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**Regulation in a Digital Age:
We Need to Move from Regulations Crafted in 1934 to Ones Crafted for 2034**

by

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The old saying “Never a dull moment” certainly describes the evolution of communications technology. Broadcast television followed radio in the 1950s, satellite TV and cable TV followed in the 1970s and ’80s, and cell phones came right behind in the 1990s.

What is new now — say, in the past decade versus the entire preceding century — is the rapidity with which technological change is dramatically transforming the communications marketplace.

Radio, television, cable TV, satellite TV, cell phones? Sure, they are all still around. But today, with the proliferation of digital broadband technologies, these older services are supplemented and complemented by — and often incorporated into — smartphones, Internet service, Internet TV, Internet telephony, and even what we’re now calling the “Internet of Things,” encompassing everything from “smart” cars to “smart” appliances, all linked to the Internet.

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What does all this change mean? For the American consumer, the answer is simple: more competition among purveyors of services and products. Sometimes the array of choices can be daunting. We're a long, long way from the time when Americans had the choice between a black rotary desk phone and a black rotary wall phone. But no one wants to go back to that era of "choice."

And what does all this change mean for the Federal Communications Commission and for Congress?

It means we're at a pivotal point that will determine whether communications policy ultimately will be aligned with new digital-marketplace realities. If it isn't, Internet service providers are likely to find themselves stuck in regulatory shackles that constrain their ability to adapt to changing consumer demand. And they are unlikely to invest as much as they otherwise would in new facilities and services.

First, the FCC. In mid January, a federal appeals court in Washington, D.C., tossed out the commission's "net neutrality" regulations, concluding that the neutrality mandates, with a nondiscrimination requirement at their core, unlawfully imposed traditional common-carrier regulation on Internet service providers. The court held that the FCC lacks authority to subject Internet providers to the same common-carrier regulatory regime applied to railroads in the 19th century and electric utilities and the old Bell System in the 20th.

But the court didn't say the FCC lacks any authority over Internet providers. So Tom Wheeler, the FCC's chairman, is mulling over what to do next. So far, he has sent mixed signals. On the one hand, he has said the agency "is not going to do anything that gratuitously interferes with the organic evolution of the Internet in response to developments in technology, business models, and consumer behavior." But he has also indicated several times that he supports the principles embodied in the net-neutrality mandates that the court just held unlawful.

While Chairman Wheeler may be under pressure from long-standing net-neutrality advocates — and, after all, these include President Obama — he should do nothing more now than engage in watchful waiting. When Mr. Wheeler says he is not going to interfere "gratuitously" with the Internet's evolution, I'm willing to grant his good intentions. The problem, however, is that if the FCC takes any action resembling reimposition of net-neutrality mandates, the effect is likely to be just the opposite of what Mr. Wheeler claims he wants.

This is because the prohibition against "discrimination" necessarily will interfere, gratuitously or not, with the evolution of technology, business models, and consumer behavior. The way marketplace participants compete is by trying to differentiate their services from those offered by their competitors. They try to develop innovative new business models that satisfy evolving consumer behavior in the light of new technological capabilities.

Exhibiting humility is hard for most regulators. But humility is what is called for from Mr. Wheeler. The FCC should take no further regulatory action at all with respect to Internet providers unless it finds that there exists a market failure that is resulting in actual consumer harm.

Now, as for Congress: House Commerce Committee leaders Fred Upton (R., Mich.) and Greg Walden (R., Ore.) have begun the arduous process of updating the Communications Act of 1934, which, in fundamental respects, remains little changed from the day it was adopted 80 years ago.

The legislative rewrite may be a multi-year project. But Congress does need to adopt a new Digital Age Communications Act that tears down the regulatory silos that lead to disparate regulation of market participants offering comparable services. This disparate regulation results from applying outdated techno-functional classifications to today's digital services. And the current statute delegates to the FCC too much unfettered discretion with no more direction than simply to regulate in "the public interest."

The indeterminate public-interest standard should be replaced with a competition-based standard that forces the FCC to focus on the question of whether a market failure exists and is actually harming consumers. And the new law should require the agency to favor narrowly tailored remedial orders, developed in adjudications of individual complaints, over broad anticipatory proscriptions that conjure up all manner of speculative harms that may never occur.

With the FCC now considering whether to attempt to reimpose rules that the appeals court found constitute traditional common-carriage regulation, and with Congress beginning the process of updating the Communications Act, communications policy is at a pivotal point.

Pivot forward! There's no way regulations developed to control railroads, electric utilities, and Bell System telephone monopolies should be applied to Internet providers.

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