



Insight

The Problematic Potential Return of Net Neutrality

JENNIFER HUDDLESTON | MAY 4, 2021

Executive Summary

- The Biden Administration has signaled its openness to reinstating net neutrality regulations.
- Proponents of net neutrality predicted that repealing it, as the Trump Administration did, would lead to consumer harm and worse internet connections, but if anything the opposite has proven true.
- Restoring net neutrality regulations and the possible expansion of such regulation to other elements of the internet such as social media could lock in existing players, deter innovation, and harm free speech.
- Congress should consider legislation to clarify the appropriate regulatory framework for various aspects of the internet to avoid the disruption that could arise from repeated shifts in FCC policy or state-level laws.

Introduction

Net neutrality is the zombie of tech policy debates: No matter how many times the debate seems settled, it returns from the dead with a renewed vigor. The debate over net neutrality and the appropriate regulatory classification of the internet not stopped since its emergence as an academic idea in the early 2000s, continuing through the Bush, Obama, and Trump Administrations.

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. At the same time, some conservatives have been pushing for similar regulation for other parts of the internet such as webhosts and social media. The return from the dead of net neutrality will solve nothing, but it could once again create new concerns for speech and innovation.

Repealing Net Neutrality Didn't Break the Internet

The Obama Administration's FCC classified broadband service as a common carrier service under Title II of the Communications Act of 1934, shifting it from the existing Title I categorization as an information service. [Advocates for Title II classification](#) argued—and continue to argue—that this classification ensures the FCC can regulate providers in a way that increases connectivity, privacy, and affordability. Repealing this classification, they asserted, would hurt consumers both in their access to broadband and in what they could access once online.

At times, the claims of what would happen in a world where broadband was not classified as Title II became extreme. After net neutrality was imposed but there was a strong movement to roll it back, proponents of the policy claimed that repealing net neutrality would have impacts ranging from the internet loading one word at a time to Yankees games and Netflix not being easily streamed to platforms blocking access to or harming marginalized groups.

After the Trump Administration's FCC issued the Restoring Internet Freedom Order in 2018 removing Title II classification, however, the apocalyptic predictions never materialized. Instead, innovation and private investment appear to [have flourished](#), or [at least have not diminished](#). What's more, America's internet network has withstood its greatest stress test – the increased demands during the COVID-19 pandemic – without the [throttling or blocking seen in Europe](#). The removal of Title II classification has proven to be far from catastrophic when it comes to internet speeds or the ability to access content.

The repeal of net neutrality also did not leave consumers without recourse. In moving the classification back to Title I, the FCC did not abandon consumers, but rather shifted consumer protection to the Federal Trade Commission (FTC). This regulatory avenue allows regulators more directly to focus on consumer harm, deception, and unfair trade practices, and it also creates more uniformity and certainty around issues such as data privacy and security for both consumers and providers.

Policymakers who continue to advocate for reinstating net neutrality or Title II classification should recognize the reality that this policy shift could have a negative impact on internet service, innovation, and investment while the claims of what might happen without Title II classification have proven to be largely exaggerated.

Calls to Expand Title II Regulation to ISPs and Other Aspects of the Internet

Nevertheless, some continue to call for a return to net neutrality regulation and even to expand such regulation beyond internet service providers (ISPs) to other elements of the internet including webhosts and social media. 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.

Classifying elements of the internet under Title II could lead to regulators intervening in companies' decisions on what content to carry, triggering First Amendment concerns. As Mercatus scholar [Brent Skorup](#) discussed regarding the debate over net neutrality, FCC requirements that prohibit blocking content or choosing what information to carry could trigger First Amendment concerns given existing jurisprudence. This approach also undermines the intention behind laws such as Section 230 that enable a wide range of speech online. Expanding Title II or common carrier classification to edge providers such as websites and other parts of the content delivery process as well would only more directly illuminate these concerns, as it would have an even more obvious and direct [impact on speech](#).

Title II classification, however, would also allow various other interventions into the tech industry. When it imposed net neutrality the first time, the FCC chose to forego other requirements, but such restraint is not guaranteed. A classification of the internet under Title II could include numerous other regulations including price controls and “must carry” requirements. The result could be that new players find it much more difficult to enter a more a highly regulated environment, locking in the existing giants. Additionally, even for existing players, regulations such as price controls or other heavy-handed interventions could discourage investment in

innovative or less certain markets out of concern that they would not recoup the costs.

The Problems of Continued Regulatory Pendulum Swings

The constant cycle of regulatory changes regarding net neutrality also has its risks for innovation and investment. Not knowing how various elements of the internet will be regulated from administration to administration could discourage expansion or investment.

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 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.

Yet if Congress acts on the matter, it should avoid many of the burdensome elements that a renewed Title II classification could bring with it and instead seek to create a solution that provides clarity around appropriate regulatory authority and certainty for innovators and investors.