Avoid Hindering the Internet's Evolution through Net Neutrality Regulation

In 2010, Congress failed to enact legislation authorizing the Federal Communications Commission (FCC) to enforce network neutrality rules. In 2011, Congress is widely expected to again take up net neutrality, a policy that would make it illegal for broadband providers to "unreasonably" discriminate among different kinds of Internet traffic. Net neutrality regulations would obstruct beneficial market arrangements for distributing digital content. Worse, they would stifle infrastructure wealth creation in network industries by undermining property rights and turning market contests over network pricing and access disputes into political battles.

Advocates of neutrality regulation argue that is necessary to prevent Internet service providers (ISPs) from either censoring or degrading certain kinds of traffic. However, neither of these concerns justifies federal regulation of Internet providers.

- **Censorship.** Many consumers do not believe that Internet service providers and other network operators, like wireless telephone carriers, should be in the business of judging the appropriateness of lawful network traffic. But not all consumers oppose filtering at the network level, which can be a valuable tool for safeguarding children from inappropriate content, for example. Broadband

providers will not be able to satisfy their users' diverse preferences, if network filtering is regulated by the federal government—whether in the form of an outright ban on filtering or a requirement that providers filter certain types of content. If broadband providers engage in overbroad filtering, they will face consumer backlash and competitive responses. In recent years, a handful of providers—including Verizon Wireless, T-Mobile, and Cox—have dabbled with content filtering. In each instance, popular opposition has been swift and fierce. Like all firms competing in a marketplace, broadband companies care about their reputation. Unreasonably blocking lawful content that users desire is a surefire way to lose friends and make enemies. Firms will make mistakes from time to time, but this trial-and-error process is the only effective method of ensuring that consumers' evolving preferences are satisfied in the long run.

- **Network Management.** Perhaps the most contentious question in the neutrality debate is how network traffic should be managed. Proponents of neutrality regulation believe that Internet providers should be required to obtain the federal government's blessing before engaging in any network management technique that involves the

prioritization of certain types of traffic. This approach would chill innovation and make complex business judgments contingent on the whims of bureaucrats. While courts should enforce the contractual arrangements (terms of service) between broadband companies and their subscribers, neither content providers nor federal regulators should be empowered to coercively dictate broadband network management. In April 2010, a federal appeals court ruled that the FCC lacks the authority to regulate Internet providers' network management practices. However, the FCC remains undeterred and now is considering a new regulatory approach aimed at empowering the agency to regulate broadband networks. As a result, broadband providers have little incentive to adopt novel pro-consumer network management techniques for fear of government intervention.

The win-win scenarios made possible by emerging network structures will ultimately render neutrality proposals obsolete. Many of the major companies that once supported neutrality regulation—Microsoft, Yahoo!, Amazon, and Google—have changed their tune, and are increasingly working alongside broadband providers, and, in some cases, nego-

tiating non-neutral arrangements for delivering their content to end users through techniques such as "edge caching" (distributing content away from a central server to servers closer to the end user). Even several prominent net neutrality advocates, such as Harvard Professor Lawrence Lessig, acknowledge that, "there are good reasons to be able to prioritize traffic."

Congress should resist calls to grant the FCC authority to enforce net neutrality rules. Regulating the broadband market will make it less competitive. In addition, creating a new regulatory regime to address elusive harms would lead to harmful consequences down the road. Net neutrality rules would invariably fail to keep pace with ever-changing technologies. As networks evolve and new technologies emerge, boundaries between "reasonable" and "unreasonable" network management will continuously shift. Consumers will vote with their wallets—if providers cross the line, subscribers will simply go elsewhere. Policy makers should focus first and foremost on how to expand consumer choice in broadband. Liberalizing the airwaves and telecommunications will help stimulate competition in the broadband marketplace.

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