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AT&T Corp. v. Iowa Utilities Board: The Supreme Court Recognizes Broad FCC Jurisdiction over Local Telephone Competition

Less than twenty years after the break up of the Bell System brought competition to long-distance markets,[1] Congress acted to promote local telephone competition by enacting the Telecommunications Act of 1996.[2] The Act thus far has produced at least as much competition in the courtroom as it has in the marketplace.[3] With $100 billion of annual revenue from local exchange service at stake,[4] incumbent local exchange carriers

1. *See* United States v. AT&T Co. ("Consent Decree"), 552 F. Supp. 131, 226–27 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). For a clear, concise overview of the rationale behind the break up of the Bell System, see Glen O. Robinson, *The Titanic Remembered: AT&T and the Changing World of Telecommunications*, 5 YALE J. ON REG. 517, 531–32 (1988) (book review).

2. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.). *See generally* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1, 4–49 (1996) (discussing the motivations behind the 1996 Act, summarizing its principal features, and offering a preliminary evaluation of its strengths and weaknesses). The heart of the Act is its effort to promote competition in local telephone service. *See* Reno v. ACLU, 521 U.S. 844, 857 (1997) (stating that the effort to promote local telephone competition was one of the "major components" of the 1996 Act); Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 304 (1996) ("[N]ext to [the telephone competition provisions,] all other parts of the Act pale in importance.").

3. The *Wall Street Journal* aptly summarized the Act's practical impact in 1997: "Instead of invading one another's phone, video, and other communications markets, potential rivals have squared off in scores of lawsuits filed in state and federal courts across the country." Bryan Gruley et al., *SBC Files Challenge to Telecom Law*, WALL ST. J., July 3, 1997, at A3. The Senate has taken legislative notice of the lack of progress in the opening of local markets. On July 1, 1999, Senator Hollings introduced the Telecommunications Competition Enforcement Act of 1999. *See* S. 1312, 106th Cong. (Sup. Docs. No. Y1.4/1:106-1312)). The bill includes the finding that ILECs "do not have adequate incentives to cooperate in [the opening of local telephone markets to competition] and that regulators have not exercised their enforcement authority to require compliance [with the 1996 Act]." *Id.* § 2(5). The bill would increase ILECs' incentives for cooperation by imposing financial penalties on companies that have not complied fully with their duties under the 1996 Act. *See id.* § 4. The FCC would have full authority to implement and enforce the bill's requirements. *See id.* For further discussion of ILECs, see *infra* note 5.

4. *See* HENK BRANDS & EVAN T. LEO, THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS 10 (1999) (stating that local exchange carriers generate roughly half of the $220 billion in annual revenues produced by the telecommunications industry).

(ILECs)[5] and competing local exchange carriers (CLECs)[6] have had ample incentive to litigate over the content of the rules governing local competition.[7] A second battleground has been the more basic question of who gets to make these rules. State utility commissions have squared off against the Federal Communications Commission (FCC or "the Commission") over the scope of federal jurisdiction under the 1996 Act,[8] thereby continuing a long history of disputes over the proper contours of "telecommunications federalism."[9] Sweeping aside a sixty-year tradition of state control over intrastate communications, the Supreme Court resolved the jurisdictional issue in 1999 by recognizing broad FCC jurisdiction over local telephone competition in *AT&T Corp. v. Iowa Utilities Board*.[10]

This Note begins by briefly describing the telecommunications regime established by the judicially supervised breakup of the Bell System[11] and the changes in that regime effected by the 1996 Act.[12] Next, the Note reviews the procedural history of *AT&T*[13] and summarizes the Court's decision and the arguments advanced in two partial dissents.[14] The Note then briefly reviews the history of telecommunications federalism prior to the 1996 Act.[15] Next, the Note analyzes the jurisdictional issues in *AT&T*,[16] arguing that

5. The Act defines an ILEC as a provider of local telephone exchange service that was a member of the exchange carrier association described in 47 C.F.R. § 69.601 (current version at 47 C.F.R. § 69.601 (1999)) at the time of the Act's passage. *See* 47 U.S.C. § 251(h)(1) (Supp. III 1997). The principal ILECs are traditional providers of local telephone service, such as GTE and the regional Bell operating companies created by the break up of the Bell System. *See* BRANDS & LEO, *supra* note 4, at 11.

6. A CLEC is any carrier who competes with any ILEC to provide local telephone service. *See* BRANDS & LEO, *supra* note 4, at 696. Most CLECs are small, although major long-distance carriers such as AT&T and MCI can become CLECs by offering local telephone service. *See* John T. Soma et al., *The Essential Facilities Doctrine in the Deregulated Telecommunications Industry*, 13 BERKELEY TECH. L.J. 565, 608 (1998) (noting that major long-distance carriers can take advantage of the Act's interconnection, unbundling, and resale requirements to provide local telephone service).

7. Most of the rules governing local competition initially were released in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C.R. 15,499 (1996) [hereinafter First Report & Order]. The local competition rules are codified at 47 C.F.R. §§ 51.1–.809 (1999).

8. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 792 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

9. BRANDS & LEO, *supra* note 4, at 39.

10. 525 U.S. 366, 378 (1999).

11. *See infra* notes 22–32 and accompanying text.

12. *See infra* notes 33–48 and accompanying text.

13. *See infra* notes 49–56 and accompanying text.

14. *See infra* notes 57–94 and accompanying text.

15. *See infra* notes 95–127 and accompanying text.

16. *See infra* notes 128–326 and accompanying text.

legislative history,[17] the plain language of the statute,[18] and the application of "tie-breaking" interpretive principles[19] do not compel the result reached by the majority. Finally, the Note discusses policy considerations that support, and may partially explain, the Court's decision.[20] The Note concludes by suggesting some troubling implications of the Court's attempt to interpret a systematically ambiguous statute on purely textual grounds.[21]

Many of the local telephone companies involved in *AT&T* were created by the break up of the Bell System in the early 1980s. Under the 1982 consent decree between the Justice Department and AT&T,[22] the corporation had to divest itself of its local telephone subsidiaries (the "regional Bell operating companies" or "regional Bells") because they functioned as "bottlenecks" that allowed AT&T to control its long distance competitors' access to customers.[23] The decree also restricted the regional Bells' lines of business,[24] barring them from competing in the long-distance market because their control of local telephone networks would have given them an unfair advantage over other long distance competitors.[25]

The consent decree further promoted long-distance competition by requiring the regional Bells to provide interconnection to competing long-distance providers on terms equal to those provided to AT&T, but did not force local exchange carriers to interconnect with potential competitors in the local market.[26] As a concession to

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17. *See infra* notes 128–50 and accompanying text.

18. *See infra* notes 151–239 and accompanying text.

19. *See infra* notes 240–304 and accompanying text.

20. *See infra* notes 305–26 and accompanying text.

21. *See infra* notes 327–32 and accompanying text.

22. The terms of the 1982 consent decree are set forth in *United States v. AT&T Co.* ("Consent Decree"), 552 F. Supp. 131, 226–27 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

23. *See* Robert B. Friedrich, *Regulatory and Antitrust Implications of Emerging Competition in Local Access Telecommunications: How Congress and the FCC Can Encourage Competition and Technological Progress in Telecommunications*, 80 CORNELL L. REV. 646, 659 (1995). Each of the seven regional Bells that emerged from the break up of the Bell System retained monopoly control over several zones known as "exchange areas" or "local access and transport areas," which unified regions with common social and economic characteristics. *See Consent Decree*, 552 F. Supp. at 141. Under the consent decree's regime, local exchange carriers handled all traffic within exchange areas while long-distance carriers handled traffic between exchange areas. *See id.*

24. *See Consent Decree*, 552 F. Supp. at 186–95.

25. *See id.* at 188–89. U.S. District Court Judge Greene modified the consent decree to stipulate that the line-of-business restrictions could be waived if the regional Bells showed that there was no "substantial possibility" that they could abuse their monopoly over the local exchanges. *Id.* at 195.

26. *See* First Report & Order, *supra* note 7, ¶ 10, 11 F.C.C.R. at 15,508 (stating that

economic realities, the consent decree allowed the newly independent regional Bells and other local exchange carriers to maintain state-regulated monopoly control over local telephone service.[27] Although genuine competition seemed possible in the long-distance market, the local exchange was thought to be a "natural monopoly" and, thus, impervious to government interventions designed to promote competition.[28] The absence of interconnection duties stifled competition because without government intervention, established phone companies had no economic incentive to cooperate with competitors.[29] Potential competitors stayed out of the local exchange market, reasoning that retail customers would not want to sign up for local service with small start-ups that could connect them with only a few thousand other local subscribers when they could sign up with ILECs that could provide access to hundreds of thousands of subscribers.[30]

In the years following the consent decree, however, technological developments made competition in local markets seem possible.[31] Early governmental efforts to promote such competition were

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prior to the 1996 Act, ILECs could discourage local competition by refusing to interconnect with market entrants); Duane McLaughlin, Note, *FCC Jurisdiction over Local Telephone Under the 1996 Act: Fenced Off?*, 97 COLUM. L. REV. 2210, 2222 (1997) (noting that "incumbent providers were under no duty to connect with prospective competitors" before the 1996 Act).

27. *See* Friedrich, *supra* note 23, at 658.

28. *See* Daniel F. Spulber, *Deregulating Telecommunications*, 12 YALE J. ON REG. 25, 29 (1995). A natural monopoly exists when the market for some good or service can be served more efficiently by a single, large firm than by multiple, smaller firms. *See* WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 120 (1994). Attempting to spur competition in areas that are naturally monopolistic is futile because economies of scale or scope inevitably give larger firms a competitive advantage. *See id.* at 120–21.

29. *See* First Report & Order, *supra* note 7, ¶ 55, 11 F.C.C.R. at 15,528 (stating that because ILECs surrender a competitive advantage by interconnecting with CLECs, standard economic incentives will not move them to do so).

30. Without interconnection, CLEC customers can communicate only with other CLEC customers. *See* BRANDS & LEO, *supra* note 4, at 20. Because the value of telephone service increases with the size of the population one can reach, a CLEC cannot offer its customers competitive value without the ability to interconnect with ILECs' vastly larger subscriber bases. *See id.*

31. Those developments include cable, cellular service, expanded fiber optics, and satellites. *See* Elizabeth A. Nowicki, *Competition in the Local Telecommunications Market: Legislate or Litigate?*, 9 HARV. J.L. & TECH. 353, 358 (1996); *see also* JOHN R. MEYER ET AL., THE ECONOMICS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 185–92 (1980) (predicting that local competition would develop because of technologies enabling market entrants to connect subscribers to telephone networks without relying on the house-to-house wires currently employed by ILECs); Spulber, *supra* note 28, at 34–45 (arguing that the line-of-business restrictions should be lifted because local telephone networks are no longer a natural monopoly).

ineffective,[32] so Congress adopted the Telecommunications Act of 1996 "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and [to] encourage the rapid deployment of new telecommunications technologies."[33] The 1996 Act promotes local competition by: (1) requiring ILECs to share their networks with competitors;[34] (2) establishing procedures for the negotiation, arbitration, and approval of interconnection agreements;[35] and (3) authorizing the FCC to preempt state regulations that function as barriers to market entry.[36] The Act also provides a significant incentive for the regional Bells to cooperate by allowing them to enter long distance competition to the extent that they open local markets to outside competitors.[37]

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32. For example, the FCC required local phone companies to interconnect with competitors in the early 1990s, but the Court of Appeals for the District of Columbia Circuit struck down the regulations as exceeding the agency's authority. *See* Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1447 (D.C. Cir. 1994). Some states enacted local competition initiatives, including interconnection requirements, but these efforts also were largely ineffective. *See* McLaughlin, *supra* note 26, at 2223 & n.78.

33. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56.

34. *See* 47 U.S.C. § 251 (Supp. III 1997). ILECs are required to interconnect their networks with those of competitors on "just, reasonable, and nondiscriminatory" terms. *Id.* § 251(c)(2)(D). In addition, ILECs must provide CLECs with access to unbundled network elements on "just, reasonable, and nondiscriminatory" terms. *Id.* § 251(c)(3). In the context of the 1996 Act, the purpose of unbundled access is to enable a CLEC to lease only those elements it needs to provide its own customers with a complete package of telecommunications services. *See* First Report & Order, *supra* note 7, ¶ 231, 11 F.C.C.R. at 15,617–18. In other words, ILECs may not make the provision of element *X* conditional on a CLEC's purchasing element *Y*. *See id.* ILECs also must offer integrated telephone services to CLECs "at wholesale rates" for resale to retail customers. 47 U.S.C. § 251(c)(4)(A). The Act, then, provides CLECs three different routes of access to an incumbent's network—interconnection, unbundled access, and resale—that may be used exclusively or in combination with one another. *See* First Report & Order, *supra* note 7, ¶ 12, 11 F.C.C.R. at 15,509.

35. *See* 47 U.S.C. § 252.

36. *See id.* § 253(d).

37. *See id.* § 271(c). Regional Bells must offer interconnection and access to their local networks in accordance with a 14-point "competitive checklist" set forth in § 271(c)(2)(B). In late 1999, the FCC determined for the first time that a regional Bell had satisfied the checklist and approved Bell Atlantic's application to offer long-distance service in New York. *See* Peter S. Goodman, *Bell Atlantic Cleared on Long-Distance; FCC Lets Firm Offer Service in N.Y.*, WASH. POST, Dec. 23, 1999, at E1.

Congress may have reasoned that the regional Bells would resist local competition vigorously unless given incentives for cooperation. *See Hearing on Telecomms. Policy Reform Before the Senate Comm. on Commerce, Science, and Transp.*, 104th Cong. 72 (1995) (Sup. Docs. No. Y4.C73/7:S.HRG.104-218) (statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Department of Justice) ("You have to make [the regional Bells] want something because they have it in their power to litigate forever."). Legislative reports, bills, hearings, and excerpts from the *Congressional Record*

Both the FCC and state regulators have important roles to play in the Act's implementation.[38] The FCC's primary responsibility is to promulgate rules establishing minimum national standards to govern the interconnection process,[39] while the state utility commissions are charged with both approving privately negotiated agreements between ILECs and CLECs and conducting mandatory arbitration when negotiations break down.[40] State commissions must insure that arbitrated agreements meet the requirements for interconnection set out in 47 U.S.C. § 251 and in the FCC's implementing regulations; the commissions also are directed to set prices according to standards in § 252(d).[41] In many respects, the states are the key actors in promoting local competition on the ground because without state approval of interconnection agreements, no meaningful local connection can develop. Perhaps recognizing that a lack of state cooperation could thwart the Act's goals, Congress directed the FCC to step in if the states fail to carry out their duties and authorized the

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relating to the 1996 Act are collected in FEDERAL TELECOMMUNICATIONS LAW: A LEGISLATIVE HISTORY OF THE TELECOMMUNICATIONS ACT OF 1996 (Bernard D. Reams, Jr. & William H. Manz eds., 1997).

38. Professor Weiser characterizes the Act as a form of "cooperative federalism," in which federal and state agencies cooperate in the interpretation and implementation of federal law. *See* Philip J. Weiser, Chevron, *Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 3 n.6, 13–14 (1999).

39. *See, e.g.*, 47 U.S.C. § 251(d)(1) (directing the FCC to establish regulations implementing the interconnection requirements in § 251(a)–(c)); *infra* note 48 (quoting parts of § 251). Note, however, that the scope of this rulemaking authority remained unclear until the Supreme Court's decision in *AT&T*.

40. *See* 47 U.S.C. § 252(b), (e)(1); S. REP. NO. 104-23, at 15 (1995) (Sup. Docs. No. Y1.1/5:104-23) ("[T]he FCC will establish the national minimum standards for opening local telephone networks and other competitive requirements. The States are then responsible for administering, implementing[,] and resolving disputes as telecommunications carriers meet these obligations.").

When a CLEC requests access to an incumbent's network, the Act allows the parties to negotiate a private agreement without regard to the interconnection duties imposed by § 251(b) and (c). *See* 47 U.S.C. § 252(a)(1). Should negotiations fail—as they generally do, *see* GTE S., Inc. v. Morrison, 199 F.3d 733, 737 (4th Cir. 1999) (noting that "it is hard to see" how negotiations between ILECs and CLECs could succeed)—either party can petition the state utility commission to arbitrate unresolved issues. *See* 47 U.S.C. § 252(b)(1). In effect, the Act recognizes that ILECs have insufficient incentives to negotiate because CLECs have "little or nothing the [ILECs] need[] or want[]." First Report & Order, *supra* note 7, ¶ 15, 11 F.C.C.R. at 15,510. Accordingly, the Act uses the compulsory arbitration process to force ILECs to the bargaining table. The arbitration process also may serve to encourage privately negotiated agreements; ILECs understand that "if negotiation goes to arbitration then the arbitrated result will reflect costs, not asymmetric bargaining power." Joseph Farrell, Creating Local Competition, Speech at the Federal Communications Commission (May 15, 1996), *in* BRANDS & LEO, *supra* note 4, at 371, 375.

41. *See* 47 U.S.C. § 252(c)(1), (c)(2); *infra* note 49 (quoting § 252).

Commission to preempt anti-competitive state regulations.[42]

The FCC issued its First Report and Order implementing the Act's local telephone competition provisions in August 1996.[43] In this mammoth document,[44] the FCC promulgated detailed rules governing the interpretation of 47 U.S.C. §§ 251 and 252.[45] Most notably, the First Report and Order directed the states to use a specific pricing methodology in establishing the rates that ILECs could charge competitors for interconnection and unbundled access to network elements.[46] This methodology, known as total element long-run incremental cost (TELRIC), required that rates be based on what it would cost an efficient carrier to produce a given network element using the most efficient technologies currently available, rather than on the actual, historical costs incurred by ILECs in providing that network element.[47] The FCC claimed authority to issue its TELRIC

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42. *See id.* §§ 252(e)(5), 253(d). Section 253 states that no state law or regulation "may prohibit or have the effect of prohibiting" any carrier from providing any telecommunications service. *Id.* § 253(a). If the FCC determines after public notice and comment that a state law effectively prohibits market entry, it must preempt the law to the extent necessary to remove the barrier to entry. *See id.* § 253(d). The FCC may not preempt competitively neutral state regulations that are designed to promote or protect universal telephone service, public safety and welfare, or consumer rights. *See id.* § 253(b).

43. First Report & Order, *supra* note 7, 11 F.C.C.R. 15,499.

44. The First Report and Order is more than 700 pages in length (including appendices) and was produced after review of more than 17,000 pages of public comments. *See* Opening Brief for the Federal Petitioners at 8, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (No. 97-831).

45. Nearly all of the First Report and Order concerns §§ 251 and 252. The text of the FCC's regulations implementing these sections is found in Appendix B of the Order. *See* First Report & Order, *supra* note 7, app. B, 11 F.C.C.R. at 16,191–236 (codified at 47 C.F.R. §§ 51.1–.809 (1999)).

46. *See id.* ¶¶ 618–740, 11 F.C.C.R. at 15,812–72 (explaining the FCC's proposed pricing methodology for interconnection and unbundled access to network elements). The rules establishing the pricing methodology are codified at 47 C.F.R. §§ 51.501–.515.

47. *See* Paul W. Garnett, *Forward-Looking Costing Methodologies and the Supreme Court's Takings Jurisprudence*, 7 COMMLAW CONSPECTUS 119, 130–31 (1999). The basic idea behind TELRIC is that if an ILEC decides to add to its network in order to provide a given unit of additional services, the ILEC's costs in providing that unit using today's most efficient technologies will be much lower than the costs it would have incurred in providing the same unit of services in the past. *See* BRANDS & LEO, *supra* note 4, at 395 (citing First Report & Order, *supra* note 7, ¶ 620, 11 F.C.C.R. at 15,813). From this point of view, basing charges for interconnection and unbundled access on the ILECs' historical costs would put competitors at a disadvantage. *See id.* (citing First Report & Order, *supra* note 7, ¶ 679, 11 F.C.C.R. at 15,846–47).

TELRIC has prompted intense scholarly debate over whether it will promote competition and whether rates set using the methodology constitute an unconstitutional "taking" of ILEC property under the Fifth Amendment. *See* U.S. CONST. amend. V (prohibiting the taking of "private property . . . without just compensation"). *Compare* J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory*

rules based on § 251, which mandated that ILECs charge "just, reasonable, and nondiscriminatory" prices for certain services and that the FCC "establish regulations to implement the requirements of [§ 251]" within six months of the Act's passage.[48]

ILECs and state utility commissions immediately challenged the

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Contract, 71 N.Y.U. L. REV. 851, 878–79 (1996) (arguing that TELRIC pricing is an unconstitutional taking and that it violates the "regulatory contract" between ILECs and the states), *and* J. Gregory Sidak & Daniel F. Spulber, *The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996*, 97 COLUM. L. REV. 1081, 1147–52 (1997) (arguing that TELRIC pricing is inefficient and will discourage facilities-based competition), *with* William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. REV. 1037, 1039 (1997) (arguing that TELRIC pricing is consistent with economic principles of efficient pricing and is not precluded by either the Takings Clause or any "regulatory contract"), *and* Garnett, *supra*, at 120 (arguing that the TELRIC methodology does not constitute an unconstitutional taking, but that TELRIC might constitute such a taking as applied to a particular carrier if the resulting rates jeopardized the financial integrity of that carrier). Petitioning ILECs also have argued that TELRIC pricing is inconsistent with the language of 47 U.S.C. § 252(d)(1)(A)(i), which directs state commissions to establish rates for interconnection and unbundled access "based on the cost . . . of providing the interconnection or network element." 47 U.S.C. § 252(d)(1)(A)(i); *see* Brief for Petitioners Regional Bell Companies and GTE at 31–35, Iowa Utils. Bd. v. FCC (8th Cir. 1999) (No. 96-3321), *available at* <http://ls.wustl.edu/8th.cir/FCC/1157472.PDF>. The Supreme Court did not reach these issues, but they will be addressed in the *AT&T* remand currently pending in the Eighth Circuit. *See id.* at 26–60.

48. 47 U.S.C. § 251(c)(3), (d)(1); *see also* First Report & Order, *supra* note 7, ¶¶ 115–17, 11 F.C.C.R. 15,559–60 (explaining the FCC's reasoning regarding its jurisdiction). Section 251 provides:

> (c) Additional obligations of incumbent local exchange carriers.
> In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
> . . . .
> (2) Interconnection.
> The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
> . . . .
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . .
> (3) Unbundled access.
> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . .
> (d) Implementation.
> (1) In general.
> Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

47 U.S.C. § 251(c)–(d).

FCC's authority to mandate TELRIC pricing in several circuit courts of appeals, arguing that § 252 authorized the state commissions to "establish any rates for interconnection, services, or network elements" in accordance with that section's provisions.[49] A phalanx of carriers seeking access to the local exchange market—ranging in size from small CLECs to giant long-distance carriers like AT&T and MCI—intervened on behalf of the FCC.[50] The panel on multi-district litigation consolidated the various FCC challenges and assigned them to the Eighth Circuit.[51] After entering an initial stay,[52] the Eighth Circuit held that the FCC lacked jurisdiction to issue its TELRIC rules[53] as well as several other regulations.[54] The Supreme Court

49. 47 U.S.C. § 252(c)(2); *see also AT&T*, 525 U.S. at 383–85 (explaining the state commissions' challenge). Section 252 states:

> (c) Standards for arbitration.
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> In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
>
> (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
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> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section . . . .
>
> . . . .
>
> (d) Pricing standards
>
> (1) Interconnection and network element charges.
>
> Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—
>
> (A) shall be—
>
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> (ii) nondiscriminatory, and
>
> (B) may include a reasonable profit.

47 U.S.C. § 252(c)–(d).

50. *See* Iowa Utils. Bd. v. FCC, 109 F.3d 418, 418–20 (8th Cir. 1996) (listing the parties), *motion to vacate denied*, 519 U.S. 978 (1996).

51. *See id.* at 421 (citing 28 U.S.C. § 2112(a)(3) (1994) (describing the procedure by which the panel on multi-district litigation consolidates petitions for review of certain agency orders and assigns them to a single court of appeals by random selection)). Federal appellate courts have exclusive jurisdiction over all final orders issued by the FCC. *See* 28 U.S.C. § 2342(1) (1994).

52. *See Iowa Utils. Bd.*, 109 F.3d at 421 (granting a stay of the FCC's pricing rules and its "pick and choose" rule).

53. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

54. *See id.* at 802–06 (invalidating several FCC regulations on jurisdictional grounds); *infra* notes 72, 157 (discussing the non-pricing jurisdictional issues in the case). The court also ruled on substantive challenges to several of the FCC's regulations. *See Iowa Utils.*

granted certiorari and consolidated the appeals with those from another case[55] under the name *AT&T Corp. v. Iowa Utilities Board*.[56]

In an opinion by Justice Scalia, the Supreme Court reversed the Eighth Circuit's jurisdictional holdings, recognizing broad FCC jurisdiction over the Act's local telephone competition provisions.[57] Most importantly, the Court held that the FCC has the authority to design a pricing methodology for use by the state commissions in arbitrating interconnection agreements.[58] The Court also reviewed several FCC rules on the merits,[59] upholding all but one.[60] Chief

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Bd., 120 F.3d at 800–01, 806–19; *supra* notes 59–60 (discussing the Supreme Court's holdings on the substantive issues). A detailed discussion of the non-jurisdictional issues in *AT&T* is beyond the scope of this Note.

55. *See* California v. FCC, 124 F.3d 934, 938–43 (8th Cir. 1997), *rev'd in part sub nom.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999). *California* involved a jurisdictional challenge to the FCC's rules implementing the dialing parity obligations imposed by 47 U.S.C. § 251(b)(3) (Supp. III 1997). The dialing parity rules forbid local exchange carriers from requiring competitors' customers to dial extra digits to place their phone calls. *See* 47 U.S.C. § 153(15) (Supp. III 1997); BRANDS & LEO, *supra* note 4, at 377. The Eighth Circuit held that the FCC had exceeded its authority because § 251(b)(3) did not explicitly grant the agency jurisdiction. *See California*, 124 F.3d at 941; *see also infra* notes 67–72, 249–69 (discussing arguments that an extremely explicit grant of jurisdiction is required to overcome language in the original Communications Act of 1934 stating that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges . . . for or in connection with intrastate communication service").

56. 522 U.S. 1089, 1089 (1999) (mem.) (granting certiorari and consolidating *Iowa Utilities Board* and *California v. FCC*).

57. *See AT&T*, 525 U.S. at 378–86.

58. *See id.* at 385.

59. *See id.* at 386–96. Four FCC rules were challenged on substantive grounds in the Eighth Circuit and reconsidered on appeal by the Supreme Court. The first three rules concern the scope of ILECs' unbundling duties under 47 U.S.C. § 251(c)(3). The first rule, the "all elements rule," refers to the FCC's decision not to impose a facilities-ownership requirement on carriers requesting unbundled access; because they do not have to own any facilities, CLECs may lease "all elements" from an ILEC. *See* First Report & Order, *supra* note 7, ¶¶ 328–40, 11 F.C.C.R. at 15,666–71. The second rule, Rule 315(b), prohibits ILECs from separating previously combined network elements before offering them to competitors for resale to their customers. *See* 47 C.F.R. § 51.315(b) (1999). The third rule, Rule 319, required ILECs to provide requesting carriers with unbundled access to a specific list of network elements. *See id.* § 51.319, *vacated by* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 392 (1999). ILECs challenged Rule 319 on two grounds, arguing both that the Rule included items that were not "network elements" under 47 U.S.C. § 153(29) and that the FCC had failed to comply with the terms of 47 U.S.C. § 251(d)(2) in developing the list. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 808–12 (8th Cir. 1997), *aff'd in part, rev'd in part sub. nom* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999); *see also infra* note 60 (discussing Rule 319 in more detail). The fourth rule, known as the "pick and choose" rule, implements 47 U.S.C. § 252(i). The regulation requires that CLECs be granted access to "any individual interconnection, service, or network element" on the "same rates, terms, and conditions" that the ILEC had given to any other CLEC in an agreement approved by a state utilities commission. 47 C.F.R. § 51.809(a) (1999).

60. The Court upheld the FCC's definition of "network element," the "all elements"

Justice Rehnquist, Justice Thomas, and Justice Breyer dissented from the majority's jurisdictional holding.[61]

rule, the "pick and choose" rule, and Rule 315(b). *See AT&T*, 525 U.S. at 386–87, 392–96; *supra* note 59 (explaining the rules). The Court vacated Rule 319, however, holding that the FCC's methodology in developing the list of network elements to be provided on an unbundled basis to CLECs was based on an unreasonable interpretation of 47 U.S.C. § 251(d)(2). *See AT&T*, 525 U.S. at 392. Justice Souter dissented from the decision to vacate Rule 319. *See id.* at 398 (Souter, J., concurring in part and dissenting in part).

Section 251(d)(2) requires the FCC to decide which network elements should be provided to CLECs on an unbundled basis by determining whether access to *proprietary* network elements is "necessary" for a CLEC and whether failure to provide access to *nonproprietary* network elements would "impair the [CLEC's] ability . . . to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2). The Court held that the "necessary" and "impair" language requires the FCC to fashion "*some* limiting standard, rationally related to the goals of the Act," that would restrict the availability of network elements to requesting carriers. *AT&T*, 525 U.S. at 388. The Court vacated Rule 319 because it concluded that the Rule failed to provide a limitation. *See id.*

Although the Court's treatment of Rule 319 did not explicitly reference *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *AT&T* appears to be a rare instance in which the Court has struck down an agency regulation at step two of the *Chevron* analysis by declaring the administrative interpretation of an ambiguous statute to be unreasonable. *See* Note, *A Pragmatic Approach to* Chevron, 112 HARV. L. REV. 1723, 1724 n.9 (1999). *See generally Chevron*, 467 U.S. at 842–44 (outlining a framework for judicial review of an agency interpretation of a statute that the agency is entrusted to administer). Under the *Chevron* analysis, reviewing courts must first decide "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress has so spoken, the court must interpret the statue in accordance with the "unambiguously expressed intent of Congress." *Id.* at 843. When "the statute is silent or ambiguous," the reviewing court must ask whether the agency's interpretation is a "permissible" or "reasonable" one. *Id.* at 843–44. The court must defer to agency interpretations of ambiguous statutes "unless they are either arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. *See generally* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 975–93 (1992) (describing the *Chevron* framework and its sometimes inconsistent effects on Supreme Court practice); The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 *passim* (1989) (analyzing and detailing the virtues of the *Chevron* framework); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2083–05 (1990) (rationalizing *Chevron* as an attempt to approximate congressional intent about when deference to agencies is appropriate and arguing that this rationale suggests some limits on the scope of *Chevron* deference).

In late 1999, the FCC issued a Third Report and Order on local competition that reformulated the "necessary" and "impair" standards of Rule 319 in response to *AT&T*. *See* 65 Fed. Reg. 2542 (2000) (to be codified at 47 C.F.R. pt. 51); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order (Sept. 15, 1999), *available at* <http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1999/fcc99238.pdf> (visited Apr. 14, 2000).

61. Justice Thomas filed an opinion concurring in part and dissenting in part, which Chief Justice Rehnquist and Justice Breyer joined. *See AT&T*, 525 U.S. at 402–12 (Thomas, J., concurring in part and dissenting in part). Justice Breyer also filed a separate opinion in which he further developed his disagreement with the Court's jurisdictional holding and added his own reasons for dissenting from the majority's decision to vacate Rule 319. *See id.* at 412–31 (Breyer, J., concurring in part and dissenting in part). Justice O'Connor took no part in the consideration of the case. *See id.* at 369.

The Court based its jurisdictional holding on a sixty-year-old provision in the Communications Act of 1934, 47 U.S.C. § 201(b), which states that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[62] The Court reasoned that § 201(b) gives the FCC jurisdiction over local telephone competition because Congress expressly chose to insert the 1996 enactments into the 1934 Act.[63] Although § 201(a) focuses on the duties of common carriers " 'engaged in interstate or foreign communication by wire or radio,' " the Court rejected arguments by the state commissions and ILECs that the jurisdictional grant in § 201(b) must be limited to matters of interstate communications.[64] Instead, the Court interpreted § 201(b)'s language as authorizing the FCC to implement whatever regulations are " 'necessary in the public interest' "[65] to carry out 47 U.S.C. §§ 251 and 252.[66]

The Court also rejected the Eighth Circuit's jurisdictional analysis. The court of appeals placed great weight on 47 U.S.C. § 152(b), a provision passed as part of the original Communications

62. 47 U.S.C. § 201(b) (1994); *see AT&T*, 525 U.S. at 377–78. The term "this chapter" in the statute refers to Chapter 5 ("Wire or Radio Communications") of Title 47 ("Telegraphs, Telephones, and Radiotelegraphs") of the U.S. Code. The quoted language from § 201(b) became law in 1938. *See* Act of May 31, 1938, ch. 296, 52 Stat. 588, 588 (adding the final two sentences to § 201(b)). Instead of "this chapter," the session law version of § 201(b) referred to "this Act," meaning the Communications Act of 1934 as amended. *See id.* (using "this Act" in reference to the Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C.A. §§ 151–614 (West Supp. 1999))). The difference in wording does not effect any substantive change—every provision of "this chapter" is also a provision of "this Act." For ease of reference, all citations to the Communications Act of 1934 as amended will be to the U.S. Code version. This Note, however, follows the Supreme Court's practice in *AT&T* of using "this [Act]" in its discussion of § 201(b) while citing to the U.S. Code.

63. *See AT&T*, 525 U.S. at 377–78 (citing the Telecommunications Act of 1996, Pub. L. No. 104-104, § 1(b), 110 Stat. 56, 56 (directing that the 1996 Act be codified as part of the Communications Act of 1934)).

64. *Id.* at 378 (quoting 47 U.S.C. § 201(a)).

65. *Id.* at 377 (quoting 47 U.S.C. § 201(b)).

66. *See id.* at 378. In its opening brief, the FCC cited several other general jurisdictional provisions in the amended Communications Act of 1934 to support its jurisdictional claims, including 47 U.S.C. § 303(r) (1994) (stating that the FCC may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]"), 47 U.S.C. § 151 (Supp. III 1997) (creating the FCC to "execute and enforce the provisions of this [Act]"), and 47 U.S.C. § 154(i) (1994) (stating that the FCC may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions"). *See* Opening Brief for Federal Petitioners at 19–20 & n.5, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (No. 97-831). The Supreme Court did not address the FCC's interpretations of §§ 151, 154(i), and 303(r).

Act of 1934, which states that " 'nothing in this chapter shall be construed *to apply or to give the Commission jurisdiction* with respect to . . . charges . . . for or in connection with intrastate communication service.' "[67] In light of § 152(b), the Eighth Circuit held that "a statute must both unambiguously apply to intrastate telecommunication matters and unambiguously direct the FCC to implement its provisions" in order to grant the FCC intrastate jurisdiction.[68] Concluding that the 1996 Act's pricing provisions failed the second prong of this test, the court held that the FCC lacked jurisdiction to impose its TELRIC methodology on the state commissions.[69] The Supreme Court majority, however, declared that the second part of § 152(b)'s disjunction ("or to give the Commission jurisdiction") only limits the FCC's "ancillary jurisdiction" to regulate intrastate communications based solely on their indirect effects on interstate communications.[70] The majority concluded that FCC jurisdiction automatically follows whenever the Act applies.[71] The Court held, therefore, that because the 1996 Act clearly "applies" to intrastate communications, the FCC's authority is co-extensive with the substantive scope of the Act by virtue of § 201(b).[72]

After offering its expansive reading of FCC jurisdiction, the Court considered the possibility that the language of specific sections of the Act might override the FCC's general jurisdiction, thereby

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67. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 796–98 (8th Cir. 1997) (quoting 47 U.S.C. § 152(b) (1994)) (emphasis added), *aff'd in part, rev'd in part sub nom.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999); *see also* Communications Act of 1934, ch. 652, § 2(b), 48 Stat. at 1065 (adopting the provision initially).

68. *Iowa Utils. Bd.*, 120 F.3d at 798. The court read the disjunctive language of § 152(b) in light of the Supreme Court's decision in *Louisiana Public Service Commission v. FCC* ("Louisiana PSC"), 476 U.S. 355 (1986). *See Iowa Utils. Bd.*, 120 F.3d at 796–800. In *Louisiana PSC*, the Court held that only "unambiguous" or "straightforward" language can overcome the limits on FCC jurisdiction established by § 152(b). 476 U.S. at 377; *see also infra* notes 117–27, 261–67 and accompanying text (discussing *Louisiana PSC*).

69. *See Iowa Utils. Bd.*, 120 F.3d at 796–98.

70. *AT&T*, 525 U.S. at 380–81. The FCC's ancillary jurisdiction gives the Commission implied powers to perform acts that may be necessary to the proper performance of its primary functions. *See* 47 U.S.C. § 154(i).

71. *See AT&T*, 525 U.S. at 380.

72. *See id.* The Court also upheld the FCC's jurisdiction to issue rules implementing several other provisions in the 1996 Act: 47 U.S.C. § 252(a) (Supp. III 1997) (requiring state commission approval of interconnection agreements negotiated before the 1996 Act became law), 47 U.S.C. § 251(f) (outlining conditions under which some rural telephone companies may be exempted from the duties imposed on ILECs by § 251(c)), and 47 U.S.C. § 251(b)(3) (requiring local exchange carriers to provide dialing parity to competitors). *See AT&T*, 525 U.S. at 385 (reversing the Eighth Circuit); *see also infra* note 157 (discussing how these jurisdictional issues would be resolved under various textual interpretations of the 1996 Act).

reserving some matters for state control.[73] The state utility commissions and ILECs had argued that because 47 U.S.C. § 252(c)(2) directs state commissions to " 'establish any rates for interconnection, services, or network elements according to [§ 252](d),' " the FCC has no authority to issue pricing regulations.[74] In response, the Court reasoned that being required to follow a pricing standard set by the FCC is compatible with the states' duty to " 'establish ... rates.' "[75] If the state commissions could be said to establish rates when they follow the pricing standards of § 252(d), the Court reasoned, they could also be said to establish rates when they follow the FCC's TELRIC rules.[76] Similarly, the Court dismissed an argument that the states must retain pricing authority under the Act because subsection (c)(1) of § 252 requires state commissions to ensure that arbitrated interconnection agreements comply with particular FCC regulations, whereas subsection (c)(2) directs the state commissions to establish rates according to the statutory standard without reference to FCC regulations.[77]

Justice Thomas, joined by both Chief Justice Rehnquist and Justice Breyer, concurred in part, but dissented from the majority's jurisdictional holdings.[78] Justice Thomas rejected the majority's analysis of § 201(b), reasoning that the section's jurisdictional grant is

73. *See AT&T*, 525 U.S. at 383 (distinguishing objections based on a lack of "underlying" or "general" FCC jurisdiction from those claiming that specific provisions of the Act displace the Commission's rulemaking authority in favor of the states).

74. *Id.* at 383–84 (quoting 47 U.S.C. § 252(c)(2)). Section 252(d) states that state commissions should set prices that are "based on the cost ... of providing the interconnection or network element" and that are "nondiscriminatory." 47 U.S.C. § 252(d)(1)(A)(i), (ii). Such prices "may include a reasonable profit." *Id.* § 252(d)(1)(B).

75. *AT&T*, 525 U.S. at 384 (quoting 47 U.S.C. § 252(c)(2)).

76. *See id.* The Court acknowledged that the states would have greater autonomy under the § 252(d) standards, but nonetheless held that the application of the TELRIC rules to particular circumstances was enough to qualify as "establishing rates" for purposes of the statute. *See id.* at 379 n.6, 384.

77. *See id.* at 384–85. Section 252(c)(1) requires states to "ensure that [the agreements] meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251 of this title*," while (c)(2) requires them to "establish any rates for interconnection, services, or network elements according to subsection (d) of this section." 47 U.S.C. § 252(c)(1), (2) (emphasis added); *see also supra* note 49 (quoting the statute more extensively). The Court acknowledged the "lack of parallelism" between subsections (c)(1) and (c)(2), but thought it inadequate to displace the FCC's authority under 47 U.S.C. § 201(b) (1994). *AT&T*, 525 U.S. at 384–85. This Note considers the lack of parallelism argument at length. *See infra* notes 185–99, 233–38 and accompanying text.

78. *See AT&T*, 525 U.S. at 402–12 (Thomas, J., concurring in part and dissenting in part).

limited by its context to interstate and foreign communications.[79] He criticized the FCC for disregarding the "100-year tradition of state authority over intrastate telecommunications," a tradition historically protected by § 152(b).[80] Like the Eighth Circuit, Justice Thomas would have required " 'unambiguous' " and " 'straightforward' " evidence that the 1996 Act gave the FCC jurisdiction over intrastate matters.[81] Recognizing FCC jurisdiction on a lesser showing, he argued, would fail to respect the "jurisdictional fence" erected by § 152(b).[82] Justice Thomas agreed with the Eighth Circuit that § 251's directive to the FCC to establish regulations within six months of the Act's passage did not create jurisdiction over the entire statute.[83] Instead, he concluded that the FCC has jurisdiction only over those subsections of § 251 that specifically mention the FCC.[84] Finally, Justice Thomas concluded that by giving the states primary responsibility for mediating, arbitrating, and approving

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79. *See id.* at 408 (Thomas, J., concurring in part and dissenting in part). Justice Thomas argued that, because all of 47 U.S.C. § 201(a) and the first sentence of 47 U.S.C. § 201(b) are clearly limited to interstate or foreign communications, § 201(b) could not be read fairly to grant the Commission regulatory authority over local telephone competition. *See id.* (Thomas, J., concurring in part and dissenting in part).

80. *Id.* at 407, 409 (Thomas, J., concurring in part and dissenting in part).

81. *Id.* at 409 (Thomas, J., concurring in part and dissenting in part) (quoting Louisiana Pub. Serv. Comm'n v. FCC ("Louisiana PSC"), 476 U.S. 355, 377 (1986)); *see also infra* note 128 (discussing the standard set in *Louisiana PSC*).

82. *Id.* (Thomas, J., concurring in part and dissenting in part). The Eighth Circuit had described 47 U.S.C. § 152(b) as a fence that is "hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf." Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 (8th Cir. 1997), *aff'd in part, rev'd in part sub. nom.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

83. *See AT&T*, 525 U.S. at 406 (Thomas, J., concurring in part and dissenting in part) (recognizing FCC jurisdiction over only those subsections that mention the FCC); *Iowa Utils. Bd.*, 120 F.3d at 794 & n.10 (same). Subsection (d)(1) states: "Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." 47 U.S.C. § 251(d)(1); *see also supra* note 48 (quoting the statute more extensively).

84. *See AT&T*, 525 U.S. at 406 (Thomas, J., concurring in part and dissenting in part). The only subsections mentioning the FCC are 47 U.S.C. § 251(b)(2) (imposing a duty on local exchange carriers to provide number portability in accordance with FCC requirements), § 251(d)(2) (addressing the FCC's role in determining what network elements must be made available for unbundled access), § 251(e) (directing the FCC to establish one or more entities to ensure that telephone numbering is administered on an impartial basis), § 251(g) (directing that interexchange access and interconnection obligations existing before the 1996 Act should remain in effect until the FCC issues superseding regulations), and § 251(h)(2) (authorizing the FCC to treat non-ILECs as ILECs for the purposes of § 251 if certain conditions are met). *See* 47 U.S.C. § 251; *see also infra* notes 173, 175 (discussing number portability in more detail). The majority objected to Justice Thomas's interpretation, observing that these subsections seem less like individual grants of authority than like references to authority already conferred elsewhere. *See AT&T*, 525 U.S. at 381–83 nn.8–9.

interconnection agreements, Congress consciously had crafted legislation respecting the states' historical role in intrastate communications.[85] Justice Thomas acknowledged that his interpretation of the Act would enlist the aid of the states in interpreting and applying federal law, but he saw no constitutional difficulty in such an arrangement.[86]

Justice Breyer, concurring in part and dissenting in part, sought to provide added support for Justice Thomas's jurisdictional conclusions by reading the 1996 Act in light of "history, purpose, and precedent."[87] Justice Breyer argued that the Act's purpose of encouraging telephone competition without wasteful duplication of facilities does not require displacement of the states' traditional power to regulate intrastate rates.[88] Indeed, he insisted that allowing state regulators to control rates would utilize their expertise about the particularities of local markets and would allow the states to serve as testing grounds for different approaches to promoting telecommunications competition.[89] He concluded that, at most, the Act authorizes the FCC to set limits defining a range of permissible pricing schemes that the states may employ while ruling out schemes that would undermine the Act's objectives.[90] According to Justice

85. *See AT&T*, 525 U.S. at 410–11 (Thomas, J., concurring in part and dissenting in part).

86. *See id.* at 411–12 (Thomas, J., concurring in part and dissenting in part) (citing United States v. Jones, 109 U.S. 513, 519–20 (1883)). Justice Thomas noted that *Printz v. United States*, 521 U.S. 898 (1997), prohibits the "commandeer[ing]" of state executive agencies, but not their participation in applying and interpreting federal law. *AT&T*, 525 U.S. at 411 (Thomas, J., concurring in part and dissenting in part) (citing *Printz*, 521 U.S. at 925–29). The Act respects *Printz's* anticommandeering principle because 47 U.S.C. § 252(e)(5) gives states the choice of either mediating and arbitrating interconnection agreements according to federal standards or being preempted by the FCC. *See* Weiser, *supra* note 38, at 19 n.72 (citing MCI Telecomms. Corp. v. Bell South Telecomms., Inc., 9 F. Supp. 2d 766, 772 (E.D. Ky. 1998)).

87. *AT&T*, 525 U.S. at 412 (Breyer, J., concurring in part and dissenting in part).

88. *See id.* at 417 (Breyer, J., concurring in part and dissenting in part).

89. *See id.* at 417–18 (Breyer, J., concurring in part and dissenting in part); *see also* Weiser, *supra* note 38, at 31–35 (stating that the ability of the states to serve as "laboratories of democracy" is an important benefit of cooperative federalism schemes such as the Telecommunications Act (citing New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

90. *See AT&T*, 525 U.S. at 418 (Breyer, J., concurring in part and dissenting in part). Justice Breyer found support for his interpretation of FCC pricing authority in 47 U.S.C. § 253, which directs the FCC to preempt any state or local statute, regulation, or legal requirement that effectively prohibits any carrier from providing interstate or intrastate telecommunications service. *See AT&T*, 525 U.S. at 418 (Breyer, J., concurring in part and dissenting in part). According to Justice Breyer, if the FCC decided after notice and opportunity for public comment that state-determined rates for interconnection and unbundled access were high enough to prohibit market entry by competitors, the FCC

Breyer, the FCC had deprived the states of pricing autonomy by mandating the use of a highly detailed pricing methodology, TELRIC, which is only one among many possible methodologies that would serve the Act's purposes.[91]

Justice Breyer also argued that the language of 47 U.S.C. §§ 251 and 252 reads most naturally as preserving state authority over intrastate ratemaking.[92] He further maintained that the legislative history of the Act supports a narrow reading of FCC jurisdiction, noting that both the House and Senate versions of the Act would have amended § 152(b) to render it inapplicable to the new local competition provisions.[93] Because these amendments had been

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would be required to preempt the state's pricing scheme. *See id.* (Breyer, J., concurring in part and dissenting in part). *But cf.* McLaughlin, *supra* note 26, at 2230–31 (noting that the scope of the FCC's preemptive authority under § 253 is unclear and, thus, likely to produce extensive litigation).

91. *See AT&T*, 525 U.S. at 424–27 (Breyer, J., concurring in part and dissenting in part) (surveying different pricing methodologies to support the claim that the FCC's TELRIC rules do not stop at defining a class of permissible pricing schemes).

92. *See id.* at 418–20 (Breyer, J., concurring in part and dissenting in part). Apparently accepting Justice Thomas's claim that FCC jurisdiction is limited to those subsections of 47 U.S.C. § 251 that specifically mention the FCC, Justice Breyer pointed out that the subsections of § 251 dealing with rates make no mention of the FCC and therefore concluded that they do not determine jurisdiction to regulate rates for interconnection and unbundled access. *See id.* at 418–20 (Breyer, J., concurring in part and dissenting in part). In contrast, § 252(c)(2) authorizes state commissions to " 'establish any rates' " for interconnection and unbundled access. *Id.* at 419–20 (Breyer, J., concurring in part and dissenting in part) (quoting 47 U.S.C. § 252(c)(2) (Supp. III 1997)). Justice Breyer concluded that the explicit references to state ratemaking authority in § 252 and the lack of references to the FCC in the ratemaking provisions of § 251 indicate that the 1996 Act was intended to preserve the states' traditional power over local telephone rates. *See id.* at 420 (Breyer, J., concurring in part and dissenting in part).

Note, however, that if § 251(d)(1) is read as a plenary grant of FCC authority over § 251, the FCC arguably is granted pricing authority to set the "just, reasonable, and nondiscriminatory" rates discussed in § 251(c)(2)(D) and (c)(3). *See infra* notes 177–84; *cf.* Jim Chen, *TELRIC in Turmoil, Telecommunications in Transition: A Note on the* Iowa Utilities Board *Litigation*, 33 WAKE FOREST L. REV. 51, 73–76 (1998) (arguing that § 251(d)(1) confers FCC rulemaking power over all aspects of § 251).

93. *See AT&T*, 525 U.S. at 422–23 (Breyer, J., concurring in part and dissenting in part). Both bills exempted "part II of title II," which includes the provisions that were codified at 47 U.S.C. §§ 251–261. *See* S. 652, 104th Cong., § 101(c)(2) (1995) (Sup. Docs. No. Y1.4/1:104-652); H.R. 1555, 104th Cong., § 101(e)(1) (1995) (Sup. Docs. No. Y1.4/6:104-1555). Justice Breyer was the only Justice writing in *AT&T* who used legislative history to support his position. *See AT&T*, 525 U.S. at 422–23 (Breyer, J., concurring in part and dissenting in part). *Compare* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 *passim* (1992) (arguing that legislative history can be helpful if used with appropriate caution), *with* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29–37 (Amy Gutmann ed., 1997) (arguing for a blanket rejection of appeals to legislative history in statutory interpretation).

dropped when the final bill emerged from the House-Senate Conference Committee, Justice Breyer concluded that Congress had intended to preserve the limitations on FCC power established by § 152(b).[94]

The Supreme Court's decision in *AT&T* effects a significant shift in the balance of power between federal and state communications regulators. Under the Communications Act of 1934, jurisdiction over communications was divided along interstate-intrastate lines: the federal government regulated interstate matters, while intrastate matters were left to the states.[95] The 1996 Act clearly changed this traditional division of jurisdictional labor, but before the Court's decision in *AT&T*, no one knew exactly how significant those changes were.[96] A brief review of the history of "telecommunications federalism"[97] will provide the necessary background for evaluating the Court's resolution of the jurisdictional questions in *AT&T*.

The federal government's first venture into telephone regulation, the Mann-Elkins Act of 1910, gave the Interstate Commerce Commission (ICC) jurisdiction over interstate and international communications.[98] Although the ICC exerted relatively little influence on the communications industry,[99] the Supreme Court's decision in the *Shreveport Rate Cases*[100] gave the ICC broad power to

94. *See AT&T*, 525 U.S. at 422–23 (Breyer, J., concurring in part and dissenting in part) (stating that statutes should not be interpreted on the assumption that Congress " ' "intend[ed] *sub silentio* to enact statutory language that it ha[d] earlier discarded in favor of other language" ' " (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 442–43 (1987) (quoting Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 392–93 (1980) (Stewart, J., dissenting))) (alteration in original)); *infra* notes 128–51 and accompanying text (discussing the 1996 Act's legislative history in more detail).

95. *See* BRANDS & LEO, *supra* note 4, at 39 (describing in broad terms the regulatory scheme established by the Communications Act of 1934).

96. *See id.* at 83 (noting that in 1998 it was "still too early to tell" how much the 1996 Act had shifted the federal-state balance of power in communications law).

97. *Id.* at 39. The label "telecommunications federalism" is taken from a chapter title in *id.* Justice Thomas briefly reviewed the history of telecommunications federalism in his dissent. *See AT&T*, 525 U.S. at 402–04 (Thomas, J., concurring in part and dissenting in part). *See generally* MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW §§ 2.1–.12, at 77–112 (1992) (reviewing the history of telecommunications federalism prior to the 1996 Act); McLaughlin, *supra* note 26, at 2213–24 (same).

98. *See* Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 539, 544–45 (amending § 1 of the Interstate Commerce Act of 1887) (repealed with regard to communications by the Communications Act of 1934, ch. 652, § 602(b), 48 Stat. 1064, 1102).

99. *See* KELLOGG ET AL., *supra* note 97, § 2.3, at 80–81 (stating that the ICC did little to regulate communications rates because it was "preoccupied with railroad regulation").

100. Houston, E. & W. Tex. Ry. Co. v. United States ("Shreveport Rate Cases"), 234 U.S. 342 (1914).

preempt state regulations generally.[101] State communications interests feared the implications of the *Shreveport Rate Cases* for the states' authority over intrastate communications,[102] so they sought clear limits on federal authority when pressure for regulatory reform in the communications industry began to build in the late 1920s.[103] Congress was swayed by such arguments during the debate over the Communications Act of 1934[104] and promised broad state autonomy over intrastate communications via 47 U.S.C. § 152(b).[105] As a result, the newly created Federal Communications Commission had more limited preemption power than that of other executive agencies.[106]

The 1934 Act purported to create a clear jurisdictional division of

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101. *See id.* at 358–59. The Court authorized the ICC to regulate intrastate commerce solely because of its effects on interstate commerce, *see id.* at 353 (stating that Congress has "the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled"), even though the ICC's enabling act denied it jurisdiction over intrastate matters, *see* Act of June 29, 1906, ch. 3591, 34 Stat. 584 (amending the Interstate Commerce Act of 1887) (repealed with regard to communications by the Communications Act of 1934, ch. 652, § 602(b), 48 Stat. at 1102).

102. *See* KELLOGG ET AL., *supra* note 97, § 2.6, at 84 n.3.

103. *See id.* § 2.6, at 84. John E. Benton, the General Solicitor for the National Association of Railroad and Utilities Commissioners, argued during a House hearing that Congress should take steps to protect intrastate communications from the sorts of federal intrusions sanctioned by the *Shreveport Rate Cases*. *See Hearings on H.R. 8301 Before the House Comm. on Interstate & Foreign Commerce*, 73d Cong. 136 (1934) (statement of John E. Benton), *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 482 (Max D. Paglin ed., 1989). On the legislative history relating to federal-state relations in the 1934 Act, see Richard McKenna, *Preemption Under the Communications Act*, 37 FED. COMM. L.J. 1, 12–18 (1985).

104. *See* McKenna, *supra* note 103, at 9; *see also* Louisiana Pub. Serv. Comm'n v. FCC ("Louisiana PSC"), 476 U.S. 355, 372 (1986) ("[Section 152(b)] was proposed and supported by the state commissions in reaction to what they perceived to be the evil of excessive federal regulation of intrastate service such as was sanctioned by the *Shreveport Rate Case* . . . ."); North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036, 1047 (4th Cir. 1977) ("[I]n enacting the Communications Act, Congress sought to deny the FCC the kind of jurisdiction over local rates approved by the *Shreveport Rate Case*.").

105. Communications Act of 1934, ch. 652, § 2(b), 48 Stat. 1064, 1065 (codified at 47 U.S.C. § 152(b) (1994)) ("[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier . . . ."). The Senate Report stated that this provision "reserves to the States exclusive jurisdiction over intrastate telephone and telegraph communication." S. REP. NO. 73-781, at 3 (1934), *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, *supra* note 103, at 711, 711–21.

106. *See* KELLOGG ET AL., *supra* note 97, § 2.7.3, at 88 (citing, e.g., City of New York v. FCC, 486 U.S. 57, 63 (1988); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 694 (1984)). The limits imposed by § 152(b) are purely statutory rather than constitutional. *See* McLaughlin, *supra* note 26, at 2213 (noting that the Commerce Clause would permit the FCC to exercise broad authority over intrastate communications).

labor: the FCC regulated interstate communications, while intrastate communications were reserved to the states.[107] Unfortunately, the realities of telephone service belie this clear division because nearly all telephone equipment is used for both intrastate and interstate calls.[108] Congress recognized this difficulty to a limited extent in the 1934 Act by authorizing the FCC to develop rules for allocating the costs of telephone plants between interstate and intrastate uses.[109] Nonetheless, courts have struggled with the "persistent jurisdictional tension" created by § 152(b).[110]

In early FCC preemption cases, courts were reluctant to enforce the apparent jurisdictional limitations imposed by § 152(b).[111] For example, in *North Carolina Utilities Commission v. FCC*,[112] the Fourth Circuit upheld the FCC's preemption of state regulations of "terminal equipment"[113] despite the fact that such equipment is used extensively in intrastate communications.[114] The court agreed with the FCC that because the same pieces of terminal equipment are used in both interstate and intrastate communications, it would be impossible to divide the regulation of such equipment between the FCC and state commissions.[115] Furthermore, the Fourth Circuit characterized

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107. *See* Communications Act of 1934, ch. 652, §§ 1, 2(b), 48 Stat. at 1064–65 (codified at 47 U.S.C. §§ 151, 152(b)); *Louisiana PSC*, 476 U.S. at 360.

108. *See Louisiana PSC*, 476 U.S. at 360; *see also* KELLOGG ET AL., *supra* note 97, § 2.7, at 85–86 (noting a "fundamental paradox in the idea that a service whose entire purpose is to obliterate distance and transcend geographic boundaries can be regulated by dual authority divided along strictly geographic lines").

109. *See* Communications Act of 1934, ch. 652, § 221(c), 48 Stat. at 1080–81 (codified at 47 U.S.C. § 221(c) (1994)). Rules for jurisdictional separation also must be approved by a joint federal-state board. *See* 47 U.S.C. § 410(c) (1994). The separations process has been criticized as "essentially arbitrary." KELLOGG ET AL., *supra* note 97, § 2.7.3, at 89.

110. Public Utils. Comm'n of Tex. v. FCC, 886 F.2d 1325, 1329 (D.C. Cir. 1989). *See generally* Jonathan Jacob Nadler, *Give Peace a Chance: FCC-State Relations After* California III, 47 FED. COMM. L.J. 457, 462–88 (1995) (reviewing the history of the "border wars" between the FCC and the states); Michael J. Zpevak, *FCC Preemption After* Louisiana PSC, 45 FED. COMM. L.J. 185, 190–217 (1993) (discussing the effects of *Louisiana PSC* on FCC preemption of state regulations); McLaughlin, *supra* note 26, at 2214–21 (providing a brief overview of the case law examining the FCC's power to preempt state law despite the limits of § 152(b)).

111. *See* Richard McKenna, *Preemption Reversed: The Supreme Court's Decision in* Louisiana Public Service Commission v. FCC, 39 ADMIN. L. REV. 43, 53 (1987) (stating that the pre-*Louisiana PSC* rule in preemption cases was simple: "The FCC always wins.").

112. 537 F.2d 787 (4th Cir. 1976).

113. "Terminal equipment," which is also called "customer premises equipment," is equipment that customers attach to the telephone network, from telephones to faxes and computer terminals. KELLOGG ET AL., *supra* note 97, glossary at 853–54, 864.

114. *See North Carolina Utils. Comm'n*, 537 F.2d at 793.

115. *See id.* at 791.

§ 152(b) as a relatively loose constraint on FCC power.[116]

In the mid-1980s, the Supreme Court's decision in *Louisiana Public Service Commission v. FCC* ("Louisiana PSC")[117] heralded a shift in judicial attitude towards § 152(b).[118] In *Louisiana PSC*, the Court considered an FCC order preempting state regulations governing the method of depreciation used in calculating the costs of telephone plant and equipment for purposes of intrastate ratemaking.[119] The FCC asserted its preemption authority on two grounds: (1) that 47 U.S.C. § 220(b) grants the FCC exclusive jurisdiction over depreciation practices;[120] and (2) that prohibiting preemption of state depreciation regulations would frustrate important federal policies.[121] The Court rejected both arguments.[122]

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116. *See id.* at 794 n.6 ("[T]he purpose of [§ 152(b)] is to restrain the [FCC] from interfering with those essentially local incidents and practices . . . that do not substantially encroach upon the administration and development of the interstate telephone network.").

117. 476 U.S. 355 (1986).

118. *See* McKenna, *supra* note 111, at 53.

119. *See Louisiana PSC*, 476 U.S. at 358, 362–63. The Court emphasized that choices about methods of depreciation significantly affect state ratemaking authority, as depreciation costs are an important part of the calculations used by state utility commissions in setting retail rates for telephone service. *See id.* at 364–65.

120. *See id.* at 366. Section 220(b) originally required the FCC to prescribe depreciation practices for all carriers subject to the Communications Act of 1934. *See* 47 U.S.C. § 220(b) (1994), *amended by* 47 U.S.C. § 220(b) (Supp. III 1997). The 1996 Act amended § 220(b) to say that the FCC "may prescribe" depreciation rates "for such carriers as it determines to be appropriate"—a change designed to allow the FCC to refrain from regulating depreciation rates if it so chooses. Telecommunications Act of 1996, Pub. L. No. 104-104, § 403(d), 110 Stat. 56, 130 (codified at 47 U.S.C. § 220(b) (Supp. III 1997)).

121. *See Louisiana PSC*, 476 U.S. at 373–75. The FCC asserted that if states used inappropriate depreciation methods, investment in new facilities would be discouraged because carriers would be unable to obtain adequate returns on their investments. *See id.* at 374. Because any decrease in telephone plant investment would impair interstate communications, the FCC argued that it should be allowed to preempt state depreciation practices inconsistent with FCC rules. *See id.* at 373–74. Noting that jurisdiction over telephone networks is divided, the FCC also argued that it must have preemptive authority because allowing the states and the FCC to depreciate the same facilities in two different ways would be senseless. *See id.* at 375.

122. *See id.* at 371–77. Several commentators have criticized the *Louisiana PSC* decision. *See* Jonathan Galst, *"Phony" Intent?: An Examination of Regulatory-Preemption Jurisprudence*, 67 N.Y.U. L. REV. 108, 143–53 (1992) (arguing that the Communications Act of 1934 did not compel the Court's decision in *Louisiana PSC* and that the decision is inconsistent with the Court's regulatory preemption jurisprudence in other areas); Paul E. McGreal, *Some* Rice *with Your* Chevron*?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 888 (1995) (dismissing the Court's decision in *Louisiana PSC* as another example of its incoherent approach to regulatory preemption); Zpevak, *supra* note 110, at 185–86 (suggesting that *Louisiana PSC* might make it difficult for the FCC to fulfill its congressional mandate to implement

While acknowledging that the language of § 220(b) could be read to support the FCC's position, the Court concluded that the statute's language was insufficiently "unambiguous" and "straightforward" to overcome the restrictions on FCC power established by § 152(b).[123] As a result, the Court held that § 220(b) did not preempt state depreciation regulations used for intrastate ratemaking.[124] The Court also rejected the FCC's policy arguments, holding that § 152(b) prevents the FCC from "confer[ing] power upon itself" merely because it thinks its intervention will best promote federal policies.[125] The Court acknowledged that it would uphold FCC jurisdiction in cases in which the interstate and intrastate components of a regulation were inseparable, but concluded that on the facts presented in *Louisiana PSC*, different depreciation methods could be applied to the same facility by allocating charges between interstate and intrastate uses of that facility.[126] In the wake of *Louisiana PSC*, lower courts began protecting the states more vigorously against FCC preemption.[127]

Against the background of continuing tension over the interpretation of § 152(b), the 1996 Act marked an unprecedented expansion of federal authority over intrastate communications.[128] Members of Congress talked of reasserting their proper role in telecommunications regulation by passing the 1996 Act,[129] but they

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national telecommunications policy).

123. *Louisiana PSC*, 476 U.S. at 377. The Court apparently reasoned that if no statute should be " '*construed* to apply or to give the Commission jurisdiction' over intrastate service,' " sufficiently clear language could satisfy § 152(b) because it would not have to be "construed" by the courts in order to create jurisdiction. *Id.* (quoting 47 U.S.C. § 152(b) (1994)) (emphasis added).

124. *See id.* at 376–78.

125. *Id.* at 374.

126. *See id.* at 375–76 & n.4. Recognizing this "impossibility exception" to 47 U.S.C. § 152(b) enabled the Court to distinguish cases like *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), described *supra* notes 112–16 and accompanying text.

127. *See* Nadler, *supra* note 110, at 473–74 (citing California v. FCC ("California I"), 905 F.2d 1217, 1230–39 (9th Cir. 1990); National Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989)). One commentator, however, has argued that the pendulum swung back toward the FCC in the early 1990s. *See* Nadler, *supra* note 110, at 482–88 (discussing judicial rejection of the states' "extravagant" attacks on FCC power in the early 1990s (citing California v. FCC ("California III"), 39 F.3d 919, 932–33 (9th Cir. 1994); California v. FCC ("California II"), 4 F.3d 1505, 1515 (9th Cir. 1993))). The Court's decision in *AT&T* appears to confirm Nadler's thesis.

128. *See* McLaughlin, *supra* note 26, at 2229 (stating that the 1996 Act clearly gives the FCC at least some authority over intrastate matters). The FCC has described the 1996 Act as "mov[ing] beyond" the 1934 Act's division between interstate and intrastate communications. First Report & Order, *supra* note 7, ¶ 24, 11 F.C.C.R. at 15,513.

129. Senator Pressler, the sponsor of the Senate bill, said that with the 1996 Act,

left many details of the new regulatory model to be worked out by the courts. The legislative history as a whole suggests that Congress wanted the FCC to create national standards that would forestall possible state resistance to competition, but that legislators also intended to give states the ability to tailor the implementation of the Act to local conditions.[130] Whether the states were to be allowed some freedom in tailoring pricing to local conditions is unclear.

In at least three ways, the House and Senate bills more strongly favored FCC pricing authority than did the bill that emerged from the Conference Committee. First, both Houses approved amendments to § 152(b) that would have bolstered the FCC's claims to pricing authority by exempting the local telephone competition provisions from its reach.[131] The final bill, however, left § 152(b) unchanged.[132] Second, the Senate bill included both interconnection requirements and the arbitration process in a single section governed by a single implementation provision that appeared to give the FCC authority over all aspects of the section, including pricing standards.[133] The final bill, in contrast, separated interconnection and arbitration into two sections—§§ 251 and 252—and left the FCC's implementation

Congress sought to "reassert its proper policy role and administer a new Federal policy designed to promote competition, innovation, and [to] protect consumers." 141 CONG. REC. 15,100 (June 7, 1995) (statement of Sen. Pressler); *see also* 142 CONG. REC. 2044 (Feb. 1, 1996) (statement of Sen. Chafee) (noting that most federal statutory communications law was 61 years old and arguing that the law should be updated to address technological changes in the communications industry).

130. *See* McLaughlin, *supra* note 26, at 2236 (basing these conclusions on a review of the legislative history of the 1996 Act); *see also* S. REP. NO. 104-23, at 15 (1995) (Sup. Docs. No. Y1.1/5:104-23) ("[T]he FCC will establish the national minimum standards for opening local telephone networks and other competitive requirements. The States are then responsible for administering, implementing, and resolving disputes as telecommunications carriers meet these obligations."). These formulations of congressional intent are insufficiently precise to resolve the jurisdictional questions presented in *AT&T*. For example, saying that the states are charged with "administering, implementing, and resolving disputes" with respect to the pricing of interconnection and unbundled access, S. REP. NO. 104-23, at 15, does not indicate whether they are to be guided in their tasks by FCC rules.

131. *See* S. 652, 104th Cong. § 101(c)(2) (1995) (Sup. Docs. No. Y1.4/1:104-652); H.R. 1555, 104th Cong. § 101(e)(1) (1995) (Sup. Docs. No. Y1.4/6:104-1555); *supra* note 93–94 (noting Justice Breyer's reliance on this aspect of the legislative history in his dissent from the majority's jurisdictional holding).

132. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

133. *See* S. 652, § 101(a). The Senate bill's proposed section 251(i) would have directed the FCC to establish rules implementing the requirements of "this section," which would have included the directives to set "nondiscriminatory" prices "based on cost" in the proposed section 251(d)(6).

authority over pricing standards unclear.[134] Third, the House bill clearly would have directed the FCC to establish pricing regulations, but the relevant section did not survive in the final bill.[135]

The Conference Committee report did not explain why these changes were made or how they were intended to affect jurisdictional issues,[136] and the floor debates on the final version of the bill were equally uninformative.[137] Furthermore, the House voted to waive the normal requirement that legislators have three days to study a bill before a final vote,[138] so many members may not have been aware of the Conference Committee changes when they voted on the bill.[139] Upon comparing the House and Senate bills with the bill that emerged from the Conference Committee, one could infer that the conferees reached a variety of compromises on the federal-state balance of power under the Act. The changes made by the Conference Committee suggest that the final bill was meant to give the states greater autonomy than they would have had under either the House or Senate bills.[140] Yet, even the conference members

134. As enacted, § 251(d)(1) requires the FCC to establish regulations implementing the requirements of "this section," and so does not explicitly address the FCC's authority to make rules implementing the statutory pricing standards contained in § 252(d)(1). 47 U.S.C. § 251(d)(1) (Supp. III 1997). Splitting the Senate's proposed section 251 into two sections suggests that the Conference Committee intended to reserve more power to the states. *But see* McLaughlin, *supra* note 26, at 2232 n.129 (suggesting that because the split between §§ 251 and 252 arose late in the legislative process and was subject to little debate, the split should not be interpreted as denying the FCC authority over the provisions of § 252).

135. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; H.R. 1555, § 101(a); H.R. CONF. REP. NO. 104-458, at 121 (1996) (Sup. Docs. No. Y1.1/5:104-458) (stating that the House bill's proposed section 242(b)(4) "directs the Commission to establish regulations requiring full compensation to the LEC for costs of providing services related to equal access, interconnection, number portability, and unbundling"), *reprinted in* 1996 U.S.C.C.A.N. 124, 131–32.

136. The Conference Report merely notes that unexplained changes included "conforming changes made necessary by agreements reached by the conferees." *See* H.R. CONF. REP. NO. 104-458, at 113, 1996 U.S.C.C.A.N. at 124.

137. *See* 142 CONG. REC. 2206–42 (Feb. 1, 1996) (recording the final House floor debate on the 1996 Act); 142 CONG. REC. 2008–48 (Feb. 1, 1996) (recording the final Senate floor debate on the 1996 Act).

138. *See id.* at 2206, 2214–15 (Feb. 1, 1996) (recording the passage of H. Res. 353, 104th Cong. (1996)). The Senate bill also was considered one day after the release of the Conference Report. *See id.* at 2008 (Feb. 1, 1996).

139. *See id.* at 2213 (Feb. 1, 1996) (statement of Rep. Conyers) ("[T]here are very few, if any, persons that have read, not to mention understand, what is in the report. That is why we have a 3-day rule layover.").

140. *See* H.R. CONF. REP. NO. 104-458, at 113 (noting that unexplained changes included "conforming changes made necessary by agreements reached by the conferees"), 1996 U.S.C.C.A.N. at 124. Although the legislative record contains no direct evidence of debate about the jurisdictional issues at stake in *AT&T*, Congress was clearly attentive to

seemed unclear about what those compromises were. Two different groups of conferees filed amicus briefs with the Eighth Circuit offering opposing accounts of the Conference Committee's intent.[141] The inconclusive character of the legislative history raises suspicions that the House-Senate conferees may have drafted an intentionally ambiguous statute to avoid a difficult policy choice.[142]

Some observers might suggest that because both House Bill 1555 and Senate Bill 652 clearly would have assigned pricing jurisdiction to the FCC, Congress's refusal to enact equally clear language in the final bill warrants a narrow reading of FCC jurisdiction.[143] Professor

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federalism concerns in its deliberations about other aspects of the Act. A 1995 floor debate in the Senate explicitly addressed federal-state relations in the context of an unsuccessful amendment that attempted to eliminate the Senate bill's proposed section 254, which would have authorized the FCC to preempt state laws that raise barriers to market entry. *See* 141 CONG. REC. 15,590–96 (June 12, 1995) (recording debate concerning the proposed "Feinstein/Kempthorne Amendment" to the Senate bill). This debate showcased a variety of viewpoints on how to strike the proper balance between federal and state power. *Compare* 141 CONG. REC. 15,592–93 (June 12, 1995) (statement of Sen. Kempthorne) (objecting to the preemption provision as a "disturbing directive" that would allow an independent federal authority "thousands of miles away" to "invalidate duly adopted State laws and local ordinances"), *with id.* at 15,596 (June 12, 1995) (statement of Sen. Pressler) (arguing that without FCC preemption power, telecommunications investment would diminish because companies could not be certain that states would not erect barriers to entry). Ultimately, the Senate reached a compromise that granted the FCC broad preemption powers with an exception for state rules regarding public rights-of-way; the states retained authority to impose additional, competitively neutral regulations consistent with those of the FCC. *See* S. 652, § 201(a) (1995) (proposing section 254(a)–(d)). This section became the basis for 47 U.S.C. § 253, which outlines the conditions under which the FCC may act to remove barriers to market entry imposed by the states.

141. *See* Brief of Amici Curiae The Honorable John D. Dingell et al., Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) (No. 96-3321) (arguing that Congress intended to reserve pricing authority to the states), *available at* <http://ls.wustl.edu/8th.cir/FCC/fcc.html> (visited April 24, 2000); Brief of Amici Curiae the Honorable Thomas J. Bliley, Jr. et al., Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) (No. 96-3321) (arguing that Congress intended to grant the FCC broad jurisdiction over local telephone competition), *available at* <http://ls.wustl.edu/8th.cir/FCC/ Opinions/FCC/brief.leg> (visited April 24, 2000). Even if all the legislative amici had agreed about Congress's—or at least the Conference Committee's—intent, their post-enactment comments probably should be regarded with skepticism. *See* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 39 (1997) (characterizing post-enactment statements of legislative intent as highly unreliable).

142. *Cf.* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288 (1988) (stating that according to public choice theory, legislators sometimes avoid alienating their constituents by supporting ambiguous laws and letting courts or agencies determine the meaning of those laws). More charitably, the conferees may have reasoned that letting the courts decide the issue of pricing jurisdiction was a small price to pay for the expeditious passage of an important bill.

143. Justice Breyer made such an argument regarding the decision not to amend 47

Eskridge has characterized this type of appeal to legislative history as a "rejected proposal" argument.[144] Although the Court has sometimes found evidence of legislative intent in a conference committee rejection,[145] it generally has refused to find such rejections significant when Congress has not faced a "clear referendum" on the disputed issue.[146]

In voting on the 1996 Act, Congress almost certainly neither faced nor made a clear choice to shift the balance of jurisdictional power contemplated in the House and Senate bills. The Conference Committee's changes were unexplained,[147] the floor debate on the final bill was limited and—to some extent—uninformed,[148] and the changes in the language affecting jurisdictional issues were subtle.[149] Therefore, the legislative history of the 1996 Act cannot support a convincing "rejected proposal" argument.[150] Indeed, one might easily

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U.S.C. § 152(b) (1994). *See AT&T*, 525 U.S. at 422–23 (Breyer, J., concurring in part and dissenting in part); *supra* notes 93–94 and accompanying text. At least one petitioner in *AT&T* claimed that the Conference Committee's decision not to amend § 152(b) resulted from intensive lobbying by the states. *See* Brief of Bell Atlantic Corp., BellSouth Corp., and SBC Communications, Inc. at 25 & n.13, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (No. 97-826) (citing comments submitted to the FCC).

144. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 245–46 (1994). Eskridge notes that "rejected proposal" arguments have met with a mixed reception in the Supreme Court. *See id.* at 245, 312–15 (discussing Supreme Court "rejected proposal" cases from 1961 to 1991). For an earlier and more extensive treatment of the same issues, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 84–89 (1988).

145. *See, e.g.*, Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199–200 (1974) (stating that a conference committee's decision to delete a provision "militates against a judgment that Congress intended a result it expressly declined to enact").

146. ESKRIDGE, *supra* note 144, at 245 (citing, e.g., NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 505–06 (1976)). Professor Dickerson argues that legislative rejection has "little probative value for any purpose" because "[t]here are many reasons for saying no." REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 160 (1975). Dickerson observes that the decision not to amend a pending bill is always ambiguous: the legislature might have objected to the policy result the amendment was meant to achieve, or it might have thought that the amendment was unnecessary because the current version of the bill already would achieve that result. *See id.* Similarly, legislative acceptance of an amendment raises the question whether the amendment added something new or merely clarified something old. *See id.* at 161. "Rejected proposal" arguments also are vulnerable to a variety of general objections to the use of legislative history in statutory interpretation. *See id.* at 137–83 (suggesting that the costs of using legislative history greatly outweigh its meager benefits); ESKRIDGE, *supra* note 144, at 207–38 (defending some uses of legislative history and analyzing the "new textualism" of Justice Scalia); Scalia, *supra* note 93, at 29–37 (calling for an end to the use of legislative history in statutory interpretation).

147. *See supra* note 136 and accompanying text.

148. *See supra* notes 137–39 and accompanying text.

149. *See supra* notes 131–35 and accompanying text.

150. Admittedly, the decision not to amend 47 U.S.C. § 152(b) (1994) seems more

use the same legislative history to argue that because both the Senate and House bills gave the FCC pricing authority and because neither the final bill nor the Conference Report signaled a clear departure from the status quo, rank and file members of Congress assumed that the FCC would have pricing authority when they voted for the Act.

On the whole, then, the legislative history of the 1996 Act offers no clear answer to the jurisdictional questions raised in *AT&T.* The trajectory of change from the House and Senate bills to the final Act may suggest a movement *toward* greater state autonomy under the Act, but does not resolve the question whether the Conference Committee changes were enough to deprive the FCC of authority to issue its TELRIC rules. Finding a clear resolution from the text of the 1996 Act is no easier. The fundamental difficulty is that while § 251 appears to give the FCC pricing authority, § 252 seems to reserve that authority to the states.[151] This Note examines four approaches to resolving this interpretive puzzle. While no approach is completely convincing, textual analysis marginally favors the conclusion that Congress intended for the states to retain pricing authority. Thus, the Court's confident affirmation of FCC authority on textual grounds appears, at best, to have been premature.

Justice Thomas's approach construes FCC jurisdiction in the narrowest possible manner, limiting it to those sections of § 251 that explicitly mention the FCC.[152] This interpretaion gives the FCC no authority over pricing because none of the Act's pricing provisions mentions the FCC.[153] The FCC's approach locates the source of its jurisdiction in § 251(d)(1), which directs the Commission to establish regulations implementing § 251 within six months of the Act's passage.[154] In contrast, the majority's approach gives the FCC

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likely to reflect a deliberate choice than the decision to separate § 251 from § 252 in the final bill. *See supra* note 134 and accompanying text (explaining that the Senate's proposed section 251 became §§ 251 and 252 of the Act). Even the decision not to amend § 152(b), however, might have reflected only a conviction that an amendment was not necessary to extend FCC power over intrastate matters in the 1996 Act. *Cf. AT&T,* 525 U.S. at 379–80 (holding that the FCC has broad jurisdiction over local telephone competition despite § 152(b)).

151. *See* 47 U.S.C. §§ 251(c)(2)(D), (c)(3), 252(c)(2), (d)(1) (Supp. III 1997); *supra* notes 48–49 (quoting §§ 251 and 252).

152. *See AT&T,* 525 U.S. at 406 (Thomas, J., concurring in part and dissenting in part); *infra* notes 158–76 and accompanying text (discussing Justice Thomas's approach in more detail); *see also supra* note 84 (listing subsections of § 251 that mention the FCC). Justice Breyer appears to subscribe to much of Justice Thomas's reasoning. *See supra* note 92 and accompanying text.

153. *See* 47 U.S.C. §§ 251(c)(2)(D), (c)(3), 252(c)(2), (d)(1).

154. *Id.* § 251(d)(1) ("Within 6 months after February 8, 1996, the Commission *shall complete* all actions necessary to establish regulations to implement the requirements of

discretionary authority over pricing based on § 201(b).[155] A fourth approach, which this Note calls the "modified dissent approach" because of its kinship to ideas raised in Justice Breyer's opinion,[156] recognizes broad FCC jurisdiction over at least the whole of § 251, but insists that the language of § 252 removes the pricing of interconnection and unbundled access from that jurisdiction.[157]

Justice Thomas's approach reserves pricing authority to the states, but in doing so it relies on an indefensibly narrow reading of

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this section." (emphasis added)); *see infra* notes 177–94 (discussing the FCC's approach in more detail).

155. *See* 47 U.S.C. § 201(b) (1994) ("The Commission *may prescribe* such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]." (emphasis added)); *infra* notes 195–223 and accompanying text (discussing the majority's approach in more detail).

156. Like Justice Breyer, the modified dissent approach emphasizes the language of § 252(c)(2) and (d)(1). *See AT&T*, 525 U.S. at 418–20 (Breyer, J., concurring in part and dissenting in part). The approach differs from Justice Breyer in squarely rejecting Justice Thomas's extremely narrow reading of FCC jurisdiction. *See id.* at 419 (Breyer, J., concurring in part and dissenting in part) (citing with approval Justice Thomas's claim that FCC jurisdiction is limited to those subsections of § 251 that explicitly mention the FCC).

157. Of the four approaches considered here, the modified dissent approach probably has the best claim to respecting the "plain meaning" of § 252. *See infra* notes 224–38 (discussing this approach in more detail); *cf.* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 796 n. 15 (8th Cir. 1997) (concluding that "the FCC's belief that it has jurisdiction to issue local pricing rules conflicts with the plain meaning of the Act"), *aff'd in part, rev'd in part sub nom.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999). It would emphasize that in § 252, the state commissions are directed explicitly to "establish ... rates," 47 U.S.C. § 252(c)(2), while no similarly explicit pricing authority is conferred on the FCC.

If the majority is correct in concluding that § 201(b) is the source of the FCC's jurisdiction, the minor jurisdictional issues concerning the FCC's rules on dialing parity, rural carrier exemptions, and approval of interconnection agreements pre-dating the Act should clearly be resolved in favor of the FCC. *See AT&T*, 525 U.S. at 385 (holding for the FCC on the minor jurisdictional issues on the ground that the relevant statutory sections do not displace the FCC's general rulemaking authority under § 201(b)); *supra* note 72 (explaining the minor jurisdictional issues in *AT&T*). The FCC approach clearly would resolve two of the minor jurisdictional issues—dialing parity and rural carrier exemptions—in favor of the FCC because both of the relevant sections fall within § 251. *See* 47 U.S.C. § 251(b)(3) (establishing a duty to provide competitors with dialing parity); *id.* § 251(f)(1) (outlining procedures through which some rural telephone companies may be exempted from the interconnection duties imposed by § 251(c)). Section 251(d)(1), however, cannot support the FCC's authority to issue rules governing when interconnection agreements pre-dating the Act must be submitted for state commission approval, for the relevant statutory provision is not part of § 251. *See id.* § 252(a) (requiring that interconnection agreements predating the 1996 Act be submitted to state commissions for approval pursuant to § 252(e)). Under Justice Thomas's approach, the FCC would lose on all of the jurisdictional issues in *AT&T*. *See AT&T*, 525 U.S. at 407 (Thomas, J., concurring in part and dissenting in part). The modified dissent approach remains neutral on the question of whether § 201(b) or § 251(d)(1) is the source of FCC jurisdiction, so it could resolve the minor jurisdictional issues by following either the majority's approach or the FCC's approach.

FCC jurisdiction. Justice Thomas argued that § 251(d)(1) is not a jurisdictional grant at all, but instead serves merely as a timetable for the issuance of regulations implementing those provisions—and only those provisions—of § 251 that explicitly mention the Commission.[158] Justice Thomas's reading was prompted in part by his belief that § 152(b) requires Congress to meet *Louisiana PSC*'s " 'straightforward' " and " 'unambiguous' " language standard to give the FCC jurisdiction over intrastate matters.[159] Yet, even if Justice Thomas were correct about the import of § 152(b), four reasons suggest that the language of § 251(d)(1) must be read to imply that the FCC has jurisdiction over *at least* the whole scope of § 251.[160]

First, the language of § 251(d)(1) is read most naturally to imply that the FCC has the authority to establish regulations for *all* the requirements of § 251.[161] The Commission is directed to "complete all actions necessary to establish regulations to implement the requirements of this section."[162] Nothing in this language indicates any limitation to those subsections of § 251 that explicitly mention the FCC.

As noted by Justice Scalia, the second problem with Justice Thomas's approach is that the subsections of § 251 that explicitly mention the FCC read less like *grants* of statutory authority than like *references* to authority conferred elsewhere.[163] Consider Justice Thomas's reading of § 251(d)(2), a provision that directs the FCC to decide which network elements should be provided to CLECs on an unbundled basis by considering whether access to proprietary elements is "necessary" and whether access to nonproprietary

158. *See AT&T*, 525 U.S. at 406 (Thomas, J., concurring in part and dissenting in part).

159. *Id.* at 409 (Thomas, J., concurring in part and dissenting in part) (quoting Louisiana. Pub. Serv. Comm'n v. FCC ("Louisiana PSC"), 476 U.S. 355, 377 (1986)); *see also infra* notes 254–69 and accompanying text (criticizing Justice Thomas's reading of § 152(b)).

160. *Cf.* Chen, *supra* note 92, at 71–76 (arguing that § 251(d)(1) should be seen as a plenary grant of FCC authority to implement the requirements of § 251); McLaughlin, *supra* note 26, at 2248 (asserting that a reading that interprets § 251(d)(1) as setting only a timetable without conferring any authority on the FCC "seems implausible").

161. Even if § 251(d)(1) is read as a timetable for FCC action, rather than as an actual conferral of authority, it at least *presupposes* that the FCC has jurisdiction over the whole of § 251. Arguably, the source of that jurisdiction is § 201(b). *Cf. AT&T*, 525 U.S. at 381–82 n.8 (suggesting that some subsections of § 251 are read most naturally as references to authority conferred in § 201(b)).

162. 47 U.S.C. § 251(d)(1).

163. *See AT&T*, 525 U.S. at 381–82 n.8; *see also* Chen, *supra* note 92, at 69–70 (stating that several of the subsections of § 251 that mention the FCC "refer to FCC rulemaking merely in passing, as though to forestall the need to articulate a more precise statutory standard until such time as the Commission resolved the matter through rulemaking").

elements would "impair" a CLEC's ability to compete.[164] According to Justice Thomas, § 251(d)(2) serves to grant the FCC authority to formulate standards for unbundled access.[165] The text, however, states that "[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider [several factors]."[166] This language appears to presuppose the FCC's authority to implement § 251(c)(3) and to serve as a limit on that authority.[167] The source of that authority is not § 252(d)(2), but § 251(c)(3) read in conjunction with the requirement of § 251(d)(1) that the FCC take action "to implement the requirements of this section."[168]

Third, the structure of § 251(d) strongly suggests that subsection (d)(1) is meant to confer broad FCC authority to implement *all* of the requirements of § 251.[169] Section § 251(d)(3) is a "savings provision" that forbids the FCC from preempting state interconnection regulations that go beyond those imposed by the FCC so long as such additional regulations do not undermine the goals of § 251.[170] If, as Justice Thomas argued, Congress had only granted the Commission the authority to implement those aspects of § 251 that explicitly mention the FCC, such a savings provision would have been unnecessary.[171]

Finally, neither the state commissions nor Justice Thomas offered any explanation of why Congress would have chosen to give the FCC jurisdiction over only a seemingly random subset of the interconnection regulations in § 251.[172] For example, allowing the FCC to issue regulations governing number portability[173] but not dialing parity[174] seems illogical. Both requirements are designed to

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164. 47 U.S.C. § 251(d)(2).

165. *See AT&T*, 525 U.S. at 406 (Thomas, J., concurring in part and dissenting in part).

166. 47 U.S.C. § 251(d)(2).

167. *Cf.* Chen, *supra* note 92, at 73–74 (suggesting that § 251(d)(2) "sets a floor, not a ceiling" on the FCC's rulemaking power under § 251(d)(1)).

168. 47 U.S.C. § 251(d)(1). Because subsection (d)(2) implies a logically prior grant of FCC authority in subsection (c)(3), Justice Thomas's claim that the FCC has authority only over those subsections that mention the FCC explicitly cannot be sustained.

169. *See* Chen, *supra* note 92, at 74–75.

170. *See* 47 U.S.C. § 251(d)(3).

171. *See* Chen, *supra* note 92, at 74–75.

172. *See AT&T*, 525 U.S. at 382 n.8. (asserting that Justice Thomas's interpretation produces "a most chopped-up statute").

173. *See* 47 U.S.C. § 251(b)(2) (alluding to Commission regulations regarding number portability). Number portability allows retail customers to retain the same phone numbers when they change carriers. *See id.* § 153(30) (Supp. III 1997).

174. *See id.* § 251(b)(3) (imposing a duty to provide dialing parity without mentioning any role for the FCC). For a definition of dialing parity, see *supra* note 55.

prevent local exchange carriers from undermining competitors by making it too inconvenient for customers to use the services of those competitors,[175] and both could be handled appropriately by regulation at the national level.[176] Thus, the absence of any policy rationale for the jurisdictional lines that Justice Thomas would draw is a final reason for rejecting his extremely narrow reading of § 251(d)(1). Justice Thomas's approach cannot be sustained; therefore, the 1996 Act is read properly as giving the FCC mandatory rulemaking power over all of § 251.

Both the FCC approach and the majority approach would grant the FCC pricing authority, but they differ on the source of that jurisdiction. The FCC approach claims that § 251(d)(1) requires the Commission to establish a pricing methodology, while the majority's approach grants the FCC *discretionary* pricing authority by locating the source of FCC jurisdiction in § 201(b). Although neither approach can resolve all of the interpretive anomalies created by §§ 251 and 252, the majority approach provides the stronger case for FCC pricing authority.

Claiming that § 251(d)(1) is a jurisdictional grant, the FCC approach argues for pricing authority by claiming that the TELRIC methodology is an attempt to specify § 251(c)'s mandates for "just, reasonable, and nondiscriminatory"[177] pricing.[178] This language is a

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175. Both Congress and the FCC viewed the number portability requirements as essential to promoting local telephone competition. *See* H.R. REP. NO. 104-204, at 72 (1995) (Sup. Docs. No. Y1.1/5:104-204), *reprinted in* 1996 U.S.C.C.A.N. 10, 37 (stating that "the ability to change service providers is only meaningful if a customer can retain his or her local telephone number"); Telephone Number Portability, ¶¶ 28–31, 11 F.C.C.R. 8352, 8367–68 (1996) [hereinafter Number Portability Order] (stating that "a lack of number portability likely would deter entry by competitive providers of local service because of the value customers place on retaining their telephone numbers"). Similarly, the FCC emphasized the importance of dialing parity to local competition in its Second Report and Order on local competition. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Second Report and Order, ¶ 22, 11 F.C.C.R. 19,392, 19,406 (1996) [hereinafter Second Report & Order] (stating that the dialing parity requirements "will foster vigorous local exchange and long distance competition by ensuring that each customer has the freedom and flexibility to choose among different carriers for different services without the burden of dialing access codes").

176. *See* Second Report & Order, *supra* note 175, ¶ 25, 11 F.C.C.R. at 19,407 (concluding that "minimum nationwide standards" governing dialing parity will best promote competition); Number Portability Order, *supra* note 175, ¶¶ 32–37, 11 F.C.C.R. at 8368–71 (explaining the need for a uniform national framework governing number portability).

177. 47 U.S.C. § 251(c)(2)(D), (c)(3); *see also supra* note 48 (quoting the statute more extensively).

178. *See* First Report & Order, *supra* note 7, ¶¶ 115–17, 11 F.C.C.R. at 15,559–60 (claiming authority to promulgate national pricing rules for interconnection and

standard means of delegating ratemaking authority to an executive agency[179] and echoes the sections of the 1934 Act that authorize the FCC to regulate pricing for interstate telecommunications.[180] Furthermore, § 252(c)(1) directs the state commissions to follow FCC regulations issued under § 251, which might appear to include any regulations defining a "just, reasonable, and nondiscriminatory" rate.[181] All these points support the FCC approach. While it is true that § 252 directs the state commissions to "establish"[182] and to make "determinations" of rates,[183] the FCC approach argues that these formulations are satisfied if the state commissions set the actual prices for interconnection and unbundled access by applying the TELRIC rules to particular circumstances.[184]

The biggest obstacle to deriving FCC jurisdiction from the references to "just, reasonable, and nondiscriminatory" rates in § 251 is the "lack of parallelism" between § 252(c)(1) and (c)(2).[185] As Justice Breyer emphasized, § 252(c)(1) directs state commissions to ensure compliance with the requirements of § 251, including any FCC regulations promulgated under that section.[186] In contrast, § 252(c)(2) directs state commissions to set rates by following the pricing standards set forth in § 252(d) and makes no reference to any FCC

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unbundled access by virtue of § 251(c)(2)(D) and (c)(3) in conjunction with the jurisdictional grant contained in (d)(1)). In other words, the jurisdictional equation for the FCC approach is: § 251(d)(1) (directing the FCC to implement the requirements of § 251) + § 251(c)(2)(D), (c)(3) (obligating ILECs to provide interconnection and unbundled access at "just, reasonable, and nondiscriminatory" rates) = FCC pricing authority.

179. *See* Chen, *supra* note 92, at 79 (describing the "statutory command to set 'just and reasonable rates' " as "ubiquitous").

180. *Compare* 47 U.S.C. § 251(c)(2)(D) (requiring ILECs to provide interconnection at rates that are "just, reasonable, and nondiscriminatory"), *and* 47 U.S.C. § 251(c)(3) (requiring ILECs to provide access to unbundled network elements on terms that are "just, reasonable, and nondiscriminatory"), *with* 47 U.S.C. § 201(b) (1994) (requiring that "charges, practices, classifications ... for and in connection with [interstate or foreign] communication service ... shall be just and reasonable"), *and* 47 U.S.C. § 202(a) (1994) (prohibiting common carriers from "unjust or unreasonable discrimination"). The FCC noted the parallel between the old and new sections of the Communications Act. *See* First Report & Order, *supra* note 7, ¶ 112, 11 F.C.C.R. at 15,558.

181. *See* 47 U.S.C. § 252(c)(1). Whether subsection (c)(1) obligates the state commissions to follow FCC rate regulations is discussed below. *See infra* 185–94 and accompanying text.

182. 47 U.S.C. § 252(c)(2).

183. *Id.* § 252(d)(1).

184. *Cf. AT&T*, 525 U.S. at 384 (concluding that state commissions could satisfy the requirements for setting rates by calculating the actual prices for interconnection and unbundled access using the TELRIC methodology).

185. *Id.*; *see also supra* note 49 (quoting 47 U.S.C. § 252(c)).

186. *See AT&T*, 525 U.S. at 419 (Breyer, J., concurring in part and dissenting in part).

pricing regulations.[187] Consequently, the lack of parallelism between § 252(c)(1) and (c)(2) appears to indicate that Congress did not contemplate the existence of FCC pricing regulations under § 251.[188]

Justice Breyer's point is supported by two well-established canons of statutory interpretation: *expressio unius est exclusio alterius*[189] and the rule that specific language trumps general language.[190] Here, *expressio unius* suggests that because Congress referenced FCC regulations in § 252(c)(1), the failure to mention such regulations in § 252(c)(2) means that the state commissions are not bound to follow FCC regulations governing the pricing of interconnection and unbundled access. Alternatively, one can argue that § 252(c)(1) and (c)(2) contradict one another because the first seems to require the states to follow FCC pricing rules while the second does not. Under such an interpretation, the principle that specific language trumps general language directs that § 252(c)(2) should prevail because it speaks specifically to pricing while

187. *See id.* at 419–20 (Breyer, J., concurring in part and dissenting in part); *see also supra* note 49 (quoting 47 U.S.C. § 252(d)).

188. Indeed, when the ratemaking language of § 251 is read in the light of its legislative history, it arguably can be dismissed as legislative boilerplate that is given substantive content only by the statutory pricing standard in § 252(d). *See infra* notes 228–32 and accompanying text. This interpretation further weakens the FCC's claim to pricing authority on the basis of § 251.

189. *Expressio unius* is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 602 (7th ed. 1999). Some commentators have criticized *expressio unius* as an unreliable principle of construction that should rarely if ever be used to decide a case. *See* DICKERSON, *supra* note 146, at 234–35; *see also* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805, 813 (1983) (discussing how scholars have dismissed this principle of statutory construction). Others, however, have argued that *expressio unius* can be valuable if used with appropriate caution. *See* David Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927–29 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 455–56 (1989). The context of § 252(c)(1) and (c)(2) is an appropriate setting for an *expressio unius* argument, as one reasonably can infer that Congress would have considered the possibility of making reference to FCC regulations in subsection (c)(2). *Cf.* Sunstein, *supra*, at 456 (stating that use of *expressio unius* is most appropriate "[w]hen it is plausible to assume that Congress has considered all the alternatives"). Incidentally, Justice Scalia has used the logic of *expressio unius* in deciding at least one statutory interpretation case. *See* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 130–33 (1989) ("[G]iven the parallel structures of these provisions, it would be a flouting of the text to imply in Section I a sanction not only withheld there but explicitly granted elsewhere. When such an interpretation is allowed, the art of draftsmanship will have become obsolete.").

190. *See, e.g.*, Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987) (holding that " 'where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one' " (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976))).

§ 252(c)(1) deals with interconnection regulations in general. Because § 252(c)(2) speaks specifically of rates and fails to mention FCC regulations, the natural inference is that the "regulations" referenced in subsection (c)(1) do not include pricing regulations.[191] The FCC approach has no answer to this lack of parallelism problem,[192] and hence runs afoul of the maxim that statutory interpretations should attribute significance to every part of a statute.[193] As a result, the FCC's contention that Congress required it to establish a binding pricing methodology for the state commissions through the language of § 251 is unconvincing.[194]

The majority approach provides a stronger textual argument for FCC pricing authority than the FCC approach because the majority offers a fairly plausible account of the lack of parallelism in § 252(c).[195] Instead of looking to § 251(d)(1), the majority upheld the FCC's pricing jurisdiction based on the Commission's general authority under § 201(b) to implement all the provisions of the Communications Act of 1934 as amended, including those provisions added by the 1996 Act.[196] According to this theory, the FCC may *choose* to exercise its general authority by promulgating rules interpreting the pricing standards in § 252,[197] but is *required* by

191. 47 U.S.C. § 252(c); *see AT&T*, 525 U.S. at 420 (Breyer, J., concurring in part and dissenting in part).

192. The FCC ignored the lack of parallelism problem in its brief. *See* Opening Brief for the Federal Petitioners, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (No. 97-831).

193. *See, e.g.*, United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (stating that "[s]tatutory construction 'is a holistic endeavor,' and at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter" (quoting United Savings Ass'n of Tex. v. Timbers of Linwood Forest Assocs. Ltd., 484 U.S. 365, 371 (1988))); Reiter v. Sonotone Corp., 442 U.S. 330, 338–39 (1979) (stating that courts should give effect to every word Congress uses whenever possible).

194. A variation on the FCC approach would treat § 251(d)(1) as a timetable rather than a jurisdictional grant, but would follow the FCC approach by basing its claim to FCC pricing authority on the references to "just, reasonable, and nondiscriminatory" rates in § 251. This variation would fare no better in dealing with the lack of parallelism in § 252 than does the FCC approach. So long as one seeks to base the FCC's pricing authority on the ratemaking language of § 251, the lack of parallelism difficulty is equally troublesome whether one reads § 251(d)(1) as a timetable or as a jurisdictional grant. However, if the majority was correct in contending that the ultimate source of FCC jurisdiction is § 201(b), an alternative argument for FCC pricing authority is possible. *See infra* notes 195–223 and accompanying text (discussing the majority's interpretive approach).

195. *See AT&T*, 525 U.S. at 384–85.

196. *See id.* at 377–78. In other words, the relevant jurisdictional equation is: § 201(b) (granting the FCC general jurisdiction) + § 252(d)(1) (setting forth pricing standards for interconnection and unbundled access) = FCC pricing authority.

197. *See* 47 U.S.C. § 201(b) (1994) ("The Commissioner *may* prescribe such rules and

§ 251(d)(1) to establish regulations implementing the requirements of § 251.[198] The majority's approach claims that this contrast between discretionary and mandatory rulemaking power explains the lack of parallelism between §§ 252(c)(1) and 252(c)(2): "It seems to us not peculiar that the mandated regulations should be specifically referenced, whereas regulations permitted pursuant to the Commission's § 201(b) authority are not."[199] To be fully convincing, however, the majority approach must establish two things: (1) that § 201(b) gives the FCC general jurisdiction over local competition; and (2) that this general jurisdiction is not displaced by the specific language of § 252.

Commentators were surprised by the majority's treatment of § 201(b) as the source of FCC jurisdiction.[200] Although Justice Scalia concluded that § 201(b)'s plain meaning gives the FCC general jurisdiction over local competition,[201] that claim is subject to two potential objections, one based on appeals to legislative intent and a second based on textual grounds.

The first objection derives from the maxim that statutory interpretation seeks to discover the intent of the enacting legislature.[202] When § 201(b) was enacted in 1938, the substantive scope of federal communications law did not extend to intrastate matters; hence, *at that time*, Congress could not have understood

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regulations as may be necessary in the public interest to carry out the provisions of this [Act]." (emphasis added)).

198. *See id.* § 251(d)(1) (Supp. III 1997) ("[T]he Commission *shall* complete all actions necessary to establish regulations to implement the requirements of this section." (emphasis added)).

199. *AT&T*, 525 U.S. at 385; *see also id.* at 384–85 (stating that the lack of parallelism between § 252(c)(1) and (c)(2) is "adequately explained by the fact that § 251 specifically *requires* the Commission to promulgate regulations implementing that provision, whereas subsection (d) of § 252 does not").

200. Two commentators who criticized the Eighth Circuit's decision did not recognize the possibility that § 201(b) might determine the scope of FCC jurisdiction. *See* Chen, *supra* note 92, at 68–76 (arguing that § 251(d)(1) is the source of the FCC's authority over local telephone competition); McLaughlin, *supra* note 26, at 2248–49 (characterizing § 251(d)(1) as a broad grant of FCC authority over the Act's interconnection provisions).

201. The majority did not use the words "plain meaning," but Justice Scalia justified his interpretation by saying that on his reading, § 201(b) "means what it says." *AT&T*, 525 U.S. at 378; *see also* 47 U.S.C. § 201(b) (stating that the FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act").

202. *See, e.g.*, Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (stating that statutory construction should aim to "ascertain the congressional intent and give effect to the legislative will"); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (stating that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent").

§ 201(b) to confer FCC jurisdiction over intrastate communications. Furthermore, neither the statutory text nor the legislative history indicate that Congress sought to change the meaning of § 201(b) by passing the 1996 Act.[203] These facts raise the question of whether the majority's reading can be squared with the congressional intent behind § 201(b).

The short answer is that the two cannot be reconciled, but that this discrepancy is not a cause for alarm. The majority opinion reflects the "textualism" of its author and, hence, does not engage in a search for the subjective legislative intent behind § 201(b).[204] Although Justice Scalia's textualism does not represent the thinking of all the Justices who voted with him on the jurisdictional issues,[205] it

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203. One provision of the 1996 Act mentions § 201, but only to insist that nothing in the new § 251 should be construed to limit the FCC's existing authority under § 201. *See* 47 U.S.C. § 251(i). The legislative history suggests that § 251(i) was included to clarify that nothing in § 251 was intended to modify the FCC rules at 47 C.F.R. § 69.1–.502 (1999), which govern interconnection and access charges between long-distance carriers and local exchange carriers. *See* S. REP. NO. 104-23, at 22 (1995) (Sup. Docs. No. Y1.1/5:104-23) (discussing the Senate bill's proposed section 251(k), the predecessor of § 251(i) in the final bill).

204. *See* Scalia, *supra* note 93, at 16–23 (criticizing the claim that discovering the subjective intent of the legislature is the goal of statutory interpretation). For Justice Scalia, the proper goal of statutory interpretation is "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*." *Id.* at 17. The search for this objectified intent does not require judges to consider legislative history. *See id.* at 29–37. Justice Scalia's "textualist" philosophy of statutory interpretation has been widely discussed. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650–56, 666–90 (1990) (explaining and critically analyzing Justice Scalia's textualism, but accepting textualist calls for a "harder" plain meaning rule, increased use of interpretive canons, and greater skepticism toward legislative history); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1161–87 (1992) (evaluating the possible justifications for Justice Scalia's "text- and rule-based approach to statutory interpretation"); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 *passim* (1991) (discussing Justice Scalia's textualism in relation to the legal process theory of Henry Hart and Albert Sacks).

205. Justice Scalia's jurisdictional discussion was joined by Justices Stevens, Kennedy, Souter, and Ginsburg. None of these Justices has been willing to join Justice Scalia in categorically rejecting appeals to legislative history. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 364 (1994) (writing before Justice Ginsburg joined the court and noting that only Justice Thomas fully shares Justice Scalia's textualist approach to statutory interpretation); *see also* United States v. Granderson, 511 U.S. 39, 51–54 (1994) (Ginsburg, J.) (relying on legislative history). Professor Merrill observes that, whereas Justices Scalia and Thomas consistently refuse to join any part of an opinion that appeals to legislative history, none of the Justices who value legislative history consistently declines to join in textualist opinions. *See id.* at 365. Thus, even when no Justice writes separately, one cannot assume that a vote for a result favored by Justice Scalia necessarily implies full agreement with the reasoning by which he reached that result.

does explain how the majority was able to base the FCC's jurisdiction over local telephone competition on § 201(b) without explicitly addressing legislative intent.[206]

As Professor Eskridge has explained, Justice Scalia's approach to statutory interpretation makes use of "horizontal" coherence arguments, which emphasize the relationships between the text being interpreted and the surrounding body of law.[207] Justice Scalia succinctly outlined his approach in *Green v. Bock Laundry Machine Co.*,[208] arguing that courts should choose the interpretation that is "(1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress ... (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated."[209] According to Justice Scalia, judges should assume "by a benign fiction" that Congress always drafts statutes with an eye towards their compatibility with other laws.[210]

Justice Scalia's emphasis on horizontal coherence leaves him open to the possibility that the meanings of statutes will change over time as their relation to the surrounding statutory body changes.[211] Accordingly, Justice Scalia's interpretive method required him to ask neither what "provisions of this [Act]" meant to the 1938 Congress nor whether the 1996 Congress subjectively intended the FCC's jurisdiction over local telephone competition to spring from § 201(b). Through the "benign fiction" that Congress knew the content of

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206. Nontextualists still might locate the source of the FCC's jurisdiction in § 201(b). For example, they might argue that the 1996 Act's effect on the statutory context changed the *denotation* of the phrase "provisions of this [Act]" so that the phrase identifies a different class of statutory sections than it did in 1938, while leaving the *meaning* of the phrase unchanged. *Cf.* DICKERSON, *supra* note 146, at 125–321 (distinguishing between the meaning/connotation and denotation of statutory language and arguing that the connotations of statutory language should be fixed by the understanding of the contemporary audience, but that the denotations of such language may properly be allowed to change over time).

207. In contrast, "vertical" coherence arguments emphasize the relations between statutory texts and the legislators who drafted them. *See* Eskridge, *supra* note 204, at 655.

208. 490 U.S. 504 (1989).

209. *Id.* at 528 (Scalia, J., concurring in the judgment).

210. *Id.* (Scalia, J., concurring in the judgment).

211. *See* Eskridge, *supra* note 204, at 655, 667–68; *see also* Alexander T. Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 56–61 (1988) (rejecting "originalist" approaches to statutory interpretation). Despite his well-known "originalism" in constitutional interpretation, Justice Scalia also acknowledges that the meaning of constitutional provisions can change as a result of amendments to other parts of the Constitution. *See* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 93, at 129, 141.

§ 201(b) when it enacted the 1996 Act as an amendment to the 1934 Act, Justice Scalia could conclude that § 201(b) gives the FCC plenary authority over all the provisions of the Act that do not explicitly displace such authority—including §§ 251 and 252.[212]

The second objection to the majority's approach argues that § 201(b) cannot be read as a grant of general jurisdiction because it is limited by its context to interstate or foreign communications.[213] Subsection (a) of § 201 defines duties of carriers engaged in "interstate or foreign communication by wire or radio."[214] The first sentence of § 201(b) prohibits unjust or unreasonable "charges, practices, classifications, and regulations for and in connection with *such communication service*"[215]—a clear reference back to the "interstate or foreign communications" addressed in § 201(a). After three proviso clauses specifying Congress's view with respect to the reasonableness of specific practices, § 201(b) concludes with the apparently general language relied upon by Justice Scalia: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]."[216] Thus, every sentence of § 201 other than the jurisdictional grant in the last sentence of § 201(b) indisputably deals with interstate or foreign communications. From a structural standpoint, the end of § 201 admittedly would be an odd place to locate a general grant of jurisdiction over whatever the Communications Act might come to include.[217]

In responding to this objection, the majority approach emphasizes that the language of the jurisdictional grant in § 201(b) is completely general, a fact that limiting interpretations cannot ignore.[218] The majority approach also finds indirect support in the

212. *See AT&T*, 525 U.S. at 378.

213. *See id.* at 408 (Thomas, J., concurring in part and dissenting in part) (arguing that the context of § 201(b) restricts its scope to jurisdiction over interstate or foreign communications).

214. 47 U.S.C. § 201(a) (1994).

215. *Id.* § 201(b) (emphasis added).

216. *Id.*

217. Chief Justice Rehnquist raised this structural point in oral argument. *See* Transcript of Oral Argument at *8, 1998 WL 729541, *AT&T*, 525 U.S. 366 (1999) (No. 97-826).

218. *But see AT&T*, 525 U.S. at 408 (Thomas, J., concurring in part and dissenting in part) (invoking the principle of *ejusdem generis* to argue that the last sentence of § 201(b) should be read as implicitly limited by its context to include only those provisions governing interstate or foreign communications). *Ejusdem generis* is a canon of statutory interpretation prescribing that "when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." BLACK'S LAW DICTIONARY 535 (7th ed.

language of §§ 251 and 252: while the Act clearly gives the FCC authority over at least some aspects of local competition,[219] the language of those sections does not appear especially well-suited to serve as the locus of that authority.[220] Even § 251(d)(1), which appears the most likely jurisdictional grant of any subsection within the two provisions, can be read plausibly as a mere timetable for the exercise of FCC authority.[221] If §§ 251 and 252 do not contain a jurisdictional grant, then, the FCC's authority over local competition must originate in another provision—namely, § 201(b).[222] Finally, the majority approach argues, in choosing to codify the 1996 Act as part of the FCC's enabling statute,[223] Congress must have intended to give the FCC broad authority of the sort contemplated in § 201(b).

The majority approach, then, has plausible responses to both potential objections to its jurisdictional theory. Yet, even if the majority is correct to treat § 201(b) as the source of general FCC jurisdiction over local competition, the modified dissent approach contends that the specific language of § 252 trumps the FCC's general jurisdiction and reserves the pricing issue to the states. Deciding between the majority and modified dissent approaches depends on how each accounts for three features of §§ 251 and 252: (1) the

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1999). For example, if a statute referred to "carrots, lettuce, and other plants," *ejusdem generis* would caution against reading "other plants" to include redwood trees. The principle seems ill suited to elucidate the meaning of § 201(b), however, because that section is not structured as a list of specific jurisdictional grants followed by a general one.

219. *See supra* notes 158–76 and accompanying text (rejecting Justice Thomas's approach and concluding that the FCC must have jurisdiction over at least the whole of § 251).

220. The individual subsections of § 251 that mention the FCC do not read like jurisdictional grants, *see supra* notes 163–68 and accompanying text, and the pricing provisions of § 252 do not mention the FCC at all. *See* 47 U.S.C. § 252(c)(2), (d)(1).

221. *See AT&T*, 525 U.S. at 406 (Thomas, J., concurring in part and dissenting in part). Although the FCC approach treats § 251(d)(1) as a jurisdictional grant, other provisions of the 1934 Act as amended arguably read more naturally as *conferrals* of FCC authority than does § 251(d)(1). *Compare* 47 U.S.C. § 251(d)(1) (Supp. III 1997) ("Within 6 months after February 8, 1996, the Commission shall complete all actions . . . ."), *with id.* § 201(b) ("The Commission may prescribe such rules and regulations . . . ."), *id.* § 303(r) (1994) (stating that the FCC may "[m]ake . . . rules and regulations and prescribe . . . restrictions and conditions"), *and id.* § 154(i) (1994) (stating that the FCC may "perform . . . acts, make . . . rules and regulations, and issue . . . orders"). See *supra* notes 66, 154, 155 for more extensive quotations of these provisions.

222. Or, if not through § 201(b), then by some other equally broad grant of FCC jurisdiction. *See supra* note 66 (listing other provisions that might support general FCC jurisdiction over the 1996 Act). Ultimately the force of this argument depends on whether one regards § 251(d)(1) as a timetable or as jurisdictional grant—two choices that seem equally plausible.

223. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 1(b), 110 Stat. 56, 56 (directing that the 1996 Act be codified as amending the Communications Act of 1934).

language of § 252(c)(2) directing the states to "establish any rates" for interconnection and unbundled access; (2) the references to "just, reasonable, and nondiscriminatory" rates in § 251; and (3) the lack of parallelism between § 252(c)(1) and (c)(2).

The plain meaning of § 252(c)(2) slightly favors the modified dissent approach.[224] The provision directs the state commissions to "establish any rates" according to the pricing standards in § 252(d)(1) and says nothing about the FCC.[225] Yet the majority approach has a fairly convincing response. It points out that being required to follow FCC pricing rules is compatible with establishing rates so long as the state commissions determine specific prices by applying the TELRIC methodology to particular circumstances. If the states can be said to establish rates when they follow the statutory pricing standard in § 252(d)(1), the majority approach argues, they can also be said to establish rates when they follow the FCC's TELRIC rules.[226]

Both the majority's approach and the modified dissent approach deny that the FCC is *required* to promulgate a pricing methodology, so both must explain away the references to "just, reasonable, and nondiscriminatory" rates in § 251.[227] Fortunately, both can argue plausibly that the ratemaking language in § 251 can be dismissed as legislative boilerplate.[228] Section 252(d) employs the language of "just and reasonable rate[s]" in passing, requiring that state determinations of the "just and reasonable rate" for interconnection and unbundled access be "based on ... cost," be "nondiscriminatory," and "may include a reasonable profit."[229] Significantly, the Conference Report

224. *Cf.* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 796 n.15 (8th Cir. 1997) (concluding that "the FCC's belief that it has jurisdiction to issue local pricing rules conflicts with the plain meaning of the Act"), *aff'd in part, rev'd in part sub nom.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

225. 47 U.S.C. § 252(c)(2).

226. *See AT&T*, 525 U.S. at 384 (discussing 47 U.S.C. § 252(c)(2) and concluding that state commissions establish rates when they apply the TELRIC rules to particular circumstances); *supra* notes 74–76 and accompanying text; *see also* Opening Brief for the Federal Petitioners at 26 n.9, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (No. 97-831) (criticizing the Eighth Circuit for making the "negative inference" that "wherever Congress assigned the state commissions *some* role in implementing the 1996 Act, it must have intended for the [FCC] to play *no* role at all").

227. If the ratemaking language in § 251 authorizes the FCC to issue pricing rules that would bind the state commissions, that pricing authority is mandatory because § 251(d)(1) *requires* the FCC to establish regulations implementing that section.

228. Just as the FCC ignored the lack of parallelism between § 252(c)(1) and (c)(2), *see supra* note 192 and accompanying text, the majority did not try to explain why Congress included the references to "just, reasonable, and nondiscriminatory" rates in § 251, *see AT&T*, 525 U.S. at 371–97.

229. 47 U.S.C. § 252(d)(1); *supra* note 49 (quoting the provision).

described the pricing standard established by § 252(d) as dictating only that prices should be "based on cost" and "may include a reasonable profit."[230] This summary suggests that the "just" and "reasonable" requirements are boilerplate language lacking substantive content.[231] Furthermore, the pricing standard in § 252(d) was drawn from Senate Bill 652, which did not require that prices be "just" or "reasonable."[232] When the pricing language of the 1996 Act is read in light of its legislative history, one might easily conclude that the language of "just and reasonable rate[s]" is a mere placeholder given substantive content only by the factors enumerated in subsections (A) and (B) of § 252(d)(1).

The most critical issue is how to explain the lack of parallelism between § 252(c)(1), which directs state commissions to ensure compliance with the requirements of § 251 and any FCC regulations promulgated under that section, and § 252(c)(2), which directs state commissions to set rates by following the pricing standards set forth in § 252(d) without reference to FCC regulations.[233] The majority approach asserts that Congress included the reference to the FCC in § 252(c)(1) because the FCC is *required* to promulgate regulations to implement § 251,[234] but did not reference the FCC in § 252(c)(2) because the Commission's rulemaking authority over the pricing

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230. H.R. CONF. REP. NO. 104-458, at 125 (1996) (Sup. Docs. No. Y1.1/5:104-458), *reprinted in* 1996 U.S.C.C.A.N. 124, 137.

231. The Conference Report's failure to mention "nondiscriminatory" as part of the pricing standard is a bit odd because that requirement is given its own subsection in the 1996 Act. *See* 47 U.S.C. § 252(d)(1)(A)(ii). Perhaps the omission is explained by the fact that the requirements dealing with cost and profit level can help the state commission to derive numbers, whereas the standard of nondiscrimination serves not to generate prices, but to rule out those prices that have discriminatory effects.

232. *See* S. 652, 104th Cong. § 101(a) (1995) (proposing section 251(d)(6)) (Sup. Docs. No. Y1.4/1:104-652). The Senate Bill read:

> (6) Charges.—If the amount charged by a local exchange carrier, or class of local exchange carriers, for an unbundled element of the interconnection provided under subsection (b) is determined by arbitration or intervention under this subsection, then the charge—
>
> (A) shall be
>
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the unbundled element,
>
> (ii) nondiscriminatory, and
>
> (iii) individually priced to the smallest element that is technically and economically reasonable to provide; and
>
> (B) may include a reasonable profit.

Id.

233. 47 U.S.C. § 252(c); *see also supra* note 49 (quoting the statute).

234. *See* 47 U.S.C. § 251(d)(1) ("[T]he Commission *shall* complete all actions necessary to establish regulations to implement the requirements of this section." (emphasis added)).

standards in § 252(d)(1) is *discretionary*.[235] The modified dissent approach takes the lack of parallelism in § 252(c) at face value, concluding that pricing jurisdiction is reserved to the states.

The modified dissent approach's solution to the lack of parallelism problem is slightly more plausible than the majority approach's for two reasons. First, the language of § 252(c)(2) more easily bears the interpretation proposed by the modified dissent approach. This claim can be demonstrated through the standard interpretive technique of redrafting disputed language to require a result in favor of each party and then asking which "redraft" is closer to the original language.[236] Imagine that the statutory language had required the state commissions to establish rates "*solely* according to subsection (d)." With the addition of the one word "solely," the statute would require the interpretation proposed by the modified dissent approach. In contrast, only language requiring the state commissions to "establish any rates according to subsection (d), including any regulations the Commission might promulgate in relation to that subsection" would compel the majority's interpretation. The second "redraft" of the statute seems a far greater stretch than the first; therefore, § 252(c)(2) is read most naturally to support state pricing authority.

Second, the modified dissent approach is more plausible than the majority approach because the statutory context suggests that Congress would not intentionally have committed the question of pricing jurisdiction to the FCC's discretion. The 1996 Act includes many provisions designed to draw clear boundaries between federal and state authority. For example, Congress required the FCC to establish regulations implementing § 251, but allowed the states to impose additional interconnection and access obligations on carriers so long as those obligations do not conflict with federal requirements.[237] Similarly, Congress granted the FCC broad preemption power in § 253(d), but explicitly exempted certain state functions from that power.[238] These provisions suggest that Congress sought to define explicitly the scope of the FCC's authority over the

235. *See id.* § 201(b) (1994) ("The Commissioner *may* prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]." (emphasis added)).

236. *Cf.* E. ALLAN FARNSWORTH, CONTRACTS 502–03 (2d ed. 1990) (describing the application of this technique in contract interpretation).

237. *See* 47 U.S.C. § 251(d)(1), (d)(3).

238. *See id.* § 253(b)–(d); *see also supra* note 140 (describing the Senate's attention to federalism issues in debating the scope of the FCC's preemption power under the Act).

states and likely would not have left the FCC discretion over the range of pricing autonomy that the states would enjoy. In the context of the 1996 Act as a whole, then, the lack of parallelism between § 252(c)(1) and (c)(2) is best explained as an affirmation of state authority.

The textual analysis of the jurisdictional issues in *AT&T* can be summarized as follows. Each of the approaches considered leaves significant interpretive anomalies. In attempting to limit FCC jurisdiction to those subsections of § 251 that explicitly mention the FCC, Justice Thomas's approach is unable to explain the language and structure of § 251. The FCC approach, which would base the FCC's authority to issue TELRIC on the ratemaking language of § 251, fails to offer any explanation of the lack of parallelism between §§ 252(c)(1) and 252(c)(2). Both the majority approach and the modified dissent approach must discount the ratemaking language in § 251 to be fully plausible.[239] Although the majority approach provides the strongest case for FCC pricing authority, the modified dissent approach offers the best overall account of the statutory text because it provides the most convincing explanation for the lack of parallelism between § 252(c)(1) and (c)(2).

This Note contends, then, that although none of the interpretive strategies considered are fully satisfactory, purely textual analysis slightly favors the modified dissent approach. In other words, a Court that faithfully followed Justice Scalia's textualist method of interpretation should have concluded that the state commissions retain pricing authority under the 1996 Act. But the margin of victory for the modified dissent approach is narrow indeed and does not dispel the suspicion that Congress never fully faced and decided the question whether the FCC has the authority to guide state interpretations of the pricing standards in § 252(d)(1). This Note will now consider whether the use of "tie-breaking" interpretive principles might provide a more satisfactory resolution of the pricing jurisdiction issue in *AT&T*.

When legislative intent is ambiguous (or nonexistent[240]), courts sometimes resolve questions of statutory interpretation by resort to "substantive"[241] or "procedural"[242] interpretive canons that tip the

239. Both of these approaches are more convincing than the FCC approach because it is easier to explain away the ratemaking language in § 251 than to explain away the lack of parallelism in § 252(c).

240. *Cf.* Scalia, *supra* note 93, at 32 (stating that "with respect to 99.9 percent of the issues of construction reaching the courts, there *is* no legislative intent").

241. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear*

balance toward one outcome or another.[243] As the Supreme Court has become less willing to use legislative history to resolve the meaning of ambiguous texts, interpretive norms have become even more important.[244] Three such norms are relevant to whether the FCC has pricing authority. The first is provided by 47 U.S.C. § 152(b), the 1934 Act provision that has been interpreted as creating a barrier to FCC jurisdiction over intrastate matters that can be overcome only by a clear statement of congressional intent.[245] Because of § 152(b), the Act carries a set of interpretive instructions that might be used to resolve issues about the federal-state balance of power in telecommunications law.[246] The second interpretive canon that might bear on *AT&T* is the presumption against finding federal preemption in areas in which the states have traditionally exercised

Statement Rules as Constitutional Lawmaking, 45 VAND. L. REV. 593, 595 (1992) (defining substantive canons as interpretive norms that reflect values drawn from the Constitution, federal statutory law, and common law). In using substantive canons, the courts assume that in the absence of some contrary signal, Congress intends to respect certain general policies—such as federalism and the availability of judicial review—in its legislation. *See id.* at 595, 597, 601. Substantive canons typically take the form of either "presumptions" or "clear statement rules." *Id.* at 595 & n.4. Presumptions can be rebutted by arguments from statutory text, purpose, or legislative history, whereas clear statement rules can be rebutted only by explicit statutory language. *See id.* at 595 n.4. Supreme Court Justices have discussed the distinction between presumptions and clear statement rules in *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 108–09 (1991), and *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260–63 (1991) (Marshall, J., dissenting).

242. A "procedural" canon often directs the courts to defer to the authority of other decisionmakers. *See* Eskridge, *supra* note 204, at 664. The *Chevron* doctrine of deference to administrative agencies is by far the most important procedural canon for the textualists on the Supreme Court. *See id.* at 665. For a different typology of interpretive norms based on their functions, see Sunstein, *supra* note 189, at 454–60.

243. The so-called "linguistic" canons of interpretation, such as *expressio unius* and *ejusdem generis*, are a part of the effort to determine the meaning of a statutory text. *See* Shapiro, *supra* note 189, at 927. The linguistic canons are distinct from substantive canons because they do not rest on potentially controversial assumptions about Congress's policy preferences. *See* Eskridge & Frickey, *supra* note 241, at 595–96.

244. *See* Eskridge, *supra* note 204, at 656–60, 663–64 (discussing how the influence of textualism has led the Court to rely less on legislative history and more on interpretative canons). Note, however, that at least in Justice Scalia's case, textualism also means that fewer statutes are judged to be genuinely ambiguous. *See id.* at 658 n.144 (stating that Justice Scalia finds few texts ambiguous); Scalia, *supra* note 60, at 521 (acknowledging that textualists will find statutes to be ambiguous under step one of *Chevron* far less frequently than those who are willing to consult legislative history).

245. 47 U.S.C. § 152(b) (1994); *supra* note 105 (quoting § 152(b)); *see also infra* notes 249–69 (discussing the application of § 152(b) to the pricing jurisdiction issue in *AT&T*). Although § 152(b) functions like a clear statement rule, it is not technically a substantive canon because it does not reflect a policy assumption adopted by the Court. Instead, it is an interpretive instruction from Congress contained within the statute itself.

246. For a discussion of interpretive instructions, see Sunstein, *supra* note 189, at 456–57.

their police powers.[247] Both of these standards tilt close interpretive questions in favor of the states and would preclude the FCC's pricing jurisdiction in *AT&T*. A third interpretive norm, deference to administrative agencies, would counsel a decision in favor of the FCC, but is conspicuously absent from the jurisdictional discussion in *AT&T*.[248]

Since *Louisiana PSC*,[249] § 152(b) has operated as a " 'super-strong clear statement rule' " that requires extremely explicit textual evidence to change the interpretive outcome from the default setting of state authority over intrastate communications.[250] Because the FCC's authority to issue its TELRIC rules is hardly "straightforward" or "unambiguous,"[251] § 152(b) would preserve state pricing authority if it controls the pricing jurisdiction issue. The statute's application depends on the significance of its disjunctive language, requiring that "nothing in this chapter shall be construed *to apply or give the Commission jurisdiction* with respect to" various intrastate matters, including, most importantly, charges.[252] That language, considered in isolation, might seem to support Justice Thomas's contention that to give the FCC jurisdiction over intrastate matters, Congress first must indicate unambiguously that a law "applies" to intrastate matters and then unambiguously indicate that the FCC has authority to make rules implementing that law.[253]

Both the historical context of § 152(b) and the Court's decision in *Louisiana PSC*, however, militate against this conclusion. As reviewed by the Court in *Louisiana PSC*,[254] the legislative history of the Communications Act of 1934 indicates that § 152(b) was written

247. *See* Rice Elevator v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also infra* notes 270–89 (discussing the application of the *Rice* presumption to the pricing jurisdiction issue in *AT&T*).

248. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–44 (1984) (outlining the norm); *see also infra* notes 290–304 (discussing the application of *Chevron* to the pricing jurisdiction issue in *AT&T*). Scholars have asked whether the *Chevron* norm should prevail or give way when it conflicts with congressional interpretive instructions or substantive canons such as that announced in *Rice*. *See* McGreal, *supra* note 122, at 844–87; Sunstein, *supra* note 60, at 2108–19. The Court decided *AT&T* without addressing such issues.

249. 476 U.S. 355, 377 (1986) (requiring "straightforward" and "unambiguous" language to overcome the limits on FCC jurisdiction imposed by 47 U.S.C. § 152(b)); *see supra* notes 117–27.

250. Chen, *supra* note 92, at 83 (quoting Eskridge & Frickey, *supra* note 241, at 615).

251. *Louisiana PSC*, 476 U.S. at 377.

252. 47 U.S.C. § 152(b) (1994) (emphasis added).

253. *See AT&T*, 525 U.S. at 409 (Thomas, J., concurring in part and dissenting in part).

254. *See Louisiana PSC*, 476 U.S. at 372–73; *see also supra* notes 102–06 and accompanying text (discussing the origins of § 152(b)).

in reaction to the Supreme Court's decision in the *Shreveport Rate Cases*,[255] which granted the Interstate Commerce Commission ancillary jurisdiction over intrastate railroad shipping rates. Section 152(b), then, was intended to limit the FCC's ability to regulate intrastate communications solely because of their effects on interstate communication.[256] Thus, the legislative history behind § 152(b) strongly supports the Court's contention that the disjunctive language of § 152(b) is intended to distinguish between the FCC's primary and ancillary jurisdiction.[257]

Further reflection on the historical context also supports the majority's interpretation of § 152(b). Because the language of § 152(b) limits the FCC, the meaning of that language can be clarified by asking what evils Congress sought to prevent. On the majority's interpretation, the disjunctive language guards against bold assertions of ancillary jurisdiction of the sort sanctioned by the *Shreveport Rate Cases*.[258] If the legislative history is any guide, Congress was preoccupied with this specific danger when it drafted § 152(b).[259] In contrast, Justice Thomas's interpretation of § 152(b) apparently would treat the disjunctive language as prompted by a desire to clarify that even if extensions in federal communications law were intended to apply to intrastate charges, the FCC would still lack jurisdiction over such intrastate matters absent an explicit grant of authority. Neither the legislative history nor the historical context indicate that Congress was concerned about preemptively settling an interpretive issue that did not materialize until the passage of the 1996 Act.[260] Most likely, the 1938 Congress never considered the precise issue in *AT&T*: whether FCC jurisdiction follows as a matter of course when federal communications law has been extended to apply directly to intrastate charges.

Although the *Louisiana PSC* Court did not explicitly parse the two sides of § 152(b)'s disjunction as respectively addressing primary and ancillary FCC jurisdiction, its analysis also is consistent with the majority position in *AT&T*.[261] In *Louisiana PSC*, the FCC claimed authority to regulate the method of calculating depreciation rates on

255. Houston, E. & W. Tex. Ry. v. United States ("Shreveport Rate Cases"), 234 U.S. 342 (1914). For a discussion of this case, see *supra* notes 100–01 and accompanying text.

256. *See Louisiana PSC*, 476 U.S. at 372–73 (citing McKenna, *supra* note 103, at 2).

257. *See AT&T*, 525 U.S. at 380–81.

258. *Shreveport Rate Cases*, 234 U.S. at 357–60.

259. *See supra* notes 102–05 and accompanying text.

260. *See supra* notes 98–106 and accompanying text.

261. *See AT&T*, 525 U.S. at 381 (discussing *Louisiana PSC*).

local telephone equipment for purposes of intrastate ratemaking.[262] The FCC's principal argument was that 47 U.S.C. § 220(b) provided direct authorization for the regulation of local depreciation methods.[263] In other words, it claimed that § 220(b) "applied" to those methods. The Court rejected this argument, stating that the language of § 220(b) was not sufficiently "straightforward or unambiguous" to overcome the rule of statutory construction articulated in § 152(b).[264] The FCC also asserted ancillary jurisdiction based on the effects of local depreciation practices on the interstate sphere.[265] The Court, however, found that such jurisdiction was barred by § 152(b).[266] Thus, *Louisiana PSC* supports, but does not necessitate, the *AT&T* majority's reading of § 152(b). As with the legislative history of § 152(b), *Louisiana PSC* simply does not speak to the question of whether a federal communications statute that directly "applies" to intrastate charges requires an additional explicit grant of jurisdiction to the FCC.[267]

Given that the statutory text, legislative history, and case law did not require the Court to view the scope of FCC jurisdiction under the 1996 Act through the lens of § 152(b), the *AT&T* majority was justified in its treatment of the provision. Section 152(b) has been criticized widely as an anachronism that ignores the realities of modern telephone communications, so courts should refuse to expand its impact unnecessarily.[268] When a statutory text clearly "applies" to

262. *See Louisiana PSC*, 476 U.S. at 364–68; *supra* notes 119–26 and accompanying text.

263. *See Louisiana PSC*, 476 U.S. at 366 (discussing 47 U.S.C. § 220(b) (1994)).

264. *Id.* at 377.

265. *Id.* at 362.

266. *See id.* at 374–75.

267. Thus, Justice Breyer was mistaken when he argued that *Louisiana PSC* was inconsistent with the majority's jurisdictional holdings in *AT&T*. *See AT&T*, 525 U.S. at 381 n.7 (criticizing Justice Breyer's use of *Louisiana PSC*, *id.* at 421 (Breyer, J., concurring in part and dissenting in part)). In the latter case, all the parties agreed that the relevant statutory sections apply to intrastate matters. *See id.*

268. *See, e.g.*, KELLOGG ET AL., *supra* note 97, §§ 2.7–2.7.3, at 85–91. The majority narrowed the force of § 152(b) by stating that the section has no application to cases in which a statute clearly "applies" to intrastate telecommunications. *See AT&T*, 525 U.S. at 380. Other commentators have suggested that courts should limit the effect of § 152(b) by interpreting the "charges" statutorily reserved to the states' jurisdiction to include only the rates paid by retail customers. *See* Galst, *supra* note 122, at 145 (arguing that § 152(b) was intended to preserve state control only over the rates charged to retail customers for local phone service); McLaughlin, *supra* note 26, at 2250–51 (arguing that a judicial re-interpretation tying "charges" to retail communications rates would help resolve the jurisdictional conflicts created by the 1996 Act). Under such an approach, § 152(b) would not speak to the question of pricing authority in *AT&T* because the "charges" at issue concern only the rates ILECs can charge CLECs for inputs used in providing retail service

intrastate communications, courts do not need to scan the text for an additional "clear statement" of FCC jurisdiction.[269] The 1996 Act should be read to give the FCC no less authority than a reasonable construction of the Act will yield.

A second interpretive principle—the " 'presumption against the pre-emption of state police power regulation' "—would tend to favor the retention of state ratemaking authority.[270] Justice Breyer advanced this argument in *AT&T* based on *Rice v. Santa Fe Elevator Corp.*[271] and *Cipollone v. Liggett Group, Inc.*,[272] two cases that examined the preemptive effects of federal statutes.[273] Justice Breyer urged that statutes preempting state police power regulations should be read with "the assumption that Congress intended to preserve [state] authority,"[274] but this appeal to the *Rice* presumption is unconvincing within the context of *AT&T* for several reasons.

First, *AT&T* is a case about jurisdiction, whereas *Rice* and *Cipollone* were cases about the scope of federal preemption. The principal issue in *AT&T* is whether the FCC has the *authority* to issue pricing regulations, not whether or to what extent its pricing regulations have preemptive effect. *If* the FCC has jurisdiction over pricing, its TELRIC rules clearly preempt inconsistent state pricing rules by virtue of the Supremacy Clause.[275] In contrast, the real issue in *Rice* and *Cipollone* was the extent to which admittedly authoritative exercises of federal power preempted state law.[276] Furthermore, both *Rice* and *Cipollone* involved claims of "field

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to customers. Nothing in the 1996 Act suggests that the FCC may regulate retail rates for local telephone service.

269. *See AT&T*, 525 U.S. at 381–82.

270. *Id.* at 420 (Breyer, J., concurring in part and dissenting in part) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992)).

271. 331 U.S. 218, 230 (1947).

272. 505 U.S. 504, 518 (1992).

273. In *Rice*, the issue was whether a federal statute regulating grain warehouses superceded state regulation in the same field. 331 U.S. at 229. In *Cipollone*, the issue was whether federal legislation governing cigarette packaging and advertising preempted certain state common-law remedies for damages caused by cigarette smoking. 505 U.S. at 509–13.

274. *See AT&T*, 525 U.S. at 420 (Breyer, J., concurring in part and dissenting in part).

275. *See* U.S. CONST. art. VI, cl. 2. Federal regulations are federal laws for purposes of the Supremacy Clause and, hence, trump any conflicting state laws or regulations. *See* Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152–53 (1982).

276. *See Cipollone*, 505 U.S. at 516–17; *Rice*, 331 U.S. at 229–31. One also might criticize Justice Breyer's use of statutory preemption cases such as *Rice* and *Cipollone* to analyze the regulatory preemption issues in *AT&T*. *See* McGreal, *supra* note 122, at 826–29 (criticizing the Supreme Court for uncritically importing statutory preemption rules into its regulatory preemption jurisprudence).

preemption," in which a federal regulatory scheme completely displaces an entire area of state law.[277] In contrast, the FCC's pricing rules—if valid—would preempt only those state pricing regulations that directly conflict with TELRIC.[278] Such "conflict preemption"[279] raises far less serious federalism concerns than field preemption and, therefore, may not merit the same interpretive treatment.[280] As an initial matter, then, the circumstances in *AT&T* are sufficiently distinct from those in *Rice* and *Cipollone* to suggest that the issue of the FCC's pricing authority is not governed by the *Rice* presumption against federal preemption of state police power regulations.

Yet, even if *AT&T* is distinguishable from *Rice* and *Cipollone*, some might argue that the general principles of "political process federalism" that support the *Rice* presumption required the Court to construe ambiguities in statutory authority against the FCC.[281] The basic theme of political process federalism is that the states must look primarily to the political process for protection from unwanted federal intrusions on their sovereignty,[282] and that the courts have an

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277. *See* McGreal, *supra* note 122, at 835–37 (discussing field preemption).

278. In fact, the 1996 Act explicitly leaves room for supplementary state regulation regarding interconnection. *See* 47 U.S.C. § 251(d)(3) (Supp. III 1997) (barring the FCC from precluding state "access and interconnection" regulations that neither conflict with nor prevent the implementation of the FCC's rules).

279. *See* McGreal, *supra* note 122, at 832–34 (discussing conflict preemption).

280. *See* Jack W. Campbell IV, *Regulatory Preemption in the* Garcia/Chevron *Era*, 59 U. PITT. L. REV. 805, 813–15 (1998). Indeed, Campbell persuasively argues that so-called "conflict preemption" is not properly a form of "preemption" at all and instead should be described as "supremacy." *Id.* at 814–15 (citing Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 784 (1994)). According to Campbell, genuine preemption is " 'more subtle, and more powerful, than simple operation of the Supremacy Clause. Preemption rests on the idea of (for lack of a better term) a "preemptive strike" against state laws *before* they conflict with federal law.' " *Id.* at 814 n.51 (quoting Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 88 (1988)). Campbell and Gardbaum argue that genuine preemption rests not on the Supremacy Clause, but on the Necessary and Proper Clause. *See id.* at 813 (citing U.S. CONST. art. I, § 8, cl. 18).

281. The phrase "political process federalism" is taken from Campbell, *supra* note 280, at 806. Professor Tribe has argued that the presumption against preemption furthers the Supreme Court's federalism jurisprudence "by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress.... [T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [the Court has] relied to protect states' interests." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-26, at 480 (2d ed. 1988).

282. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court stated that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Id.* at 550. Although the teaching of *Garcia* on this point has been limited somewhat by the Court's decision in *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1944), exceeded Congress's authority

important role to play in preserving the integrity of that political process. Through the use of "clear statement" rules and presumptions of statutory interpretation, courts can require Congress to deliberate about and explicitly embrace the federalism implications of new legislation.[283] These interpretive principles foster political accountability by ensuring that Congress cannot sidestep federalism issues by passing ambiguous statutes and then allowing courts or executive agencies to take the political heat for making unpopular choices that increase federal power.[284] In effect, the Court holds Congress's feet to the fire by insisting that significant shifts in the federal-state balance of power be made by Congress alone.

Political process federalism might seem to require a decision in favor of the state commissions because recognizing FCC pricing authority would shift the federal-state balance of power, and the text and legislative history of the 1996 Act suggest that Congress was not completely accountable for that shift.[285] Nonetheless, concluding that political process federalism requires a decision in favor of the states would be premature. At the very least, there must be some threshold level below which the federalism implications of congressional action are too slight to trigger the concerns of political process federalism.

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under the Commerce Clause), the political process remains the primary mechanism for vindication of state sovereignty interests. *See Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) (stating that the responsibility for monitoring the balance of power between federal and state interests falls primarily on the political branches of government).

283. *See* Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) ("[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."); Eskridge & Frickey, *supra* note 241, at 630–31 (arguing that clear statement rules and presumptions give meaning to underenforced constitutional norms such as federalism and help to assure that important policy choices are made by the political branches). Eskridge and Frickey argue that with the Rehnquist Court's increasing use of clear statement rules, " 'quasi-constitutional law,' the reading into statutes of constitutional values subject only to clear legislative override, has replaced constitutional law, the invalidation of federal statutes, as the way in which the Court is enforcing 'our federalism.' " *Id.* at 612.

284. On the congressional proclivity for ducking difficult decisions, see 122 CONG. REC. 31,622 (1976) (statement by Rep. Flowers) ("Congress pass[es] myriad laws and ... invest[s] ... agencies with ... vast power to make rules and regulations, and then ... stand[s] back and say[s] when ... constituents are aggrieved or oppressed by various rules and regulations, 'Hey, it's not me. We didn't mean that.' "); *see also* Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1130 n.42 (1977) (quoting this statement).

285. *See supra* note 129–50 and accompanying text (suggesting that the legislative history of the Act provides no conclusive evidence of congressional intent on the issue of pricing authority); *supra* note 151–239 and accompanying text (suggesting that the text of the Act provides no conclusive evidence of congressional intent on the issue of pricing authority).

Consider, for example, that *every* federal regulation has the potential to displace inconsistent state laws by virtue of the Supremacy Clause and, thus, the potential to alter the balance of power between the federal government and the states. Yet, to require explicit congressional deliberation on the federalism implications of every agency action would be absurd.[286] As one commentator noted, "[i]f courts required Congress to sanction clearly each exercise of agency authority that might conflict with extant state law, creation of the agency obviously would be a colossal waste of time."[287]

While the FCC's authority to issue TELRIC was important enough to prompt vigorous litigation by the state utility commissions, it may fall below the threshold at which the Court should require clear statements of congressional intent in the interests of political process federalism. The issue in *AT&T*, after all, was not whether the state utility commissions could set prices in any way they choose.[288] Rather, the issue was whether a state's discretion in setting rates within the new *federal* arbitration scheme was to be limited by the FCC's pricing rules *in addition to* the statutory pricing standard. Although Congress did not squarely shoulder the responsibility for that further limitation, the additional burden on state sovereignty is comparatively small. As the Court observed, the jurisdictional debate in *AT&T* was "not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew."[289] Although there is some room for debate on the question, the Court probably was

286. Justice Breyer's attempt to interpret the 1996 Act in light of the *Rice* presumption leads to absurd consequences if carried to its logical conclusion. Under Justice Breyer's analysis, whenever a federal agency action preempts any state law or regulation—at least in areas in which the state traditionally has exercised its police powers—aggrieved parties could argue that the agency lacked jurisdiction to take the disputed action, absent clear evidence of congressional intent to preempt the relevant state law. Needless to say, such preemptive intent would rarely, if ever, be found. Justice Breyer likely would argue that, as applied to the circumstances in *AT&T*, a "clear and manifest" conferral of jurisdiction would be enough. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). But that is not what the *Rice* presumption requires. As noted above, intent to confer jurisdiction and intent to preempt are not the same. *See supra* notes 275–76 and accompanying text.

287. Campbell, *supra* note 280, at 822.

288. The statute explicitly requires the state utility commissions to follow the pricing standards contained in § 252(d)(1) and makes their decisions subject to review in federal district court. *See* 47 U.S.C. § 252(d)(1), (e)(6) (Supp. III 1997). Congress spelled out these significant incursions of federal power on traditional state authority with considerable clarity.

289. *AT&T*, 525 U.S. at 379 n.6. The Court acknowledged that the FCC might circumscribe state pricing autonomy more closely than the courts, but thought that the difference was too minor "to spark a passionate 'States' rights' debate." *Id.*

correct in concluding that, when considered in the context of the 1996 Act, the issue of pricing authority does not raise federalism concerns sufficient to justify applying the interpretive strategies of political process federalism.

Unlike the first two interpretive principles considered, the *Chevron* doctrine of deference to reasonable agency interpretations would favor the FCC's claims to pricing authority.[290] Rather curiously, however, *Chevron* apparently played no role in the majority's treatment of the jurisdictional issues in *AT&T*.[291] Perhaps the Court failed to cite *Chevron* because it found no ambiguity in the statutes relevant to the FCC's jurisdictional claims.[292] This Note has argued, however, that the relevant texts do not yield a clear resolution of the pricing jurisdiction issue.[293] The textual ambiguities raise the question whether the Court might properly have resolved the issue of FCC pricing authority by invoking the *Chevron* doctrine.

The answer hinges on whether the FCC is entitled to judicial deference when interpreting the scope of its statutory jurisdiction. Justice Scalia has stated explicitly that *Chevron* deference should extend to an agency's jurisdictional interpretations.[294] The Court as a whole, however, has never explicitly settled this question,[295] and

290. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–44 (1984); *see also supra* note 60 (discussing *Chevron*).

291. The majority, however, did mention *Chevron* in summing up its treatment of the entire case. *See AT&T*, 525 U.S. at 397. After noting that some of the FCC's interpretations of the 1996 Act favored the Commission's interests over state interests and CLEC interests over ILEC interests, the Court cited *Chevron* for the proposition that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Id.* (citing *Chevron*, 467 U.S. at 842–43). This statement might be read as evidence that the Court would have deferred to the FCC's reasonable claims of jurisdiction had it found the jurisdictional language of the statute ambiguous.

292. *See id.* at 378 (recognizing broad FCC jurisdiction because § 201(b) "means what it says"). Professor Merrill argues that the rise of textualism on the Supreme Court has sapped the *Chevron* doctrine of some of its vitality, as textualist judges increasingly choose to resolve difficult interpretive questions on the basis of their own judgments about what the statutory text means. *See* Merrill, *supra* note 205, at 366–73.

293. *See supra* notes 151–239 and accompanying text.

294. *See* Mississippi Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment) ("[I]t is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844–45 (1986); NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 n.7 (1984))). *But see id.* at 387 (Brennan, J., dissenting) (stating that "this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction").

295. *See* Quincy M. Crawford, Comment, Chevron *Deference to Agency Interpretations That Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 961 (1994) (citing Dole v. United Steelworkers of Am., 494 U.S. 26, 54–55 (1990) (White, J.,

scholarly commentary is divided on the issue.[296] Commentators who endorse Justice Scalia's position generally emphasize the difficulty of separating jurisdictional from non-jurisdictional questions.[297] In contrast, opponents of this position insist that in certain cases the distinction between jurisdictional and non-jurisdictional issues is fairly clear and that, with respect to jurisdictional issues, concerns about agency self-dealing militate against the application of *Chevron* deference.[298]

The better view appears to be that *Chevron* should not apply to jurisdictional questions. Admittedly, the question of who should have authority to promulgate pricing rules is a policy question—arguably a policy question in which the FCC has even greater expertise than Congress.[299] Nevertheless, whatever policy edge the FCC might have in deciding that question is offset by concerns that the Commission's judgments regarding its own jurisdiction might be biased by self-interest.[300] As Professor Sunstein writes, "courts should not permit

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dissenting)).

296. *Compare id.* at 968–76 (arguing that *Chevron* applies to jurisdictional questions primarily because there is no principled way to separate jurisdictional from non-jurisdictional issues), *with* Sunstein, *supra* note 60, at 2097–2101 (arguing that, at least to the extent that jurisdictional and non-jurisdictional questions can be separated, courts should not defer to agency interpretations of their own jurisdiction because Congress would be unlikely to have intended for agencies to be "judges in their own cause"), *and* Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A. Inc. v. NRDC, 87 COLUM. L. REV. 986, 1005–07 (1987) (arguing that little deference should be given to agency interpretations of their own jurisdiction because of the dangers of "agency aggrandizement").

297. *See, e.g.*, Crawford, *supra* note 295, at 968–76. Crawford has noted that in most cases, jurisdictional and non-jurisdictional questions are mixed inextricably. *See id.* at 975. For example, the FCC's authority to define what counts as a network element for purposes of 47 U.S.C. § 153(29) (Supp. III 1997) was accorded deference by the Supreme Court. *See AT&T*, 525 U.S. at 387. Yet, the interpretation of network element also affects the scope of the agency's jurisdiction because the FCC only can order the unbundling of items that meet the definition of network element. *See* 47 U.S.C. § 251(c)(3) (Supp. III 1997). If there could be no deference on any question that affected the agency's jurisdiction, *Chevron* would become a dead letter. *See* Crawford, *supra* note 295, at 975.

298. *See* Sunstein, *supra* note 60, at 2097–2101; *see also* Merrill, *supra* note 60, at 1024–25 (arguing that under his proposed "executive precedent" model, a lesser degree of deference may be owed to an agency's interpretations of its own jurisdiction). Professor Merrill argues that *Chevron* is not consistently followed by the Supreme Court and that a multi-factor, "executive precedent" model for deciding when to defer to agency interpretations would afford both a better description of the Court's practice and a more normatively satisfying view. *See* Merrill, *supra* note 60, at 980–1033.

299. In the First Report and Order, the FCC discussed the pros and cons of adopting a national approach to pricing instead of leaving pricing decisions wholly in the hands of the states. *See* First Report & Order, *supra* note 7, ¶¶ 105, 109–11, 113–14, 11 F.C.C.R. at 15,553, 15,555–59.

300. *See* Braun, *supra* note 296, at 1005 (citing Addison v. Holly Hill Fruit Prods., Inc.,

foxes to guard henhouses."[301] Moreover, to the extent that the *Chevron* doctrine is justified as an attempt to follow congressional instructions about who should have the power to resolve statutory ambiguities, it seems implausible to assume that Congress would want jurisdictional ambiguities to be resolved by parties with direct interests in the outcomes.[302] Not every statutory ambiguity represents a congressional decision to delegate interpretive authority to agencies.[303] Because Congress was unlikely to have left the issue of pricing jurisdiction in the FCC's hands,[304] the *Chevron* doctrine should not be used to resolve that issue.

Thus, it appears that despite the majority's confident resolution of the case on textual grounds, neither the text and legislative history of the 1996 Act nor established interpretive principles compel that result. Indeed, textual analysis slightly favors the conclusion that the state commissions should be free to develop their own pricing methodologies under the 1996 Act. Nevertheless, the Court's decision becomes more understandable and defensible if one interprets the Act in the light of public policy considerations. This

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322 U.S. 607, 616 (1944)).

301. Sunstein, *supra* note 189, at 470.

302. Professor Sunstein views *Chevron* as "an attempted reconstruction of congressional instructions ... that is responsive to the comparative advantages of the agency in administering complex statutes." Sunstein, *supra* note 60, at 2101. Accordingly, he would not apply *Chevron* "when the best reconstruction argues against deference." *Id.* He emphasizes that "[i]ndependent judicial assessments are ... appropriate in ... contexts involving predictable bias, most notably jurisdictional determinations." *Id.*

For Justice Scalia, on the other hand, *Chevron* is not an attempt to reconstruct congressional intent at all. *See* Scalia, *supra* note 60, at 517. Instead, *Chevron* functions "principally as a background rule of law against which Congress can legislate.... Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved ... not by the courts but by a particular agency, whose policy biases will ordinarily be known." *Id.*; *see also AT&T*, 525 U.S. at 397 ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency."). Perhaps Justice Scalia is willing to defer to an agency's reasonable interpretations of its own jurisdiction in part because he differs from Sunstein about the rationale behind *Chevron*. *But see* Crawford, *supra* note 295, at 977–82 (arguing that deference to agencies' interpretations of their own jurisdiction is appropriate regardless of the rationale behind the *Chevron* doctrine). While Justice Scalia's understanding of *Chevron* promises the greater predictability of a bright-line rule, the question remains as to where the Court gets the authority to adopt such a bright-line rule even in cases in which the rule fails to accord with congressional intent. *Cf.* Eskridge & Frickey, *supra* note 241, at 636–40 (discussing the claim that the Rehnquist Court's use of interpretive principles is countermajoritarian); Scalia, *supra* note 93, at 29 (expressing skepticism about the legitimacy of the Court's use of interpretive principles to make it more difficult for Congress to achieve certain results).

303. *See* Braun, *supra* note 296, at 1000–02.

304. *See supra* notes 237–38 and accompanying text (suggesting that Congress would not have wanted to leave the issue of pricing authority to the FCC's discretion).

Note now outlines a policy-based interpretive argument that may have influenced the *AT&T* majority, and concludes on the basis of this argument that the Court reached the correct result in the case even though its stated reasoning appears inconsistent with the statutory text.[305]

Although Justice Scalia has argued that courts should not interpret statutes in the light of public policy assumptions,[306] even avowed textualists find it difficult to avoid making assumptions about the policy preferences of Congress when they interpret statutes. In *AT&T*, for instance, the majority rejected Justice Thomas's claim that the 1996 Act gave the FCC jurisdiction only over those subsections of 47 U.S.C. § 251 that explicitly mention the Commission partly on the ground that it was "most unlikely that Congress created such a strange hodgepodge."[307] In other words, the Court was reluctant to accept Justice Thomas's interpretation when it could not imagine any policy reasons why Congress would have created the jurisdictional scheme he proposed. The Court has sometimes gone further, justifying statutory interpretations on the ground that Congress would not have made an unorthodox policy choice without debating that choice and expressing it in clear statutory language. One such example is the Court's invocation of the "silent dogs"[308] principle of statutory interpretation in *Chisom v. Roemer*.[309] In that case, the Court held that the word "representatives" in an amendment to the Voting Rights Act of 1965[310] must be read to include judges, reasoning that a decision to treat the election of judges differently

305. Additional policy reasons support the majority's result, but they are reasons that courts often do not acknowledge explicitly. For example, some commentators have expressed a preference for FCC jurisdiction on the theory that state utility commissions have been "captured" by the ILECs and, hence, would be less likely than the FCC to promote robust competition. *See, e.g.*, Chen, *supra* note 92, at 91–92 (stating that federal telecommunications policy historically has favored competition while state regulators have preferred local monopolies); Weiser, *supra* note 38, at 36 (suggesting that arguments against state autonomy under the 1996 Act reflect a "concern that state agencies are more vulnerable to capture than federal ones").

306. *See* Scalia, *supra* note 93, at 20 ("Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.").

307. *AT&T*, 525 U.S. at 382 n. 8.

308. *See* Chisom v. Roemer, 501 U.S. 380, 396 & n. 23 (1991) (citing Harrison v. PPG Indus., Inc., 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)). The Court alluded to a Sherlock Holmes story in which the decisive clue was a watchdog's failure to bark in the night. *See id.*; ARTHUR CONAN DOYLE, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES 383, 400 (1930); *see also* ESKRIDGE, *supra* note 144, at 220–21, 325 (discussing the "dog did not bark" canon).

309. 501 U.S. 380 (1991).

310. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, §2(b), 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(b) (1994)).

from the election of legislators would have been so remarkable that one would have expected Congress to comment on it.[311] Because the congressional "dog" did not bark, the Court effectively concluded that the statutory language should be read to produce a result in accordance with the Court's own expectations about the policy preferences of Congress.[312] Although Justice Scalia vigorously rejected the *Chisom* Court's reasoning,[313] an analogous "silent dogs" argument may be at work in the majority's resolution of the pricing jurisdiction issue in *AT&T*.

The majority repeatedly voiced its incredulity toward the idea that Congress meant for the state commissions to implement a federal program by developing their own pricing schemes without any guidance from the FCC. In response to Justice Thomas's observation that no constitutional problems were posed by requiring the states to implement and interpret federal law, the Court stated that it was "aware of no similar instances in which federal policymaking has been turned over to state administrative agencies."[314] The Court further characterized the dissenters' interpretation of the 1996 Act as creating a "decidedly novel" scheme in which Congress would expand the scope of federal telecommunications law to include intrastate communications, "but in a few specified areas (ratemaking, interconnection agreements, etc.) [would leave] the policy implications of that extension to be determined by state commissions, which—within the broad range of lawful policymaking left open to administrative agencies—are beyond federal control."[315]

In a similar fashion, the majority responded to Justice Breyer's appeal to the *Rice* presumption against federal preemption of state police power regulations by observing that the crucial question in *AT&T* was "whether the state commissions' participation in the

311. *See Chisom*, 501 U.S. at 404.

312. *See id.* at 396, 403–04; *cf. Harrison*, 446 U.S. at 602 (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.").

313. *See Chisom*, 501 U.S. at 405 (Scalia, J., dissenting) (criticizing the majority for beginning its interpretation "not with what the statute says, but with an expectation about what the statute must mean absent particular phenomena"). Nevertheless, Justice Scalia has elsewhere suggested that even in "normal, no-thumb-on-the-scales interpretation," courts might legitimately expect that "extraordinary" congressional decisions such as those limiting the sovereign immunity of states should be "explicitly decreed rather than offhandedly implied." Scalia, *supra* note 93, at 29.

314. *AT&T*, 525 U.S. at 385 n.10; *but cf.* Weiser, *supra* note 38, at 22–39 (arguing that federal courts should defer to state agency interpretations of federal law).

315. *AT&T*, 525 U.S. at 385 n.10.

administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any ' "presumption" ' applicable to this question, it should arise from the fact that a federal program administered by fifty independent state agencies is surpassing strange."[316]

These reactions to the views of Justices Thomas and Breyer suggest that the majority may have been influenced by a simple "silent dogs" argument: (1) The "silent dogs" principle suggests that if Congress wants to do something unusual or extraordinary, it will clearly signal that desire. (2) The dissenters' interpretation of the 1996 Act would produce a regulatory scheme both "decidedly novel" and "surpassing strange," so it follows from the "silent dogs" principle that if Congress had intended to give the states pricing authority under the Act, it would have signaled that desire in unmistakable terms. (3) Because Congress failed to "bark" loudly in §§ 251 and 252 of the Act, those sections should be read to grant pricing jurisdiction to the FCC.

The plausibility of this argument depends largely on whether one accepts the premise that it would have been unusual and extraordinary for Congress to preserve state pricing autonomy within a federal regulatory scheme. This Note argues that such a step would have been extraordinary because it would either require the federal courts to engage in extensive judicial policy making or to sacrifice the uniformity of federal law. To understand why the dissenters' approach would pose this choice, one must first appreciate that the pricing standards set forth in § 252(d)(1) confer a great deal of discretion on the policymaker.[317] Under the majority's approach, that discretion is conferred upon the FCC, which promulgates a general pricing methodology to be administered by the states. Although the state commissions set different prices based on local assessments of cost, the meaning of the federal requirement that rates be just, reasonable, nondiscriminatory, and cost-based will be essentially the same in all fifty states. Under the dissenters' approach, however, the discretion to set prices within the range consistent with the Act's pricing standards falls primarily on state utility commissions. They might adopt different approaches to pricing, and hence the federal pricing requirements potentially could have a different meaning in

316. *Id.* at 379 n.6 (quoting *id.* at 420 (Breyer, J., concurring in part and dissenting in part)).

317. *See id.* at 423 (Breyer, J., concurring in part and dissenting in part) (stating that the Act's pricing standards have given agencies "broad methodological leeway"); *supra* note 49 (providing the text of § 252(d)(1)).

each of the fifty states.

As Justice Scalia remarked, such a result would be "surpassing strange"[318] because it would conflict with a policy so deeply rooted in the Court's practice that it rarely needs to be articulated—the policy in favor of uniform application of federal laws. The policy dates back to *Martin v. Hunter's Lessee*,[319] in which Justice Story announced that the Supreme Court had the authority to review state interpretations of federal law and justified that principle partly on the ground that without uniform state interpretations of federal law, no end of "public mischiefs" would result.[320] Although in recent years Justices have been more frank in acknowledging that complete uniformity of interpretation is unattainable,[321] the uniformity of federal law remains an important policy goal[322] and arguably an interpretive presumption.[323]

The only way to grant pricing authority to the states without sacrificing the uniformity of federal law would be through aggressive use of the federal district courts' authority to review state commission arbitration proceedings.[324] Theoretically, the federal courts could impose a uniform pricing standard on all the states,[325] but such an

318. *AT&T*, 525 U.S. at 379 n.6.

319. 14 U.S. (1 Wheat.) 304, 347–48 (1816).

320. *Id.* at 348.

321. *See* Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 826 (1986) (Brennan, J., dissenting) (conceding that complete uniformity in the interpretation of federal law has not been attained).

322. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989) ("[F]ederal statutes are generally intended to have uniform nationwide application."). The proposed "silent dogs" argument might be subject to attack on the ground that uniform application of federal law is an overrated policy value. *Cf.* Weiser, *supra* note 38, at 40–44 (extolling the virtues of non-uniformity). Yet, even if allowing considerable variation in the state administration of federal programs can be desirable, such a regulatory scheme is unusual enough that Congress might be expected to signal clearly its desire to allow the states to apply federal law in a non-uniform manner.

323. Note, however, that at least one commentator has cautioned that the uniformity of federal law should not be considered as *more* than an interpretive presumption. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 220 n.59 (1985) ("It is not at all clear that uniformity is a value inherent in the constitutional structure.").

324. *See* 47 U.S.C. § 252(e)(6) (Supp. III 1997).

325. Courts uniformly have employed de novo review in deciding whether state utility commissions have interpreted the 1996 Act properly. *See, e.g.*, GTE S., Inc. v. Morrison, 199 F.3d 733, 745 (4th Cir. 1999) (determining that de novo review is necessary because state agencies deserve less deference than do federal agencies when they interpret federal law); AT&T Communications of the S. Cent. States, Inc. v. BellSouth Telecomms., Inc., 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998) (stating that "it is not appropriate to defer to [sic] state agency's interpretations of federal law"); AT&T Communications of Cal., Inc. v. Pacific Bell, No. C 97-0080 SI, 1998 WL 246652, at *4 (N.D. Cal. May 11, 1998) (adopting

attempt would entangle the courts in just the sort of policy judgments that are more appropriately left to politically accountable executive agencies.[326] The choice for the federal courts under the dissenters' reading of the Act would amount to this: they would either have to defer to state commission judgments—thus sacrificing the uniformity of federal law—or to take on policymaking functions more properly left to executive agencies. The majority was unwilling to read the Act as imposing such a choice on the federal judiciary—and quite properly so. Congress could, of course, decide to sacrifice either the uniformity of federal law or the practice of leaving policy decisions to executive agencies. But one would expect Congress to discuss such a decision at length and to signal it clearly; Congress did neither in the 1996 Act. Thus, whether or not the "silent dogs" argument actually influenced the majority, it provides strong support for the Court's decision to uphold the FCC's pricing jurisdiction.

In conclusion, the Supreme Court's decision in *AT&T* is correct in recognizing broad FCC jurisdiction over all aspects of § 251, but the Court's attempt to resolve the pricing jurisdiction issue by appeal to the plain meaning of the text is unsatisfying. Both the legislative history and the text of the 1996 Act are systematically ambiguous. Indeed, they may even suggest that Congress did not simply fail to address the issue of pricing jurisdiction, but intentionally avoided a clear decision on that issue.[327] The Court's appeal to plain meaning suppresses these ambiguities, thereby providing another example of the Rehnquist Court's penchant for pulling the rabbit of plain meaning from the hat of statutory ambiguity.[328]

Such interpretive sleight of hand raises troubling questions, especially in cases such as *AT&T* in which Congress may have chosen ambiguous language in order to cede a difficult policy choice to the courts. If the plain meaning of statutory text does not reflect any congressional policy choice, close textualist readings that refuse to consider policy considerations can produce wise decisions only by

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de novo review for questions of federal law under the 1996 Act), *aff'd*, 203 F.3d 1183 (9th Cir. 2000); U.S. W. Communications, Inc. v. Hix, 986 F. Supp. 13, 17–18 (D. Colo. 1997) (stating that state agencies' interpretations should not be granted the same degree of deference as federal agencies' interpretations).

326. *Cf.* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865–66 (1984) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

327. *See supra* note 142 and accompanying text (suggesting that the 1996 Act's treatment of pricing authority may be intentionally ambiguous).

328. Professor Merrill has observed that the internal dynamics of the Rehnquist Court create disincentives for finding statutes ambiguous. *See* Merrill, *supra* note 205, at 370–71.

happenstance.[329] Furthermore, rigorous textual analysis of ambiguous statutes is unlikely to produce predictable decisions or to minimize judicial discretion.[330] Indeed, analysis of the texts at issue in *AT&T* strongly suggests that the Court could have used "plain meaning" arguments to support either the FCC or the state commissions. These problems raise an even more fundamental question about why courts *should* be bound by statutory text that cannot be said to reflect the policy choices of elected representatives.[331]

In the face of these problems, choosing to decide cases solely on textualist grounds *might* be justified if, as Justice Scalia contends, textualist interpretation eventually will lead Congress to draft statutes more responsibly.[332] One may doubt, however, whether courts should be willing to disregard policy considerations completely in the hopes of improving congressional behavior. Apparently, the *AT&T* majority was not willing to do so. Although the Court claimed to articulate the plain meaning of the 1996 Act, its decision on the pricing jurisdiction issue is better supported by the "silent dogs" argument than by textual analysis. Perhaps the Court was inconsistent in failing to keep policy assumptions completely out of its analysis, but such inconsistency should be welcomed when there is reason to believe that Congress has intentionally left an important policy decision in judicial hands. In such circumstances, it is better to have the judiciary consider policy issues than to have no policy deliberations at all.

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329. *Cf.* Merrill, *supra* note 60, at 1002 (noting a concern that, by deciding interpretive questions at the plain meaning level, courts will dictate policy "without any consideration of the substantive values at issue in the policy disputes—either those that animated Congress or those articulated by the agency charged with administration of the statute").

330. *See* ESKRIDGE, *supra* note 144, at 42–47 (arguing that Justice Scalia's textualism does not yield determinate results in hard cases and does no more to constrain judicial discretion than other interpretive theories).

331. *Cf.* WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND STATUTORY INTERPRETATION 235 (2000) (suggesting that textualism may lack a plausible theory of political authority and threatens to "sever the connection between democracy and the rule of law in ways that we should find alarming"); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 111–12 (1989) (arguing that a statute's power to constrain stems from "the fact that [its] words express a specific collective decision made by the designated political authority").

332. *See* United States v. Taylor, 487 U.S. 326, 345–46 (1988) (Scalia, J., concurring in part) (stating that statutory interpretation should "foster[] th[e] democratic process" by stimulating Congress to draft statutes with more exactitude). *But see* Eskridge, *supra* note 204, at 677 (expressing doubt that even the wholehearted judicial embrace of textualism would greatly affect Congress's approach to drafting statutes).