in certain acts within Oregon); S.289, No. 169, at 572 (Vt. 2018) (“Internet service provider’ or ‘provider’ means a business that provides broadband Internet access service to any person in Vermont.”); H.B. 2282, 65th Leg., 2018 Reg. Sess., at 156 (Wash. 2018) (prohibiting certain acts by “a person engaged in the provision of broadband internet access service in Washington state”).

¹³⁸ See OR. REV. STAT. § 174.109 (2017) (“[P]ublic body’ means state government bodies, local government bodies and special government bodies.”).

¹³⁹ S.B. 822 (Cal. 2018); H.B. 4155, 79th Leg. Assemb., 2018 Reg. Sess. (Or. 2018); S.289, No. 169 (Vt. 2018); H.B. 2282, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

¹⁴⁰ S.B. 822, at 6449 (Cal. 2018).

The vanguard states face an uphill battle, with California and Vermont already confronting major lawsuits.¹⁴¹ To be frank, these laws are doomed.¹⁴² Insofar as broadband Internet service is classified as a Title I information service, states are preempted from enacting most Internet regulation.¹⁴³ Nevertheless, this descriptive observation does not displace the normative question of whether states *should* be silenced on Internet regulation. Certainly, in part, these state laws reflect a last gasp attempt to negate a politically unpopular decision, but beneath the partisan strata lies this normative question.

The object of this Note is to grapple with this question and, through a dormant Commerce Clause analysis, exhume states' authority to police matters affecting their citizens. Ultimately, this process will expose the current congressional framework as an archaic vehicle for Internet regulation which assumes the all-too-common view of the Internet as an ethereal, borderless entity. This Note will conclude that the congressional backdrop should be updated, and room should be reserved for states to regulate the Internet congruent with local needs.

III. ARGUMENT

To normatively evaluate state net neutrality laws, it is critical to first consider whether present state net neutrality regulations will survive the impending challenges. Because RIFO reclassified broadband Internet service as a Title I information service, the longstanding federal policy of nonregulation for information services will almost certainly preempt the states' efforts.

This Note posits that the inevitability of this conclusion is suspect for several reasons. First, this Note surveys the Internet policy debate over the last twenty years and contends that the parties have fatally presupposed the viability of their common premise: the regulatory framework established by the Communications Act and Telecommunications Act. The Internet, in its present form, transcends any telecommunications medium

¹⁴¹ See *supra* notes 14–15 and accompanying text.

¹⁴² See Campbell, *supra* note 9 (noting that state net neutrality laws are “an exercise in futility”).

¹⁴³ See *Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (“[A]ny state regulation of an information service conflicts with the federal policy of nonregulation.”).

contemplated in 1934 and 1996; accordingly, it should not be bound by those controls. Second, for a policy perspective outside of telecommunications law, this Note solicits the dormant Commerce Clause for guidance. Third, after determining that the dormant Commerce Clause does not prohibit state net neutrality regulation, this Note conjures federalism principles to show the benefits of state regulation.

A. THE FUTILITY OF STATE NET NEUTRALITY LAWS

The FCC's repeal of the 2015 net neutrality rules was one of the most controversial administrative initiatives in recent history.¹⁴⁴ Consequently, those displeased with the FCC's approach fought back in every conceivable way.¹⁴⁵ The most severe response was taken in four states where lawmakers, in effect, reinstated the 2015 rules within state lines.¹⁴⁶

Despite the confidence of these legislators, the state net neutrality regulations face imminent peril, principally in the form of federal preemption.¹⁴⁷ In RIFO, the FCC claimed express preemptive authority over state attempts to regulate net neutrality.¹⁴⁸ This claim to express authority, however, is superfluous for the FCC already wields implied conflict preemption authority over information services.¹⁴⁹

One thing is unequivocally clear from the *Computer Inquiries*: states are preempted from regulating Title I information services under the federal policy of deregulation.¹⁵⁰ Federal preemption occurs when

Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law

¹⁴⁴ See Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html> (“The discarding of the net neutrality regulations is the most significant and controversial action by the F.C.C. under Mr. Pai.”).

¹⁴⁵ See *supra* notes 14–15 and accompanying text.

¹⁴⁶ See Neidig, *supra* note 136 (describing the state net neutrality laws).

¹⁴⁷ See *id.* (noting the impending preemption challenges).

¹⁴⁸ RIFO, *supra* note 1, paras. 194–95.

¹⁴⁹ *Id.* paras. 202–03.

¹⁵⁰ See *supra* note 82 and accompanying text.

is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.¹⁵¹

In drafting RIFO, the FCC undoubtedly was aware of the preemption power tethered to a Title I broadband Internet service classification.¹⁵² To support their preemption claim, the FCC cited three sources: (1) the impossibility exception,¹⁵³ (2) the policy of nonregulation for information services,¹⁵⁴ and (3) the forbearance provision of the Communications Act.¹⁵⁵ The soundness of the FCC's impossibility exception and forbearance justifications are immaterial, however, for the federal policy of nonregulation patently preempts state regulation of information services.¹⁵⁶

The four state net neutrality laws will ultimately succumb to this policy of deregulation.¹⁵⁷ Commentators in support of these state laws have questioned the FCC's preemption authority, arguing that the FCC cannot forego its regulatory power in a given field and simultaneously preempt state regulation in that field.¹⁵⁸ This

¹⁵¹ *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368–69 (1986) (internal citations omitted).

¹⁵² *See RIFO*, *supra* note 1, paras. 202–03 (noting that preemption is consonant with the “longstanding federal policy of nonregulation for information services”).

¹⁵³ *Id.* para. 198.

¹⁵⁴ *Id.* para. 202.

¹⁵⁵ *Id.* para. 204.

¹⁵⁶ *See NUCHTERLEIN & WEISER*, *supra* note 19, at 190–92 (“Perhaps the most enduring legacy of *Computer III* is the FCC’s decision to maintain federal jurisdiction over enhanced services under Title I of the Communications Act and to preempt state regulation of most such services to ensure a deregulatory environment for the fledgling Internet industry.”).

¹⁵⁷ *See OWENS*, *supra* note 10, at 32–33 (noting the preemptive effect of the policy of deregulation); Campbell, *supra* note 9 (arguing that state net neutrality efforts will be “short-lived” as preemption is a “slam dunk”).

¹⁵⁸ *See, e.g.,* Jon Brodtkin, *Why the First State with a Net Neutrality Law Isn’t Scared of Lawsuits*, ARS TECHNICA (Mar. 16, 2018), <https://arstechnica.com/tech-policy/2018/03/net-neutrality-supporting-lawmaker-tells-isps-were-ready-for-lawsuits/> (describing why the FCC lacks the authority to preempt state net neutrality laws); Shaban & Fung, *supra* note 5

argument ignores the historical classification of broadband Internet as an information service and the traditional FCC deregulatory policy toward information services.¹⁵⁹ Further, this argument wholly neglects the line of jurisprudence endorsing the preemption of state information service regulation pursuant to the FCC's national policy of deregulation.¹⁶⁰ When the FCC reclassified broadband Internet service as a Title I information service, it concurrently foreclosed state regulation of the medium.¹⁶¹ As long as the Title I classification remains, preemption is inexorable.

B. LOOKING BEYOND PREEMPTION

Under the foregoing preemption analysis, courts will quickly dispose of the present state net neutrality laws. Given the simplicity of this task, why devote an entire Note toward it? This Note contends that the simplicity of this conclusion is dubious, and closer inspection of it betrays troubling, obsolete foundations.

An evaluation of any policy would be incomplete absent a genealogy to reveal its path.¹⁶² The same goes for the FCC's preemptive policy of deregulation for information services. As stated earlier, the geneses of the policy lay in the *Computer Inquiries*, where the FCC liberated data processing/enhanced services from common carrier regulation.¹⁶³ At the time of *Computer I*, there were hundreds of data processing service bureaus offering service to thousands of branch offices, and it was anticipated that dozens more would enter the market, thereby enhancing competition and

(describing the position that an agency without power to regulate in an area also lacks power to preempt states in that area).

¹⁵⁹ See discussion *supra* Section II.B.1.

¹⁶⁰ See Charles M. Davidson & Michael J. Santorelli, *Federalism in Transition: Recalibrating the Federal-State Regulatory Balance for the All-IP Era*, 29 BERKELEY TECH. L.J. 1131, 1173–75 (2014) (explaining the federal preemption of state broadband Internet service regulation through its classification as an information service).

¹⁶¹ See *Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (“[A]ny state regulation of an information service conflicts with the federal policy of nonregulation.”).

¹⁶² See Michel Foucault, *Nietzsche, Genealogy, History* (“A genealogy . . . will never confuse itself with . . . ‘origins,’ will never neglect as inaccessible the vicissitudes of history. On the contrary, it will cultivate the details and accidents that accompany every beginning; it will be scrupulously attentive to their petty malice; it will await their emergence, once unmasked, as the face of the other. . . . The genealogist needs history to dispel the chimeras of the origin . . .”), in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 139, 144 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977).

¹⁶³ See discussion *supra* Section II.B.1.

innovation for all.¹⁶⁴ The FCC believed that the data processing market would “burgeon and flourish best” in the absence of regulation, for government intervention was limited to “areas where there is a natural monopoly, where economies of scale are of such magnitude as to dictate the need for a regulated monopoly, or where other such factors are present to require governmental intervention to protect the public interest because a potential for unfair practices exists.”¹⁶⁵ At the time of *Computer II* and *Computer III*, competition and technological innovation in the enhanced services market continued to thrive, and the deregulatory policy was reaffirmed.¹⁶⁶

When Congress overhauled the Communications Act in 1996, it largely left the *Computer Inquiry* rules untouched—including the deregulatory policy for enhanced services.¹⁶⁷ It should go without saying that in 1996, the Internet was radically different than in 2018.¹⁶⁸ In 1996, the first user-friendly web browsers had just been introduced and the Internet was beginning to enter the public consciousness.¹⁶⁹ Contrast that with today, where the Internet is the epicenter of commerce and human activity, a medium that aggregates the functions of every communications network into one.¹⁷⁰ Along with technological innovation, the market of Internet provision has radically transformed since 1996.¹⁷¹ In 1996, there were essentially no broadband services; users typically accessed the Internet through dial-up connections over common carrier telephone lines provided by one of many dial-up ISPs.¹⁷² With a cornucopia of ISPs to choose from, ISPs had a strong incentive to

¹⁶⁴ See *Computer I* Tentative Decision, *supra* note 81, paras. 19–22 (describing the 1970 market of data processing services).

¹⁶⁵ *Id.* paras. 19, 22.

¹⁶⁶ See *Computer II*, *supra* note 84, para. 128 (“Nothing has transpired over the past decade which would lead us to alter these conclusions. On the contrary, we find that our perception of the market environment for these types of services was largely accurate.”); Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, para. 351 (June 16, 1986) [hereinafter *Computer III*] (affirming the deregulatory policy for enhanced services).

¹⁶⁷ See NUCHESTERLEIN & WEISER, *supra* note 19, at 192 (“Congress left the *Computer Inquiry* rules essentially untouched when it overhauled the Communications Act in 1996.”).

¹⁶⁸ See *id.* (noting the infantile state of broadband Internet in 1996).

¹⁶⁹ See *id.* at 170–72 (describing the state of the Internet in 1996).

¹⁷⁰ See *id.* at 171–72, 177, 230–31 (describing the modern importance of the Internet and its integration of communications platforms).

¹⁷¹ See *id.* at 231 (noting the transformation of the Internet market since 1996).

¹⁷² See *id.* at 192 (describing the state of Internet providers in 1996).

provide customers with quality and complete access, making the 1996 Internet “exceptionally competitive.”¹⁷³

Today, the Internet market is profoundly different.¹⁷⁴ In the mid-1990s, cable companies revolutionized residential Internet access by using existing cable television pipes to carry broadband Internet services.¹⁷⁵ Additionally, these cable companies began to merge with other telecommunications providers, and this allowed cable companies to bundle all network services together and offer the resulting bundle to consumers.¹⁷⁶ Throughout the twenty-first century, these alliances had a colossal impact on both the availability of Internet access and the diversity of providers.¹⁷⁷ A 2015 FCC study showed that just twenty-four percent of developed areas in the United States had at least two ISPs that offered official broadband speeds,¹⁷⁸ and as of 2018, “[f]ifty percent of American households have access to only one Internet provider, with no competition to drive faster or more affordable service.”¹⁷⁹

It is clear that Congress, in the 1996 Act, did not anticipate the “monopolistic and oligopolistic markets” of Internet provision today.¹⁸⁰ This observation has been fatally overlooked in the net neutrality debate, and this Note posits that it is integral to any modern Internet policy. Indeed, the present quagmire of Internet regulation is attributable to the Communications and Telecommunications Acts which, together, perversely govern the

¹⁷³ *Id.*

¹⁷⁴ See Mikhail Guttentag, *A Light in Digital Darkness: Public Broadband After Tennessee v. FCC*, 20 YALE J.L. & TECH. 311, 314–17 (2018) (describing the grotesque lack of competition among ISPs).

¹⁷⁵ See NUCHESTERLEIN & WEISER, *supra* note 19, at 192 (explaining the transformational shift in broadband Internet access facilitated by cable companies).

¹⁷⁶ See *id.* at 231 (discussing the bundling of services); Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1, 87–88 (1999) (discussing the emerging alliances between cable companies and other providers).

¹⁷⁷ See Guttentag, *supra* note 174, at 315–16 (explaining the devastating impact that cable mergers had on ISP competition).

¹⁷⁸ See Jeff Dunn, *America Has an Internet Problem — but a Radical Change Could Solve It*, BUS. INSIDER (Apr. 23, 2017, 10:09 AM), <https://www.businessinsider.com/internet-isps-competition-net-neutrality-ajit-pai-fcc-2017-4#-10> (noting the FCC study).

¹⁷⁹ Guttentag, *supra* note 174, at 316.

¹⁸⁰ *Id.* at 323; see also NUCHESTERLEIN & WEISER, *supra* note 19, at 231 (“When Congress wrote the 1996 Act, it did not anticipate that cable companies, free of conventional common carrier requirements, would invest heavily in broadband, tightly integrate ISP functionality with last-mile transmission, and offer the resulting service bundle to consumers.”).

Internet.¹⁸¹ These legislative schemes were built around communications networks of the twentieth century like the telegraph, telephone, radio, and television.¹⁸² Today, the Internet can effortlessly perform the functions of all of these classic communications platforms at blistering speeds.¹⁸³ Given the extraordinary, convergent nature of this medium, why should it be regulated by strict statutory silos which fail to apprehend it?¹⁸⁴

This Note submits that a return to this congressional scheme is warranted for three reasons. First, the modern Internet is incongruous with the Acts' archaic categories; consequently, it should not be bound by concomitant regulations and policies. Second, a deregulatory policy toward information services and the Internet may have been warranted in 1996, when the market was inundated with providers, but that policy is blind to the present broadband Internet market dominated by ISP monopolies. Third, the Internet is the lodestar of the twenty-first century and our economic anchor—the gravity of this platform commands clear congressional voice.

C. PREEMPTION NOTWITHSTANDING, SHOULD STATES HAVE A REGULATORY ROLE?

The present state net neutrality laws are lambs to the slaughter;¹⁸⁵ still, they are not surplusage. As the previous section animates, the federal government has muffed Internet regulation.¹⁸⁶ Further, meaningful progress over Internet regulation seems unlikely with the current polarization in

¹⁸¹ See NUCHESTERLEIN & WEISER, *supra* note 19, at 231–32 (“[B]ecause it acted when it did, Congress bequeathed a legal and political quagmire to the FCC and the federal courts.”).

¹⁸² See *United States v. Sw. Cable Co.*, 392 U.S. 157, 172 (1968) (noting that in 1934 Congress could not have foreseen the development of television but it is still within the FCC’s jurisdiction); S. REP. NO. 73-781, at 1 (1934) (“The purpose of this bill is to create a communications commission with regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.”).

¹⁸³ See Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 175 (1998) (“Ironically, the very observation that the Internet can individually simulate, as well as collectively combine, a variety of existing communications technologies suggests that the nature of the Internet exceeds the narrow category of mass communications technology.”).

¹⁸⁴ See NUCHESTERLEIN & WEISER, *supra* note 19, at 231 (“In revising the Communications Act in 1996, Congress left intact each of those statutory silos . . .”).

¹⁸⁵ See discussion *supra* Section III.A.

¹⁸⁶ See discussion *supra* Section III.B.

Washington. Preempting federal preemption, this Note suggests that state net neutrality regulation is a viable antidote.

This position requires the momentary suspension of preemption, but this is not in vain, for removing these preliminary shackles allows us to consider state net neutrality laws in a broader legal context. Further, by removing this state action from the arcane jungle of Internet law, the regulations can be evaluated against traditional legal principles. The question, again, is this: may states impose net neutrality restrictions on ISPs? Fundamentally, questions concerning state autonomy implicate principles of constitutional law and federalism.¹⁸⁷ In constitutional law, the principal doctrine concerning state regulation is the dormant Commerce Clause.¹⁸⁸ Therefore, it is fitting to evaluate the viability of state net neutrality regulations through a dormant Commerce Clause analysis.

The dormant Commerce Clause is the principle implied by the Commerce Clause, which functions to safeguard “Commerce . . . among the several States.”¹⁸⁹ It captures the notion that some state laws, despite the absence of affirmative federal action under the commerce power, nevertheless violate the inherent tenets of the Commerce Clause.¹⁹⁰ Under this principle, “the Court has invalidated state laws that either ‘discriminate against’ or impose an ‘undue burden’ on interstate commerce.”¹⁹¹ Subject to invalidation under the dormant Commerce Clause are state laws that facially discriminate against interstate commerce, which confront a “virtually *per se* rule of invalidity,” and facially neutral laws, which encounter strict scrutiny if “(1) [their] protectionist tendencies are so apparent that [they are] functionally indistinguishable from a tariff or other facially discriminatory rule; (2) [they were] adopted because of a protectionist purpose; or (3) [they have] intolerable ‘extraterritorial’ effects.”¹⁹²

¹⁸⁷ See DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 4 (2004) (noting the “principles rooted in the value of state autonomy”).

¹⁸⁸ See *id.* (discussing the relevance of the Commerce Clause and dormant Commerce Clause with respect to state autonomy).

¹⁸⁹ U.S. CONST. art. I, § 8, cl. 3; COENEN, *supra* note 187, at 209.

¹⁹⁰ COENEN, *supra* note 187, at 209.

¹⁹¹ *Id.* at 210 (footnotes omitted) (first citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978); and then citing *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353 (1951)).

¹⁹² *Id.* at 220–21 (footnote omitted) (citing *City of Philadelphia*, 437 U.S. at 624).

The Court's jurisprudence in this area has meandered at times, but the modern test for facially neutral laws is the *Pike* balancing test.¹⁹³

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.¹⁹⁴

The *Pike* test has most frequently been used in transportation cases, but it has also been used outside of the transportation context.¹⁹⁵ Notably, the Court has invalidated a facially neutral law under the *Pike* test only once outside of the transportation context.¹⁹⁶

All four state net neutrality laws are facially neutral, in that they do not discriminate between in-state actors and out-of-state actors,¹⁹⁷ thus it is appropriate to evaluate these laws under the *Pike* test. Furthermore, to simplify the analysis, this Note will evaluate a generalized state net neutrality statute rather than all four individually. This fictitious statute, like the four others and the 2015 rules, will prohibit ISPs that provide broadband Internet service within the state from blocking, throttling, or engaging in paid prioritization.¹⁹⁸

¹⁹³ *Id.* at 253.

¹⁹⁴ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁹⁵ See COENEN, *supra* note 187, at 255, 266 (discussing the Court's use of the *Pike* balancing test both in and outside the transportation context).

¹⁹⁶ *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); see also COENEN, *supra* note 187, at 266–67 (“[D]espite referring often to the *Pike* test, the Court has expressly relied on that test only once in invalidating a clearly nondiscriminatory state law outside the road-safety context.”).

¹⁹⁷ See *supra* note 137.

¹⁹⁸ See discussion *supra* Section II.B.

To begin, it must be noted that the Internet is an “instrumentality of interstate commerce.”¹⁹⁹ This classification, however, does not immunize the Internet from state regulation—states frequently regulate aspects of interstate services, like interstate transportation and the shipment of food.²⁰⁰ Additionally, it is important to remember that the Internet is not an ethereal, free-floating body which users tap into, but a physical network made possible through the mass interconnection of cables, computers, modems, and routers, and this network is maintained by ISPs that reach into states to provide service.²⁰¹ Every Internet communication follows a physical path between IP addresses via routers, and geographical identification of these communications is possible through the emerging technology of geolocation.²⁰² It follows that some Internet communications are interstate while others are purely intrastate, but on the whole the Internet is considered part of interstate commerce.²⁰³

Now, onto the *Pike* test. First, the law “regulates even-handedly to effectuate a legitimate local public interest,”²⁰⁴ in that it applies to all ISPs operating within the state—regardless of their state of origin—and is in place for the protection of consumers.²⁰⁵ Legitimate state interests may include economic purposes, particularly those guarding “against road wear, unfair trade practices, monopolization, and even theft.”²⁰⁶ Here, under our hypothetical state law, the state has imposed net neutrality restrictions on ISPs to ensure unfettered access to the Internet for

¹⁹⁹ Michele Martinez Campbell, *The Kids Are Online: The Internet, the Commerce Clause, and the Amended Federal Kidnapping Act*, 14 U. PA. J. CONST. L. 215, 244 n.122 (2011).

²⁰⁰ See COENEN, *supra* note 187, at 256, 270 (discussing the Court’s deference toward state regulation of certain aspects of interstate commerce).

²⁰¹ See discussion *supra* Section II.A.1.

²⁰² See Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling’s Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41, 43 (2010) (“Geolocation technologies . . . allow[] Web sites to quickly and automatically determine an Internet user’s [sic] physical location.”); Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs,”* 100 CORNELL L. REV. 1129, 1158 (2015) (noting that geolocation services that check Internet protocol addresses are among the easiest tools to determine where an Internet user is located).

²⁰³ See *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) (“Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of interstate commerce, and to prohibit its use for harmful or immoral purposes regardless of whether those purposes would have a primarily intrastate impact.” (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964))).

²⁰⁴ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

²⁰⁵ See *supra* note 195 and accompanying text.

²⁰⁶ COENEN, *supra* note 187, at 242.

its residents. The growing lack of competition among ISPs has left the state's citizens vulnerable to severe exploitation by ISPs, particularly for citizens located in rural areas who may have access to only one ISP. Due to the economic, consumer protection-based interest the state aims to further with this law, it has a recognizable state interest under the dormant Commerce Clause.

With the state interest established, the degree of the law's burden on the flow of interstate commerce must then be measured.²⁰⁷ To be fair, the burden imposed on interstate commerce is not slight.²⁰⁸ Many ISPs offer nationwide service, and compliance with unique laws in select states would bridle such efforts.²⁰⁹ On the other hand, despite their protests, the data show that ISPs had no trouble complying with the Obama-era rules, thus implying that imposing the same rules in some areas of the country would not handcuff them.²¹⁰

The prevailing argument against state regulation, raised by the FCC,²¹¹ Ajit Pai,²¹² the DOJ,²¹³ and ISPs,²¹⁴ is that ISP compliance

²⁰⁷ See *Pike*, 397 U.S. at 142 (“If a legitimate local purpose is found, then the question becomes one of degree.”).

²⁰⁸ See RIFO, *supra* note 1, paras. 1–4 (explaining how net neutrality rules impede the ability of ISPs to effectively perform their operations and burden the Internet's progress); Jonathan Spalter, *All Americans Deserve Equal Rights Online*, USTELECOM (Mar. 26, 2018), <https://www.ustelecom.org/blog/all-americans-deserve-equal-rights-online> (exclaiming “hell no” to state net neutrality laws in a USTelecom blog post).

²⁰⁹ See OWENS, *supra* note 10, at 71 (describing the difficulties nonresident ISPs would face in complying with a state-by-state patchwork of Internet laws).

²¹⁰ See Frieden, *supra* note 57, at 678–80 (arguing that the FCC's conclusion that net neutrality stifles innovation and investment is unfounded, and ignores the billions of dollars that have been continually invested in broadband since the 2015 rules); Jon Brodtkin, *Ajit Pai Offers No Data for Latest Claim that Net Neutrality Hurt Small ISPs*, ARS TECHNICA (Dec. 12, 2017, 10:35 AM), <https://arstechnica.com/tech-policy/2017/12/ajit-pai-claims-net-neutrality-hurt-small-isps-but-data-says-otherwise/> (noting the massive strides made in investment and innovation by ISPs since the 2015 rules took effect).

²¹¹ See RIFO, *supra* note 1, para. 194 (“[A]llowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates.”).

²¹² See Pai, *supra* note 13, at 4 (“California's micromanagement poses a risk to the rest of the country. . . . [B]roadband is an interstate service. . . . [I]f individual states like California regulate the Internet, this will directly impact citizens in other states.”).

²¹³ See Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 19, *United States v. California*, No. 2:18-at-01539 (E.D. Cal. Sept. 30, 2018) (No. 2–1) (“[G]iven that ISPs cannot realistically comply with one set of standards in this area for California and another for the rest of the Nation—especially when Internet communications frequently cross multiple jurisdictions—the effect of this state legislation would be to nullify federal law across the country.”).

²¹⁴ See Brian Fung, *Washington State's Net Neutrality Law Is the Beginning of a Big Headache for Internet Providers*, WASH. POST (Mar. 6, 2018, 11:38 AM),

with fifty different laws would be impossible, although little justification has been offered in support. To the contrary, recent history suggests that compliance would be feasible. ISPs routinely monitor and control users' Internet activity,²¹⁵ a practice which, incidentally, catalyzed the net neutrality movement.²¹⁶ Further, ISPs tailor broadband provision on an *individual* basis to engage in certain conduct prohibited by net neutrality rules, like bandwidth throttling.²¹⁷ ISPs catalogue their users' personal information, including residential addresses, and for good reason—such information is necessary to physically provide Internet access.²¹⁸ Therefore, since ISPs already discriminate between residential broadband users on the basis of Internet behavior and know *where* users are, it seems that ISPs could easily attune their broadband provision to the laws of states where users reside. Finally, ISPs and the Pai FCC have argued that net neutrality rules restrict technological innovation.²¹⁹ Evidence of this claim is mixed, if not antithetical,²²⁰ and at any rate, a purported impediment on technological innovation would only occur in states with net neutrality rules.

https://www.washingtonpost.com/news/the-switch/wp/2018/03/06/washington-states-net-neutrality-law-is-the-beginning-of-a-big-headache-for-internet-providers/?noredirect=on&utm_term=.034e9b23d8f5 (“As we[, USTelecom,] have cautioned repeatedly, we simply cannot have 50 different regulations governing [broadband].”).

²¹⁵ See Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 156 (2010) (“[C]arriers have begun to inspect the actual content of a consumer's transmitted or received data being sent over their networks by utilizing various technologies such as deep packet inspection and packet sniffing. Carriers may ‘inject’ (or ‘spooof’) additional packets into the data that their consumers are receiving so as to interfere with specific online activities These technologies allow carriers to command the type of insights into their customers' behavior once only achieved by search engines.” (footnotes omitted)).

²¹⁶ See Wu, *supra* note 2, at 167–68 (“[W]e need distinguish between forbidden grounds of discrimination, those that distort secondary markets, and permissible grounds, those necessary to network administration and harm to the network. . . . [I]t will be inter-network criteria of discrimination that cause concern. In technical terms, this means discrimination based on IP addresses, domain name, cookie information, TCP port, and others [B]roadband carriers should not discriminate in how they treat traffic on their broadband network on the basis of inter-network criteria.”).

²¹⁷ See Andrew Gioia, Note, *FCC Jurisdiction over ISPs in Protocol-Specific Bandwidth Throttling*, 15 MICH. TELECOMM. & TECH. L. REV. 517, 520–22 (2009) (describing techniques Comcast used to throttle the bandwidth of specific users).

²¹⁸ See Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1627 (1999) (describing the detailed personal information ISPs hold).

²¹⁹ See RIFO, *supra* note 1, para. 1 (“We eliminate burdensome regulation that stifles innovation and deters investment.”).

²²⁰ See *supra* note 210 and accompanying text.

Admittedly, state net neutrality rules would impose a burden on interstate broadband service, but it is not obvious that this burden outweighs the state interest in protecting vulnerable citizens from ISP manipulation. ISPs prospered under past net neutrality restrictions, and they have proven their capacity to follow state-specific rules.²²¹ Hence, in light of the traditional reverence for state police powers, these burdens do not cast the laws within the dormant Commerce Clause's proscription.

The dormant Commerce Clause argument in favor of the states is, at the very least, colorable. Moreover, a couple of federalism concerns support state net neutrality laws. First, a clear takeaway from the net neutrality debate is growing divergence on how the Internet should be regulated. Such variance provides the paradigmatic opportunity for states to serve as "laboratories of democracy."²²² This concept is credited to Justice Brandeis,²²³ who famously wrote: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."²²⁴ Additionally, in *Lopez*, the Court explained the value of this concept amid extant policy disagreement:

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.²²⁵

²²¹ See *supra* note 166 and accompanying text.

²²² See COENEN, *supra* note 187, at 28–29 (presenting the concept of states as laboratories so that local social and economic needs are met without national interference).

²²³ See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 69 (2014) (discussing Justice Brandeis's "famous aphorism").

²²⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²²⁵ *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

The federal attempts at Internet regulation have been awkward, and public opinion is fractured. Therefore, in the spirit of Justice Brandeis, why not let states experiment? This move would both satisfy popular will and supply empirical examples of various regulatory schemes.

Second, allied with the state laboratory concept is the principle that federalism fosters civic identification and participation with local government.²²⁶ Alexander Hamilton and James Madison explained this principle well in the *Federalist Papers*.²²⁷ Hamilton, a Federalist, wrote:

It is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes, more than any other circumstance, to impressing upon the minds of the people affection, esteem, and reverence towards the government. This great cement of society . . . would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise . . . to the power of the Union. The operations of the national government, on the other hand, falling less immediately under the observation of the mass of the citizens, the benefits derived from it will chiefly be perceived and attended to by speculative men. Relating to more general interests, they will be less apt to come home to the feelings of the people; and, in

²²⁶ See *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 789–90 (1982) (Powell, J., dissenting) (“In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government. Alexis de Tocqueville understood well that participation in local government is a cornerstone of American democracy: ‘It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and the provincial assemblies. [It] is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different States, to be afterwards applied to the country at large.’” (alteration in original) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 181 (H. Reeve trans., 1961))).

²²⁷ *E.g.*, THE FEDERALIST NO. 17 (Alexander Hamilton), NO. 46 (James Madison).

proportion, less likely to inspire an habitual sense of obligation, and an active sentiment of attachment.²²⁸

Madison, a Democratic-Republican, wrote:

The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. . . . [T]he first and most natural attachment of the people will be to the governments of their respective States. . . . By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. . . . If an act of a particular State, though unfriendly to the national government, be generally popular in that State and should not too grossly violate the oaths of the State officers, it is executed immediately and, of course, by means on the spot and depending on the State alone. The opposition of the federal government . . . would but inflame the zeal of all parties on the side of the State, and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty.²²⁹

This principle is significant for net neutrality regulation because broadband provision varies by state and region, and different communities have different Internet needs.²³⁰ For example, rural areas typically have only one ISP whereas urban areas tend to have

²²⁸ THE FEDERALIST NO. 17, at 90–91 (Alexander Hamilton) (ABA ed., 2009).

²²⁹ THE FEDERALIST NO. 46, at 265, 268 (James Madison) (ABA ed., 2009).

²³⁰ See Guttentag, *supra* note 174, at 320 (“Like electricity in the late nineteenth century, the provision of Internet service today largely follows the profit motives of private providers. These profit motives disfavor providing affordable high-speed service to less profitable poor or rural populations when compared to denser, higher-income neighborhoods.”); *see, e.g.*, S.289, No. 169, at 569–70 (Vt. 2018) (“The FCC’s regulatory approach is unlikely to achieve the intended results in Vermont. The policy does little, if anything, to overcome the financial challenges of bringing broadband service to hard-to-reach locations with low population density. However, it may result in degraded Internet quality or service. The State has a compelling interest in preserving and protecting consumer access to high quality Internet service.”).

multiple options.²³¹ It follows that these communities likely have different Internet policy attitudes.²³² Increasingly, “Internet access [i]s a necessary condition for active participation in society,”²³³ thus it may properly be considered, in Madison’s words, within the “domestic and personal interests of the people.”²³⁴ The pillars of federalism empower communities to legislate according to their domestic needs, and Internet regulation belongs within this ambit. The people of California, Oregon, Vermont, and Washington agree, and all other states should take notice.

As mentioned from the outset, this dormant Commerce Clause analysis of state net neutrality laws is legally moot due to the preemptive federal policy of deregulation for information services. Nevertheless, this analysis is valuable for it reveals the sound policy backing the states.

IV. CONCLUSION

The four state net neutrality laws are preempted by the federal policy of nonregulation for information services. This conclusion, however, should not be so perfunctory. These state laws embody the federal failure to account for the Internet’s dramatic rise and, like the Four Horsemen,²³⁵ portend of an Internet calamity. To avoid this fallout, this Note argues that Congress should abandon the

²³¹ See Guttentag, *supra* note 174, at 316 (“Fifty percent of American households have access to only one Internet provider, with no competition to drive faster or more affordable service, and an additional ten percent of households (including nearly forty percent of households in rural areas) have no access to a broadband Internet provider at all.”); see, e.g., S.289, No. 169, at 569 (Vt. 2018) (“Many Vermonters do not have the ability to choose easily between [ISPs]. This lack of a thriving competitive market, particularly in isolated locations, disadvantages the ability of consumers and businesses to protect their interests sufficiently.”).

²³² See, e.g., S.289, No. 169, at 570 (Vt. 2018) (“The State may exercise its traditional role in protecting consumers from potentially unfair and anticompetitive business practices. Doing so will provide critical protections for Vermont individuals, entrepreneurs, and small businesses that do not have the financial clout to negotiate effectively with commercial providers . . .”).

²³³ Nicola Lucchi, *Internet Content Governance and Human Rights*, 16 VAND. J. ENT. & TECH. L. 809, 853 (2014).

²³⁴ THE FEDERALIST NO. 46, *supra* note 229, at 265 (James Madison).

²³⁵ See *Revelation* 6:12–17 (King James) (“[L]o, there was a great earthquake; and the sun became black as sackcloth of hair, and the moon became as blood; [a]nd the stars of heaven fell unto the earth . . . And the heaven departed as a scroll when it is rolled together; and every mountain and island were moved out of their places. . . . And the kings of the earth . . . said to the mountains and rocks, [f]all on us, and hide us from the face of him that sitteth on the throne, and from the wrath of the Lamb: For the great day of his wrath is come; and who shall be able to stand?”).

archaic regulatory frame left by the Communications and Telecommunications Acts and craft a scheme attendant with polices that fully embrace the Internet's technological and market transformation.

In the alternative, this Note suggests that passing the buck to states is not an outrageous idea. Indeed, dormant Commerce Clause and federalism principles illustrate that state Internet regulation is preferable to federal regulation in several ways. States may craft solutions superior to all previous federal attempts or they may not, but they should at least have the opportunity. One thing is clear: the debate over net neutrality will continue to rage, and RIFO may even be repealed. Nevertheless, if the most volatile crucibles can be removed, the flames will abate, making a workable compromise possible.