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Are the FCC's "New" Regulations Really an "Obamacare for the Internet"?

Abstract

"A few days ago, news services everywhere were abuzz with news about the Federal Communication Commission's (FCC) new "Net Neutrality" regulations. While many internet sources have been advocating for this concept for a while now, recent coverage has increased not only because of decisive action by the FCC but also because of a rising tide of criticism and outcry, particularly from Republican politicians and commentators."

Posting about net neutrality, government regulations, and what they mean for us from *In All Things* - an online hub committed to the claim that the life, death, and resurrection of Jesus Christ has implications for the entire world.

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Donald Roth

A few days ago, news services everywhere were abuzz with news about the Federal Communication Commission's (FCC) new "Net Neutrality" regulations. While many internet sources have been advocating for this concept for a while now, recent coverage has increased not only because of decisive action by the FCC but also because of a rising tide of criticism and outcry, particularly from Republican politicians and commentators. Probably most famously, Sen. Ted Cruz referred to the measure as "Obamacare for the Internet" in a public [tweet](#) on the topic.

So what's the truth? Has the government taken over the internet? Should throngs of people be massing in the streets reveling in the triumph of freedom over corporate monopolies? As you might expect, the answer is somewhere in between, but, for reasons I will explain, there are ample reasons to be optimistic.

What is "Net Neutrality"?

"Net Neutrality" as a term is generally attributed to Columbia Law Professor Tim Wu and an [article](#) he wrote for the *Journal on Telecommunication and High Tech Law* while teaching at the University of Virginia in 2003. The article wove in past case law and tried to lay out principles for how to preserve the unique innovative landscape of the internet, and these principles have guided net neutrality proposals ever since.

The term itself signifies the idea that network providers (think Comcast, Verizon, or whoever you pay for your internet service) should not be able to discriminate or interfere with what sort of data they actually carry into your home. The idea would compare the internet to electricity. It seems preposterous to think that the electric company could charge you more or even prevent you from using certain household appliances with the power they provide you, why should the companies that sell you the ability to connect to the internet be able to do that with your internet content?

While the large internet service providers (ISPs) claim that they have never actually done something like this, Verizon, in a lawsuit against the FCC in 2012, explicitly claimed that it had the right to do so.

"[E]ach day millions of individuals use the Internet to promote their own opinions and ideas and to explore those of others, and broadband providers convey those communications. In performing these functions, broadband providers possess "editorial discretion." Just as a newspaper is entitled to decide which content to publish and where, broadband providers may feature some content over others." [Brief of Appellant at 43, Verizon v. FCC, No. 11-1355 \(DC Cir. July 2, 2012\)](#)

The general principle behind net neutrality then is that internet providers should be able to charge you either based on the bandwidth they provide (as they currently do) or the amount of it you use (more similar to how mobile broadband is billed), but they should not be able to charge you (or the content creators) based on the content you actually use or interfere with your ability to use it.

Is the Government "Taking Over the Internet"?

This is the fear at the heart of Ted Cruz' tweet and the catchiest byline of most of the criticism leveled at the FCC's actions. So is it true? In the sense that there will be more regulation of ISPs now than there was prior to this action, yes. In the sense that this is something totally new or anything remotely parallel to "Obamacare for the Internet", no.

Going back to Prof. Wu's article mentioned earlier, the reason the idea of net neutrality developed in 2003 is related to the fact that in 2002, the FCC changed its regulations, deciding to regulate ISPs as "information services" rather than "common carriers." I won't bore you with specifics, but [the law](#) defines the technical difference between these two things, in the words the cable companies themselves use, as a distinction between information services, which create, process, and store data, and common carriers, which primarily transmit it.¹ The real importance though is the practical difference: information services are virtually unregulated, while common carriers are subject to things like non-discrimination requirements.

Now, you may be a little confused at this point. Hopefully it's not because I'm lapsing too far into legalese. Instead, you might be thinking that it seems like your internet provider just transmits data to you, rather than "creating, processing, or storing" it. That is, it sounds like internet providers would naturally be better described as common carriers than information services.

You would be right. In fact, when this reclassification was challenged in front of the U.S. Supreme Court, Justice Antonin Scalia (usually a favorite of conservative folks) agreed too, but he only had a couple of other justices on his side. The rest of the court, due largely to the immense leeway that administrative agencies have to interpret the law that they're regulating, found that the FCC's reclassification was legal.²

The history of net neutrality then is an attempt by the FCC to keep this classification of broadband providers in place while still imposing some rules, particularly those related to discrimination based on content, that are part of common carrier regulation. The FCC officially adopted net neutrality regulations in 2010, but they have run into repeated legal obstacles to enforcement. Essentially, by a series of adverse rulings, the DC Circuit in particular has sent a clear message to the FCC that it can't have its cake and eat it too.³

The action taken by the FCC then is really just undoing what seems to have proven to be mistake that it made back in 2002. But what about other objections to this regulatory action?

Do the Regulations mean the Government will Control Internet Content?

No. The First Amendment generally prevents the government from meddling with the content of free expression. However, it can act to prevent private organizations from things like discrimination when those organizations themselves act as conduits for public speech. It's why other common carriers, like bus companies and hotels, don't get to choose who they allow to use their services. The FCC is able to regulate certain decency standards with radio and broadcast (local) television, but this is due to a scarcity of available frequency bandwidth that simply isn't there with the internet. The Supreme Court made this clear in [Turner Broadcasting v. FCC](#) all the way back in 1994.

What this means is that this may actually be an arena where the sort of protections of free expression that the government guarantees far exceed those offered by private companies (see Verizon's statement quoted earlier). Yes, there is something appealing to the argument that more government can't mean more freedom, but this might be a narrow exception to that rule.

Aren't the Regulations Antiquated/Exceedingly Long/Created in Unusual Secrecy?

I've seen several variations of these arguments floating around the internet, and there's not much merit to them, so I'll deal with them quickly in turn:

The law that these regulations refer to was passed back in 1996 (or 1934, if we're talking about the first

Telecommunications Act), but that act largely authorizes regulation without putting a ton of meat on those bones. The FCC has broad discretion and a general mandate to regulate in a way that permits innovation and flexibility and they can choose not to impose all common carrier restrictions that the law permits them to use.

The regulations themselves are over 300 pages long, and while that certainly sounds like a lot, it's not that remarkable in the world of government regulation. After all, this is regulating an entire industry.

Finally, Republican lawmakers have criticized FCC Chairman Tom Wheeler for not sharing the final version of the regulations publicly before passing them; however, while he *could* share these regulations, it's not wildly unusual for an agency not to. These regulations have already been open to a public comment period that's part of the normal process for making rules like this, and the FCC received nearly [4 million comments](#) on its proposed plan, including 2.5 million comments [replying](#) to other initial comments. In sum, the public has had nearly unprecedented input on the nature of these rules, and it's not totally unfair for Wheeler and the Commission to call that enough.

Will these Regulations Stifle Innovation in the Future?

This is the primary argument made by the cable companies and their supporters, and I suppose it's always possible. There are two countervailing considerations, however: First, the provision of cellphone service (not mobile data) is and has always been a common carrier.⁴ If that service was able to innovate, develop, and invest within the common carrier regime, broadband can probably survive. Secondly, the FCC is planning to apply even fewer of the more restrictive common carrier rules to broadband service than it does to mobile voice services.⁵ Together, these are both good reasons to at least be optimistic about the regulatory footprint these rules will leave on innovation.

So Where Does this Leave Us?

Ultimately, we have to wait to see what the regulations are and what their long-term impact and enforcement will be before we could pass any sort of final judgment. Chairman Tom Wheeler [insists](#) the regulations are "light touch." We will have to see to what degree they are, but there are many reasons to be optimistic about that promise and many reasons not to rush to condemnation and fear of what's being done. It's possible, perhaps probable, that the implementation will see some hiccups, but the idea of net neutrality has been and remains a good one.

Footnotes

1. National Cable & Telecommunication Association, [Why It's a Good Thing That Broadband isn't a Common Carrier](#) (Jan. 27, 2014). [↩](#)
2. [National Cable & Telecommunications Association v. Brand X Internet Services](#), 545 U.S. 967 (2005). [↩](#)
3. See, e.g. [Verizon Communications v. FCC](#), 740 F.3d 623 (D.C. Cir. 2014); [Comcast Corp. v. FCC](#), 600 F.3d 642 (D.C. Cir. 2010). [↩](#)
4. See, e.g. Mitchell Lazarus, ["Court Upholds FCC Role as Data Roamin' Umpire"](#) *CommLawBlog* (Dec. 12, 2012). [↩](#)
5. [Fact Sheet: Chairman Wheeler Proposes New Rules](#), Federal Communication Commission (Feb. 4,

2015). ↩