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SUPERVISING DISCRIMINATION: REFLECTIONS OF THE INTERSTATE COMMERCE ACT IN THE BROADBAND DEBATE

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"The forms of action we have buried, but they still rule us from their graves."[1] For a telecoms lawyer asked to reflect on the 125th anniversary of the Interstate Commerce Act, F.W. Maitland's famous line concerning common law procedure leaps to mind. The 1887 Interstate Commerce Act (ICA)[2] continues to exert an outsize influence on the world of telecommunications—despite changes in both the ICA and telecoms. The ICA's original commitments of just and reasonable rates, nondiscriminatory service, and supervision by an administrative agency were, as is well-known, copied from the railroad statute into numerous other federal regulatory regimes—including the Communications Act of 1934.[3] And while the ICA's structure steadily changed in the 1970s and 1980s, leading to the Interstate Commerce Commission's eventual demise in 1996, the Communications Act remains the controlling statute for an enormous, and increasingly important, segment of the American economy—notwithstanding that telephones, telegraphs, and broadcasting (the objects of that Act) are no longer the important services.

In fact, the most persistent issue for the Federal Communications Commission (FCC) in recent times has been—and remains—in the realm of broadband services: specifically, the application of "nondiscrimination" rules to the Internet. Both the FCC and commentators discuss this issue as if it were, in part, simply the

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1. F.W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 295, 296 (1st ed. 1909).

2. Ch. 104, 24 Stat. 379 (1887).

3. Ch. 652, 48 Stat. 1064 (1934); *see* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1325, 1330–31 (1998) (the original ICA model of regulation); *id.* at 1333–34 (ICA copied into Communications Act and other statutes).

extension of nondiscrimination obligations codified in 1887 and 1934 and behave as if nondiscrimination notions under those statutes might illuminate the modern debate. I have done the same, and perhaps even worse by reaching back to the common law of common carriage,[4] and there is at least some purchase to be had in all this, "because non-discrimination was unquestionably the overriding goal of the Interstate Commerce Act, taking precedence even over the 'just and reasonable' [rate] requirement."[5]

But, as important as the nondiscrimination obligation was to the regulatory model initiated by the ICA, much of the current telecoms (or broadband) debate forgets that nondiscrimination was merely one aspect of a regulatory system in which all aspects of a carrier's services were supervised. And under that supervision, discrimination was frequently allowed—after all, the statute forbade only "unjust discrimination,"[6] which gave the regulators considerable flexibility. Moreover, discrimination was frequently *required* in this regulatory model, in the name of universal service. This richer history should allow a better consideration of the modern, broadband problem.

I. "NONDISCRIMINATION" IN THE CURRENT TELECOMS DEBATE

One influential commentator in the debate over the proper rules for broadband regulation (Tim Wu) has made the pitch that "in coming decades . . . the main point of the telecommunications law should be as an anti-discrimination regime, and that the main challenge for regulators will be getting the anti-discrimination rules right."[7] He is hardly alone.[8] And the FCC's only significant foray into Internet regulation has been to impose nondiscrimination rules on Internet access providers, first issuing a (since vacated) cease-and-desist order against one provider[9]

4. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225 (2002).

5. Kearney & Merrill, *supra* note 3, at 1331–32.

6. *E.g.*, Interstate Commerce Act § 2, 24 Stat. at 379–80.

7. Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. ON TELECOMM. & HIGH TECH. L. 15, 16 (2006); *see also id.* at 37 ("[I]n the coming decades, anti-discrimination rules as between applications and transport services are the single greatest priority for the telecommunications law.").

8. *See* Jerry Kang, *Race.Net Neutrality*, 6 J. ON TELECOMM. & HIGH TECH. L. 1, 1 (2007) ("The 'net neutrality' debate is undergoing a theoretical transition. Since the late 1990s, we have moved from 'open access,' to 'end to end,' to 'net neutrality,' and by 2007, the question seems to have transformed into 'anti-discrimination.'").

9. *See* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

and following more recently with generally applicable rules providing that "[f]ixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic."[10] Virtually no one calls for the other economic elements of the original regulatory paradigm, such as renewed restrictions on entry and exit, or the return of rate-regulation. And while few call for the FCC to be abolished, everyone (including the FCC) agrees that its touch should be lighter, more ex post, more deferential to private companies. The FCC itself describes the Open Internet rules as "high level," indicating that they will be applied case-by-case through private negotiation, private standard-setting, and, only as necessary, complaint and enforcement actions through the agency.[11]

Those pushing for modern, Internet nondiscrimination rules frequently invoke their statutory history—from the ICA through the original Communications Act. The FCC invoked the Interstate Commerce Act when it forbade "unreasonable discrimination" by broadband carriers, although the reference came in rejecting calls for stronger nondiscrimination rules.[12] More recently, in setting up his project for broadband anti-discrimination rules, Tim Wu argued that "[a]s an anti-discrimination regime, common-carriage is important both historically and conceptually."[13] Similarly, Susan Crawford has said that modern market conditions require returning to the old ways—that "[w]e need to return to the basic notion of a non-discriminatory network underlying communications. . . . [T]he old paradigm of regulation is new again—with a few changes."[14] The foresighted work of Ithiel de Sola Pool expressly argued for common carrier rules for new electronic networks, where monopoly conditions warranted.[15] Even the opponents of network neutrality rules make the connection between those rules and the historic nondiscrimination regime of the Interstate Commerce Act. For example, Bruce Owen has written that "[p]roponents of net

10. Preserving the Open Internet, 25 FCC Rcd. 17905, 17906 (2010).

11. *Id.* at 17908–09.

12. *Id.* at 17948–49 & n.239 ("As recently as 1995, Congress adopted the venerable 'reasonableness' standard when it recodified provisions of the Interstate Commerce Act.").

13. Wu, *supra* note 7, at 30; *see also id.* ("Western Union's discriminatory practices were eventually remedied through the device of 'common carriage.' In 1888, Congress gave the Interstate Commerce Commission the power to regulate subsidized telegraph lines, and in 1910, Congress declared telegraph companies to be common carriers. The 'common carriage' concept was preserved in the 1934 Communications Act and still forms the basis for the regulation of telephone carriers, and thus necessitates a close look.").

14. Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 937 (2009).

15. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 246 (1983).

neutrality may recognize their own fears and goals . . . [in] the legislative history of the first modern attempt by the federal government to regulate directly the behavior of large firms, in this case railroads. The result was the 1887 Act to Regulate Commerce."[16]

II. THE SHIFTING NORMS OF NONDISCRIMINATION UNDER ICA STATUTES

A call for broadband nondiscrimination rules as an extension of the nondiscrimination requirement of the ICA and of the Communications Act misses two important pieces of the history of those regimes. As already noted, the statutory text forbade only "unjust" (or "unreasonable") discrimination, and the regulators sometimes used that discretion to approve discriminatory rates.[17] More importantly, the goal of universal service, especially in the Communications Act, meant that the regulators affirmatively valued discrimination—discrimination that helped maintain artificially low prices for some services while ensuring that the carrier met its total revenue needs.

The common law did not impose a strict nondiscrimination duty on common carriers—so long as rates were reasonable, they did not have to be equal.[18] The ICA was undoubtedly meant to do more. Specific provisions forbade much long and short-haul discrimination, and the statute generally forbade unreasonable discrimination.[19] It is sometimes said of the Interstate Commerce Act that "[t]he core concern in the nondiscrimination area has been to maintain equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce differential pricing where dissimilarities in those key variables exist."[20]

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16. Bruce Owen, *Antecedents to Net Neutrality*, REGULATION, Fall 2007, at 14, 15. Owen did not mean this as a compliment.

17. The principle that the courts would defer to the ICC's findings on discrimination was established early. "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. . . . Preliminary resort to the Commission is required . . . because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission." Great N. Ry. v. Merchs. Elevator Co., 259 U.S. 285, 291 (1922).

18. *See* Speta, *supra* note 4, at 258.

19. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 131–48 (1991); Clyde B. Aitchison, *The Evolution of the Interstate Commerce Act: 1887–1937*, 5 GEO. WASH. L. REV. 289, 298 (1937); Kearney & Merrill, *supra* note 3, at 1332–33.

20. Sea-Land Serv., Inc. v. ICC, 738 F.2d 1311, 1317 (D.C. Cir. 1984).

But introducing the idea that the tariffed rate may respond to competitive conditions—that discounts can be approved "on grounds of reduced costs *and* the need to meet intermodal competition"[21]—eliminates any need for "costs" to serve as the basis of a nondiscrimination requirement. Moreover, the Interstate Commerce Commission early implemented "value-of-service pricing," under which high-priced commodities were charged more (regardless of cost of transport).[22] And even further deviations from nondiscrimination were permitted: "The Hoch–Smith Resolution, passed by Congress in 1925, explicitly required the ICC to give consideration to the relationship between agricultural freight rates and agricultural incomes and has been interpreted as giving clear legislative sanction to the maintenance of the value-of-service rate structure."[23] These practices had economic and noneconomic explanations. Economically, value-of-service pricing "may have been a roughly adequate method of concentrating the fixed costs of railroad service on those customers whose demands for rail transportation were least elastic,"[24] and permitting rate concessions upon the development of intermodal competition allowed the railroad to keep the traffic at some rate (maintaining at least a marginal contribution to fixed costs). Noneconomically, low prices for agricultural commodities no doubt were popular.

That did not mean that nondiscrimination was a dead letter, to be sure. Formal nondiscrimination requirements persisted. Even when the ICC and later the FCC (and the courts) approved contract rates, the law required that a carrier offer the rate to any party that could meet the exact terms of the rate.[25] Extreme formalism came in the Communications Act context, when the FCC approved what were known as "contract tariffs"—service packages that, while tariffed, in most cases could be met by only one potential customer.[26] Moreover,

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21. *Id.* (emphasis added).

22. *See* Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 26 (1971) ("'Value-of-service' pricing in the railroad industry . . . [was] the practice of proportioning rail rates to the price of the commodity transported . . . .").

23. ANN F. FRIEDLAENDER & RICHARD H. SPADY, FREIGHT TRANSPORT REGULATION: EQUITY, EFFICIENCY, AND COMPETITION IN THE RAIL AND TRUCKING INDUSTRIES 2 (1980).

24. Posner, *supra* note 22, at 26.

25. *See, e.g.*, *Sea-Land Serv., Inc.*, 738 F.2d at 1317–19 (approving contract rates in ICC context).

26. *See* Competitive Telecomms. Ass'n v. FCC, 998 F.2d 1058, 1061, 1064 (D.C. Cir. 1993) (approving contract tariffs under the Communications Act).

substantive nondiscrimination cases did occur, and the regulators did, from time to time, hold that tariffs for similar services were discriminatory.[27]

The point, though, is that nondiscrimination, while an important rule, was very much applied based on the overall context, and that context was part economic and part noneconomic. Economically, railroads had high fixed costs, which needed to be recovered. Noneconomically, the Interstate Commerce Act's politics excluded recovery of those fixed costs against the most captive customers (the short-haul, agricultural customers). As competition developed, further concessions from the traditional modes of proceeding, including nondiscrimination, were required. Consider the D.C. Circuit's statement in one of the telecommunications contract tariff cases: "We have the impression that there is a certain air of unreality about this case. The FCC (one way or another) will undoubtedly permit AT&T to compete effectively against its competitors . . . ."[28]

Little need be added about universal service, for the point is now clear. Regulators wanted universal service (and, in the case of railroads, cheap agricultural service, and, in the case of telephones, cheap local residential service). This meant cross-subsidies, some of which necessarily violated any notion of cost-based nondiscrimination. In telephony, business rates were higher than residential rates, even if the business and the residence shared the same address. Long-distance rates were made uniform, even though the costs were higher on lightly used trunk routes.[29]

III. LESSONS

What does this mean for the debate over broadband nondiscrimination rules? Without doubt it means that one cannot simply say that the Interstate Commerce Act and the Communications Act adopted nondiscrimination rules for essential services, and therefore such nondiscrimination rules should now be adopted for broadband carriers (because broadband service is becoming essential). And one also cannot say that nondiscrimination rules are the response

27. *See* MCI Telecomms. Corp. v. FCC, 917 F.2d 30 (D.C. Cir. 1990) (remanding in light of conclusion that certain contract tariffs' price differences had not been adequately justified).

28. *Id.* at 42.

29. On these points, see generally STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 369 (3d ed. 2012).

to broadband monopoly, for of course the monopoly is incomplete. The business access market is likely more robustly competitive (as it was in traditional telephony in the 1990s) than the residential market. Under the traditional scheme's permission of rate discounts to respond to competition, the result would be to allow carriers to charge businesses less than residential customers. But, of course, the universal service imperative of the traditional regime would *not* in fact have permitted that result, for what were largely noneconomic (or at least distributional) grounds.

These conflicting forces have always been conflicting, but they could be resolved by a traditional regulator such as the ICC or the FCC in a system in which entry was legally and practically limited, and in which the regulator had the tools to ensure that carriers would receive adequate overall returns. Applying nondiscrimination rules while attempting to maintain the essentially unregulated nature of Internet carriers is a much trickier enterprise, and it is not clear how the new system can adapt to balance these concerns. On the one hand, the FCC's recent foray attempts to meet this concern by only stating a high-level principle of nondiscrimination and promising to adjudicate disputes. Adjudication may allow the FCC to forbid only particularly problematic practices, minimizing its intrusion into the business practices of the carriers, and to consider any legitimate business justifications offered by the carriers for specific services. On the other hand, the FCC has rejected the notion that discrimination is only a concern when it can be expressly linked with anticompetitive foreclosure (which would be an instance in which the carrier is making *more than* normal profits).[30] As a result, the Open Internet Rules have the potential to impose important business restrictions on the carriers, while the FCC no longer comprehensively supervises them and assures the adequacy of their revenues.

In short, while the Interstate Commerce Act's nondiscrimination requirement provides something of a model for the broadband world, the rule was part of a system—a system in which nondiscrimination was never absolute and that allowed compensation for its costs. The FCC and advocates for broadband nondiscrimination may take one part of a system and not others, but should acknowledge—and explain—their selectivity.

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30. Preserving the Open Internet, 25 FCC Rcd. 17905, 17949 (2010).