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A STEP TOWARD COMPETITION IN LOCAL TELEPHONE SERVICE: *AT&T CORP. V. IOWA UTILITIES BOARD*

Charles H. Sanders[*]

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I. INTRODUCTION

On February 8, 1996, Congress enacted the Telecommunications Act of 1996[1] ("the Act") "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid

* J.D. candidate, Class of 2000, Harvard Law School.

1. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

deployment of new telecommunications technologies."[2] Until the 1990s, common wisdom asserted that, while competition was feasible in long-distance telephone service,[3] local service was a natural monopoly.[4] The Act principally promised to create competition in local

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2. 110 Stat. at 56 (statement of purpose).

3. The road to competition in long-distance service followed a tortuous path of regulation and litigation. In the early 1970s, the FCC required incumbent service providers to connect their local networks with the facilities of the new competing long-distance carriers. *See* Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971), *aff'd sub nom.*, Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir. 1975). State public utility commissions and the incumbents unsuccessfully challenged these federal mandates, contending that they impermissibly invaded the States' authority over intrastate communications. *See, e.g.*, North Carolina Utils. Comm'n v. FCC, 537 F.2d 787, 791–94 (4th Cir. 1976); National Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422, 431 (D.C. Cir. 1989). However, as the dominant telephone service provider, AT&T effectively employed the FCC to stifle long-distance competition until the D.C. Circuit forced the FCC to require interconnection of the local networks to MCI's nascent long-distance service. *See* MCI Telecomms. Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977) (holding that the FCC lacks the authority to insist on a showing of "public convenience and necessity" before approving new telephone services); MCI Telecomms. Corp. v. FCC, 580 F.2d 590 (D.C. Cir. 1978) (holding that the previous decision required the FCC to compel AT&T to provide interconnections to MCI).

True competition in long-distance service only emerged after the Department of Justice's 1982 consent decree with AT&T (also called the Modification of Final Judgment ("MFJ")). *See* United States v. AT&T, 552 F. Supp. 131, 226–32 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983). The MFJ forced the Bell operating companies ("BOCs") to transfer their long-distance business to AT&T, and the BOCs became the local telephone service providers in many markets. The MFJ prohibited BOCs from offering long-distance service, and AT&T became an exclusively long-distance carrier in a competitive market. *See* National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1105–11 (D.C. Cir. 1984).

By entering the consent decree, Judge Harold H. Greene "installed himself as a third overseer of the telecommunications industry." Philip J. Weiser, Chevron, *Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 15 (1999). With the Act's nullification of the consent decree, the task of regulating telecommunications has returned to the proper authorities: Congress and the FCC. Judge Greene eagerly surrendered his awkward position as "telecom czar." *See* Leslie Cauley, *Telecom Czar Frets over New Industry Rules*, WALL ST. J., Feb. 12, 1996, at B1 ("'I'm glad Congress is taking it over . . . . I've had this case 18 years. I think that's long enough.'" (quoting Judge Greene)).

4. *See, e.g.*, MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW 1 (1992) ("The high cost of fixed plant, the steadily declining average cost of service, and the need for all customers to interconnect with one another made it seem both sensible and inevitable to have a single monopoly provider."); AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 726 (1999) ("Until the 1990s, local phone service was thought to be a natural monopoly.").

service;[5] however, more than three years later, this objective remains largely unaccomplished. Incumbent local exchange carriers ("LECs") continue to possess a monopolistic grasp on local telephone service, with less than one percent of residential customers escaping to competitive local exchange carriers ("CLECs").[6] In 1999, most consumers simply cannot choose among local telephone service providers.[7]

While one might question whether Congress overestimated the technological feasibility of local competition at the time it passed the Act, a primary reason for the sluggish progress toward this goal has clearly been paralyzing litigation.[8] Once the Federal Communications Commission ("FCC") issued its First Report and Order implementing the Act,[9] the incumbent LECs began their court battles to maintain their

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5. *See* Reno v. ACLU, 521 U.S. 844, 857–58 (1997) ("The Telecommunications Act of 1996 was an unusually important legislative enactment. . . . The major components of the statute . . . were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting." (citation omitted)); *see also* U.S. West Communications, Inc. v. Hix, 986 F. Supp. 13, 14 (D. Colo. 1997) ("The Act, at its core, is designed, among other things, to end monopolies in the local telephone market and open the market to competition."); Weiser, *supra* note 3, at 13 ("The Act's central goal is to open up the nation's historically monopolized local telephone markets to competition . . . ."). While the Act principally focuses on the deregulation of local telephone service, it addresses topics as diverse as alarm monitoring services, automated ship safety systems, and the closed captioning of television programs. *See* 47 U.S.C. §§ 275, 363, 613 (Supp. II 1996). Parts of section 223 involving provisions which prohibited knowing transmission to minors of "indecent" or "patently offensive" communications were found unconstitutional in *Reno v. ACLU.*

6. *See* Steve Rosenbush, *High Court Slams Local Carriers*, USA TODAY, Jan. 26, 1999, at 1B ("Fewer than 1% of residential customers have switched carriers so far.").

7. *See The State of Competition in the Telecommunications Marketplace Three Years After Enactment of the Telecommunications Act of 1996: Hearing Before the Subcomm. on Antitrust, Bus. Rights, and Competition of the Senate Judiciary Comm.*, 105th Cong. (1999) (statement of Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice), *available in* 1999 WL 101530 ("According to the CEA [Council of Economic Advisors] report, [CLECs] have so far captured between 2 and 3 percent of the local exchange market as measured by lines, or about 5 percent of the market measured by revenues."). The two-to-one revenue-to-line ratio probably reflects the fact that CLECs first pursue lucrative business customers, keeping the vast majority of residential customers without access to alternative local telephone service.

8. *See* Thomas G. Donlan, Editorial Commentary, *Dialing for Trouble: The Supreme Court Struggles with a Phony Phone Law*, BARRON'S, Feb. 1, 1999, at 51 ("[C]omplaining is all that any of the players have done since the bill became law. It has become a Telecommunications Lawyers' Enrichment and Full Employment Act.").

9. Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, FCC 96-325, 11 F.C.C.R. 15,499 (1996) [hereinafter First Report and Order].

local monopolies.[10] Last Term, in *AT&T Corp. v. Iowa Utilities Board*,[11] the Supreme Court addressed a number of the incumbents' arguments against the FCC's implementation of the Act and, while vacating one regulation, upheld all the other regulations at issue against both jurisdictional and substantive challenges.[12] By firmly establishing the FCC's jurisdiction to implement the Act, the Court has effectively ensured that deregulation of local telephone service can evolve under a uniform national program, rather than dooming the process to individualized determinations in state regulatory commissions prone to capture by incumbent LECs.[13] In addition, by upholding all but one of the regulations challenged on substantive grounds by the incumbent LECs, the Court has brought the promise of local competition a step closer to reality. The FCC's national rules should "expedite negotiations and arbitrations by narrowing the potential range of dispute . . . , offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish."[14]

II. THE EIGHTH CIRCUIT DECISIONS

The Supreme Court's decision in *Iowa Utilities Board* arose on appeal from two cases in the Eighth Circuit,[15] which had consolidated a number of challenges to the FCC's regulations brought by incumbent

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10. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 792 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom.*, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

11. 119 S. Ct. 721 (1999).

12. *See id.* at 726–39.

13. *See id.* at 728–33.

14. First Report and Order, *supra* note 9, ¶ 41.

> Some parties have argued that explicit national standards will delay the emergence of local telephone competition, but none has offered persuasive evidence to substantiate that claim, and new entrants overwhelmingly favor strong national rules. We conclude . . . that some national rules will enhance opportunities for local competition, and we have chosen to adopt national rules where necessary to establish the minimum requirements for a nationwide pro-competitive policy framework.

Id. ¶ 59.

15. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom.*, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999); California v. FCC, 124 F.3d 934 (8th Cir. 1997), *rev'd in part sub nom.*, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

LECs and state utility commissions.[16] Only seven weeks after the FCC promulgated its First Report and Order, the Eighth Circuit granted a preliminary stay.[17] After hearing oral argument six days later, the panel decided to maintain a temporary stay on some of the key provisions of the First Report and Order, pending final review.[18] The FCC and two long-distance carriers eager to compete in local service markets — AT&T and MCI — unsuccessfully sought to vacate the stay by petitioning Supreme Court justices.[19] Not surprisingly, while the stay remained in effect, the lack of guidance created by the suspension of the regulatory framework and the uncertainty engendered by looming litigation precluded any real progress toward local competition.

When the Eighth Circuit eventually evaluated the merits of the consolidated cases more than nine months after instituting the stay, the outcome essentially entrenched the incumbent LECs while the court battle proceeded to the next level. In the more important of its two decisions, *Iowa Utilities Board v. FCC*,[20] the Eighth Circuit addressed sixteen challenges to the First Report and Order,[21] and the parties successfully appealed nine of the rulings to the Supreme Court.[22] Four

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16. *See* Iowa Utils. Bd. v. FCC, 109 F.3d 418, 421 (8th Cir. 1996).

17. *See id.*

18. *See id.* at 427.

19. First, the FCC, AT&T, and MCI applied to Circuit Justice Thomas, who refused to vacate the stay. *See* FCC v. Iowa Utils. Bd., 117 S. Ct. 378 (1996); Ass'n for Local Telecomms. Servs. v. Iowa Utils. Bd., 117 S. Ct. 379 (1996). The FCC immediately reapplied to Justice Ginsburg, while AT&T and MCI reapplied to Justice Stevens. After being referred to the full Court, the renewed applications were likewise denied. *See* FCC v. Iowa Utils. Bd., 519 U.S. 978 (1996); Ass'n for Local Telecomms. Servs. v. Iowa Utils. Bd. 519 U.S. 978 (1996).

20. 120 F.3d 753 (8th Cir. 1997). While nine months might appear to be a long delay, one must appreciate the extent of consolidation involved in this case. The case lists twenty-five docket numbers, and the list of parties consumes approximately thirty pages of the federal reporter. *See id.*

21. *See id.*

22. *See* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999). The arguments discussed in the text *infra* represent the principal challenges to the First Report and Order that the Supreme Court considered on appeal. *See id.* In parts of its opinion that were not reviewed by the Supreme Court, the Eighth Circuit resolved that:

(1) the FCC misinterpreted the Act in its First Report and Order, *supra* note 9, ¶¶ 101–103, claiming federal preemption of any state policy that conflicted with an FCC regulation promulgated pursuant to section 251;

(2) the FCC misconstrued the Act in a portion of 47 C.F.R. § 51.317 (1996) which, along with parts of paragraphs 278 and 281, created a presumption that a network element had to be unbundled if technically feasible;

of these nine holdings involved jurisdictional challenges. In the most significant part of its opinion, the Eighth Circuit found that the FCC lacked jurisdiction to promulgate pricing rules for the rates incumbent LECs could charge competitors to use their facilities.[23] Similarly, the panel concluded that the FCC exceeded its statutory mandate by asserting general authority to review agreements between incumbent LECs and CLECs that had been approved by state commissions.[24] The Eighth Circuit also held that the FCC did not have jurisdiction to issue rules establishing additional standards for state commissions to follow in assessing whether rural or small LECs qualified for exemptions from or modifications of duties generally imposed on incumbents.[25] In its final denial of jurisdiction, the court resolved that the FCC could not require interconnection agreements that were negotiated before the enactment of the Act to be submitted for state commission approval.[26]

The remaining five rulings addressed substantive challenges to the

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(3) the FCC violated the plain language of the Act by promulgating 47 C.F.R. §§ 51.305(a)(4) and 51.311(c) (1996), requiring incumbent LECs to provide CLECs with access at quality levels superior to those enjoyed by the incumbents themselves if so requested by CLECs;
(4) the FCC did not thwart the Act's purpose by issuing its unbundling rules;
(5) the petitioners lacked standing to challenge the unbundling rules as infringing on the intellectual property rights of third parties;
(6) the petitioners could not challenge the FCC's unbundling rules as effecting unconstitutional takings because the claim was unripe; and
(7) the FCC validly exercised its authority under subsection 251(c)(4)(B) in promulgating 47 C.F.R. § 51.613 (1996), which announced that promotional rates that last for more than 90 days would be considered retail rates.

See Iowa Utils. Bd. v. FCC, 120 F.3d at 793–820.

23. *See Iowa Utils. Bd. v. FCC*, 120 F.3d at 793–800; *id.* at 800 n.21 (vacating 47 C.F.R. §§ 51.501–.515 (1996), except for § 51.515(b); §§ 51.601–.611; §§ 51.701–.717, except for certain sections to the extent that they apply to commercial mobile radio service providers).

24. *See id.* at 803–04 (rejecting the FCC's view, expressed in its First Report and Order, *supra* note 9, ¶¶ 121–128, that it was empowered to review agreements approved by state commissions under its general authority to hear complaints pursuant to 47 U.S.C. § 208 (1994)).

25. *See id.* at 801–03 (finding that the FCC exceeded its jurisdiction under subsection 251(f) of the Act by promulgating 47 C.F.R. § 51.405 (1996)).

26. *See id.* at 804–06 (vacating 47 C.F.R. § 51.303 (1996) because the FCC lacked jurisdiction to determine which agreements must be submitted for state regulatory review).

First Report and Order. Finding that the FCC's construction of the Act was reasonable, the panel upheld its broad definition of the statutory term "network elements."[27] In addition, the Eighth Circuit ruled that the FCC did not shirk its statutory duty by loosely interpreting the "necessary" and "impair" standards for determining which network elements needed to be offered to CLECs on an unbundled basis.[28] Again finding in the FCC's favor, the panel held that the FCC did not need to promulgate a regulation that required a CLEC to have some of its own facilities before it could purchase unbundled network elements from an incumbent.[29] By contrast, the court found that the regulation requiring incumbent LECs to combine network elements at the request of purchasing CLECs violated the statute.[30] Finally, the Eighth Circuit determined that the FCC had construed the Act unreasonably in promulgating its "pick and choose" rule, which allowed CLECs to incorporate individual provisions from previously negotiated interconnection arrangements into their own agreements with LECs.[31]

In the minor opinion reviewed by the Supreme Court, *California v. FCC*,[32] the Eighth Circuit considered a jurisdictional challenge to the FCC's dialing parity rules and a substantive challenge to its numbering administration rule. The FCC had included these regulations in its Second Report and Order.[33] Dialing parity is "a technological capability that enables a telephone customer to route a call over the network of the customer's preselected carrier without having to dial an access code of extra digits," while numbering administration involves "the coordination and distribution of all telephone numbers in the United States."[34] With

27. *See id.* at 808–10 (upholding the FCC's definition of "network elements" contained in 47 C.F.R. § 51.319(f)–(g) (1996) and its First Report and Order, *supra* note 9, ¶¶ 263, 413).

28. *See id.* at 810–12 (upholding the FCC's interpretations of the "necessary" and "impair" standards contained in 47 C.F.R. § 319 (1996) and its First Report and Order, *supra* note 9, ¶¶ 282–83, 285).

29. *See id.* at 814–15; First Report and Order, *supra* note 9, ¶¶ 328–41.

30. *See id.* at 813 (vacating 47 C.F.R. § 51.315(b)–(f) (1996), which required incumbent LECs to combine network elements at the request of CLECs).

31. *See id.* at 800–01 (vacating the "pick and choose" rule contained in 47 C.F.R. § 51.809 (1996)).

32. 124 F.3d 934 (8th Cir. 1997), *rev'd in part sub nom.*, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

33. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-333, 11 F.C.C.R. 19,392 (1996) [hereinafter Second Report and Order].

34. *California v. FCC*, 124 F.3d at 939, 943 (citations omitted).

the same panel presiding,[35] Judge Hansen once again found that the FCC had overreached its jurisdiction by promulgating dialing parity regulations for intrastate telecommunications.[36] The Eighth Circuit dismissed the petitioners' claim against the numbering administration rule as unripe.[37] The Supreme Court considered the Eighth Circuit's dialing parity ruling on appeal.[38]

III. THE SUPREME COURT DECISION

In *Iowa Utilities Board*, the Supreme Court affirmed *Iowa Utilities Board v. FCC* in part and reversed it in part, and reversed *California v. FCC* in part.[39] Writing for the Court,[40] Justice Scalia reversed the lower court's jurisdictional rulings against the FCC and upheld all but one regulation against substantive challenges.[41] As the leading proponent of the plain-meaning approach to statutory interpretation,[42] Justice Scalia naturally authored a textualist opinion. He located a textual basis in the statute for providing the FCC with general jurisdiction to promulgate rules under the Act and deferred to the

35. Judges Bowman, Wollman, and Hansen reached unanimous decisions in both *Iowa Utils. Bd. v. FCC* and *California v. FCC*.

36. *See California v. FCC*, 124 F.3d at 939–43 (vacating 47 C.F.R. §§ 51.205–.215 (1996) as applied to intrastate telecommunications).

37. *See id.* at 943–44.

38. *See* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 733 (1999).

39. *See id.* at 738.

40. Justice Scalia wrote for the Court in all parts of his opinion. Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer joined Parts I (overview), III.A (definition of "network element"), III.C (facilities-ownership requirement), III.D (combination of network elements), and IV ("pick and choose" rule) of his opinion. Justices Stevens, Kennedy, Souter, and Ginsburg joined Part II (scope of FCC jurisdiction) of his opinion. Chief Justice Rehnquist and Justices Stevens, Kennedy, Thomas, Ginsburg, and Breyer joined Part III.B ("necessary" and "impair" standards) of his opinion. Justice O'Connor, who has long held AT&T stock, did not participate in the decision. *See* Jan Crawford Greenburg & Jon Van, *Ruling May Speed Phone Competition*, CHI. TRIB., Jan. 26, 1999, § 3, at 1.

41. *See Iowa Utils. Bd.*, 119 S. Ct. at 726–39.

42. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997). *See also, e.g.*, Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 527 (1998) ("Justice Antonin Scalia has led a revival of textualist statutory interpretation on the Court."); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 835 (1991) (characterizing Justice Scalia as "the high priest of the new textualism").

agency's interpretation of the statute where plausible.[43] Although otherwise a member of the majority, Justice Souter suggested according the FCC even greater deference and would have upheld the single regulation vacated by the Court.[44] Justices Thomas and Breyer provided the main opposition. Writing for three justices,[45] Justice Thomas concluded that the FCC had exceeded its jurisdiction, although he agreed with the Court's analysis of the substantive challenges.[46] While he joined Justice Thomas's opinion, Justice Breyer wrote separately to take the criticism a step further.[47]

A. The Scope of FCC Jurisdiction

The most fundamental attack against the First Report and Order staged by the incumbent LECs and state commissions was a jurisdictional challenge to the FCC's pricing rules.[48] In particular, they vehemently opposed the FCC's mandate that state commissions base the prices incumbent LECs could charge CLECs for interconnection and unbundled access on "total element long-run incremental cost"[49] ("TELRIC").[50] After convincing the Eighth Circuit to vacate the FCC's pricing methodology on jurisdictional grounds, the incumbent LECs and state commissions fought to sustain this result on appeal.[51]

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43. *See Iowa Utils. Bd.*, 119 S. Ct. at 726–39.

44. *See id.* at 739–41 (Souter, J., concurring in part and dissenting in part).

45. Justice Thomas filed an opinion concurring in part and dissenting in part, in which Chief Justice Rehnquist and Justice Breyer joined.

46. *See Iowa Utils. Bd.*, 119 S. Ct. at 741–46 (Thomas, J., concurring in part and dissenting in part).

47. *See id.* at 746–54 (Breyer, J., concurring in part and dissenting in part).

48. *See supra* note 23 for a list of the pricing regulations vacated by the Eighth Circuit.

49. Iowa Utils. Bd. v. FCC, 120 F.3d, 753, 793 (8th Cir. 1997).

50. *See* 47 C.F.R. § 51.505(b) (1998). The FCC defined TELRIC as "the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements." *Id.*

51. *See, e.g.*, Brief for Bell Atlantic Corp., BellSouth Corp., and SBC Communications Inc. at 19–46, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141) [hereinafter Brief for Bell Atlantic]; Brief for Respondents the GTE Entities and Cross-Petitioner GTE Midwest Inc. at 25–49, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141) [hereinafter Brief for GTE].

1. The Majority Decision

Since the Telecommunications Act of 1996 is an amendment to the Communications Act of 1934,[52] the Court looked to the background of the 1934 Act and subsequent amendments to assess the extent of the jurisdictional grant to the FCC.[53] In section 201(b), a 1938 amendment to the Communications Act of 1934, Justice Scalia identified text supporting the FCC's authority to promulgate the pricing rules.[54] Section 201(b) provides in part that the FCC may "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[55] Therefore, the Court reasoned that the FCC's rulemaking authority encompassed implementation of the local competition provisions of the Telecommunications Act of 1996.[56] This broad jurisdictional basis under section 201(b) reached far beyond the FCC's ability to issue pricing rules. Section 201(b) also permitted the FCC to promulgate regulations regarding rural exemptions, require state commissions to examine preexisting agreements, and issue rules on dialing parity.[57] The Court refused to rule in the FCC's favor on only one jurisdictional issue: its authority to review agreements approved by state commissions. Finding the matter unripe because the FCC's perception of its own authority has "no immediate effect on the plaintiff[s'] primary conduct," Justice Scalia declared that the court below should not have reached the claim.[58]

2. Opposing Views

In contrast to Justice Scalia's broad view of FCC jurisdiction, the Eighth Circuit found that section 2(b) of the Communications Act of 1934,[59] coupled with the Supreme Court decision in *Louisiana Public Service Commission v. FCC*[60] interpreting that section, prevents the

52. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 ("Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).").

53. *See Iowa Utils. Bd.*, 119 S. Ct. at 729–33.

54. *See* 47 U.S.C. § 201(b) (1994).

55. *Id.*

56. *See Iowa Utils. Bd.*, 119 S. Ct. at 729–33.

57. *See id.* at 733.

58. *Id.*

59. 47 U.S.C. § 152(b) (1994).

60. 476 U.S. 355 (1986) (barring federal preemption of state regulation of the

FCC from promulgating pricing rules to encourage local competition.[61] With the exception of some sections of Title 47 that were not at issue, section 2(b) provides that "nothing in this chapter shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service."[62] Writing for the Court in *Louisiana Public Service Commission*,[63] Justice Brennan explained that this section "fences off from FCC reach or regulation intrastate matters."[64] Based on this interpretation, the Eighth Circuit considered section 2(b) "an explicit congressional denial of power to the FCC" that Congress could override "only by unambiguously granting the FCC authority over intrastate telecommunications matters."[65] The court determined that, while the Telecommunications Act of 1996 certainly applied to intrastate telecommunications, the Act contained no grant of authority to issue pricing rules clear enough to overcome section 2(b)'s jurisdictional limitation.[66]

Justices Thomas and Breyer adopted the lower court's arguments in their opinions opposing the FCC's jurisdictional authority to promulgate a pricing methodology to guide the state commissions.[67] Both justices also relied on historical arguments to support their contention that the states held exclusive authority to determine local rates.[68] They believed that the Act did not intend to wrest the power to set rates away from the states, disregarding "the 100-year tradition of state authority over intrastate telecommunications."[69] Against this

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depreciation of dual jurisdiction property in the context of state commissions' determinations of intrastate rates).

61. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 (8th Cir. 1997) ("[S]ection 2(b) remains a *Louisiana* built fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf.").

62. 47 U.S.C. § 152(b) (1994).

63. Justices White, Marshall, Rehnquist, and Stevens joined Justice Brennan's opinion.

64. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 370.

65. *Iowa Utils. Bd. v. FCC*, 120 F.3d at 796.

66. *See id.* at 798 ("[T]he pricing provisions of sections 251 and 252 clearly apply to intrastate telecommunication service, but they do not unambiguously call for the FCC's participation in setting the rates.").

67. *See* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 741–46 (Thomas, J., concurring in part and dissenting in part); *see id.* at 746–53 (Breyer, J., concurring in part and dissenting in part).

68. *See id.* at 741–43 (Thomas, J., concurring in part and dissenting in part); *see id.* at 746–50 (Breyer, J., concurring in part and dissenting in part).

69. *Id.* at 743 (Thomas, J., concurring in part and dissenting in part).

historical background, Justice Breyer explained that "the Act's language more clearly foresees retention, not replacement, of the traditional allocation of state-federal rate-setting authority."[70] Like the Eighth Circuit, Justice Thomas would grant the FCC jurisdiction to implement provisions only where the Act specifically called for FCC action.[71] Section 251(d)(1) represented the most promising candidate for an express grant of authority to promulgate pricing regulations.[72] However, like the Eighth Circuit,[73] Justice Thomas considered it essentially a time constraint.[74]

In Justice Thomas's opinion, the three-justice minority also criticized the majority's reliance on section 201(b) as a grant of broad jurisdiction.[75] They pointed to section 201(a)'s exclusive application to "interstate or foreign communication"[76] and, under the principle of *ejusdem generis*,[77] indicated that section 201(b)'s general grant of authority should be limited to the subjects enumerated in section 201(a).[78] With *Louisiana Public Service Commission* weighing heavily on their minds, the three justices could not "see how [section] 201(b) represent[ed] an 'unambiguous' grant of authority that [was] sufficient to overcome [section] 2(b)'s jurisdictional fence."[79]

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70. *Id.* at 748 (Breyer, J., concurring in part and dissenting in part). Justice Thomas similarly remarked: "It seems to me that Congress consciously designed a system that respected the States' historical role as the dominant authority with respect to intrastate communications." *Id.* at 745 (Thomas, J., concurring in part and dissenting in part).

71. *See id.* at 743 (Thomas, J., concurring in part and dissenting in part).

72. *See* 47 U.S.C. § 251(d)(1) (Supp. II 1996) ("Within 6 months after [the date of enactment of the Telecommunications Act of 1996], the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.").

73. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 794 (8th Cir. 1997) ("We believe that subsection 251(d)(1) operates primarily as a time constraint . . . .").

74. *See Iowa Utils. Bd.*, 119 S. Ct. at 743 (Thomas, J., concurring in part and dissenting in part) ("I believe this subsection is a time limitation . . . .").

75. *See id.* at 743–44 (Thomas, J., concurring in part and dissenting in part).

76. 47 U.S.C. § 201(a) (1994).

77. The *ejusdem generis* canon of statutory construction dictates that "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

78. *See Iowa Utils. Bd.*, 119 S. Ct. at 744 (Thomas, J., concurring in part and dissenting in part).

79. *Id.* at 744 (Thomas, J., concurring in part and dissenting in part).

3. The Court's Response

Justice Scalia addressed the counterarguments to the Court's position in his opinion, tackling the opposing views in copious footnotes. The Court criticized Justice Breyer's contention that the Act did not contemplate FCC rulemaking in the rate-setting field, noting that the background legislation manifestly contained section 201 and that section 251(i) explicitly referred to it.[80] In addition, the Court considered it "impossible to understand how th[e] use of the qualifier 'interstate or foreign' in [section] 201(a), which limits the class of common carriers with the duty of providing communication service," could possibly reach "forward into the last sentence of [section] 201(b) to limit the class of provisions that the [FCC] has authority to implement."[81] Justice Scalia also rebuffed the states' rights arguments set forth by Justices Thomas and Breyer:

> [T]he question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the 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 50 independent state agencies is surpassing strange.[82]

Even in the absence of FCC rules, federal courts would review the determinations of state commissions when challenged as contravening federal policy.[83] Therefore, this debate was fundamentally "not about whether the States [would] be allowed to do their own thing, but about

80. *See id.* at 729 n.5. Section 251(i) states: "Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title." 47 U.S.C. § 251(i) (Supp. II 1996).

81. *Iowa Utils. Bd.*, 119 S. Ct. at 730.

82. *Id.* at 730 n.6.

83. Federal question jurisdiction would apply to cases arising under the Act, and a party contending that a state commission had violated the Act would surely choose a federal forum. *See* 28 U.S.C. § 1331 (1994).

whether it [would] be the FCC or the federal courts that [would] draw the lines."[84]

Arguing for the private petitioners before the Court, Mr. Bruce Ennis, Jr., accurately described the problem with the minority's approach:

> [T]here are already hundreds of Federal district court challenges to the State arbitration decisions, and the vast majority of them specifically challenge the rate methodologies employed by the States. Until all of those challenges are finally resolved after appeals, potential competitors cannot even know how much they would have to pay for access and interconnection. This already substantial delay, and the delays still ahead regarding multi-billion dollar investment decisions, has seriously frustrated the act's central purpose. A construction of the act that so frustrates the principal purpose of the act cannot be right.[85]

The prospect of fifty state commissions interpreting the Act independently, with their decisions re-evaluated in the district courts, appeared incredibly cumbersome and daunting.[86] Unsurprisingly, the

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84. *Iowa Utils. Bd.*, 119 S. Ct. at 730 n.6.

85. Transcript of Oral Argument at *21–*22, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141), *available in* 1998 WL 729541 (Oct. 13, 1998) [hereinafter Transcript of Oral Argument]; *see also id.* at *31 (Ms. Diane Munns, arguing for the state commissions:

> QUESTION: And you could have 50 different States having 50 different sets of regulations.
>
> MS. MUNNS: Yes, you could, Your Honor.
>
> QUESTION: Until they were all litigated out eventually, you know.);

*id. at *46* (Mr. Laurence H. Tribe, arguing for the private respondents:

> QUESTION: And who defines the limits of that word cost?
>
> MR. TRIBE: The Federal judiciary ultimately....
>
> QUESTION: The Federal judiciary without any Federal executive in between.).

86. The federal judiciary believed that the Act should reduce the burden of overseeing telecommunications policy that it had carried under the MFJ. *See* Duane McLaughlin, Note, *FCC Jurisdiction over Local Telephone Under the 1996 Act: Fenced Off?*, 97 COLUM. L. REV. 2210, 2210 (1997) ("When President Clinton signed the Telecommunications Act of 1996 . . . into law, perhaps no group was more hopeful for

Court could identify "no similar instances in which federal policymaking ha[d] been turned over to state administrative agencies."[87] Ultimately, even if the district courts showed state agencies considerable deference, the Supreme Court would probably need to consider a consolidated appeal from these cases to provide some measure of uniformity.[88] Reading the Act in a way that would engender a massive amount of litigation and further appeals to the Court surely would have been unwise.

The majority also responded to the argument that section 2(b) of the Communications Act of 1934 bars FCC jurisdiction over rate setting.[89] Justice Scalia explained that *Louisiana Public Service Commission*, rather than presenting "a question almost identical" to the one at issue in this case,[90] only concerned the FCC's ancillary jurisdiction to regulate intrastate matters "to effectuate the federal policy of encouraging competition in interstate telecommunications."[91] The Telecommunications Act of 1996 specifically addressed *intrastate* competition; therefore, the FCC should have primary jurisdiction over implementing the local competition provisions.[92] The Court concluded

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its success than the federal judiciary." (footnote omitted)). For a discussion of the MFJ, see *supra* note 3.

87. *Iowa Utils. Bd.*, 119 S. Ct. at 733 n.10. This point was discussed at oral argument:

> QUESTION: Ms. Munns, if it's a Federal statute, then who is taking care to see that the Federal law is faithfully executed? I thought that was the job of the Federal executive. And I don't know, frankly, any scheme where you have Federal law governing, Federal courts doing the review, but no Article II agency. There's no Federal executive presence in it. . . . The legislation is Federal. The enforcement in court is Federal, but in between no Federal executive presence. And is there any other — in all of Federal law, is there any other such scheme, and if there is, how does it measure up to Article II?
>
> MS. MUNNS: . . . I'm not aware of any scheme like this . . . .

Transcript of Oral Argument, *supra* note 85, at *33–*34 (Ms. Diane Munns, arguing for the state commission respondents).

88. The Court indicated that the question of whether federal courts must defer to state agencies' interpretation of federal law posed a novel legal issue. *See Iowa Utils. Bd.*, 119 S. Ct. at 733 n.10. See Weiser, *supra* note 3, for an argument that federal district courts should defer to state agencies' determinations under the Act.

89. *See Iowa Utils. Bd.*, 119 S. Ct. at 730–31.

90. *Id.* at 750 (Breyer, J., concurring in part and dissenting in part).

91. *Id.* at 731 (citing Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986)).

92. *See id.* at 731 n.7; *cf.* McLaughlin, *supra* note 86, at 2250 ("The biggest concern in creating a new interpretation is to give meaning to the words of section 2(b)

that Justice Thomas's approach, which would only confer jurisdiction on the FCC where the statute explicitly referred to FCC involvement, would produce "a most chopped-up statute" and judiciously chose not to create "such a strange hodgepodge."[93] In oral argument, Justice Scalia even appeared to be attempting to convince his colleagues that section 2(b) had simply become obsolete.[94]

4. TELRIC's Merits

Since the Eighth Circuit vacated the pricing regulations on jurisdictional grounds, the Supreme Court only reached the jurisdictional issue, leaving open the possibility of a substantive challenge to the FCC's TELRIC approach. Limiting its opinion to the issues presented, the Court chose not to express a view on the merits of TELRIC, while Justice Breyer criticized the FCC's decisions to preclude other pricing models.[95] However, the wisdom of this forward-looking cost scheme has been the subject of extensive academic debate,[96] and courts will

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without frustrating the 1996 Act's statutory scheme.").

93. *Iowa Utils. Bd.*, 119 S. Ct. at 731 n.8.

94. *See* Transcript of Oral Argument, *supra* note 85, at *13–*15 (Mr. Seth P. Waxman, Solicitor General, arguing for the federal petitioners).

> QUESTION: . . . 2(b) has its exceptions written in, except as provided in sections 223 through 227, inclusive, and section 332, and subject to 301 in title 6. Nothing in this act shall be construed to apply or give the Commission jurisdiction with respect to, blah, blah, blah, blah, blah. It's just impossible to apply that anymore. . . .
>
> QUESTION: . . . then Justice Scalia is right, that 2(b) is just not really applicable anymore.

Id.

95. *See Iowa Utils. Bd.*, 119 S. Ct. at 752–53 (Breyer, J., concurring in part and dissenting in part).

96. J. Gregory Sidak and Daniel F. Spulber lead the campaign against TELRIC, attacking it on both economic and constitutional grounds. *See generally* J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES (1997) (arguing that deregulation can constitute a taking); *see* 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 (1997) (proposing an alternative to TELRIC); J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851 (1996) (arguing that pricing schemes such as TELRIC constitute a taking under the Fifth Amendment); J. Gregory Sidak & Daniel F. Spulber, *Givings, Takings, and the Fallacy of Forward-Looking Costs*, 72 N.Y.U. L. REV. 1068 (1997) (extending their analysis in *Deregulatory Takings and Breach of the Regulatory Contract* and responding

probably need to consider whether the FCC can sustain TELRIC methodology under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[97] The possibility looms that state commissions' use of TELRIC — which ignores historical costs — to determine prices will prompt Fifth Amendment takings claims by LECs.[98]

B. Unbundling Rules

While the appeal to the Supreme Court did not require consideration of the merits of TELRIC methodology, the Court confronted substantive challenges to a number of the FCC's unbundling rules.[99] Section 251(c)(3) places on incumbent LECs:

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to criticism).

For critiques of Sidak and Spulber's book, see Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801 (1999) (book review); Jim Rossi, *The Irony of Deregulatory Takings*, 77 TEX. L. REV. 297 (1998) (book review).

William J. Baumol and Thomas W. Merrill lead the other side of the debate, viewing TELRIC more sympathetically and considering takings claims less promising. *See* 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 (1997) (supporting the use of forwarding-looking cost determinations to set prices from an economic standpoint and defending the practice against arguments that such an approach constitutes a taking); William J. Baumol & Thomas W. Merrill, *Does the Constitution Require that We Kill the Competitive Goose? Pricing Local Phone Services to Rivals*, 73 N.Y.U. L. REV. 1122 (1998) (concluding the series of dueling articles by the authors and Sidak and Spulber in the journal); *see also* William J. Baumol et al., *Parity Pricing and its Critics: A Necessary Condition for Efficiency in the Provision of Bottleneck Services to Competitors*, 14 YALE J. ON REG. 145 (1997) (discussing proper pricing of a monopoly input needed by both the incumbent and its entering competitors).

For other participants in the debate, see, for example, Stephen F. Williams, *Deregulatory Takings and Breach of the Regulatory Contract: A Comment*, 71 N.Y.U. L. REV. 1000 (1996) (arguing that incumbents may be in a good position to compete with new entrants); Oliver E. Williamson, *Deregulatory Takings and Breach of the Regulatory Contract: Some Precautions*, 71 N.Y.U. L. REV. 1007 (1996) (arguing for a different approach to compensation for stranded costs); Alfred E. Kahn & William E. Taylor, *The Pricing of Inputs Sold to Competitors: A Comment*, 11 YALE J. ON REG. 225 (1994) (assessing efficient pricing where competitors require an input controlled by a rival).

97. 467 U.S. 837 (1984) (setting forth a reasonableness standard for deferring to federal agencies).

98. *See supra* note 96.

99. *See Iowa Utils. Bd.*, 119 S. Ct. at 733–38.

> 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 at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.[100]

In Section 251(d)(2), Congress further explains that:

> In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether —
> (A) access to such network elements as are proprietary in nature is necessary; and
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[101]

Given this statutory background, incumbent LECs challenged the FCC's implementation on numerous fronts, attempting to restrict competitors' access to their local networks. They disputed the FCC's determination of what constitutes a "network element," its interpretation of the "necessary" and "impair" standards, its understanding of an "unbundled basis," and its lack of a facilities-ownership requirement.[102] The incumbents' substantive challenges generally failed to persuade the Court; however, the incumbent LECs managed to obtain one favorable result. Justice Scalia vacated the rule governing the "necessary" and "impair" standards but upheld all the other regulations at issue.[103]

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100. 47 U.S.C. § 251(c)(3) (Supp. II 1996).
101. *Id.* § 251(d)(2).
102. *See Iowa Utils. Bd.*, 119 S. Ct. at 733–38.
103. *See id.*

1. The "Network Elements" Definition

Before the FCC could decide which network elements the incumbent LECs needed to provide to CLECs "on an unbundled basis," it had to define the scope of the inquiry by preliminarily considering which features of an incumbent's local service were statutorily-designated network elements.[104] The Act defines a "network element" as "a facility or equipment used in the provision of a telecommunications service" and instructs that the "term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."[105] Using this expansive definition, the FCC resolved that the term encompassed operations support systems ("OSS"), operator services and directory assistance, and vertical switching features.[106] OSS includes "software systems and accompanying databases that are necessary to process orders, handle billing, and provide maintenance and repair capabilities to phone customers."[107] Call waiting, call forwarding, and caller ID are examples of vertical switching functions.[108]

Incumbent LECs argued that the FCC stretched the concept of "features, functions, and capabilities . . . provided by means of [a] facility or equipment" too far.[109] They parsed the term "network elements" into its component words "network" and "elements," concluding that only physical parts of a network could be network elements.[110] However, the incumbent LECs erred in applying this plain-meaning approach to statutory interpretation since the Act expressly defined the term.[111] The definition of network elements included

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104. 47 U.S.C. § 251(c)(3).

105. *Id.* § 153(29).

106. *See* 47 C.F.R. § 51.319(f) (1998) (OSS); *id.* § 51.319(g) (operator services and directory assistance); First Report and Order, *supra* note 9, ¶¶ 263, 413 (vertical switching functions).

107. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 808 (8th Cir. 1997).

108. *See id.*

109. 47 U.S.C. § 153(29) (Supp. II 1996).

110. *See* Brief for GTE, *supra* note 51, at 54; Brief for the Respondent/Cross-Petitioner U S West, Inc. at 36–37, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141) [hereinafter Brief for U S West]; *cf.* Brief for Bell Atlantic, *supra* note 51, at 68–69.

111. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47 (1989) ("We have often stated that *in the absence of a statutory definition* we 'start with the

"subscriber numbers, databases, signaling systems, and information," precluding any argument that only physical things could be network elements.[112] Additionally, the incumbents claimed that Congress used the term "network elements" to refer only to those facilities needed to route calls, not to features completely unrelated to call transmission.[113] This argument blatantly ignored the other identified purposes for which network elements may be used, including "billing" and "collection."[114] Even if, under the *ejusdem generis* canon of statutory construction, the catchall phrase "or other provision of a telecommunications service" in section 153(29) might be construed as limited by the preceding enumerated purposes,[115] it would seem unduly restrictive not to include the FCC's additional rationales for designating network elements, such as providing "maintenance and repair" capabilities.[116]

Besides these general arguments against the FCC's implementation of section 153(29), the incumbents also directed specific attacks against the designation of OSS, operator services and directory assistance, and vertical switching functions as network elements.[117] They asserted that Congress did not intend OSS to be considered network elements since providing CLECs with access to such "nonessential facilities and services"[118] would force incumbents to surrender their business skills to the competition.[119] However, this contention confused the FCC's duty to determine *what a network element is* with its duty to indicate *which network elements must be provided to competitors*. The FCC could designate OSS as network elements under section 153(29) without allowing competitors access to them under section 251(c)(3). The incumbent LECs also disputed the FCC's conclusion that human services, such as operator services and directory assistance, and

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assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" (emphasis added) (quoting Richards v. United States, 369 U.S. 1, 9 (1962)).

112. *Cf. Iowa Utils. Bd.*, 119 S. Ct. at 734 ("Given the breadth of [section 153(29)'s] definition, it is impossible to credit the incumbents' argument that a 'network element' must be part of the physical facilities and equipment used to provide local phone service.").

113. *See* Brief for Bell Atlantic, *supra* note 51, at 68–72; Brief for GTE, *supra* note 51, at 54–60; Brief for U S West, *supra* note 110, at 36–41.

114. 47 U.S.C. § 153(29).

115. *Id.*

116. 47 C.F.R. § 51.319(f)(1) (1998).

117. *See* Brief for Bell Atlantic, *supra* note 51, at 69–72; Brief for GTE, *supra* note 51, at 58–59; Brief for U S West, *supra* note 110, at 38–41.

118. Brief for U S West, *supra* note 110, at 41.

119. *See* Brief for Bell Atlantic, *supra* note 51, at 69–70; Brief for GTE, *supra* note 51, at 58–59; Brief for U S West, *supra* note 110, at 38.

automated services, such as call waiting, call forwarding, and caller ID, constituted network elements.[120] They indicated that, although the unbundling provision of the House bill originally applied to "services, elements, features, functions, and capabilities," the Conference Committee eliminated the term "services" when it revised the scope of unbundling.[121] In addition, since section 251(c)(4) expressly provided a means for competitors to obtain access to retail services, one incumbent LEC argued that the *inclusio unius est exclusio alterius* (inclusion of one thing implies exclusion of all others) canon of statutory interpretation implied that services should not be considered network elements in section 251(c)(3).[122]

Although these arguments possessed some merit, the substantial breadth of the Act's "network element" definition left the FCC with considerable room for decision making. The Court unanimously agreed with the Eighth Circuit that the FCC's application of the statutory language was "eminently reasonable."[123] Therefore, under *Chevron*, Justice Scalia upheld the FCC's implementation of section 153(29).[124]

2. The "Necessary" and "Impair" Standards

In contrast, seven justices concluded that the FCC had failed to consider adequately the "necessary" and "impair" standards imposed by section 251(d)(2) in promulgating rule 319.[125] This rule guaranteed CLECs access to at least seven principal classes of network elements: local loops, network interface devices, switching capabilities, interoffice transmission facilities, signaling networks and call-related databases, OSS functions, and operator services and directory assistance.[126] Under rule 317, a CLEC could also petition state commissions for access to additional network elements on a case-by-case basis.[127] To determine which classes of network elements to make available to CLECs in rule 319 and to guide state commissions' individualized determinations

120. *See* Brief for Bell Atlantic, *supra* note 51, at 70–72; Brief for GTE, *supra* note 51, at 57–58; Brief for U S West, *supra* note 110, at 39–41.

121. *See* Brief for Bell Atlantic, *supra* note 51, at 70; Brief for GTE, *supra* note 51, at 58; Brief for U S West, *supra* note 110, at 39; *see also* H.R. 1555, 104th Cong. § 242(a)(2) (1995).

122. *See* Brief for GTE, *supra* note 51, at 57–58.

123. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 734 (1999).

124. *See id.*

125. *See id.* at 734–36.

126. *See* 47 C.F.R. § 51.319 (1998).

127. *See id.* § 51.317.

regarding provision of additional network elements under rule 317, the FCC had to interpret the Act's general requirement that denying access "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer" and its more specific mandate that granting "access to such network elements as are proprietary in nature [be] necessary."[128]

The FCC eviscerated both standards.[129] According to its First Report and Order, the "impair" standard demanded only consideration of "whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier [sought] to offer."[130] Since this approach did not require that the decrease in quality or increase in cost reach any threshold level of significance to create a right of access, a CLEC would be entitled to insist on access to an incumbent's network element even if obtaining it elsewhere would involve only a trivial difference in cost or quality. Justice Scalia correctly noted that an "entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been 'impaired' in its ability to amass earnings, but [it] has not ipso facto been 'impair[ed] . . . in its ability to provide the services it seeks to offer.'"[131]

Similarly, the FCC concluded that deeming a proprietary network element "necessary" did not mandate consideration of whether "requesting carriers [could] obtain the requested proprietary element from a source other than the incumbent."[132] How could one determine that an incumbent LEC's network element was necessary without looking at the available alternatives? Like the FCC's interpretation of the "impair" standard, this approach rendered the "necessary" requirement meaningless; the FCC essentially empowered CLECs to obtain access to any network elements they desired. The Court simply could not

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128. 47 U.S.C. § 251(d)(2) (Supp. II 1996).

129. The FCC originally misinterpreted a CLEC's right to access unbundled network elements "at any technically feasible point" as an incumbent LEC's "duty to provide all network elements for which it is technically feasible to provide access." First Report and Order, *supra* note 9, ¶ 278 (internal quotation marks omitted) (quoting 47 U.S.C. § 251(c)(3)). The Eighth Circuit rejected the FCC's confused reading of section 251(c)(3). *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 810 (8th Cir. 1997). The FCC did not appeal this ruling, but this confusion might explain the FCC's decision to strip the "necessary" and "impair" standards of any force — it believed mere technical feasibility was the underlying principle. *See Iowa Utils. Bd.*, 119 S. Ct. at 736.

130. First Report and Order, *supra* note 9, ¶ 285.

131. *Iowa Utils. Bd.*, 119 S. Ct. at 735 (quoting 47 U.S.C. § 251(d)(2)).

132. First Report and Order, *supra* note 9, ¶ 283.

"avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] . . . c[a]me up with, it would not have included [section] 251(d)(2) in the statute at all."[133] Incumbent LECs argued that the proper implementation of the statute should approximate the "essential facilities" doctrine, which instructs that only bottleneck elements should be opened up to competitors,[134] but the Court only resolved that the FCC must "apply some limiting standard."[135]

Apart from the plain-meaning basis of the Court's decision, a strong public policy argument supported the outcome. The FCC's approach would create an unduly strong disincentive to incumbent LECs' research and development because CLECs could obtain unfettered access to any new or improved network element upon request.[136] By vacating rule 319, the Court ensured some degree of protection for incumbents' investments.[137] In addition, while Justice Scalia did not explicitly address rule 317, the Court's reasoning established that a CLEC's mere assertion of a desire to obtain a network element will not suffice.[138]

Of the eight Justices who sat on the case, only Justice Souter favored upholding the FCC's interpretations of the "necessary" and "impair" standards.[139] Even though he admitted that the FCC's

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133. *Iowa Utils. Bd.*, 119 S. Ct. at 735.

134. *See* Brief for Bell Atlantic, *supra* note 51, at 66–67; Brief for U S West, *supra* note 110, at 33–34; *see also* H.R. 1555, 104th Cong. § 242(a)(2) (1995). For discussion of the "essential facilities" doctrine, see 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 771–73 (1996).

135. *Iowa Utils. Bd.*, 119 S. Ct. at 734.

136. *See* Brief for Bell Atlantic, *supra* note 51, at 67–68 ("[U]nder the FCC's rules, an incumbent can be required, after investing millions of dollars in developing a new service or feature, to turn that service or feature over to its competitors . . . regardless of whether those competitors can obtain its equivalent elsewhere. That rule will quite obviously provide a significant disincentive to research and development by incumbents."); Brief for U S West, *supra* note 110, at 35 ("Congress required the FCC to apply the even stricter 'necessary' standard to the unbundling of such elements, because it no doubt understood that an incumbent LEC will not invest in research and development if its innovations must automatically be turned over to rivals."); *see also* Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005, 1034 (1987) ("[R]equiring an inventor, even of an unpatented invention, to give his secrets away to his competitors discourages innovation . . . .").

137. *See Iowa Utils. Bd.*, 119 S. Ct. at 736.

138. *See id.* at 734–36; *see also* MCI v. Bell-Atlantic, 36 F. Supp. 2d 419, 424 n.4 (D.D.C. 1999) ("[A]lthough the [Supreme] Court did not reach the validity of § 51.317, the *Iowa Utilities* holding is equally applicable to that regulation.").

139. *See Iowa Utils. Bd.*, 119 S. Ct. at 739–41 (Souter, J., concurring in part and

interpretation would "probably allow a competitor to obtain access to any network element that it want[ed]," Justice Souter considered the FCC's approach within "the bounds of reasonableness" under *Chevron*.[140] He concluded that the FCC permissibly applied the words in their "weak senses."[141] According to these weak-sense meanings, not granting access to a network element could "impair" a CLEC if it could not get the profit it wanted without the element, and a proprietary network element could be "necessary" if access to it would increase profitability.[142]

However, Justice Souter's argument would frustrate congressional intent and unduly empower the FCC by ignoring *Chevron*'s threshold commandment. Under *Chevron*, if "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[143] By imparting such a large zone of ambiguity to the words "necessary" and "impair," Justice Souter would thwart Congress's ability to express its will with reasonable clarity. The form of agency deference Justice Souter endorsed would stultify precision in legislative drafting by enabling agencies to read words in whatever "sense" they desired. "Necessary" could mean anything from "desirable" to "indispensable," rendering the impact of statutory provisions a matter of agency whim. Congress's only effective means of asserting its purpose would be to enact detailed statutes that essentially obviated any need for regulations. Mandating this result would not only severely encumber the lawmaking process with the tedium of implementing complex statutes, but would also transfer responsibility for making technical judgments from specialized agencies to a legislative body comprised of persons with diverse training.[144]

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dissenting in part).

140. *Id.* at 739.

141. *Id.* at 739–40.

142. *See id.* at 740.

143. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984).

144. The FCC's First Report and Order spans over 700 pages, including over 3,000 footnotes. *See generally* First Report and Order, *supra* note 9. While the FCC's explanations of its judgments admittedly account for much of the text, the enormity of the First Report and Order clearly indicates that asking Congress to draft legislation with comparable specificity would be ludicrous.

3. The Facilities-Ownership Requirement

The incumbent LECs unsuccessfully urged the Supreme Court to instruct the FCC to impose a facilities-ownership requirement on CLECs.[145] This argument arose out of the Eighth Circuit's deference to the FCC's unbundling rules.[146] Since the court below upheld both the FCC's broad interpretation of "network elements" and its evisceration of the "necessary" and "impair" standards, CLECs essentially obtained the right to access all facets of the incumbents' networks.[147] The Eighth Circuit even explicitly stated that a competitor could "obtain the ability to provide telecommunications services entirely through an incumbent LEC's unbundled network elements."[148]

Full access alone might not have scared the incumbents. However, the details of pricing under the Act, coupled with this blanket access, terrified them because it created the possibility that competitors could use incumbents' own networks in their entirety to sell local telecommunications services at lower prices than the incumbents themselves.[149] Under the TELRIC methodology for determining the prices incumbent LECs could charge CLECs for access to the unbundled network elements, state commissions could only consider forward-looking costs.[150] Therefore, CLECs would not bear any of the sunk costs associated with developing the network elements they acquired. In addition, CLECs would not be immediately burdened by the universal service cross-subsidies that incumbents had to include in their prices. To achieve universal service, state commissions permitted incumbent LECs to bill businesses and certain other customers at rates substantially above the cost of providing service to them to compensate for the requirement that incumbents supply local service at below-cost rates to rural and other residential customers.[151] Since competitors would face no duty under the Act to provide universal service, they could initially engage in regulatory arbitrage and steal the incumbents'

145. *See Iowa Utils. Bd.*, 119 S. Ct. at 736.

146. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 807–20 (8th Cir. 1997).

147. *See id.* at 807–12; *see also id.* at 814–15.

148. *Id.* at 814.

149. *See* Brief for Bell Atlantic, *supra* note 51, at 48–51; Brief for U S West, *supra* note 110, at 41–46; Reply Brief for Cross-Petitioner GTE Midwest Inc. at 4–16, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141) [hereinafter Reply Brief for GTE].

150. *See* 47 C.F.R. § 51.505(b) (1998).

151. *See, e.g.*, Brief for Bell Atlantic, *supra* note 51, at 3.

most profitable business customers.[152] While section 254 required implementation of a new universal service regime that would include CLECs, the FCC failed to meet the fifteen-month timetable imposed by section 254(a)(2) and indicated that implementation of section 254 was not a priority.[153]

Although the Court's vacating rule 319 precluded competitors from taking advantage of incumbent LECs by gaining unlimited access to their networks, the incumbents' argument for a facilities-ownership requirement nevertheless deserves analysis because it implicates the fundamental structure of the Act. In section 251(c), Congress provided three avenues for CLECs to enter local telecommunications markets: purchasing incumbent LECs' services at wholesale rates for resale, leasing elements of incumbents' networks on an unbundled basis, and interconnecting its own facilities with incumbents' networks.[154] The resale option required CLECs to purchase access at wholesale rates, which were based on incumbents' retail rates. The wholesale rates included the universal service cross-subsidies and all other costs borne by the incumbent LECs, except for "marketing, billing, collection, and other costs" that would be avoided by selling the wholesale services to the CLECs.[155] Since this means of competition preserved some return on investment for the incumbent LECs and ensured a relatively low profit margin for CLECs, this mode of entry did not threaten the incumbents. A competitor could only hope to achieve lower prices than an incumbent "by performing marketing and billing functions more efficiently."[156]

Incumbent LECs contended that enabling CLECs to obtain access to their entire networks at TELRIC-based prices, which did not reflect historic costs or universal service cross-subsidies, rendered the resale option superfluous and undermined the structure of the Act.[157] The CLECs attempted to differentiate this entire network leasing

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152. *See, e.g., id.* at 49–50.

153. *See* Reply Brief for GTE, *supra* note 149, at 15.

> Ignoring the fifteen-month timetable set by Congress, the FCC has postponed explicit funding . . . until 1999 and is now fighting before the Fifth Circuit to protect its delays, insisting that the . . . funding system demanded by the Act is not an 'immediate requirement' at all, but rather is merely an 'eventual goal.'

Id.

154. *See* 47 U.S.C. § 251(c) (Supp. II 1996).

155. First Report and Order, *supra* note 9, ¶ 32.

156. Brief for Bell Atlantic, *supra* note 51, at 51.

157. *See id.* at 46–53; Reply Brief for GTE, *supra* note 149, at 4–16; Brief for U S West, *supra* note 110, at 41–46.

arrangement from resale on the basis that leasing would involve greater risks because they would have to invest in some network elements without knowing how many customers would sign up for their services.[158] However, even if this argument were credible, one might seriously question whether Congress intended to reward CLECs with lower prices and the potential for regulatory arbitrage by leasing incumbents' entire networks instead of simply buying access at wholesale prices.[159] To add insult to injury, incumbent LECs would not only face prices undercutting their own from the competition's use of their entire networks but also the prospect of competitors jointly marketing long distance and local service.[160] While the Act banned such joint marketing for resale-based competition to avoid giving CLECs an unfair advantage, leasing incumbents' entire networks would allow them to circumvent this restriction.[161]

Although these arguments had merit, the incumbents overreached by requesting a facilities-ownership requirement. Rather than merely

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158. *See* Reply Brief for the Petitioners AT&T et al. at 20–26, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141) [hereinafter Reply Brief for AT&T]; Brief for the Petitioners MCI Telecommunications at 23–26, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141) [hereinafter Brief for MCI].

159. *See* Transcript of Oral Argument, *supra* note 85, at *86.

> QUESTION [the response indicates that it was posed by Justice Breyer]: It seems virtually inconceivable intuitively that somebody goes and says — the loop costs like . . . $12 a month and the chance that a customer who has it attached to her house is not going to pay the $12 a month or $14 or something like that — I mean, it's conceivable I grant you, but . . . if that's what the FCC is driving at, I think they'd have to use some example that's a little better than just announcing that there is some risk that the loop won't be paid for.

Id.; *cf.* Brief for Bell Atlantic, *supra* note 51, at 62. The FCC declared that:

> [A] competitor may demand that the incumbent's switch and transport facilities be "priced on an actual usage basis" — in other words, the competitor need make no up-front investment and need bear no risk of demand fluctuations. . . . Similarly, a competitor need make no up-front investment in loops, which are purchased individually when a customer switches providers.

Id. (citation omitted in brief).

160. *See* Brief for Bell Atlantic, *supra* note 51, at 52; Brief for U S West, *supra* note 110, at 46 n.19.

161. *See* 47 U.S.C. § 271(e)(1) (Supp. II 1996) (applying the joint marketing prohibition only to CLECs that obtain access under section 251(c)(4), the resale provision).

urging the Court to enforce the Act's tripartite structure for local-market entry, they sought a prospective remedy unsupported by the statutory text.[162] While section 251(c)(3) requires incumbent LECs to provide interconnection to CLECs "at any technically feasible point," the Act does not support the assumption that CLECs would have to own facilities to pursue this option.[163] Those interconnecting facilities could be rented or leased from local telecommunications service providers other than the incumbent LECs, such as cable television companies.[164] Perhaps the incumbents would have been more successful had they been less ambitious in seeking a ruling that section 251(c)(3) indicated congressional intent to require some physical connection with any external facility.[165] However, they did not frame the question in this

162. While instituting a facilities-ownership requirement would have required ignoring statutory text in an attempt to protect the incumbent LECs, this sought-after solution would actually have done little to help their cause. It might have delayed CLECs' access to their network elements, a result antithetical to the Act's purpose, but it would not have resolved the underlying problems of regulatory arbitrage or joint marketing. In addition, a CLEC's need to install a single facility to obtain access to the rest of an incumbent's network at TELRIC-based prices would have done little to inhibit CLECs from achieving tremendous cost advantages. *Cf.* Reply Brief for AT&T, *supra* note 158, at 26–32.

163. 47 U.S.C. § 251(c)(3). For a full exposition of the argument, see Brief for Bell Atlantic, *supra* note 51, at 57–61.

164. The alternative approaches also demonstrate that a facilities-ownership requirement would be difficult to implement without distorting incentives. *Cf.* First Report and Order, *supra* note 9, ¶ 339. The FCC explained:

> [I]t would be administratively impossible to impose a requirement that carriers must own some of their own local exchange facilities in order to obtain access to unbundled elements . . . . We conclude that it would not be possible to identify the elements carriers must own without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation. We further conclude that such a requirement could delay possible innovation. These effects would diminish competition for local telephone services, and thus any local exchange facilities requirement would be inconsistent with the 1996 Act's goals of promoting competition. Moreover, if we imposed a facilities ownership requirement that attempted to avoid these competitive pitfalls, it would likely be so easy to meet it would ultimately be meaningless.

Id.

165. While the Act itself expressed no preference as to a competitor's mode of entry into a local market, many have suggested that facilities-based competition was, or at least should be, the long-term goal. *See, e.g.*, Transcript of Oral Argument, *supra* note 85, at *82 (Mr. Seth P. Waxman, Solicitor General, arguing for the federal petitioners:

> QUESTION [Justice Breyer]: Do you think that's what . . .

manner, and the Supreme Court unanimously affirmed the Eighth Circuit's refusal to impose a facilities-ownership requirement.[166]

4. Separation of Combined Network Elements

In contrast, the Supreme Court unanimously rejected the Eighth Circuit's holding that incumbent LECs could separate already-combined network elements before making them available to CLECs.[167] If Justice Scalia had not vacated rule 319, this ruling would certainly have exacerbated incumbents' fears of regulatory arbitrage and underselling by competitors. However, in light of the Court's other rulings, the decision to forbid this "anticompetitive practice" was a welcome practical development.[168] Otherwise, some of the benefit of local competition would have been eroded because CLECs would have needed to pay a form of protection money to incumbents to keep them from sabotaging their networks.[169] The engineering realities of telecommunications networks render this perverse result even more absurd. Given the highly interdependent nature of telecommunications networks, any actual disconnection of elements provided to competitors would be impossible because the incumbent would similarly suffer.[170] Thus, incumbent LECs would be extorting competitors with an illusory threat.[171] The Court properly prohibited incumbents from engaging in this anticompetitive behavior.

While public policy clearly favored the Court's decision, the text offered a less compelling foundation. Section 251(c)(3)'s mandate that incumbents make elements available to CLECs "on an unbundled basis" provided the pivotal statutory language.[172] Incumbents contended that

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> Congress meant by competition? We're going to have — just one single network, but we're going to have competing salesmen.
> MR. WAXMAN: No. Congress wanted . . . new entrants to build facilities.);

Thomas J. Hall, Note, *The FCC and the Telecom Act of 1996: Necessary Steps to Achieve Substantial Deregulation*, 11 HARV. J.L. & TECH. 797, 826–27 (recommending sunset provisions on sections 251(c)(3)–(4), the unbundled access and resale provisions).

166. *See* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 736 (1999).

167. *See id.* at 736–38.

168. *Id.* at 738.

169. *See* Brief for the Petitioners AT&T et al., at 42–43, n.29, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141) [hereinafter Brief for AT&T].

170. *See id.*

171. *See id.*

172. 47 U.S.C. § 251(c)(3) (Supp. II 1996).

"unbundled" meant "physically separated,"[173] while the prospective competitors responded that it denoted "separately priced."[174] Although the CLECs might have had a stronger case for their definition with multiple dictionaries and prior regulatory decisions to support it,[175] the Court found the wording ambiguous.[176] As a result, it evaluated the FCC's approach under *Chevron* for reasonableness and appropriately upheld rule 315(b)'s bar on separating already-combined elements as "entirely rational."[177]

5. The Takings Issue

In the Eighth Circuit, the incumbents attacked the FCC's unbundling rules as unconstitutional takings under the Fifth Amendment.[178] The panel dismissed the claim as unripe,[179] and the Supreme Court did not consider it on appeal. This argument receives brief attention here because it likely will be asserted after the FCC promulgates new "necessary" and "impair" standards. The idea that deregulation could constitute a taking has become a hotly debated topic in academia in the wake of recent deregulation, and takings claims could potentially thwart the movement toward competition.[180] The unbundling regulations represent a prime candidate for a takings assault, especially coupled with the TELRIC pricing methodology.[181] They could be viewed as creating physical invasions of incumbents' property or takings of their investment-backed expectations.[182] However, the

173. Brief for GTE, *supra* note 51, at 66–69; Brief for U S West, *supra* note 110, at 50–51.

174. Brief for AT&T, supra note 169, at 38–42; Brief for MCI, *supra* note 158, at 17–22.

175. *See* Brief for AT&T, supra note 169, at 38–42; Brief for MCI, *supra* note 158, at 17–22.

176. *See* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 737 (1999).

177. *Id.*

178. *See* Iowa Utils. Bd. v. FCC, 120 F.3d 753, 818 (8th Cir. 1997).

179. *See id.*

180. *Compare* SIDAK & SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES, *supra* note 96, *and* Sidak & Spulber, *Deregulatory Takings and Breach of the Regulatory Contract, supra* note 96, *and* Sidak & Spulber, *Givings, Takings, and the Fallacy of Forward-Looking Costs, supra* note 96, *with* Baumol & Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996, supra* note 96, *and* Baumol & Merrill, *Does the Constitution Require that We Kill the Competitive Goose? Pricing Local Phone Services to Rivals, supra* note 96.

181. *See supra* note 96.

182. *See* Sidak & Spulber, *Deregulatory Takings and Breach of the Regulatory*

second claim would involve an inversion of the usual approach; instead of alleging that the institution of regulation took their vested property rights or reasonable investment-backed expectations, incumbents would be alleging that the attempt to deregulate constituted a taking of interests produced by the original regulatory regime. The extent to which one can possess a protected interest in regulation under the Fifth Amendment remains an intriguing issue that the courts will almost certainly address.

If the Court sympathizes with the takings challenge, the cost of deregulation could substantially increase, perhaps even to the point of rendering the process impracticable. This result would severely injure consumers at the cost of protecting the regulated industry. Fortunately, Supreme Court precedent offers considerable protection against a takings attack on the unbundling rules. While *Loretto v. Teleprompter Manhattan CATV Corp.*[183] establishes that even a minor physical invasion can constitute a taking, the compensation that would need to be paid for taking a little office space to install computers and other equipment at incumbents' facilities would be negligible.[184]

By contrast, a finding of taking of reasonable investment-backed expectations under *Lucas v. South Carolina Coastal Council*[185] could prove devastating. However, considering the rapid advance of telecommunications technology, the recent move toward deregulation of many industries, and specific congressional consideration of telecommunications deregulation, incumbents would probably have a difficult time convincing the Court that they had reasonable investment-backed expectations in remaining regulated natural monopolies. Could an incumbent LEC really assert a vested right to remain a regulated monopoly indefinitely as it closely observed Congress planning the dismantling of that regime almost twenty years after being granted its monopoly status? Any semblance of governmental inducement to ignore the omens of competition is notably lacking.[186] In addition, since incumbents receive the right to compete in long-distance markets in return for opening up their local monopolies to competition,[187] they would have difficulty proving "deprivation of all economically feasible

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Contract, *supra* note 96.

183. 458 U.S. 419 (1982).

184. *See id.*

185. 505 U.S. 1003 (1992).

186. *Cf.* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

187. *See* 47 U.S.C. § 271 (Supp. II 1996) (providing for the entry of incumbent LECs into long-distance markets).

use."[188]

Another important consideration is whether incumbent LECs could receive compensation prospectively for anticipated harm under the regulations or whether their claims would not be ripe until they suffered injury. To add certainty to the deregulation process, prospective evaluation of the claims would be preferable and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[189] might be interpreted to support that approach in this context.[190]

C. The "Pick and Choose" Rule

Reversing the Eighth Circuit, the Supreme Court unanimously reinstated the FCC's "pick and choose" rule.[191] The FCC promulgated this rule to implement section 252(i), which instructed:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[192]

Based on this statutory language, the FCC issued a "pick and choose" rule that allowed competitors to secure "any individual interconnection, service or network element arrangement" from an incumbent LEC's existing agreements "upon the same rates, terms, and conditions as those provided in the agreement."[193] Incumbents objected that permitting a competitor to select discrete provisions from extant agreements would unfairly allow them to obtain the "quid" from quid pro quo negotiations without giving the "quo."[194] In addition, they

188. *Lucas*, 505 U.S. at 1016 n.7 (internal quotation marks omitted). However, surrendering their local monopolies in return for the ability to compete in long-distance service probably represents a very poor exchange for incumbent LECs. While local service currently consists of monopolies generating over $95 billion in annual revenue, long-distance service involves competing carriers producing an annual revenue of only $31 billion. *See* JOHN THORNE ET AL., FEDERAL BROADBAND LAW 9 (1995).

189. 482 U.S. 304 (1987) (damages resulting from a taking may be awarded for time prior to a judicial determination that a taking occurred).

190. *See id.*

191. *See* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 738 (1999).

192. 47 U.S.C. § 252(i).

193. 47 C.F.R. § 51.809(a) (1998).

194. *See* Brief for Bell Atlantic, *supra* note 51, at 72–74; Brief for GTE, *supra* note

argued that the rule would halt the give-and-take process of negotiation since any concession granted in the context of a particular agreement would be available to all potential competitors.[195] To mitigate this disincentive, the FCC provided that an incumbent LEC could require a CLEC to accept other terms "legitimately related" to the coveted provision.[196] However, forcing incumbents to disclose ex post which provisions were disadvantageous to their competitors might itself have some chilling effect on negotiations.[197] Even better for incumbents, the FCC asserted that the rule would not apply if "[t]he costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier [we]re greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement."[198]

Although the incumbents offered valid criticism of the "pick and choose" rule, Justice Scalia wisely deferred to the FCC's implementation of section 252(i). Considering the statutory text, the rule was "not only reasonable" but also "the most readily apparent" interpretation.[199] While Justice Scalia recognized that it might "impede negotiations," that determination was "a matter eminently within the expertise of the [FCC] and eminently beyond [the Court's] ken."[200] The "pick and choose" rule reflected the FCC's belief that the ability to select provisions from existing agreements would enable competitors to enter local markets more quickly than uninhibited negotiation with incumbents and, in light of the incumbents' staunch resistance to competition, that assessment cannot be viewed as unreasonable. If the FCC had instead created a "take-it-or-leave-it" approach to entire agreements, it might have "encourage[d] an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier [did] not need, in order to discourage subsequent carriers from making a request under that agreement."[201] Despite careful consideration of alternatives to the "pick and choose" rule and attempts to ward off its potential adverse consequences, the rule's net impact might nonetheless be unfavorable. In that event, the FCC could

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51, at 71–74; Brief for U S West, *supra* note 110, at 53–58.

195. *See See* Brief for Bell Atlantic, *supra* note 51, at 72–74; Brief for GTE, *supra* note 51, at 71–74; Brief for U S West, *supra* note 110, at 53–58.

196. First Report and Order, *supra* note 9, ¶ 1315.

197. *See* Brief for U S West, *supra* note 110, at 56 n.20.

198. 47 C.F.R. § 51.809(b)(1) (1998).

199. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 738 (1999).

200. *Id.*

201. First Report and Order, *supra* note 9, ¶ 1312.

always change the rule. The Court acted judiciously by leaving this empirical choice of implementation policy in the FCC's more capable hands.

IV. CONCLUSION

One can only view the advantageous practical result of Justice Scalia's opinion — his restoration of hope for competition in local telephone service — as a fortuitous coincidence. In a case concerning long-distance telephone service competition just before Justice Scalia's appointment to the Court, Justice Brennan admonished that "it goes without saying that we do not assess the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry."[202] This cautionary note applies more forcefully to an opinion authored by Justice Scalia, who believes "a law means what its text most appropriately conveys, whatever the Congress that enacted it might have 'intended.' The law is what the law says, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it."[203] Nonetheless, without giving any weight to the congressional purpose motivating the Act,[204] his opinion infuses new life into its promise of local competition.[205]

The Court, cognizant of its judicial role, often chides that it will not function as a legislature of last resort.[206] Yet, in this case, the political

202. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 359 (1986).

203. Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring) (citing United States v. Public Util. Comm'n of Cal., 345 U.S. 295, 319 (1953) (Jackson, J., concurring)).

204. *See Iowa Utils. Bd.*, 119 S. Ct. at 738 ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency . . . . We can only enforce the clear limits that the 1996 Act contains . . . ." (citation omitted)).

205. *See* Seth Schiesel, *High Court Says Phone Giants Don't Have to Sell Access*, N.Y. TIMES, Jan. 26, 1999, at C1 ("'I woke up today with a bad case of the flu and was lying in bed and the news of the decision was an elixir,' William E. Kennard, the [FCC's] chairman, said. . . . 'This should accelerate the pace of local competition because it will bring certainty to the implementation of the [A]ct,' he added."). As one might surmise from the title of the aforementioned article, some commentators viewed the Supreme Court decision as a victory for the incumbent LECs. However, this misconception was not widely held. On the day of the decision, shares of the incumbent LECs fell over seven percent on average, with Bell Atlantic's stock suffering its steepest drop in more than eight years. In contrast, the stock of long-distance companies rose. *See* Rosenbush, *supra* note 6; Scott Moritz, *FCC Controls Local Phones, Top Court Rules Door is Open to Competition*, THE RECORD (Bergen County, N.J.), Jan. 26, 1999, at B1.

206. *See, e.g.*, *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 376 ("As we so often

economy of telecommunications firmly placed the Court in that position.[207] While dismissing this reality as beyond its purview, the Court auspiciously ruled in the best interests of consumers awaiting choice in local telephone service. Justice Scalia remarked:

> It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.[208]

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admonish, only Congress can rewrite this statute.").

207. *See The State of Competition in the Telecommunications Marketplace Three Years After Enactment of the Telecomms. Act of 1996: Hearing Before the Subcomm. on Antitrust, Bus. Rights, and Competition of the Senate Judiciary Comm.*, 105th Cong. (1999), *available in* 1999 WL 101525 [hereinafter *Pressler Statement*] (statement of former Sen. Larry Pressler, former Chairman of the Senate Commerce, Science and Transportation Committee as well as that Committee's Subcommittee on Telecommunications, and the principal author of the Act) ("According to a speech I regularly give on telecommunications interest groups, there are about a dozen groups which have veto power over any new telecommunications legislation. Therefore, I suggest that there probably won't be any new telecommunications legislation for five to ten years, if then even."); Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 866 ("[T]he entrenched political economy of telecommunications law has undermined much of the progress attributable to economic and technological evolution.").

208. *Iowa Utils. Bd.*, 119 S. Ct. at 738. It is difficult to be critical, however. *See Pressler Statement, supra* note 207. Pressler, the Act's principal author, explained:

> That Act took 13 years to pass, and was a hard-fought bill. I do not believe it is generally known, but teams of about 35–45 staff worked on Saturdays and Sundays throughout much of 1995 to hammer out differences. They worked as volunteers — as you know, there is no overtime pay in government service — so the least I could do was pay for their lunches!! It was with some amusement that I recently heard Justice Scalia comment during a Supreme Court proceeding that a certain paragraph in the Act was not entirely clear. I wanted to jump up and recall how we had to negotiate each weekend so that an equal number of House members who each insisted on adding adverbs, adjectives and punctuation to that paragraph [could participate]. Indeed, one even insisted on the addition of a comma! Making legislation[, like] making sausages[,] is . . . not a pretty business.

Id.; *cf.* 143 CONG. REC. S23 (Jan. 7, 1997) (statement of Sen. Lott). Paying tribute to former Sen. Pressler, Sen. Lott announced:

> [P]erhaps Larry Pressler's greatest achievements as a Senator

This ambiguity could have served as fertile ground for judicial meddling, but the Court dealt with it in the best manner possible: it gave the responsibility of addressing the ambiguity to the agency most capable of doing so.[209]

By granting the FCC jurisdiction to implement the Act and deferring to all but one of its regulations, the Supreme Court sent a strong message to incumbent LECs that the FCC is in charge.[210] Court battles over the Act will certainly continue, and substantive challenges to both TELRIC methodology and the new "necessary" and "impair" standards are highly probable. However, while incumbent LECs will undoubtedly fight with vigor to protect their lucrative local monopolies,[211] the Court has established a solid legal foundation that should facilitate progress toward the Act's ultimate goal: local telecommunications competition.

> came in his last 2 years in office, when he served as chairman of the Commerce, Science, and Transportation Committee. . . . Chairman Pressler reported 97 bills and resolutions out of the Commerce Committee — more than any other Senate Committee during the 140th [sic] Congress. Of those, 87 became law.
>
> Of that 87, perhaps the most heralded was the Telecommunications Act of 1996, the most important economic growth legislation to become law in a decade. This piece of legislation was Larry Pressler's life for well over a year.
>
> It's fair to say that the Telecommunications Act would not be law today if not for Larry Pressler. It passed with extraordinary support because Larry Pressler took the time to work with virtually every Member of Congress — House and Senate — to see that their concerns were addressed.

Id.

209. *See* Mike Mills, *Supreme Court Backs FCC on Phone Rules: Decision Could Speed Opening of Local Markets*, WASH. POST, Jan. 26, 1999, at E1 ("'For three years Congress pounded the FCC, saying . . . [w]e were a rogue agency,' [former FCC Chairman Reed] Hundt said. 'But we said all along that Congress couldn't conceivably have passed a national policy without giving us authority to write national rules.'"); Greenburg & Van, *supra* note 40 ("Sprint Corp.'s general counsel, J. Richard Devlin, hailed the ruling as 'a total victory for consumers. Instead of a patchwork of state regulations, we'll have a uniform federal structure.'").

210. Only a week before, the Court denied certiorari on the incumbents' claim that sections 271 through 275 of the Act constituted an unconstitutional bill of attainder, after the Fifth Circuit rejected the argument. *See* SBC Communications, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999).

211. When the Act was passed, the ten largest local service providers controlled ninety-two percent of the $100 billion local telephone market. *See* H.R. REP. NO. 104-204, pt. 1, at 50 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 13. Clearly, they have every incentive to oppose the introduction of competition with all their corporate might.