



The Center for Internet and Society at Stanford Law School is a leader in the study of the law and policy around the Internet and other emerging technologies.

[Home](#) » [Blog](#) » Seven Reasons the New GOP Bill Will Not Give Us Net Neutrality

SEVEN REASONS THE NEW GOP BILL WILL NOT GIVE US NET NEUTRALITY

By **Barbara van Schewick** on January 28, 2015 at 6:47 am

This blog post was co-authored by [Barbara van Schewick](#) and [Morgan Weiland](#). [Valarie Kaur](#) contributed to this post.

After a year of debates on network neutrality, the GOP has finally joined the party. Through a **draft bill** released this month and congressional hearings last week, Republicans have taken a step in the direction of supporting network neutrality. That's a good thing, and moves them closer to the existing consensus. Roughly four million Americans submitted comments to the Federal Communications Commission (FCC) calling for real network neutrality last year, and **polls show** that both Republicans and Democrats overwhelmingly support a ban on fast lanes.

At first glance, the bill looks great — it appears to ban prioritization, throttling, and blocking, echoing language used by President Obama and FCC Chairman Tom Wheeler to describe their proposals. But upon closer examination, the bill is so narrowly written that it fails to deliver meaningful network neutrality.

Here's a summary of the key problems with the bill, explained in detail in our recent article in the Stanford Law Review Online, **[New Republican Bill is Network Neutrality in Name Only](#)**.

1. **The bill's ban on paid prioritization captures only a subset of practices that harm innovation and free speech online.** The bill only prohibits Internet service providers (ISPs) from charging

application and content providers for prioritization. It does not prohibit ISPs from charging these providers for other forms of preferential treatment that also harm innovation and free speech. For example, the bill would prohibit Comcast from charging Netflix for prioritizing Netflix's packets. That's good. But it would still give Comcast the power to strike other deals with Netflix. Netflix could pay, for instance, for a guaranteed amount of bandwidth during times of congestion, or for its packets not to count against subscribers' monthly bandwidth caps, known as "zero-rating." But these practices pose the same threat to innovation and free speech as fees paid in exchange for prioritization. Worse, under the bill, deals for preferential treatment other than prioritization are automatically legal and cannot be challenged. This opens the door to the most problematic kinds of exclusive and discriminatory deals. For example, Comcast could offer a guaranteed amount of bandwidth to Netflix, but not to Hulu, or charge different prices to Netflix and Hulu for the same service. Any meaningful network neutrality regime needs to ban all types of access fees, not just those for prioritization.

2. **The bill bans only a subset of harmful discriminatory practices.** The "no-throttling" rule in the bill bans only technical discrimination, i.e. the differential handling of packets in the network. The bill does not ban other forms of differential treatment like zero-rating or application-specific pricing. For example, an ISP could exempt its own application from subscribers' monthly bandwidth caps, but still count competing applications against the cap, a common practice in Europe. This gives ISPs the power to distort competition and interfere with user choice using non-technical means. Moreover, the bill doesn't provide enough protection even for technical discrimination. ISPs could still distort competition and interfere with user choice by discriminating against classes of applications. For example, ISPs might limit the use of online streaming services during times of congestion, while continuing to allow the use of other bandwidth-intensive types of applications. Or they could slow down all Internet telephony applications that let users make calls over their Internet connection, like Skype or Vonage, to make them less competitive with their own traditional telephony offering. The power to choose winners and losers online should belong to the market, not to ISPs. This is why any meaningful nondiscrimination rule must apply to all forms of discrimination and ban discrimination against individual applications and classes of applications (so-called "application-specific discrimination").
3. **The bill opens the door to discriminatory network management practices.** In the bill, the rules against blocking and throttling are subject to a problematic exception for "reasonable network management." Contrary to the FCC's 2010 Open Internet Order, the bill only requires network management to be "appropriate and tailored," but doesn't require network management to be as application-agnostic as possible. This means that ISPs would be able to slow down or limit the use of specific applications or classes of applications during times of congestion, as long as the discrimination is limited to times of congestion.* When they weren't prohibited from doing so, ISPs have done just that. In the United States, Canada, and the United Kingdom, ISPs have routinely discriminated against specific applications or types of applications to manage congestion. But for the user or provider of the affected application, it doesn't matter whether an ISP engages in blocking or discrimination to increase its profits or manage its network. In both cases, users can't use the application of their choice, and application providers have problems reaching their users. This is why the FCC and the Canadian Radio-Television and Telecommunications Commission have long required ISPs to manage their networks in a manner that is as application-agnostic as possible. Such an approach gives ISPs the tools to manage their networks and provide a quality experience for all Internet users, while protecting the Internet as a level playing field and supporting user choice even during times of congestion. Any meaningful network neutrality regime must ensure that network management is not only appropriate and tailored, but also as application-agnostic as possible.
4. **The bill fails to define "user choice," creating a possible loophole for discrimination and access fees.** The bill states that its provisions shall not "limit consumers' choice of service plans or consumers' control over their chosen broadband Internet access service." This sounds appealing —

after all, preserving users' ability to choose how they would like to use the Internet is one of the key goals of any network neutrality regime. However, there is no explanation of what consumer choice and control mean. As a result, ISPs could offer their services in ways that, while creating the illusion of user choice, still allow them to discriminate or charge access fees. As we explain in our [Stanford Law Review Online article](#), ISPs have attempted to expand their control under the guise of "user choice" in the past, for instance in the debate over user-controlled Quality of Service. What's worse, the bill takes away the FCC's authority to clarify this question through rulemaking in the future. The bottom line: as long as the bill does not define "user choice," it's left up for grabs in the midst of an ongoing debate between ISPs and net neutrality advocates and could be used to weaken or circumvent the bill's substantive limits on blocking, throttling, and paid prioritization. A meaningful network neutrality regime must protect user choice, but it should do so implicitly — by structuring the individual rules so that they preserve user choice. In other words, when done correctly, real network neutrality rules won't need a separate provision on user choice — it simply will be baked in.

5. **The bill fails to address interconnection and strips the FCC of power to do so in the future.** The bill does not regulate practices that last-mile ISPs engage in at the point of interconnection with other networks. That means that under the bill, ISPs can still block, discriminate, or impose access fees when data enters their network at the interconnection point. Although the interference happens at a different point in the network (i.e. at the point of interconnection instead of when traveling across the last-mile network), the impact on users and the harm to innovation and free speech remain the same. Moreover, the bill removes the FCC's rulemaking authority related to network neutrality, so the FCC can't address problems with last-mile interconnection in the future. Any meaningful network neutrality rules must include interconnection.
6. **The "specialized services" permitted by the bill are vague and largely unregulated, creating yet another potential loophole.** ISPs have long pushed for a broad exception to any network neutrality regime that allows them to offer additional services over a user's Internet connection that are exempt from network neutrality rules. The vague "specialized services" provision in the bill could be just that. Like the provisions on user choice and interconnection, it's the sort of loophole you could drive a truck through. For example, as Public Knowledge's Harold Feld [explained](#), ISPs might be able to offer their own online video applications as "specialized services" that receive priority or "sell prioritized service to specific applications simply by calling these fast lanes 'specialized services.'" These are reasonable concerns. Additionally, exempting specialized services might give ISPs an incentive to limit (or fail to upgrade) the amount of capacity available for normal, regulated broadband Internet access service in order to have more capacity for unregulated specialized services. Finally, ISPs might offer specialized services in a way that distorts competition — for example, by offering them exclusively to themselves or their partners, or by charging different prices for the same service. By stripping the FCC of any rulemaking authority with respect to network neutrality, the bill leaves the FCC unable to address these concerns. And even the vague limits in the definition of specialized services can only be clarified in response to individual complaints.
7. **The bill ties the FCC's hands — in network neutrality and other emerging broadband telecommunications policies.** A federal agency can usually choose to implement laws through rulemaking or case-by-case adjudication. But this bill strips the FCC of any rulemaking authority related to the bill's network neutrality rules. This dramatically limits the FCC's ability to implement and enforce the bill's provisions. The FCC could only enforce the law on a case-by-case basis in reaction to complaints. It could not independently investigate violations of the bill. And it would never be able to adopt regulations to give meaning to some of the bill's more ambiguous provisions or address future network neutrality problems as they arise. Moreover, the bill strips the FCC of any other authority it might use to regulate ISPs — whether to enact network neutrality rules or address other issues that emerge in the rapidly developing field of telecommunications. The bill makes it impossible for the FCC to reclassify Internet access service as a telecommunications service under Title II of the

Communications Act, and removes the FCC's *existing* authority to regulate broadband providers under section 706 of the Telecommunications Act of 1996. These restrictions would have ripple effects beyond network neutrality. Most immediately, the bill would prevent the FCC from relying on section 706 to preempt state laws that prohibit cities from building and running city-owned broadband networks, an approach it planned to take and that President Obama recently endorsed.

It is heartening that congressional Republicans are moving away from opposition to network neutrality and toward the consensus in favor of meaningful network neutrality rules. However, the bill as currently written does not go nearly far enough and in some instances creates new problems. As our article shows, the bill would require a significant overhaul to ensure that it adequately protects users, innovators, and speakers against blocking, harmful discrimination, and access fees.

The good news is that we don't need to go back to the drawing board. We can instead direct our attention to the FCC. Next month, the Commission could adopt a proposal that has unprecedented support, including from President Obama: a ban on blocking, application-specific discrimination, and access fees under Title II of the Communications Act. We should urge the FCC to adopt this proposal, the most clear and direct way to establish meaningful and lasting network neutrality protections.

* As currently written, the bill's "no throttling" rule does not prohibit discrimination among classes of applications, so ISPs would be able to slow down selected classes of applications even if there is no congestion.

A longer version of this work previously appeared in the Stanford Law Review Online at 67 STAN. L. REV. ONLINE 85 (2015), and is available at <http://www.stanfordlawreview.org/online/new-republican-bill-is-network-neutrality-in-name-only>. When possible and appropriate, please cite to that version.

Focus Areas:

Related Topics:

Add new comment

E-mail

Your name

The content of this field is kept private and will not be shown publicly.

Comment *

Text format

[More information about text formats](#)

Web page addresses and e-mail addresses turn into links automatically.

Allowed HTML tags: `<a>` `` `` `<cite>` `<blockquote>` `<code>` `` `` `` `<dl>` `<dt>` `<dd>` `<p>` `
` `` `<u>`~~`<strike>`~~`<sup>`

Lines and paragraphs break automatically.

Notify me when new comments are posted

SAVE PREVIEW

Once you hit Save, your comment will be held for moderation before being published. You will not see a confirmation message once you hit the Save button but please be assured your comment has been submitted and we will review it.

This work is licensed under a [Creative Commons Attribution 3.0 Unported License](http://creativecommons.org/licenses/by/3.0/) [http://creativecommons.org/licenses/by/3.0/].