



The Daily Dish

SCOTUS and the Future of Net Neutrality

DOUGLAS HOLTZ-EAKIN | AUGUST 26, 2022

Eakinomics has a long history with [net neutrality](#) (the idea that Internet users should be free to access the content and services of their choosing, and that Internet service providers shouldn't unfairly discriminate among content and service providers). Its [first appearance](#) at AAF was in April 2010, the year AAF opened its doors. Over the ensuing dozen years, it made an average of 20 appearances annually as administrations changed and the Federal Communications Commission (FCC) toggled back and forth between Title I and Title II (of the 1934 Communications Act) regulation of the Internet.

This experience led to the following [conclusion](#): “It is time for this tiresome movie to stop. The fundamental problem has been that the FCC does not have clear authority to regulate the Internet, and the Title II regime is too anachronistic, cumbersome, and intrusive to make any sense. The solution is for Congress to decide on a bipartisan regulatory regime for the Internet, [pass legislation](#), and pass the baton to the FCC to implement this new law.”

That's right, Congress needs to do its job.

That was true four years ago but, as Jeff Westling [points out](#), it is especially true now. “The Supreme Court's implementation of the major questions doctrine in [West Virginia v. Environmental Protection Agency](#) has sent shockwaves through the administrative state, as the decision will likely [limit agency rulemaking and actions](#) moving forward.” In particular: “the *West Virginia* decision will undoubtedly impact future Federal Communications Commission [network neutrality rules](#), which would treat broadband providers as common carriers.”

The important part of the decision was the “major questions doctrine” that limits agencies' actions on questions of major economic or political significance without clear authority from Congress. Net neutrality regulation regulating broadband service as a common carrier is

precisely the kind of major question that the Supreme Court highlighted. It is now very clear that if Congress wants to regulate broadband as a common carrier, it needs to either put that regulatory framework in law or pass a law that clearly gives the FCC the authority to do so.

Just as important, the current FCC should refrain from executing any plans it has for network neutrality regulation.