The Daily Dish

Of Zombies and Net Neutrality

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Eakinomics: Of Zombies and Net Neutrality

AAF's Jennifer Huddleston is warning us that net neutrality – the zombie of tech policy (her word, not mine) – is likely to re-emerge in the Biden Administration: "This debate is likely to reemerge in the Biden Administration, as acting Federal Communications Commission (FCC) chair Jessica Rosenworcel supports net neutrality and the Biden Administration decided to withdraw the federal government's challenge to California's net neutrality law."

Sigh.

As part of my research (yes, Eakinomics is built on a research foundation; did you think I just say this stuff?), I searched the AAF website for "net neutrality." AAF has been writing on net neutrality since 2010. You would think that by now the case would be settled and all would agree on the light-touch regulatory approach under Title I of the Communications Act that has prevailed for essentially the history of the internet and is responsible for the tradition of dramatic innovation and its ability to withstand the demands placed on it by the COVID-19 pandemic. But no, once more there seems to be an appetite on the left for something like the so-called Open Internet Order during the Obama Administration, which sought to "save" the internet by classifying broadband services as the equivalent of a 1930s phone call and regulating it to a standstill.

So, maybe the left is just unwilling to learn. But now some on the right are also calling to apply heavy-handed regulation to other aspects of the internet. As highlighted by Huddleston: "Most notably calls for applying a more expansive common carrier regulation to a variety of tech companies has been heard both from conservatives such as Justice Clarence Thomas and from progressives such as FTC nominee Lina Khan. Reclassifying elements of the internet as common carriers whether ISPs or social media platforms could lead to a much more regulatory approach that has consequences for speech and innovation."

That is a real concern and highlights the fundamental principle at the heart of many internet regulation debates. Most of the litigation over net neutrality has not been over the policy; it has been over whether the FCC has the authority to impose the policy. As Huddleston notes: "A better route than ever-changing FCC interpretations would be congressional action to clarify the regulatory status of the internet and the appropriate authorities involved. Ideally this clarification would avoid a reclassification under Title II and its associated problems, but it should provide greater clarity around the authority of the FCC or FTC [Federal Trade Commission] to address this recurring policy debate. Such an approach would provide better regulatory certainty for innovators and clearer guidance for regulators. Congressional action could also address issues associated with a potentially emerging patchwork of state laws that could disrupt the internet by providing clear preemption directing that many internet issues are to be decided as a federal matter."

In short, Congress, please do your job and spare us another swing of the net neutrality pendulum.