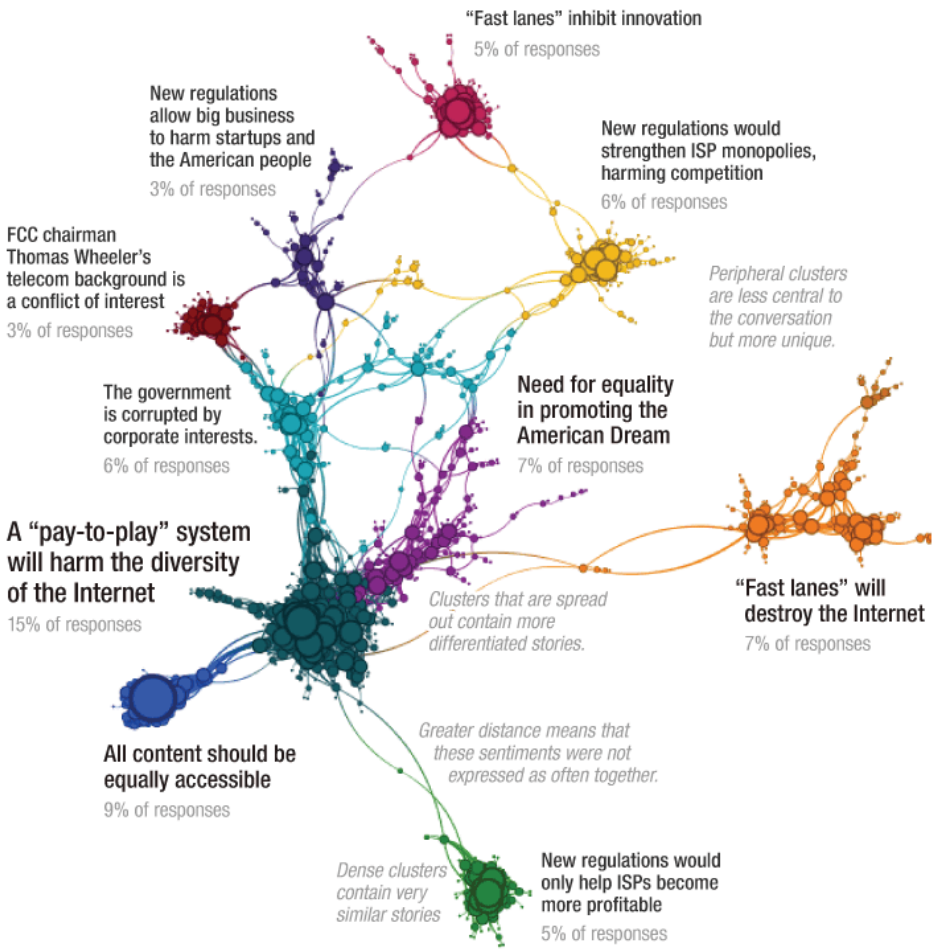

THE FCC HAS THE AUTHORITY NOW TO REGULATE AND ENFORCE NET NEUTRALITY

On December 21, 2010, the Federal Communications Commission (FCC) held a special meeting to address concerns associated with preserving net neutrality, the principle that all Internet traffic should be treated equally. Apple co-founder Steve Wozniak, shared his views regarding the Internet bandwidth crisis.

Mr. Wozniak who is a strong proponent of net neutrality, attended the FCC December 2010 (see picture with 'Woz" along with Ian Stewart (in front), Jim Valentine (to the left of 'Woz') and Richard Doherty (to the right of 'Woz').

This public comment is a continuation of the December 21, 2010, attendance in Washington DC at the FCC special meeting regarding the Open Internet attended by Steve et al; and was drafted by MonaLisa Wallace, Esq.

Please accept for your consideration this 'follow on' to our original effort, which provides a legal and technical plan that will allow the FCC to address the concerns of the overwhelming majority of submissions to the May 15, 2014 rulemaking, calling for public comment on how best to protect and promote an open Internet. We believe the legal logic contained herein provides the fastest and surest path to the FCC's creation of cohesive and rational guidelines that will promote the entrepreneurial Internet. We feel it is the Internet's *level playing field* that has undeniably has formed the basis for a prosperous economic future, present and future.

The Silicon Valley analytical and visualization companies *Quid (see graphic above)* and *TechCrunch* reported over 2,000 mentions of "free speech," and more than 500 mentions of "startups." The relatively large amount of responses reflects a tidal wave of concern for the importance of the public well-being. The concern echoes the many citizens hoping to prevent profit-motivated financial barriers to Internet content publication, by protecting net neutrality. The *Sunlight Foundation* analyzed more than 800,000 comments already filed on this issue, with the majority demanding net neutrality as well as calling for reclassification of Internet providers under Title II as 'common carriers.' Protecting net neutrality, by preventing profit motivated financial barriers to Internet access is in accord with the stated intentions of the FCC, as spelled out in the original Open Internet Order of 2010.

Responding to the praise for an open Internet and its promised positive social impact, this response offers the following legal guideline to the commissioners:

The FCC has the common law authority and the statutory mandate to regulate and enforce open Internet policies, regardless of the misclassification of providers as 'information services'

Regardless of the decision by the United States Court of Appeals for the District Circuit of Columbia, on January 14, 2014, Verizon v FCC (case No. 11-1355; Verizon v FCC et al). Internet providers are common carriers because the basis of US law is common law. Common law was established in Roman times, adopted and forwarded by the English, and is fundamentally incorporated into the law of the United States of America.

Common law implies 'common carriage' for the Internet even without codified public utility regulation. Common law allows us to make laws about well-known things such as 'a chair,' and common law asserts, 'a chair is a chair,' -- hence the definition of a chair is an accepted or commonly defined thing. Without this basis for law, every detail would need argument and this would make interpretation impossible. Hence common law is much like common sense. Common law recognizes that a fact is not the same as an interpretation or opinion. A tree is a tree. Hence, laws are made regarding chopping down trees in parks, without the need to specifically classify a spruce as a tree. A government can codify a law saying chopping down trees in the park is illegal. A law stating it is illegal to cut down trees cannot be avoided by claiming a spruce is not a tree. However, a law can be revised to state: It is illegal to cut down trees in the park unless they are spruces. Using common law, whether the FCC classifies broadband providers as 'information services' or even 'spruces' they cannot change it from being a 'common carrier' by the common law definition. This is why the Verizon v. FCC case should be appealed.

The Internet has squarely fallen within the jurisdiction of the FCC since the

Telecommunications Act of 1996 amending the Communications Act of 1934. Without FCC willingness to admit the truth – **the Internet is a public utility and therefore Internet providers are 'common carriers,' because the Internet is a public communications network developed, paid for and given value by the taxpayers who own it** – continued debates over the costs and benefits of net neutrality is spinning wheels and obfuscating the underlying regulatory dearth curtailing unlawful exploitation of public property.

More specifically, the public response agreeing with the FCC that a free and open Internet serves the public good, including but not limited to encouraging innovation and competition, does not resolve the issue of whether or not the FCC has the fundamental authority and mandate to enforce net neutrality.

Read the Court's admonishment in Verizon vs. FCC that it was the FCC's own refusal to label broadband providers as 'common carriers' that was the basis of their decision against recognizing FCC authority to enforce the full scope of the Open Internet Order of 2010:

> 355: "Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the *Open Internet Order (page 4)."*

If the FCC correctly recognizes the Internet as a public utility and broadband providers as 'common carriers,' the Court itself indicated its decision would only be a temporary derailment of full enforcement of the Open Internet Order of 2010.

If the FCC fails to redefine broadband providers as 'common carriers' this ruling would potentially enable the type of multi-tiered exploitation of the Internet that has the Public in an uproar. It is by this resignation to lack of statutory support, that the Court indirectly invites the FCC to address its failure to take the necessary regulatory steps to classifying Internet providers as more than just information services but as gatekeepers to a public utility, thereby agreeing to labeling broadband Internet providers as 'common carriers.' This would theoretically avoid overstepping the scope of the statutory mandate described by Section 706.

While some of the public commentary addresses the heavy lobbying pressure to curtail common carriage classification, it is noteworthy that substantial potential profits for the broadband industry justify tremendous expenditures aimed at preventing accurate and truthful classification. Namely, that the Internet belongs to the Public and that broadband providers are by there very function acting as gatekeepers to public access to their public utility; this is labeled by common law as 'common carriage.'

Because the common law, and not necessarily statute, defines who is and who is not a common carrier, the FCC itself lacks the authority to exempt broadband providers from the classification because a fact cannot be changed simply by being so deemed by an administrative rulemaking. A tree is a tree, whether or not there is a law declaring it a tree. Hence an appeal containing this reclassification would certainly win the FCC the power to enforce the public good, even should that enforcement fall outside the scope of Section 706.

What the Court failed to acknowledge in the January 14, 2014, Verizon v FCC decision, is that classification by the FCC or any governmental body of a public utility in any statutory format changes neither the reality of a resource being a public utility, nor the governmental authority and mandate to protect public interest in that resource.

There is a long established history of case law that supports this point of view. Indeed, the tenet that common law itself determines status as a common carrier has consistently been the law of the land. In 1901 U.S. Supreme Court (Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92 (1901); page 181) declares that telegraph providers are common carriers *despite the lack of any codified statute*:

> There is no body of federal common law, separate and distinct from the common law existing in the several states, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statutes enacted by the several state. No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges.

The next logical query after assuming the premise that net neutrality is a public good, would be what does that have to do with the FCC? Section 706 plants Internet providers cleanly within the purvey of the FCC, the question of scope being the only controversial issue. Assumed in the January decision by the Verizon v FCC Court, lack of statutory support, perhaps underscored with the FCC's own rulemaking determining broadband providers not 'common carriers' and instead declaring them to be 'information services,' allegedly means that the FCC does not have the authority to regulate to the full extent of the Open Internet. The FCC, however, does have the full authority to regulate the Internet and its common carriers because of the common law definition and as part of its initial 1934 mandate that states:

> Regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority theretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

This mission drove creation of the Open Internet Order of 2010, recognizing the importance of protecting the Public from unfair gatekeeping of their access to the Internet. That authority was clarified by the United States Supreme Court in 1901 when it determined that the court was in a position to determine as a matter of fact whether or not telegraph carriers were common carriers regardless of a lack of statute, using instead: common law. So although much of the legal discussion is supposed to rest on which is preferred, Title II or Section 706 as a source for the FCC authority to regulate to the full extent of the Open Internet Order of 2010, both are rendered simultaneously

independently effective and redundant according to the common law definition of 'common carrier.' In other words, the FCC has the authority to regulate to the full extent of the Open Internet Order regardless of which, neither or both Section 706 and Title II.

The Internet is a public utility and therefore any business functioning as a gatekeeper to that public good should only do so according to regulatory laws, both statutory and common law, to prevent unjust profiteering and protect public access to a public resource. The real problem here is that the FCC is both recognizing its mandate to protect the open nature of the Internet, as part of its fundamental mission, yet failing to take the regulatory steps to fulfill this duty. Namely, the FCC must overcome the lobbying strategy invoking fear, uncertainty and doubt to exposing this new and vital technology to highly developed statutory public utility regulations, admittedly some of which are outdated and irrelevant but nevertheless are changeable, in the interest of protecting unfettered innovation.

Forbearance and the technical solution to unfettered Internet traffic shaping:

Taking the position of cable providers who were forced to adopt unpopular ‘cable cards’ and ‘must carry’ rules, we suggest that the FCC can/should forbear the Internet from irrelevant rules but with the following requirements.

- No preferential treatment of data sources.
- Network operators can give users the choice of filtering at their networks, defaulting provided routers to the traffic shape of their desire. In this way a network provider could prioritize traffic to the best consumer experience, while still allowing the end user to tune to his/her special needs. End users can access consumer premises equipment (home cable/modem/routers) to change the equipment to whatever profile best fits their needs.
- The users must have defaulted access to multipoint protocols, to promote Internet Protocol Television (IPTV) efficiency and user choice.

These simple rules will allow publishers and content providers to drive innovation and allow the Internet to support mass audience (e.g., 4k live Internet television distribution and emergency channels.)

Title II does not have to be a perfect fit. Common carriers can fill out a form and request forbearance of inapplicable FCC regulations. If all the nuance and statutory fine-tuning adopted over eighty years of Title II does not fit perfectly, it is only a matter of refining the regulation just as common carrier regulations were refined to meet the needs of the Public from wagon trails to cellular phone service. If the FCC reclassifies broadband providers under Title II, the commission could use its authority to forbear under Section 10 (c) to selectively decide not to enforce sections of the Communications Act that do not apply to broadband. Under Section 10(c), any telecommunications carrier or class of telecommunications carriers may file a petition with the Commission asking that it exercise this forbearance authority.

United States common law as interpreted by the United States Supreme Court does not require a Public utility to be called a Public utility by any governmental body for it to actually *be* a Public utility. Common carriage regulations have evolved since ancient Rome to modern communications law. In 1901, the Supreme Court heard the case of Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92, 98 (1901). Agreeing with several state courts, the U.S. Supreme Court held that even without a statute, a telegraph company is a common carrier and thereby owes a duty of non-discrimination to the consumer because it is the common law and not a statute that defines a 'common carrier.' Thus the concept of common carriage does not depend on public utility regulation, and a user's rights of service from a common carrier do not rely solely on statute. Statutory public service regulation augments and clarifies common law's common carriage oversight, but cannot override or supplant it. Where the Court went wrong in the January 14, 2014, Verizon v FCC decision was to allow the refusal of the FCC to classify broadband providers as 'common carriers' under Title II to undermine the FCC authority to fulfill its mission to protect public interest in a free and open Internet. Where the Court went right was to point out the hypocrisy in regulating Internet providers as common carriers without being willing to admit that they are common carriers in their rulemaking.

Broadband providers, as part of their regular business, undertake for hire to transport information from place to place, offering its services to all such as may choose to employ them and pay the charges. Several states by statute declare that every one who offers to the Public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier. Broadband companies transport messages and information utilizing the Internet, a public resource invented and developed with US taxpayer money. This is not a judgment or opinion, it is a fact. The value of access to this public resource has already been recognized by Wall Street. The value of control by Internet gatekeepers can be computed as the difference between the actual physical assets, intellectual property and ability to pay dividends and the stock market price of certain technology stocks.

There was a day when an IPO like Google's could have been priced down in the pennies according to turn of the century valuation strategies (e.g., hard assets, dividend payments, revenues). Everyone knows today that the value of the original Google public offering was that the Public goes there to access the resource known as Internet – a very valuable intangible asset referred to sometimes as 'eyeballs.' Thus not only does the Public's investment in the Internet make it a bought and paid for public utility, but even their attention to it through protocols such as TCP/IP and other public developed universal conventions make the public an active component of what defines the Internet. Moreover, the valuation of future innovative companies may be negatively impacted should ISP's be allowed to have discriminatory practices.

Some might argue that it is a constitutional issue to regulate assets away from privately held companies. But for common carriers, common law implies that the public utility they access required a much more substantial public investment than the costs of any particular private business infrastructure investment. Even if the broadband Internet providers spent an estimated trillion dollars for their component infrastructure it remains small change to the amount the US taxpayer has paid since the development of DARPA and continuing today with a regular part of the federal research and development budget.

Likewise, if those broadband companies created their own intranet [*intranet is* lowercase], without

connecting to the public Internet and without using (Cerf/Kahn's) TCP/IP (created with the Defense Advanced Research Project ("DARPA") taxpayer funds, then perhaps a more realistic valuation of their percentage of Internet infrastructure investment would come clear (i.e., it would have substantially less value). But so long as they rely on the Public's Internet to access the information of public demand, they undeniably fall within the definition of the common law 'common carrier.' Arguments and predictions about whether it is good or bad for broadband companies when the Internet is recognized as a public utility does not change the fact that it is a public utility. Arguments that because the Internet is not regulated as a public utility, it has grown and innovated with unfettered alacrity are irrelevant in determining the truth or falsity of a resource's status as a public utility. A tree is still a tree. It if it a public utility it is a public utility (exempted from common carrier regulations or not). If a business is utilizing the Internet to transport information for sale to the public, then the Internet is undeniably a common law common carrier. This is probably why the Court left it open without prejudice for the FCC to correct the misclassification of broadband Internet in the January 2014 decision and why citizens are so outraged – there is intuitive public agreement that the Internet is owned by the taxpayer and that real taking here would be by allowing private profiteering from unequal access to the Internet.

The Internet grammatical capitalization has been the traditional convention since its inception because it represents a singular network of connected networks, beginning originally as ARPANET then what is now known as the Internet. The Internet is a specific network of connected intranets. If broadband providers want to be excluded from regulations in the public interest related to how they connect to the public utility known as the Internet, they should make their own interconnected intranet and disconnect from the publicly owned Internet, as well as create their own version of the public protocols which make the Internet work (TCP/IP). Weather or not the FCC or broadband providers recognize that the Internet is a public utility, the public seems to have very strong perception that it is. In the aforementioned TechCrunch word analysis; in the million plus comments to this rulemaking, the F* word [sic] had top ten frequency.

That kind of emotional outcry may not come from dry statutory interpretation, but from fundamental American entitlements we are raised to believe we have based on the US Constitution. The Supreme Court relied on this common understanding in 1901 when it established a common carrier need not be statutorily described to nonetheless BE a common carrier. Determining both its regulatory authority and policy objectives related to net neutrality, the Federal Communications Commission has an opportunity to appeal, as highlighted January 14, 2014 by the DC Circuit Court of Appeals. Concomitantly, the FCC should immediately reclassify broadband as 'telecommunications' under Title II of the Communications Act, create a policy of forbearance under 10 (c), and regulate it according to its mission as a common carrier of the Internet, a public owned utility.

The effect of that reclassification would be to designate Internet service providers as 'common carriers,' making them subject to the full exercise of FCC regulatory authority. The solution does not require a new telecommunications statute, just frank admission that the Internet is a public utility because it was created by the public with the public's funds to serve the public. No private business has the right to unregulated interference with the public's access to its own resource.

In conclusion,

THE FCC ALREADY HAS THE AUTHORITY TO REGULATE AND ENFORCE NET

NEUTRALITY BY COMMON LAW AND THE VERIZON DECISION SHOULD BE APPEALED

Specifically, this response addresses the specific rulemaking questions related to the Section 706 blueprint for restoring the Open Internet rules offered by the D.C. Circuit in its decision in Verizon v. FCC, which relies on the FCC's legal authority under Section 706 of the Telecommunications Act of 1996, by pointing out two important clarifications:

1) The authority to regulate a public utility need not be based on statute but on the factual truth: a resource being owned by the public is a common law determination.
2) The Court identifies the hypocrisy the FCC promulgates by attempting to regulate the Internet as a public utility in the public interest consistent with their original mandate, while simultaneously refusing to classify broadband providers as common carriers under Title II of the Communications Act. An analysis of the benefits of one approach over the other to ensure the Internet remains an open platform for innovation and expression, would be simply that Title II would codify the mandate to regulate the Internet as a public utility with providers that are 'common carriers' and Section 706 would inform the policy motivations in future rulemaking and forbearance decisions.

The FCC has the legal authority to appeal the Verizon v FCC decision citing the 1901 Supreme Court decision, restoring the FCC Open Internet Order of 2010 on the basis that its authority need not come from the FCC's own admission that broadband providers are common carriers, nor Section 706, because common law requires that a fact is a fact regardless of it being stated in a particular statute or not. And the fact that the FCC and the vocal public outcry understand that the Internet is a public resource and its providers 'common carriers,' are sufficient under common law. Responsibility to the public and its regulatory system begins when a private carrier connects to the Internet and accepts transmission traffic from it – the private carrier should not be allowed to prioritize sources of traffic, only to offer their customers products that contain user changeable traffic shaping. How private carriers select its direct customers, either end-users or content providers, can and should be regulated when what is logically inevitable from profiteering from these decisions can result in substantial public harm: suppression of free speech, the effective transfer of value and wealth from American entrepreneurs and inventors, the impediment of technological and social innovation, and the many listed concerns in the public outcry responding to this rulemaking.

We thank the FCC for its diligence regarding this matter and we are confident it will fulfill its mandate and charter by classifying the Internet as a common carrier.

Drafted by MonaLisa Wallace, Esq.

Legal Precedents:

Western Union Tel. Co. v. Call Publishing Co.
181 U.S. 92 (1901)

U.S. Supreme Court
Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92 (1901)

Western Union Telegraph Company v. Call Publishing Company

No. 117

Argued and submitted December 4, 1900

Decided April 16, 1901

181 U.S. 92

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

Syllabus

Where there is dissimilarity in the services rendered by a telegraph company to different persons, a difference in charges is proper, and no recovery can be had unless it is shown not merely that there is a difference in the charges, but that the difference is so great as, under dissimilar conditions of service, to show an unjust discrimination, and the recovery must be limited to the amount of the unreasonable discrimination.

There is no body of federal common law, separate and distinct from the common law existing in the several states, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statutes enacted by the several states.

The principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by Congressional enactment.

Questions of fact, when once settled in the courts of a state, are not subject to review in this Court.

This was an action commenced on April 29, 1891, in the District Court of Lancaster County, Nebraska, by the Call Publishing Company to recover sums alleged to have been wrongfully charged and collected from it by the defendant, now plaintiff in error, for telegraphic services rendered. According to the petition, the plaintiff had been engaged in publishing a daily newspaper in Lincoln, Nebraska, called the Lincoln Daily Call. The Nebraska State Journal was another newspaper published at the same time in the same city, by the State Journal Company.

Page 181 U. S. 93

Each of these papers received Associated Press dispatches over the lines of defendant. The petition alleged:

"4th. That during all of said period, the defendant wrongfully and unjustly discriminated in favor of the said State Journal Company and against this plaintiff, and gave to the State Journal Company an undue advantage, in this: that, while the defendant demanded, charged, and collected of and from the plaintiff for the services aforesaid seventy-five dollars per month for such dispatches, amounting to 1,500 words or less daily, or at the rate of not less than five dollars per 100 words daily per month, it charged and

collected from the said State Journal Company for the same, like, and contemporaneous services only the sum of $1.50 per 100 words daily per month."

"Plaintiff alleges that the sum so demanded, charged, collected, and received by the said defendant for the services so rendered the plaintiff as aforesaid was excessive and unjust to the extent of the amount of the excess over the rate charged the said State Journal Company for the same services, which excess was $3.50 per 100 words daily per month, and to that extent it was an unjust and wrongful discrimination against the plaintiff and in favor of the State Journal Company."

"That plaintiff was at all times and is now compelled to pay said excessive charges to the defendant for said services, or to do without the same; that plaintiff could not dispense with such dispatches without very serious injury to its business."

The telegraph company's amended answer denied any unjust discrimination, denied that the sums charged to the plaintiff were unjust or excessive, and alleged that such sums were no more than a fair and reasonable charge and compensation therefor, and similar to charges made upon other persons and corporations at Lincoln and elsewhere for like services. The defendant further claimed that it was a corporation engaged in interstate commerce; that it had accepted the provisions of the act of Congress entitled "An Act to Aid in the Construction of Telegraph Lines and to Secure to the government the Use of the Same for Postal, Military, and other Purposes," approved July 24, 1866; that it had constructed its lines under the authority

Page 181 U. S. 94

of its charter and that act, and denied the jurisdiction of the courts of Nebraska over this controversy. A trial was had resulting in a verdict and judgment for the plaintiff, which judgment was reversed by the supreme court of the state. 44 Neb. 326. A second trial in the district court resulted in a verdict and judgment for the plaintiff, which was affirmed by the supreme court of the state (58 Neb.192), and thereupon the telegraph company sued out this writ of error.

MR. JUSTICE BREWER delivered the opinion of the Court.

The contention of the telegraph company is substantially that the services which it rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not at the time these services were rendered prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial, and that therefore, there being no controlling statute or common law, the state court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the Journal Company. In the brief of counsel, it is said:

"The contention was consistently and continuously made upon the trial by the telegraph company that, as to the state law it, could not apply, for the reasons already given, and that, in the absence of a statute by Congress declaring a rule as to interstate traffic by the telegraph company, such as was appealed to by the publishing company, there was no law upon the subject."

The logical result of this contention is that persons dealing with

Page 181 U. S. 95

common carriers engaged in interstate commerce and in respect to such commerce are absolutely at the mercy of the carriers. It is true, counsel do not insist that the telegraph company or any other company engaged in interstate commerce may charge or contract for unreasonable rates, but they do not say that they may not, and if there be neither statute nor common law controlling the action of interstate carriers, there is nothing to limit their obligation in respect to the matter of reasonableness. We should be very loth to hold that, in the absence of congressional action, there are no restrictions on the power of interstate carriers to charge for their services; and, if there be no law to restrain, the necessary result is that there is no limit to the charges they may make and enforce.

It may be well at this time to notice what the exact rulings of the state court were. The charge to the plaintiff was $5 per 100 words, and to the State Journal Company $1.50 per 100 words. When the case came to the supreme court for examination of the proceedings in the first trial, it appeared that no proper exceptions to the instructions had been preserved, and the only question, therefore, for consideration was the sufficiency of the evidence to sustain the verdict, and the court held that the mere fact of a difference in charge was not sufficient to invalidate the contract made with the plaintiff, and that there was no satisfactory evidence that the difference in the charge was unreasonable. In the course of its opinion, the court said:

"There was no evidence tending to show that the charge to the Call Company was, in itself, unreasonably high, that the charge to the Journal Company was unreasonably low, or that the charge to either was greater or less than the ordinary or reasonable charge to others for similar services. It follows, therefore, that the verdict was sustained by the evidence if, as a matter of law, it was sufficient to show either that another person was obtaining dispatches for a less sum than the plaintiff without regard to differences in conditions, or, if it was sufficient to show a difference in rate accompanied by a difference in conditions, leaving to the jury, without other evidence, the duty of comparing the difference in rates with the difference

Page 181 U. S. 96

in conditions, and determining without other aid whether or not the difference in rates was disproportionate to the difference in conditions. But the verdict was not sustained by the evidence if a mere difference in rates without regard to conditions was insufficient to ground a right of action, or, a difference both in rates and conditions being shown, it was also necessary to establish by evidence that these differences were disproportionate. . . . As we have already stated, a considerable difference in the absolute rate charged the Call Company and the Journal Company was shown, but there was also shown a difference in conditions affecting the expense and difficulty of rendering the services, which at common law would justify some difference in rates, and this difference was one which the proviso quoted from the seventh section of our statute expressly recognizes as justifying a discrimination in this state. There was no evidence to show that the rate charged the Call Company was unreasonably high. There was no evidence to show that the rate charged the Journal Company was unreasonably low. There was no evidence to show what difference in rates was demanded or justified by the exigencies of the differences in conditions of service. We do not think that the enforcement of contracts deliberately

entered into should be put to the hazard of a mere conjecture by a jury, without evidence upon which to base its verdict. How can it be said that a jury acts upon the evidence and reaches a verdict solely upon consideration thereof when, having established a difference in rates and a difference in conditions, without anything to show how one difference affects the other, or to what extent, it is permitted to measure one against the other, and to say that to the extent of one dollar or to the extent of one thousand dollars the difference in rates was disproportionate to the difference in conditions? It may be said that it would be difficult to produce evidence to show to what extent such differences in conditions reasonably affect rates. This may be true, but the answer is that, whatever may be the difficulties of the proof, a verdict must be based upon the proof, and a verdict must be founded upon evidence, and not upon the conjecture of the jury or its

Page 181 U. S. 97

general judgment as to what is fair, without evidence whereon to found such judgment."

Under this construction of the law, the first judgment was reversed, and the second trial proceeded upon the lines thus laid down by the supreme court. On that trial, the court charged:

"You are instructed that not every discrimination in rates charged by a telegraph company is unjust. In order to constitute an unjust discrimination, there must be a difference in rates under substantially similar conditions as to service; the rate charged must be a reasonable rate; under like conditions, it must render its services to all patrons on equal terms; it must not so discriminate in its rates to different patrons as to give one an undue preference over another."

"It is not an undue preference to make one patron a less rate than another where exist differences in conditions affecting the expense or difficulty in performing the services which fairly justify the difference in rates, and where it is shown that a difference in rate exists, but there is also a substantial difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions."

"In this action there is shown to exist not only, on the one hand, a difference in the rates charged to the patrons of the telegraph company, the Call Publishing Company, and the State Journal Company, but, on the other hand, also a difference in the conditions under which the telegraph services were rendered to the two companies, and the question that you have particularly to direct your attention to is how far this difference in condition justified the difference in rates charged -- to what extent, if any, the difference in rates charged the rival companies was disproportioned to the difference in conditions under which the services were rendered. If you find such disproportions to have existed, and that, by reason thereof, the amount charged the plaintiff was in excess of what a reasonable rate would be under the circumstances, then you are to find, if facts have been presented to you by which you can find,

Page 181 U. S. 98

the amount of such excess as the amount which the plaintiff would be entitled to recover."

"The burden of proof is upon the plaintiff to show by a preponderance of the evidence the existence of

the discrimination claimed by it; also that the differences in conditions shown are disproportionate to the difference in charges made, as well as all the other material allegations of its petition."

"You should approach this case not in an attitude as if you were charged with the duty of determining rates for the telegraph company. Its stock is the property of private individuals, who have elected officials for that purpose. They are there to manage the affairs of their corporation in their own way, so long as what they do is within reason. Courts of law are maintained to correct abuses, and it is only after the plaintiff has convinced you that the telegraph company has abused its privileges that the court will interfere. The telegraph company is a common carrier, and is said to exercise quasi-Public functions. On the other hand, the Call Publishing Company has certain legal rights. It embarks in an enterprise in the City of Lincoln. It has for a competitor the State Journal Company, and perhaps others. In its race for success it ought not to be unfairly handicapped. For the purpose of getting the news both it and the Journal use the Associated Press dispatches. In fixing its charges to these two competing companies for these dispatches, it is the duty of the telegraph company not to unjustly discriminate in favor of either, as explained to you in these instructions; and, as before stated to you, if the plaintiff has been able to convince you that the defendant had so discriminated, then the telegraph company would be required to answer to the plaintiff in whatever damages the plaintiff has satisfied you he has suffered."

"In arriving at your verdict, you should consider whatever evidence there is going to show charges made by the telegraph company to other persons or in other places for like services under like conditions; the increased cost of operating plant occasioned by increased work, if any; the difference of volume of business between the telegraph company's day and night work, as it would be a reasonable discrimination for the company

Page 181 U. S. 99

to make this difference the basis for a difference in charges; the difference in charges between day and night services generally, as shown by the evidence; also the difference in the character of the night and day work; the time required to perform it, as shown by the evidence; the charges made by the company for other services unless made under circumstances and conditions different from those under consideration, so as not to furnish a fair criterion as to charges; the general operating expenses of the company as affected by rates charged, as well as all other facts before you which may aid you in arriving at a conclusion. However, this is to be understood: that, for the plaintiff to recover, it must show the discrimination; that the discrimination was unjust, as explained in these instructions; and, further, you must be able from the evidence furnished you to measure the damages, if any, sustained by the plaintiff. You are not to fix the damages in any haphazard manner, nor by mere speculation, but by reasons sustained by the evidence and showing in a reasonable way the amount thereof."

"The jury are instructed that the defendant telegraph company is not presumed to have unjustly discriminated against any of its patrons and in favor of certain other of its patrons, but, on the contrary, it is presumed to have properly and justly established its rates according to the various kinds of service it may be called upon to render, considering its duty to the Public and to its stockholders."

And it was under these instructions that the jury returned a verdict for the plaintiff. The case therefore was not submitted to the jury upon the alleged efficacy of the Nebraska statute in respect to

discriminations, but upon the propositions, distinctly stated, that where there is dissimilarity in the services rendered, a difference in charges is proper, and that no recovery can be had unless it is shown not merely that there is a difference in the charges, but that that difference is so great as, under dissimilar conditions of service, to show an unjust discrimination, and that the recovery must be limited to the amount of the unreasonable discrimination.

No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce

Page 181 U. S. 100

or in that wholly within the state, are performing a Public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the Public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations is a proposition which, to say the least, is startling. And yet, as we have seen, that is precisely the contention of the telegraph company. It contends that there is no federal common law, and that such has been the ruling of this Court; there was no federal statute law at the time applicable to this case, and, as the matter is interstate commerce, wholly removed from state jurisdiction, the conclusion is reached that there is no controlling law, and the question of rates is left entirely to the judgment or whim of the telegraph company.

This Court has often held that the full control over interstate commerce is vested in Congress, and that it cannot be regulated by the states. It has also held that the inaction of Congress is indicative of its intention that such interstate commerce shall be free, and many cases are cited by counsel for the telegraph company in which these propositions have been announced. Reference is also made to opinions in which it has been stated that there is no federal common law different and distinct from the common law existing in the several states. Thus, in Smith v. Alabama,124 U. S. 465, it was said by Mr. Justice Matthews, speaking for the Court:

Page 181 U. S. 101

"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. Wheaton v. Peters, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the state in which they sit, or by which the transaction is governed, exercise an

independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of Railroad Co. v. Lockwood, 17 Wall. 357, where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied is nonetheless the law of that state."

P. 84 U. S. 478.

Properly understood, no exceptions can be taken to declarations of this kind. There is no body of federal common law separate and distinct from the common law existing in the several states in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

What is the common law? According to Kent:

"The common law includes those principles, usages, and rules of action applicable to the government and security of person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature."

1 Kent 471. As Blackstone says:

"Whence it is that, in our law, the goodness of a custom depends upon its having been used time

Page 181 U. S. 102

out of mind, or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority, and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this Kingdom. This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole Kingdom, and form the common law, in its stricter and more usual signification."

1 Blackstone 67. In Black's Law Dictionary, page 232, it is thus defined:

"As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs, and, in this sense, particularly the ancient unwritten law of England."

Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are

modified by congressional enactment.

But this question is not a new one in this Court. In Interstate Commerce Commission v. Baltimore & Ohio Railroad,145 U. S. 263, 145 U. S. 275, a case which involved interstate commerce, it was said by MR. JUSTICE BROWN, speaking for the Court:

"Prior to the enactment of the Act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers."

In Bank of Kentucky v. Adams Express Co. and Planters' Bank v. Adams Express Co.,93 U. S. 174, 93 U. S. 177, the express companies received at New Orleans certain packages for delivery at Louisville. These were interstate shipments. In the course of transit,

Page 181 U. S. 103

the packages were destroyed by fire, and actions were brought to recover the value thereof. The companies defended on the ground of an exemption from liability created by the contracts under which they transported the packages. Mr. Justice Strong, delivering the opinion of the Court, after describing the business in which the companies were engaged, said:

"Such being the business and occupation of the defendants, they are to be regarded as common carriers, and, in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers."

And then proceeded to show that they could not avail themselves of the exemption claimed by virtue of the clauses in the contract. The whole argument of the opinion proceeds upon the assumption that the common law rule in respect to common carriers controlled.

Reference may also be made to the elaborate opinion of District Judge Shiras, holding the Circuit Court in the Northern District of Iowa, in Murray v. Chicago & Northwestern Railway, 62 F. 24, in which is collated a number of extracts from opinions of this Court, all tending to show the recognition of a general common law existing throughout the United States, not, it is true, as a body of law distinct from the common law enforced in the states, but as containing the general rules and principles by which all transactions are controlled, except so far as those rules and principles are set aside by express statute. It would serve no good purpose to here repeat those quotations; it is enough to refer to the opinion in which they are collated.

It is further insisted that, even if there be a law which controls, there is no evidence of discrimination such as would entitle the plaintiff to the verdict which it obtained. But there was testimony tending to show the conditions under which the services were rendered to the two publishing companies, and it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination. And questions of fact, as has been repeatedly held, when once settled in the courts of a state, are not subject to review in this Court. Dower v. Richards,151 U. S. 658; Egan v. Hart,165 U. S. 188; Chicago, Burlington &c. Railroad v. Chicago,166 U. S. 226, 166 U. S. 242; Hedrick

Page 181 U. S. 104

v. Atchison, Topeka & Santa Fe Railroad,167 U. S. 673, 167 U. S. 677; Gardner v. Bonestell,180 U. S. 362.

These are the only questions of a federal nature which are presented by the record, and, finding no error in them, the judgment of the Supreme Court of Nebraska is

Affirmed.

SOURCE: Official Supreme Court case law is only found in the print version of the United States Reports. Justia case law is provided for general informational purposes only, and may not reflect current legal developments, verdicts or settlements. We make no warranties or guarantees about the accuracy. https: //supreme.justia.com/cases/federal/us/181/92/case.html.

SOURCE: TechCrunch - Inside the FCC's 1.1 Million Net Neutrality Comments
http: //techcrunch.com/2014/08/05/inside-the-fccs-1-1-million-net-neutrality-comments/