



## Net Neutrality and the Role of States

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Net Neutrality regulation remains a contentious – and thus far rejected – topic in Washington DC policy circles. That regulatory stalemate in Washington has had the unfortunate effect of encouraging proponents of Internet regulation to take their case to the states and to localities. Michigan is the first instance of this regulatory forum shopping, where regulatory proponents are encouraging the state Senate not to approve a video franchising bill that cleared the state House without net neutrality language. The ultimate result of these state net neutrality efforts will be unavailing litigation battles, at best, and harmful balkanization at worst. In the meantime, consumer benefits from advanced broadband networks will be delayed while investment halts awaiting federal courts to overturn the states' ill-advised regulatory forays.

The definitive objection to state net neutrality regulation is that the states are preempted from regulating broadband Internet services. The U.S. Supreme Court's *Brand X* decision, and follow-on Orders from the FCC have declared that broadband Internet services over telephone, cable and electric power lines are "information services," and thus immune from state regulation.<sup>1</sup> This means, with strong categorical certainty, that states or localities attempting to impose net neutrality-type requirements would find themselves preempted by clear federal law that prohibits state regulation of the Internet. For a state trying to impose net neutrality regulation, then, the result will be high litigation costs ending in a federal court holding the state regulation invalid.

Federal law, then, will effectively block any state net neutrality efforts. But such jurisdictional niceties have not stopped willful states or localities in the past. Courts or federal regulators eventually overrode state and local forays into wireless regulation, telecommunication unbundling and pricing, and extralegal franchising requirements. But threats of preemption did not stop those regulatory attempts in the first place.

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<sup>1</sup> There may be a quirk here in the regulation of voice-over-Internet-protocol (or "VoIP") communications that has yet to be fully played out legally, but the larger point holds that broadband Internet services are unregulated "Title I" services.

So, the practical danger of net neutrality regulation from the states is nil, right? Not necessarily.

First, states and localities often have a decided view of their prerogatives, even in the face of clear federal law. Right now, for instance, the Missouri Public Service Commission is steadfastly attempting to regulate Comcast's VoIP product, even though the FCC has been rather clear that it cannot. Though Comcast – like another VoIP provider, Vonage, before it – will prevail in fighting back state regulation of its Internet voice service, that does not preclude a litigious road before certainty is achieved. Nonetheless, Missouri's current losing streak in trying to regulate VoIP, and Minnesota's loss before that, should be a cautionary tale to states thinking about regulating broadband Internet.

Second, even assuming states can impose net neutrality in the face of clear federal law, think of the balkanizing travesty that would be. Broadband Internet service providers would face a patchwork of different regulatory treatment that would impede business and add costs to services. What is more, states imposing net neutrality would be disadvantaging themselves and effectively putting their citizens at the back-of-the-line for broadband investments. Broadband Internet providers have limited investment ability and enormous needs to continue upgrading networks. States that try to regulate broadband in an unneeded, onerous way will find investment going elsewhere.

The threat of abiding state or local net neutrality mandates is small in the long-run. There is simply no regulatory authority for states to accomplish it. In the near-term, however, net neutrality skirmishes might well break out for the simple reason that where there is a venue, Internet regulation proponents will use it to press an advantage. In the end, consumers are the losers because, while regulatory skirmishes go on, network investment is being delayed. The right response by states hearing the siren song of net neutrality is: "no, now please go build and compete in the marketplace."