

The legal idea that companies providing transport services for general-purpose communications networks are obliged not to discriminate with respect to the content or source of those communications is going out of fashion. Eli Noam, writing in 1997, thought that there might be several decades of transition before the elimination of “common carriage” obligations took place, but events are moving much more swiftly than that. The legal spadework has already been done, and the phasing-out of communications networks subject to any non-discrimination limitation is well underway. Yet despite having succeeded in eliminating any express legal obligation to treat all highspeed Internet communications equally, providers of general-purpose communications services in this country still want to portray themselves as wide-open carriers of information. Users of Internet access services, for their part, believe that these companies are fundamentally in the transport business and have a duty to carry all communications presented to them without discrimination.

This substantial gap between user belief (now skillfully played-upon by the communications companies in their advertising) and regulatory reality presents a puzzle. In my view, understanding and resolving this puzzle is centrally important to the economic and social future of the U.S. There were many good reasons that for more than 100 years the law applied a non-discrimination obligation to the providers of general-purpose communications networks. This principle is important not just because it is elderly (although we should be careful with it on that account); it is important because it is the foundation on which a great deal of U.S. communications law exists. It is a key part of what I will call our [Communications Legal Infrastructure], in that it governs the balance of power among private communications companies, the Federal Communications Commission, the courts, and the legislature by ensuring end-users the liberty to communicate across general-purpose networks. Most of the developments in general-purpose communications network law over the last 100 years have assumed the existence of an underlying non-discriminatory network. The removal of common-carriage non-discrimination obligations from general purpose networks represents a fundamental assault on the assumptions that underly the US communications system. Yet because “non-discrimination” is perceived to have only a self-interested industry faction behind it, it is easily dismissed these days.

The founders of communications law chose between two models in dealing with telephony: letting competition set the rates and terms of service, or allowing private companies to provide general-purpose communications services subject to government regulatory requirements that would include an obligation of non-discrimination. They chose the second model, having in mind a long tradition of “common carriage” nondiscrimination obligations imposed on companies that are involved in general-purpose transport of communications; traditionally, a focus of government attention. This second model has provided the framework for all non-broadcast communications

law. Indeed, the history of telecommunications law in this country indicates a strong tidal pull towards requiring all providers of highspeed access to the Internet to provide transport services on a non-discriminatory basis.

Fifty years ago, no one would have questioned the appropriateness of treating telephone companies like common carriers, obliged not to discriminate against particular communications and to provide service to all comers. Just over fifty years ago, in fact, Ma Bell agreed not to provide any services other than common carriage services regulated by government, and was reportedly untroubled by this limitation. Forty years ago, the Federal Communications Commission (FCC) limited telephone companies' use of computers to uses "incidental to" traditional common carriage transport of communications, in an effort to keep those companies from interfering with the then-nascent data processing market. Today, however, after a successful assault on the founders' legal and normative framework for communications, the situation has been completely reversed. Now general-purpose communications companies say they should be treated like newspaper editors, given full editorial control over the communications that they transport. Now companies providing Internet access (our new general-purpose communications network) are providing only services that are non-common carriage in nature.

Perhaps this development is a mine-run event. Perhaps we are better off as a nation because of the increasingly proprietary nature of the communications networks on which we rely. Even though internet access is becoming a replacement for telephone and postal mail/text services of all kinds, if there is discrimination in the form of "network management," perhaps it can be remedied by baseline privacy rules applying to online communications, or by after-the-fact antitrust examinations of whether a particular carrier has abused its market position. If you are not comforted by the application of these remedies, maybe there is something more important going on. Perhaps there is some relevant core value to the now-abandoned idea of common carriage. After all, it was central to communications law for eighty years.

Scholars have focused intensely on the idea of "network neutrality" in the last seven years or so, with Larry Lessig and Tim Wu leading the way. There have been many attempts to theorize the importance of neutral, nondiscriminatory internet access to innovation and economic growth, including by me, by Brett Frischmann and Barbara van Schewick, and others. But the positive role of the common carriage framework in overall communications law and policy, and the dramatic subversion of that framework during the last few years (triggering the network neutrality battle), has been under-explored.

In the summer of 2005, the Supreme Court's decision in *BrandX* raised the profile of the common carriage issue. The decision deferred to the Commission's view that highspeed cable modem internet access was an "information service" – and thus not covered by any nondiscrimination or interconnection obligations. The decision did not explain where the "information services" category came from or why removing internet access from this category represented a complete reversal in communications regulation from the agreed framework of fifty years ago; indeed, Justice Thomas treated the entire situation as a

difficult, ahistorical, semantic mind-bender that had been solved in a technocratic manner by the FCC and should not be second-guessed by the Court. BrandX emboldened the telephone companies (wireline and wireless) to seek the same “information service” treatment from the Commission for their own highspeed internet access services, and to work towards phasing out the dial-up internet access services that are still subject to common carriage treatment. Congress, meanwhile, said nothing. More recently, FCC actions in connection with Comcast’s discrimination demonstrate that the agency continues to ask the wrong questions. The right questions are: why do incumbents always win, and why has common carriage been destroyed so effectively? Retrospective fault-finding will never fix this situation, which calls for a prospective legislative, structural approach.

The conventional view of this dismantling of the central communications framework is that it was inevitable given the language of the 1996 Telecommunications Act and the economic pressures to which the carriers have been subject over the last few years. On this view, this dismantling has no particular precedent – it merely marks the coming of a new age of communications – and there is no reason to fix this state of affairs through legislation or other government actions.

In this Article I present a different view of both the historical precedent for the dismantling of the common carriage framework and the need for decisive reform. The language of the Communications Act, and the presence of Title II within that Act, is helpful evidence that this country takes common carriage seriously. We have the history of telegraphy to instruct us when considering how data-carriage services should be treated. This history provides the precedent that the conventional view claims does not exist, and shows that given sufficient discretion vertically-integrated “last mile”/text carriers will both discriminate in favor of their own “text” services and act on the content of messages they are asked to transmit, to their own commercial advantage.

Part I describes the evolution of the common carriage framework for general-purpose communications networks, including telegraphy and telephony. This examination allows me to state a future-proof definition of “common carriage” that is based on non-discrimination and does not necessarily include the obligation to cross-subsidize rural service. That obligation was tacked onto the traditional idea of “common carriage” for convenience and political “cover” purposes, and needs to be severed (and paid for by everyone) as part of the reform I suggest. Part II analyzes the historical statutory story by examining the current “information service”/“telecommunications” dichotomy in some detail. Although the BrandX opinion ignored the history of this dichotomy, the classification of something as an “information service” is based on the concomitant continued existence of a non-discrimination obligation for basic transport. Taking the existence of common carriage transport as a given, the Department of Justice and the FCC more than fifty years ago tried to devise definitional lines to keep the common carriers – then, the telephone companies – out of the business of data processing (“information services”). Today, everything the telephone companies do is called an “information service,” and the “common carriage” (“telecommunications service”)

category is almost completely vestigial. The carriers now see themselves as the future of all converged services.

Part III presents the argument for the common carriage ideal in communications. It argues that three conditions – the longstanding policy consensus as to the importance of internet access to economic growth and innovation; the impossibility of “fixing” communications discrimination through post hoc procedures; and the ineffectiveness of antitrust law as a remedial framework – provide the necessary context for a decisive shift back to the non-discrimination portion of the common carriage ideal (not tied necessarily funding universal service). Part III also responds to a number of arguments against common carriage.

Part IV offers proposals for remedying the current situation. In my judgment, the conventional view (“this was bound to happen”) is dangerously superficial. To treat the elimination of the common carriage framework as if it was merely an exercise in routine administrative evolution (driven onwards by the obvious needs of industry) is to ignore its fundamental historical significance: through the tacit cooperation of deferential courts, ineffective legislators, and an aggressive, industry-sensitive FCC, a central organizing principle of communications law in this country is on the verge of being destroyed. To have a communications law without this principle in place puts our general-purpose communications network – yesterday, the telephone; today, the Internet - at great risk of control by private entities, something we have done our best to avoid in the past. Our laws are outdated and ineffective, and we will need our new president and Congress to work together to shore up the legal framework for the transport of basic communications (the Communications Legal Infrastructure). The elements of this legal framework will have to include a basic nondiscrimination obligation as well as the complete structural separation of network operators from other businesses, and federal subsidies for network provision in rural and other underserved areas. Just as every ferry operator was required to carry every passenger who showed up on the shore, no matter how large or small the ferry business, so too should every Internet access provider be required to carry all communications without discrimination.