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THE SOURCES OF STATUTORY MEANING:
AN ARCHAEOLOGICAL CASE STUDY OF
THE 1996 TELECOMMUNICATIONS ACT

John C. Roberts*

THANKS to Justice Antonin Scalia's tireless advocacy and persistence since arriving on the Supreme Court in 1986, the subject of statutory interpretation has enjoyed an unprecedented renaissance in recent years.¹ Legal scholars, philosophers, political scientists and judges have all participated in the debate, employing a variety of analytical tools and revealing a spectrum of views about the roles of courts, agencies, and Congress. This Article makes no pretense of advancing the theoretical discussion concerning the rival schools of statutory interpretation. Rather it seeks to shed light on the real world of statutory meaning through an in-depth case study of one current controversy.

One of the lessons emerging from a close reading of difficult statutory interpretation cases, and from the scholarly literature, is that all problems of statutory interpretation are not alike. Moreover, differences in the origin and characteristics of particular disputes over statutory meaning may justify different analytical approaches. This Article deals with one of the most challenging and difficult contexts in which the meaning of a statute may be brought into question. First, the case study involves a complex regulatory statute with a number of interrelated parts. Second, it involves a powerful and well-entrenched regulatory agency with established expertise in the subject matter. Third, it involves a technologically sophisticated subject. Fourth, the statutory terms at issue have a long history

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involving not only Congress, but the agency and the federal courts as well. Finally, the controversy affects important business interests and thus brings into play corporate and trade association actors often absent from these sorts of controversies.

Thus, the lessons drawn from this case study may be of limited relevance to a narrower dispute over statutory meaning. Since complex regulatory schemes are a frequent tool of the modern legislature, however, these more difficult interpretive tasks are increasingly common. And since this story involves some unique interpretative techniques, it may well have some more general lessons to teach about the process of establishing a particular meaning.

My title suggests an archaeological metaphor. Indeed, for complex disputes over statutory meaning that involve Congress, the regulatory agency, the courts, and powerful industry groups—all acting over many years—the process is much like excavation. The analyst must dig through layers of meaning to arrive at a clear understanding of the statute, just as the archaeologist finds older tools and pottery remains at many levels to help explain the development of modern-day civilization. The archaeological metaphor is helpful not in the sense that some concrete discovery lies at the bottom of the excavation that "solves" the interpretive puzzle, but rather in the more subtle sense that all discoveries at each layer of excavation must be pieced together in the end, and properly weighed, in order to illuminate meaning.

The plan of attack is as follows. Part I addresses the background and importance of a current controversy over the meaning of key definitional provisions of the Telecommunications Act of 1996. Part II explores the specifics of the current controversy and the positions of the parties on issues of statutory meaning. We will also describe a unique process employed in this situation to join the debate over statutory meaning among the various interests. Part III conducts an independent exploration—an archaeological dig, if you will—into the many sources of statutory meaning involved in this controversy, in order to evaluate the competing claims being made. Finally, Part IV looks at possible wider implications and general lessons.

It will soon be apparent that I am not entirely neutral in the current factional fighting between competing schools of statutory interpretation. I am most assuredly not a textualist follower of Justice Scalia. Indeed, the whole purpose of this Article is to explore sources of meaning that Justice Scalia would dismiss at the outset as both irrelevant and unknowable.2 As one who spent three years as General Counsel to an authorizing committee of the United States Senate and who teaches legislative process and administrative process to law students, I believe firmly that legislative history is both relevant and necessary in applying statutes to real world

situations. I join those, like Justice Breyer, former Judge Mikva, and others, who seek a more sophisticated use of legislative history materials and a deeper understanding of the legislative process as a background to statutory interpretation.\(^3\) In fact, as this case study shows, it may be necessary to broaden the inquiry even further in some especially complex disputes over statutory meaning. Just as Justice Scalia advocates in cases involving the meaning of some constitutional terms, we may be required to delve far beyond traditional pre-enactment legislative history in order to come up with a "right" answer. The intelligent interpreter must be willing to look at prior legislation, regulatory action before the passage of the language in question, earlier court decisions using the same words, and even industry arguments over the implications of particular choices of meaning. Thus, it is my bold assertion that the textualist would be lost in trying to answer the particular question posed in this case study—common sense, dictionaries, and statutory context provide little guidance, and I argue that it will often be so in disputes of this kind. Dig we must . . .

I. BACKGROUND

At the center of this particular study of statutory meaning is a bitter controversy among some members of Congress, the Federal Communications Commission, and industry groups over the meaning of several of the most fundamental terms in the Telecommunications Act of 1996 ("1996 Act").\(^4\) More specifically, the dispute is over the meaning and scope of two critical definitions in the legislation—"telecommunications"\(^5\) and "information service."\(^6\) As we shall see, the disagreement concerns not only the correct meaning of these two terms, but also their interrelationship—whether one category excludes the other. Far reaching regulatory, legal, and financial consequences attend the resolution of the controversy. Moreover, some unusual techniques have been used in the battle.

A. THE TELECOMMUNICATIONS ACT OF 1996

First, it is necessary to understand the statutory context of this dispute. The story begins with the enactment of the Communications Act of 1934

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(“1934 Act”), which created the Federal Communications Commission (“FCC”) and gave it power to regulate two quite different industries - telephones and radio. The 1934 Act was short and vague, an enabling statute in the old style that gave the FCC very broad powers with little substantive guidance, except the famous “public interest, convenience, and necessity” standard.

Over the years, the FCC's role changed drastically, especially as it struggled to deal with radio (later joined by television and cable). The FCC became the poster child for regulatory ineptitude in the difficult task of selecting broadcast licensees, and it repeatedly clashed with the D.C. Circuit over issues of substantive regulation. Until the 1984 Cable Act, Congress repeatedly ignored or rebuffed calls by the FCC and critics to amend and update the 1934 Act to provide guidance on emerging issues and technologies. The list is a long and sad one. In a whole succession of problem areas, the FCC struggled without clear congressional direction, often resulting in wasteful litigation, industry uncertainty, and regulatory chaos. The FCC lacked clear authority, for example, to deal with direct regulation of radio and television networks, and Congress failed to clarify its powers. Congress refused to clarify or codify the fairness doctrine, despite its great importance to the industry, leaving the FCC on its own. Further, it failed to amend the 1934 Act to deal with emerging technologies such as cable and microwave distribution of video signals, leaving the Supreme Court to develop an awkward auxiliary jurisdiction theory. Congress also allowed the FCC to stagger blindly into the area of competition in long-distance telephone service, even though the issue was of surpassing importance and cried out for legislative guidance. It forced the FCC to create quasi-copyright rules for cable transmission of televi-

12. The FCC's fairness doctrine had two distinct parts: an obligation to affirmatively cover important public issues, and an obligation to present contrasting points of view on those issues the station did cover. It was first formalized in Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The constitutionality of the fairness doctrine was upheld by the Supreme Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969).
13. The Court reasoned that the FCC could regulate activities that were reasonably necessary to carry out the core responsibilities of the Communications Act. Since cable had a profound impact on broadcasting, for example, it could be regulated under this “ancillary jurisdiction” theory. United States v. Southwestern Cable Co., 392 U.S. 157, 181 (1968).
14. In the late 1960s and early 1970s, the FCC allowed MCI and other new carriers to provide private long distance service to businesses. MCI then started its Execunet service, which resembled regular public long distance. The Court of Appeals rejected the Commis-
sion signals, when an amendment to the 1934 Act or the Copyright Act was certainly in order.\textsuperscript{15} Again, its failure to act led to efforts by the Supreme Court to legislate in the area, with disastrous results.\textsuperscript{16} Perhaps most egregious of all, Congress refused to give the FCC any guidance in its long and unsuccessful effort to give meaning to the public interest standard in the context of licensing.\textsuperscript{17}

While Congress did finally act in the 1980s with regard to FCC jurisdiction over cable\textsuperscript{18} and copyright liability,\textsuperscript{19} its general attitude toward the key statutory issues in telecommunications law until the 1996 Act is one of neglect.\textsuperscript{20} Perhaps its approach reflects the extreme sensitivity of regulating broadcasting, or an entrenched desire to leave discretion and policy in the hands of the FCC. Whatever the cause, the hands-off attitude toward the FCC's organic statute changed in the early 1990s, and a long period of legislative discussion culminated in the Telecommunications Act of 1996.

The 1996 Act amends the 1934 Act but is many times longer. Where the 1934 Act was vague and vested broad discretionary powers in the FCC, the 1996 Act is complex and specific, having something in common

\textsuperscript{15} They included regulation of distant signal importation by cable companies, rules restricting carriage of programming by cable companies that duplicated the programs of local broadcasters, rules requiring the carriage of local stations, and requirements for obtaining retransmission consent from broadcasters. See generally, John Thorne et al., \textit{Federal Broadband Law}, § 10.6 (1995).


\textsuperscript{19} See 17 U.S.C. § 111 (1976). The Supreme Court's interpretation of the Copyright Act created a situation intolerable to the powerful broadcast industry, and Congress eventually settled on a compromise—a compulsory license for retransmission of broadcast signals by cable companies.

\textsuperscript{20} Since 1934, Congress has frequently used the hearing process to influence FCC policy. Admittedly, the pressure of individual members on specific issues has often been intense. Thus, the point here is not that Congress lacked interest in FCC policy, but only that it rarely resorted to formal statutory clarification as a means of expressing its will.
with the most complex environmental statute. The new act is an amalgam of both regulation and deregulation, of both broad policy discretion and direct regulation of bewildering complexity, of both technological updating and glaring missed opportunities.

The avowed purpose of the 1996 Act is to create a new de-regulatory and pro-competitive paradigm in telecommunications. Its basic thrust is to obliterate old protectionist regimes for local telephone and cable service, and to encourage new competition. The legislation envisages local companies moving into long-distance, long-distance companies providing local service, the creation of entirely new telephone competitors, local companies entering the cable business, and the emergence of entirely new kinds of cable competitors. At the same time, the 1996 Act contains new and highly complex regulatory schemes—detailed rules on interconnection of new competitors with local telephone companies,\(^2\) complicated restrictions on local telephone companies' entry into long-distance,\(^2\) and four different regulatory options for telephone companies' entry into cable.\(^2\)

The attitude toward the FCC embodied in the 1996 Act is decidedly mixed. On the one hand, Congress dramatically reversed decades of indifference by mandating in detail certain new policy initiatives, leaving the FCC only to implement them. Local interconnection is an example of this attitude. On other, perhaps more politically sensitive issues, however, Congress left the FCC broad discretion, as in broadcast and cable ownership rules.\(^2\) In some areas, like universal service, Congress made some crucial policy decisions but at the same time left the FCC with a very complex and loosely defined job of filling in the gaps.\(^2\) Because the statute is so long and complicated, the FCC was left with a daunting task of carrying out a large number of difficult rule making proceedings within a very short time, an assignment that has stretched the Commission's physical and intellectual resources. Now, for the first time in its history, the FCC administers a long and complex statute, and has much of its regulatory agenda set directly by Congress.

This is not the place to make an overall assessment of the quality of Congress's handiwork in the Telecommunications Act of 1996. Critics have already begun to point out, however, that the Act was obsolete


\(^{24}\) Broadcast ownership rules are embodied in FCC regulations, while cable rules are found in statute, at 47 U.S.C. § 613 (c)-(f). Section 202 of the 1996 Act limits radio and TV ownership both nationally and in each market, and gives the FCC the power to reconsider and change them in section 202 (h).

\(^{25}\) The FCC may, for example, expand the definition of universal service itself, following general principles laid down in the statute. 47 U.S.C. § 254 (b)-(c) (Supp. III 1998). It may expand Congress's definition of entities required to contribute to universal service funding. 47 U.S.C. § 254(d) (Supp. III 1998). The FCC is also exhorted in the statute to develop new rules to promote new advanced services for consumers. 47 U.S.C. § 254(h)(2) (Supp. III 1998). Perhaps most important, the Act says nothing about costing rules for universal service, leaving that sticky issue to the FCC.
when it was passed, and that it failed to correctly predict where the combination of global business pressures and technological advances would take the newly converging telecommunications industry. Indeed, since the 1996 Act was developed by House and Senate committees in 1994 and 1995, it almost completely failed to anticipate the Internet and the impact that Internet-based telecommunications services would have on this complex web of technological and industrial development. Therein lie the seeds of the current controversy over the definitions of "telecommunications" and "information service."

B. The Triggering Issues—Universal Service and Advanced Services

To understand this controversy, it is necessary to understand the background of two long-standing telecommunications issues—universal service and the deployment of advanced services. For it is the impact of the 1996 Act on these two issues that triggered the current dispute.

1. Universal Service

Universal service is simultaneously a corporate goal of the old Bell System, a social policy pursued by the FCC and state public utility commissions, and now a statutory goal of U.S. telecommunications law. At the most fundamental level, it is a simple concept—that all Americans should have access to certain basic telephone services at affordable rates. It stems not only from the desirability of speedy communications for all households in an open democratic society, but also from the obvious economic benefit of having a telephone network that allows a caller to reach any other resident of the country quickly and cheaply.

26. Despite Congress's desire and hope, for example, local telephone companies have shown little interest in becoming head-to-head competitors with cable companies in delivering video programming. Therefore, cable companies are still largely monopolies. By the same token, Congress believed that requiring telephone companies to open their local markets to competition as a prerequisite to entering the lucrative long-distance market would motivate them to cooperate with local competitors, but that hope too has been largely unrealized. As of this writing, only one local company has qualified to enter the long-distance market. Instead of competing against one another, the regional Bell operating companies have opted to merge, so as to better compete globally. AT&T, instead of becoming an aggressive competitor for local phone service, has moved massively into cable by acquiring TCI and Media One, choosing the cable route into the home rather than the telephone line. This last strategy was not foreseen by the 1996 Act and creates a number of new policy issues which are outside the scope of this Article. The fierce battle over "cable access"—whether cable companies should be required to allow competing Internet service providers direct access to cable modem platforms—raises serious statutory questions which the 1996 Act simply cannot answer. The issue, though now of great importance, was not anticipated or dealt with by the drafters. Indeed, it is not even clear whether Internet access through a cable modem is a "cable service," an "information service" or a "telecommunications service" under the Act's definitions. Ultimately the federal courts may be asked to resolve this far-reaching question of telecommunications policy.

27. See generally THOMAS G. KRATENMAKER, TELECOMMUNICATIONS LAW AND POLICY 348-52 (2d ed. 1998).
Developed by the old unified Bell System, the modern concept of universal service responded to the fact that providing telephone service to some potential subscribers was disproportionately expensive—running a line to each home in rural areas, for example, is much more expensive than running lines to those in high-density urban areas. By the same token, it is more expensive per call for low usage homes to have long-distance service than for high-usage businesses. Because the Bell System owned and controlled the entire communications network, however, it possessed the means to keep rates low for basic residential service and for home long-distance service by cross-subsidization. As long as overall profits were satisfactory, it mattered little to the Bell System whether one part of the system paid below-cost rates, as long as another paid above-cost rates. Thus was born, with explicit and implicit support from the FCC and the state public utility commissions, a complicated system of cross-subsidies designed to keep down residential rates and spur expansion of the telephone system. The principal subsidies were: business use subsidizing residential, urban areas subsidizing rural, and long-distance callers subsidizing local service.

For many years this system worked well, though it was invisible to most consumers and lacked a statutory basis. The Bell System created the cheapest and most efficient telephone system in the world, allowing penetration of telephones in the United States to reach a level of almost 94% of all households. Granted, the cross-subsidies created problems for the Bell System in the government’s antitrust case leading to the system’s breakup. Despite the complicity of state and federal regulators, the cross-subsidies were viewed as anti-competitive and products of excessive market power. But while AT&T and the local Bell companies continued the same universal service policies after the system’s breakup in 1984, and the FCC in the 1980s created explicit funding mechanisms to stimulate phone hook-ups in low income areas, cracks began to appear in the rickety system of subsidies.

A series of FCC decisions in the 1960s and 1970s brought competition to the long-distance market. And it soon became apparent that universal service subsidies and competition were incompatible in the long run.

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28. By the 1950s, AT&T controlled 23 local Bell telephone companies, and owned minority stakes in two others, Cincinnati Bell and Southern New England Telephone. It also owned its own exclusive equipment manufacturing business, Western Electric, and a formidable research arm, Bell Labs. While there were many small telephone companies scattered around the country, some municipally owned, the only significant player was GTE. In sum, the Bell System served over 80% of U.S. telephone customers.


31. See supra note 14.
Since only established long-distance carriers paid into the universal service fund, and since long-distance rates embodied a built-in subsidy to local rates, new carriers could afford to offer much lower long-distance rates and still make a profit. While this advantage posed no immediate threat to AT&T, it allowed MCI, Sprint, and other competitors to quickly establish themselves by focusing on markets where AT&T's rates were unnaturally high.

Universal service thus presented both a problem and an opportunity for the drafters of comprehensive telecommunications reform legislation in the 1990s. The old network of implicit subsidies could not possibly survive the new regime of competition in local service. Incumbent carriers eventually would have to charge more cost-based rates or see their competitors take away business because of the presence of implicit subsidies. So a new method of supporting universal service was necessary. But this occasion for fundamental reform also presented the opportunity to redefine and expand the concept of universal service, and throughout the hearings on the new legislation there was much talk of expanding the definition of universal service beyond the provision of basic services—Plain Old Telephone Service ("POTS")—to a statutorily-based list of services including emergency services, touch tone dialing, and eventually Internet access. In addition, a group of Senators envisaged a related policy goal—to provide Internet access to schools, libraries, and rural health care providers, expanding the concept of universal service still further.

Thus was born Section 254 of the Telecommunications Act of 1996. That section made explicit the goal of universal service, giving it a statutory basis for the first time. Congress defined universal service as an evolving list of services, and delegated power to a new Federal-State Joint Board and to the FCC to define the term. It further provided that a wider group of entities would have to pay for the costs of universal service—not just established long-distance carriers, but "[e]very telecommunications carrier that provides interstate telecommunications services. . . ." For the first time, cellular telephone and paging companies and (by FCC addition) other wireless providers would broaden the revenue base for universal service. Absent from the list, as we shall see, are Internet service providers, creating the seeds of the controversy that stimulates this Article. Finally, Section 254 contemplates that after an un-

33. Backed publicly by Vice President Gore, Senators Snowe, Rockefeller, Kerrey, Exon, and others successfully added the "E-rate" discount plan for schools, libraries, and rural health care providers as Section 310 of the Senate bill, S. 652. It survived the House-Senate conference to become section 254(h) of the Communications Act.
specified transition period, the current system of hidden subsidies will be
replaced with a new open and understandable system.\textsuperscript{38} There will, in the
future, be no need to create non-cost-based pricing systems that are in-
compatible with a fully competitive telecommunications industry, and the
laudable national goals of universal service, expanded to include schools,
libraries, and rural health care providers, can still be realized.

2. Regulation of Advanced Services

The second background element necessary to understand the current
controversy is the thirty-year effort of the FCC to come to grips with the
computer age and to fashion a regulatory policy that incorporates ad-
vanced data processing into the traditional concepts of telecommunications. Unlike many other FCC policies over the years since 1934, its
efforts in this area have largely been well-considered and forward-
looking.

In sharp contrast to today’s exciting and technologically sophisticated
telecommunications industry, the old-style telephone business was the
epitome of uninteresting, highly regulated stability. Transmission of voice
telephone messages was considered by all to be a classic “natural monop-
oly” and was regulated as such by the FCC, state commissions, and the
Justice Department (through consent decrees). The Bell System domi-
nated American telephone communications, and was regulated under
common carrier principles developed for railroads. Key concepts in-
cluded the primacy of filed rates (tariffs), requirements of open access by
customers and non-discrimination between them, and public utility style
cost-of-service ratemaking.\textsuperscript{39} Telephone regulation was a sleepy legal
backwater, an accountant’s game, in contrast to the more exciting world
of broadcasting. Though there was considerable antitrust activity aimed
at the Bell System in the 1950s and 1960s,\textsuperscript{40} and the beginnings of compe-
tition in long-distance telephone service, the FCC’s first foray into the
technological future came in the mid-1960s, when it began to see the po-
tential of transmitting complex non-voice information over the public
switched telephone network operated chiefly by the Bell System.

The Commission initiated its first Computer Inquiry in 1966, at a time
when computers were giant centralized machines and companies used
their services largely through time sharing. Data processing services that
allowed interaction with data such as financial information were coming
on line, and of course, the data was made available to customers over
telephone lines. The Commission in its first Computer Inquiry attempted
to address two important questions—whether these new data processing
uses for the public switched telephone network should be regulated just

\textsuperscript{39} See generally MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS
LAW, ch. 2 (1992) [hereinafter KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW].
\textsuperscript{40} Id. at ch. 4. There were a number of private antitrust cases against AT&T, as well
as federal consent decrees issued in 1914 and 1956 aimed at anti-competitive practices.
as voice messages were, and whether the Bell companies should be allowed to offer such advanced telecommunications services themselves. After a lengthy public proceeding involving all of the relevant industry groups and outside experts, the FCC made a momentous decision in its 1971 Computer I decision—data processing services would develop in an unregulated environment, but the participation of existing telephone companies in these new businesses would be severely restricted. The issue was complicated, and the arguments over line-drawing are the same ones being deployed today. In order to define regulated and unregulated communications services under the Computer I structure, the Commission divided them into message switching (traditional voice telephone service), data processing (services in which information could be accessed, modified, or manipulated by the user), and hybrid services (combining the two concepts). Hybrid services were further divided into those principally involving messaging with some incidental computing (hybrid communications), and those principally involving data processing with some incidental messaging (hybrid data processing). The first form of hybrid service, hybrid communications, would be regulated like messaging. The second, hybrid data processing, would be exempted from regulation like full-fledged data processing. The FCC’s refusal to regulate data processing services under the Act was later upheld by the federal courts on review of Computer I.

In its 1970 and 1971 Computer I opinions, the FCC supported its regulatory decisions by arguing that the emerging computer industry was highly competitive, and that common carrier regulation under Title II might stifle innovation and retard the availability of new services (then only dimly perceived). It left open the possibility that it could impose some regulation under its ancillary jurisdiction theory should it become necessary. The Commission then decided to allow existing local telephone companies, because they were still monopolies, only highly restricted access to competitive businesses like data processing, lest they abuse their bottleneck power.

By the time the FCC returned to these issues in 1976, the computer industry was changing rapidly. Soon the centralized large computer would give way to the decentralized PC environment, and the types of different data processing applications available multiplied rapidly—sports scores, stock quotes, alarm monitoring, electronic publishing, voice answering services, and many others. In its Second Computer Inquiry, the FCC was forced to revisit its crucial line-drawing, while keeping in place

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42. See Computer I Tentative Decision, 28 F.C.C. 2d at ¶ 15.
43. See id. at ¶¶ 39-42.
44. See GTE Serv. Corp. v. FCC, 474 F.2d 724, 736 (2d Cir. 1973).
45. See Computer I Tentative Decision, 28 F.C.C. 2d at ¶ 23.
46. See id. at ¶ 36.
the deregulatory thrust of its original decision. In the Computer II decision, released in 1980, the FCC admitted that its attempt to sub-divide hybrid services into two categories based on whether simple message transmission or data processing predominated in the particular service was doomed to fail. The combinations were infinite, and the required distinctions were bogging down both the Commission and the industry. So the FCC, with strong industry support, made its second momentous decision, which formed the basis for the current controversy. It abandoned the hybrid services category altogether, and divided all communications services into just two categories—basic and enhanced. “Basic” services were defined as the core of the public switched telephone network traditionally subject to regulation, the “common carrier offering of transmission capacity for the movement of information.” Only the path was provided, with no control over the data transmitted. An “enhanced” service, by contrast, was “any offering over the telecommunications network which is more than a basic transmission service.” The Commission emphasized that it classed any service that involved acting on the content, code, protocol, or other aspects of the customer's information, or even just the ability to interact with it, as “enhanced.” This “contamination” concept—that any enhancement added to basic pipeline transmission function took the service out of the basic and into the enhanced category—became the cornerstone of the FCC's approach to advanced data processing services. The contamination idea recognized that all enhanced services have a basic transmission component, and even acknowledged that some enhanced services are very similar to regulated basic services. But the FCC argued that its regime was the only logical or legally defensible approach.

On the legal side, the Commission argued that its core regulatory authority under Title II of the Communications Act of 1934 extended only to common carriers. Though the term “common carrier” was not then (and is not now) actually defined in the 1934 Act, courts had developed over the years a pretty clear working definition. Common carrier services were those offered on the same terms to everyone, and provided no opportunity for the carrier to change the content of the information. In other words, common carriers offered pure transmission capacity. In the Commission's view, the new data processing services were quite different.

47. Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 F.C.C. 2d 384, 386 (1980) (Final Decision).
48. Id. at ¶ 93-96.
49. Id. at ¶ 97. The FCC later adopted a formal definition of “enhanced services” — “services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.” 47 C.F.R. § 64.702(a) (1998).
50. See Computer II Final Decision, at ¶ 122.
Companies offering them provided tailored services to each customer and had the power to act on the content and form of the customer's data to create more sophisticated information. Regulation of data processing, the FCC argued, might well take it beyond the authority over common carrier services in the 1934 Act.\(^5\) Even if the Commission could regulate these services under some ancillary jurisdiction theory, as necessary for comprehensive regulation of telephone companies, the FCC asserted the power to decline the exercise of that jurisdiction in the public interest.\(^5\)

On the policy side, the FCC reiterated its view from *Computer I* that the data processing business was highly competitive and needed no regulation. Forbearance, in its view, was necessary in order to unleash the highly innovative and fast changing computer industry. Moreover, its new framework had the added advantage of being simple, providing more certainty and predictability for the industry.

*Computer II* was upheld in all important respects by the D.C. Circuit in 1982.\(^5\) Critically for our story, the court upheld the FCC's legal conclusion that data processing did not meet the established definition of common carrier services, and that the FCC could decline to exercise its ancillary jurisdiction (even assuming it existed).\(^5\)

Complicating this development of a regulatory theory for computer services is the parallel antitrust case against AT&T, culminating in the 1982 settlement that broke up the Bell System. The Modification of Final Judgment ("MFJ")\(^5\) that ended the case allowed AT&T, which was to be separated from the regional Bell Operating Companies, into the data processing business with restrictions. It prohibited the twenty-three operating companies, soon to be combined into seven regional companies, from themselves engaging in data processing businesses, since they were thought to be natural monopolies in their service areas and therefore to exercise potential monopoly control over computer services on their networks. As illustrated in some detail below, the MFJ adopted definitions of telecommunications and information services that were substantively similar to those used by the FCC in its computer inquiries. In the administration of the consent decree over the next fourteen years, Judge Greene applied the same conceptual framework—data processing was to remain unregulated, and advanced data processing services were defined as essentially anything other than basic transmission service.\(^5\) The local telephone companies' participation in advanced services was still viewed with great skepticism, an attitude that probably hindered the develop-

\(^{52}\) See *Computer II* Final Decision, at ¶ 123.

\(^{53}\) See id. at ¶ 124-27.


\(^{55}\) See id. at 209-14.


\(^{57}\) See infra Section III (G).
ment of sophisticated new telephone services. Eventually the restriction was lifted, allowing the local companies to offer data processing through separate corporate affiliates.

II. THE DEFINITIONS ISSUE EMERGES

This section will explore the regulatory actions, industry changes, and technological advances that, in combination with the provisions of the 1996 Act, brought on the current controversy concerning the meaning and scope of the terms “telecommunications” and “information service.”

A. TECHNOLOGICAL AND BUSINESS CONVERGENCE

As the Federal Communications Commission began the long and difficult process of implementing the Telecommunications Act of 1996 in the two years following its enactment, it became obvious that the pace of technological change was deeply affecting both the overall structure of the 1996 Act and the specific regulatory strategies embodied in it. Many of these changes were well underway in 1995 when the legislation was taking shape, though their most far-reaching implications were not clearly seen by its drafters. These technological changes are now universally referred to by the shorthand term “convergence.” Convergence has many meanings, but its thrust is clear. All telecommunications content is increasingly being delivered by digital means, as a stream of zeroes and ones, instead of the old analog method. This convergence of transmission method is making possible other kinds of convergence. Voice, video, and data may now all be transmitted by the same means and are therefore increasingly interchangeable. This change is also transforming the telecommunications businesses formerly conceived as inhabiting different worlds. Cable companies can deliver telephone service and Internet access, telephone companies can provide Internet access, and it is possible to listen to radio stations and watch television on a home computer via the Internet, to mention just a few. Companies like Microsoft, NBC, AT&T, SBC, and Time-Warner increasingly see themselves as being in a variety of telecommunications businesses at the same time. Eventually, convergence may result in a home device that is a combination of a personal computer, telephone, fax machine, and television set. In such a world, the business competition will be among competing producers of

58. Ironically, as Kellogg, Thorne and Huber have pointed out, the antitrust case developed against the Bell system contained very little actual evidence on enhanced services abuses or competitive dangers. See Kellogg et al., Federal Communications Law, supra note 39, at 316-17.


“content” for such a device, and among competing lines into the home by which to connect the device to the wider world.

A prime example of a “convergence” technology arising largely after the passage of the 1996 Act is Internet telephony. Though the drafters of the legislation were aware of the Internet, and indeed included a provision encouraging development of the Internet in an unregulated environment, there is nothing in the extensive legislative history to indicate that they were aware of the new phenomenon of Internet telephony. For some time Internet users both possessing the same software have been able to communicate by voice. Only beginning in 1997 and 1998, however, was there serious consideration of telephone service using regular home telephone instruments that could be delivered via the Internet. By 1999, many argued that Internet telephony had the potential to supplant a good deal of traditional telephone service within the next ten years. Not surprisingly, this new technological marvel does not fit well into the regulatory scheme of the 1996 Act. Is it “telecommunications” like the POTS it resembles, and thus regulated under Title II? Or is it an Internet service, classed as “information service” under the Act and thus not regulated at all? These questions, as we shall see, are not just academic ones, since the proper classification of Internet telephony and other advanced services profoundly affects the FCC, universal service policies, the competitive balance between telephone and Internet companies, and the profit margins of some key corporate players.

B. Carrying out the 1996 Act—the FCC’s Regulatory Revolution

Implementing the 1996 Act was, and is, an enterprise of enormous scale. The FCC is statutorily required to carry out a number of complex rule makings, some with short deadlines, and has initiated numerous others on its own. The changes required by the broadcast and cable portions of the new legislation are relatively modest, but those required by changes to Title II are daunting indeed. The local telephone business must essentially be transformed from monopoly to competition, and a number of new approaches to regulation must be implemented under the


62. Earl Comstock, one of the principal staff drafters of the 1996 Act, maintained in conversations with the author that the staff members involved knew about and discussed such advanced phenomena as Internet telephony during the formation of the 1996 Act. The subject did not surface, however, during the extensive hearings in both houses.

63. There was extensive discussion about the future of Internet telephony during the FCC’s en banc hearing on February 19, 1998, held in conjunction with its Report to Congress on Universal Service. For excellent surveys of future competition in telephone services, including Internet telephony, see Telecommunications—Bypassing the Bells, WALL ST. J., September 21, 1998; Review of Information Technology, FIN. TIMES (LONDON), Oct. 7, 1998.

64. The FCC has placed on its web site a chart listing hundreds of pending and completed actions taken in implementation of the 1996 Act. It is divided into 27 different subject areas and contains hundreds of discrete regulatory actions.
intense scrutiny of industry groups and the states. The turf concerns are many, and all parties are prepared for costly and prolonged litigation to protect their interests.

The Commission's immediate implementation task under the Title II amendments in the 1996 Act involved three major areas—interconnection, access reform, and universal service. The FCC first tackled interconnection and finished its initial rules in late 1996. Its decision, elaborating the statutory ground rules for competition in local telephone service, raised a host of thorny legal and policy issues. The order was immediately challenged by a large group of industry and state PUC parties, and the FCC's position was largely vindicated by the Supreme Court in late 1998. These rules for the most part did not touch on the difficult issue of the relationship between the definitions of telecommunications and information services, and so are not directly relevant to our story.

The two other major areas of FCC rulemaking in the initial implementing stages, however, directly bear on the definitional controversy. The Commission conducted the rulemakings on access charges and universal service in tandem, and promulgated both decisions on the same day in May 1997. Each was a major undertaking. Over 200,000 pages of comments were filed by a bewildering array of parties—states, state regulatory agencies, federal agencies, schools and school associations, universities, libraries, non-profit public interest groups, and of course many corporations and industry trade groups. They addressed every conceivable issue raised by the difficult universal service controversy.

The access reform proceeding addressed head-on a series of the most obvious cross-subsidy mechanisms that the 1996 Act aimed to eliminate. They included the large access charges paid by long-distance carriers to interconnect with local phone companies, which are not cost-based and eventually must be eliminated or drastically overhauled. There are other access charges as well, all of them means of shifting revenues. Even assuming that the existing system is illogical and costly, however, some sort of access charge paid by computer services companies that use the local phone company's network of wires and switches to provide a service to customers makes sense. In this proceeding the FCC made a start toward eventually revamping this complex system, but left most of the traditional access charges in place for the moment lest the rates of residential subscribers be adversely affected. Most crucial for our discussion, it reiterated its Computer II decision that providers of data processing services

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66. As usual, the FCC's rules were savaged by the Court of Appeals but generally upheld in the Supreme Court. See Iowa Util. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997); AT&T Corp. v. Iowa Util. Bd., 119 S. Ct. 721 (1999).
were end-users like individual home subscribers or businesses. Since they were not analogous to interconnecting telecommunications companies, they paid no special access charges. In its discussion of these issues, the Commission expressed the view that the new definitional regime of the 1996 Act was the same as its *Computer II* regime.

The Universal Service Report and Order, our main focus, is over 500 pages long, and was preceded by a recommended decision of the Federal-State Joint Board on Universal Service that was the same length. The FCC's order addresses all of the goals for the nebulous concept of universal service, many of them conflicting, that Congress articulated in Section 254 of the 1996 Act. Among them are eventual replacement of implicit subsidies as a means of funding universal service with an open and understandable system of taxation; implementing a broader base of corporate contributors to universal service; providing sufficient funding for support of telephone service to rural and high-cost areas; finding new funding for expanded support for schools, libraries, and rural health care providers; achieving equity and competitive neutrality among both contributors and recipients of funding; and protecting the consumer from increased prices for telephone service. Many of the FCC's specific decisions are outside the scope of this Article, but they have provoked outcries from every quarter. Among the most controversial were the Commission's decision to create two quasi-public companies to administer the rural and school portions of the fund, its inclusion of both local and state revenues in the base for computing the amount an interstate telecommunications company will pay into the fund, the funding levels chosen and their effect on rates, its decision to allow schools and libraries to receive funding for backbone Internet access, and its choice of a forward-looking proxy cost model to determine contributions and support levels. These and other issues were the subject of a judicial review proceeding in the Fifth Circuit that generally upheld the Commission's universal service rules.

In a decision that brought about the present controversy, the FCC determined that it would not require Internet service providers or any other providers of "information services and enhanced services" to contribute to the universal service fund. Though some commenters argued that ISPs should be required to contribute, on the theory that they competed with traditional telephone companies, the FCC ruled that the definitional sections of the 1996 Act did not permit such a conclusion. The Commiss-
sion reasoned that while Internet access and similar advanced services were delivered by telephone wires, they were “enhanced” not “basic” services under its Computer II framework. It then went on to rule that the terms “enhanced services” used by the FCC and “information services” used in the 1996 Act were “substantially similar.” It further asserted that the regulatory regime it had been operating under since Computer II—broadly defining information services as anything other than pure common carrier pipeline service and deregulating them—would continue under the 1996 Act. Therefore, since ISPs and similar companies, including those who might deliver Internet telephony, were not engaged in “telecommunications” they could not be required to contribute to universal service funding under section 254 of the Act.

Foreshadowing the future controversy with Senator Stevens, the Commission noted in this crucial portion of its opinion that it had met with the Senator’s staff on these questions. It also noted that “the office of Senator Stevens” and a few other commenters had argued strenuously that “information services are inherently telecommunications services because information services are offered via ‘telecommunications.’” The opinion explained that since Internet services alter the form and content of the customer’s information, they cannot be “telecommunications” under the Act’s definition. They must be information services. Repeating the policy arguments made in Computer II, the Commissioners noted that Senator Stevens’s position would result in the imposition of Title II common carrier regulation on ISPs and other providers of advanced data processing services. This result is not only unwise, but also counter to the deregulatory thrust of the 1996 Act.

The implications of the FCC’s disposition of this issue and its interpretation of “information service” and “telecommunications” under the Act are far-reaching. As critics quickly pointed out, ISPs would have a competitive cost advantage against local telephone companies entering the Internet access business because ISPs would not pay access charges or contribute to universal service funding. The Commission also created another competitive asymmetry by ruling that ISPs could receive support from the universal service fund for providing certain services to schools and libraries, even though they were not required to make contributions. Finally, for the moment the FCC’s position meant that providers of the new Internet telephone service, even if it was substantially similar to traditional service in the eye of the consumer, would not contribute to universal service funding or pay access charges for the use of the local

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74. Id. at ¶ 789, n.2023.
75. Id. at ¶ 788. The Commission had earlier held that the two sets of definitions were substantially similar in its proceeding to implement the sections of the 1996 Act dealing with entry by local telephone companies into the long-distance market. See Implementation of the Non-Accounting Standards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 F.C.C.R. 21905, at ¶ 99-102 (1996) (First Report and Order).
76. Universal Service Order, supra note 67, at ¶ 788.
77. See id. at ¶ 789 n.2022.
78. Id.
C. CONGRESSIONAL REACTION AND SECTION 623

The FCC's May 1997 Universal Service Order, along with the earlier Non-Accounting Standards Order and follow-up decisions on universal service, set off a loud debate with its critics. Telephone companies complained that Internet companies were given a competitive advantage by being excluded from the contribution base for universal service, but at the same time were allowed to receive payments for providing access to schools, libraries, and rural health care providers under Section 254(h). This so-called E-rate program, estimated to involve up to $2.5 billion per year, was controversial in other ways. Because it was closely identified with Vice President Gore and the Clinton Administration's "information highway" rhetoric, it came under general attack from some Republicans, who referred to it as the "Gore Tax." At the same time, Senator Stevens and other congressional critics from western states were concerned that the new focus on schools and libraries would undermine funding for rural and high-cost telephone service that had always been the core focus of universal service policies. Still others, including some FCC commissioners, criticized the total amount of universal service funding on the grounds that it made it more difficult to reduce telephone service rates to consumers and businesses. In effect, they argued, the promise of lower rates through elimination of non-cost-based access charges would be

79. Later, in its Report to Congress, the FCC noted that phone-to-phone Internet telephony may well be indistinguishable from regular telephone service to the consumer, and if so, might have to be classified as a telecommunications service. It declined to definitively rule on this question, however, preferring to wait for a more developed record. See Federal-State Joint Board on Universal Service, 13 F.C.C.R. 11501 §§ 88-91 (1998) [hereinafter Report to Congress].

80. See infra note 120 (sources cited).


83. From the beginning, Commissioner Furchgott-Roth has been a vociferous opponent of the FCC's universal service policies, and especially its E-rate funding decisions. Commissioner Powell has raised concerns about the levels of funding for the E-rate program and the secondary priority given to rural and high-cost support. Both are Republican members. See, e.g., Federal-State Joint Board on Universal Service, FCC 99-121 (May 28, 1999) (Twelfth Report and Order on Reconsideration) (funding levels for E-rate) (Statement of Commissioner Furchgott-Roth dissenting) (statement of Commissioner Powell concurring in part and dissenting in part); Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, 13 F.C.C.R. 11810 (1998) (dissenting statement of Commissioner Harold Furchgott-Roth) (separate statement of Commissioner Michael K. Powell dissenting).
thwarted by offsetting larger payments to the universal service fund, and one of the main goals of the 1996 Act would be frustrated.

To make the Commission's life even more difficult, some telephone companies began showing universal service charges separately on their bills, making it look like a new telecommunications tax. This action caused individual consumers to write to their representatives in Congress. 84

Finally, the Commission's decision to create a separate Schools and Libraries Corporation to collect and distribute E-rate funds came under both legal and political attack. The GAO and congressional critics questioned the Commission's power to create a separate corporation for this purpose, and also feared that the separate structure was intended to favor this part of the universal service program. 85

Faced with these concerns, congressional critics, led by Senator Ted Stevens of Alaska, had several options. They could rely on public and private criticism of the FCC, in the time-honored tradition of jawboning, hoping that the commissioners would weaken and modify the universal service system. They also could attempt to enact amendments to the 1996 Act to force changes. These amendments might have included specific modifications of the definitions of "telecommunications" and "information service" to bring about the inclusion of ISPs in universal service. They might also have included new provisions to deal with the regulatory status of Internet telephony. Conversations with key staffers for Senator Stevens confirm, however, that Senators had no desire to amend the 1996 Act so soon after its passage. In any case, there was no congressional consensus on the issues of concern to Stevens and his allies. 86 After the Universal Service Order was adopted in May 1997, the departure of the FCC's strong chairman and three other commissioners raised some hope that the agency might reconsider these policy decisions.

There is little documentation of this period of informal jockeying, but Senator Stevens's strategy is discernable from telecommunications trade press reports and discussion with Hill staffers. He began talking publicly about holding up the pending nominations of William Kennard as Chairman and three others as new FCC members until his concerns about uni-

84. See, e.g., Ted Bridis, AT&T to Add 93-cent Monthly Fee to Bills, SAN DIEGO UNION-TRIB., July 19, 1998, at C-2; Mark Genrich, McCain Has the FCC's Number on Internet-Related Phone Fees, ARIZ. REPUBLIC, June 17, 1998, at B6; Mark P. Couch, Phone Customers Objecting to Universal Service Fees, FORT WORTH STAR-TELEGRAM, June 29, 1998, at 21. The FCC and the telephone companies have continued to bicker over the correct way to show universal service contributions on customers' bills.


universal service were addressed.\textsuperscript{87} This, of course, would have crippled the Commission and delayed any implementation of the 1996 Act. Senators Stevens and Burns in fact held up the nominations for a time, doubtless while behind-the-scenes negotiations took place. The trade press also mentions that Senator Stevens was suggesting a new statutory provision.\textsuperscript{88} The new provision took a different tack from that of amending the Telecommunications Act of 1996, and instead called for a formal FCC report on various controversial issues, including universal service.

The FCC nominations did go through later in October 1997.\textsuperscript{89} As the controversy swirled, however, Senator Stevens apparently used his considerable clout as ranking member of the Commerce Committee, which supervised the FCC and had drafted the 1996 Act, and his position as Chairman of the Governmental Affairs Committee, to persuade the House-Senate Conference Committee on the Fiscal 1998 Appropriations Act for the Departments of Commerce, Justice, State, the Judiciary and Related Agencies (including money for the FCC) in November 1997 to include this novel reporting provision. Considering the whole history of this episode, there is a strong hint that he was given this provision by the conferees, in the time-honored tradition of the House and Senate, for withdrawing his opposition to the FCC nominees.\textsuperscript{90} The Appropriations Act provision reads as follows:


(a) The Federal Communications Commission shall undertake a review of the implementation by the Commission of the provisions of the Telecommunications Act of 1996 (Public Law 104-104) relating to universal service. Such review shall be completed and submitted to the Congress no later than April 10, 1998.

(b) The report required under subsection (a) shall provide a detailed description of the extent to which the Commission interpretations reviewed under paragraphs (1) through (5) are consistent with the plain language of the Communications Act of 1934 (47 U.S.C. 151 et

\textsuperscript{87} See Panel Oks FCC Nominees; Stevens May Seek to Delay, \textsc{National Journal's Congress Daily}, October 8, 1997; Stevens May “Object” to Votes on FCC Nominees, \textsc{Communications Daily}, October 8, 1997.

\textsuperscript{88} See \textsc{Communications Daily Notebook}, \textsc{Comm. Daily}, Oct. 24, 1997.

\textsuperscript{89} 143 Cong. Rec. S11,312 (daily ed. Oct. 29, 1997).

\textsuperscript{90} Those familiar with the workings of the Senate know that its tradition of action by consensus and the phenomenon of the “hold” on nominations and legislation make it possible for a Senator to obtain a provision he or she desires on an unrelated bill by this means. It is much more difficult to translate a hold into a provision in a Conference Report, however, since assent by the House in advance would also be necessary. Given Senator Stevens’s powerful position, and the relatively harmless “report” requirement he was holding out for, it may well be that clearance was also obtained from the key members of the House for what became Section 623. House leaders hold their noses about such deals, because House rules are much stricter on the question of inserting unrelated matter into appropriations bills. House traditions on not inserting new matter in conference are likewise stronger than those in the Senate. Nonetheless, by a process now lost in the legislative mists, Section 623 magically appeared in the bill as finally enacted.
seq.), as amended by the Telecommunications Act of 1996, and shall include a review of—

(1) the definitions of "information service," "local exchange carrier," "telecommunications carrier," and "telephone exchange service" that were added to section 3 of the Communications Act of 1934 (47 U.S.C. 153) by the Telecommunications Act of 1996 and the impact of the Commission's interpretation of those definitions on the current and future provision of universal service to consumers in all areas of the nation, including high cost and rural areas;

(2) the application of those definitions to mixed or hybrid services and the impact of such application on universal service definitions and support, and the consistency of the Commission's application of those definitions, including with respect to Internet access under section 254(h) of the Communications Act of 1934 (47 U.S.C. 154(h));

(3) who is required to contribute to universal service under section 254(d) of the Communications Act of 1934 (47 U.S.C. 254(d)) and related existing federal universal service support mechanisms, and of any exemption of providers or exclusion of any service that includes telecommunications from such requirement or support mechanisms;

(4) who is eligible under sections 254(e), 254(h)(1), and 254(h)(2) of the Communications Act of 1934 (47 U.S.C. 254(e), 254(h)(1), and 254(h)(2) to receive specific federal universal service support for the provision of universal service, and the consistency with which the Commission has interpreted each of those provisions of section 254; and

(5) the Commission's decisions regarding the percentage of universal service support provided by federal mechanisms and the revenue base from which such support is derived.91

Section 623 is arguably the most interesting aspect of the current case study. On its face, it only requires the FCC to report to Congress on several regulatory issues that were causing controversy—the funding levels of universal service, the status of "hybrid" services like Internet access, and decisions about who must contribute and who can obtain funding support. The unique feature of this section, however, is its requirement that the FCC justify its interpretations of the 1996 Act and defend their consistency with "the plain language" of the Telecommunications Act. The FCC is specifically directed to justify its interpretations of "telecommunications," "information service," and other terms derived from those two, and to show their impact on the goals of universal service. The tone of the provision strongly suggests that Congress considers the FCC to be on the wrong track, and that its current interpretations of the statutory definitions are incorrect. Expressed as part of a duly enacted statute, these suggestions carry far more weight than similar views articulated by a powerful legislator alone. They surely carry more weight

than the views of certain members of a congressional committee expressed in a committee report. As we shall discuss more fully below, Section 623, particularly subsections (1) and (2), represents part of an extraordinary dialogue between Congress and the FCC about the meaning of a statute, and an effort by Congress to influence the agency's interpretive process as it carries out the Telecommunications Act. It has no counterpart, at least insofar as diligent research could confirm, in any other statute.92

Discussions with the key staff member who worked on Section 623 for Senator Stevens confirm its purpose.93 Given the changes on the Commission and the controversy over its Universal Service Order, there was some hope that the FCC would actually change its mind on such key issues as the separateness of the categories "telecommunications" and "information service." More realistically, Senator Stevens and his staff wanted to force the FCC to fully articulate its interpretations and to justify them, in the hopes that critics might eventually prevail as the flaws in the FCC's arguments were exposed. It is apparent that Senator Stevens was motivated by a genuine belief that the Commission's E-rate plan, its exemption of all ISP services from universal service funding, as well as its overall funding decisions, would profoundly weaken public support for universal service, ultimately harming his constituents in rural and high-cost Alaska. Moreover, he and his key staff experts believed that leaving Internet service providers outside the funding system would, given the projected growth of Internet telephony and other new services, slowly erode the funding base of universal service to the detriment of all Americans.

D. FCC Response to Section 623

Most scholars and practicing lawyers think of statutory interpretation as a process engaged in principally by judges and their law clerks, with help from traditional legal briefs filed by the parties. Increasingly, however, we have come to realize that much statutory interpretation takes place within administrative agencies, as the Supreme Court eventually recognized in Chevron.94 Little attention has been given to the process by which administrative agencies go about this interpretive function. In the case of the FCC, it is relatively common for the Commission to ask for comments on the meaning and scope of statutory terms as part of its normal rulemaking process under Section 553 of the Administrative Procedure Act.95 Presumably, the FCC then considers the legal arguments

92. But see infra note 218.
95. For example, the FCC asked commenting parties to help with its interpretation of the ownership provisions of the 1996 Act, and discussed their views in its recent order. See Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, Report and Order released August 6, 1999. 1999 WL 591756 (F.C.C.). Likewise the FCC
of outside parties along with the analysis of its own staff in making its interpretation of statutory terms. Courts under *Chevron* have generally not commented on the fact that the agency in question solicited outside help in making its statutory interpretation. Here, the FCC followed a much more complex, and perhaps even unique, process to deal with a difficult problem of statutory meaning.

In enacting Section 623, Congress did not specify any particular procedural requirements for the FCC to follow in formulating its “Report to Congress.” Indeed, similar reporting requirements have in recent decades become a common congressional tool for forcing the Executive Branch to articulate its position or for sidestepping a controversial issue. The whole subject of congressionally mandated reports as a species of legislative activity is an interesting one, lightly considered but beyond the scope of this Article. Though the FCC might have simply conferred with its own lawyers and policy staff and written its “Report” without outside consultation, it decided upon a very different course, creating a unique and multi-faceted dialogue focused in important part on statutory interpretation.

The FCC decided, after the enactment of Section 623 in November 1997, to follow Section 553 of the Administrative Procedure Act and use a notice and comment process. While not strictly rule-making, since it did not focus on the adoption of a legislative rule in APA terms, the process is the same.\(^\text{96}\) The FCC promulgated a public notice on January 5, 1998, requesting public comments on the questions listed in Section 623 and reprinting the text of the statutory provision. For convenience and clarity, the request for comments was made a part of Common Carrier Bureau Docket Number 96-45, the universal service rulemaking proceeding for which literally hundreds of thousands of pages of comments had already been received. In its eventual report, the Commission characterized the subsequent process as follows:

We are mindful that the proper implementation of these provisions is critical to the success and survival of the nation’s universal service system and, accordingly, have taken our obligations very seriously. In preparing this Report, we have sought and reviewed thousands of pages of public comments. We have considered more than 5,000 informal public comments filed via electronic mail. We have held two *en banc* hearings during which panels of experts – including representatives of the Internet community, telecommunications compa-

\(^{96}\) Section 551(5) of the APA defines rule making as the process for formulating, amending or repealing a rule. 5 U.S.C. § 551(5) (1994). The FCC often uses the informal notice and comment procedures of Section 553 for other kinds of policy making proceedings such as a Notice of Inquiry.
nies, educators and state officials – discussed their views with us concerning the interpretive issues surrounding the relevant provisions of the 1996 Act. Although many of the rules at issue have been in place for nearly a year, we have considered each rule and interpretation anew and without preconceptions, in light of both the plain language and overall purposes of the 1996 Act.97

Internally, the FCC formed an inter-office task force to work on the report, which had to be written in a very short period under the terms of Section 623. It included key staffers from the Common Carrier Bureau, the Office of Plans and Policy and other offices, and a law professor in residence at the FCC.98 The FCC specified that all ex parte contacts with Commissioners or staff members be reported in the docket. Thus, we know that extensive informal consultation went on between interested parties and staff members as the Report was prepared. A round of reply comments was added to help sharpen the issues.

The truly unusual aspect of this proceeding was the formal participation of congressional parties in the process. After enacting the statute and calling for the FCC to formally interpret it in accordance with its wishes, members of Congress then became directly involved in helping the FCC arrive at its interpretations. Senators Stevens and Burns submitted a letter in response to the January 5th call for public comments, which became the centerpiece of the discussion over definitions. This letter was not simply a routine communication from two Senators. Ted Stevens of Alaska was the most senior member of the Senate Commerce Committee, which oversees the FCC. He was then Chairman of the Governmental Affairs Committee, and later became Chairman of the Appropriations Committee. By any definition, he was one of the four or five most powerful members of the Senate. Conrad Burns of Montana was Chairman of the Communications Subcommittee of the Commerce Committee in February 1998, and like Senator Stevens had been a member of that key subcommittee during consideration of the 1996 Act. Moreover, Senator Stevens had been a key participant in drafting the 1996 Act, and was the author and sponsor of the Section 623 legislation that called for the Report to Congress. In addition, he was a key member of the Conference Committee that had hammered out the final form of the 1996 Act.

Senators Stevens and Burns made several main points in their letter, which the FCC and many other commentators focused on during the proceeding. The document is a mixture of legal and policy arguments. The senators purported to speak for the entire Congress, not just for themselves, and to convey to the FCC the "correct" meaning of the definitions of "telecommunications" and "information service" in the 1996 Act.99

98. Professor Jonathan Weinberg of Wayne State University Law School.
Their principal policy concern was that by retaining the conceptual framework of Computer II, the FCC was undermining long-range support for the Universal Service Fund, and thus support for rural and high-cost service areas such as those represented by Senators Stevens and Burns. This was so because the Commission's construction of "information service" under its contamination theory meant that all Internet access services and Internet telephony delivered to the home would be ineligible for support under universal service. They further argued that exempting such core services as Internet access and e-mail from the definition of "telecommunications" created a competitive anomaly: since these services did not pay access fees or universal service costs and since they were unburdened by regulation, they possessed an unfair advantage over similar services offered by telephone companies. The long-term result, argued Stevens, was that companies had an incentive to migrate such services onto the Internet, lowering universal service revenues.

The Senators' legal argument was more subtle. They contended that by replacing the FCC categories of "basic" and "enhanced" services, Congress intended to abandon the FCC's conceptual framework altogether. Indeed, the Stevens comments assert that the definitions of "telecommunications" and "information service" were intended to be entirely new. They were not meant to be mutually exclusive, as the FCC had held "basic" and "enhanced" were, but rather were intended to overlap. Certain information services also contained a telecommunications component, and thus were also "telecommunications services" under the Act. Because of this overlap in definitions, it was possible to categorize Internet access services and Internet telephony as "telecommunications." These services could thus be required to pay access and universal service charges and would be eligible for future universal service subsidies, ensuring that even homes in rural and high-cost areas had affordable Internet access. The Stevens comments make detailed arguments about the legislative history, which we explore below, but the overall thrust is clear—the FCC missed the main point of the definitions in the 1996 Act, and therefore distorted the entire modernizing thrust of the legislation.

Many of the other parties did not focus on these definitional issues raised by the Universal Service Report, but rather on the other contro-


102. Id. at 8.
103. Id. at 9.
104. Id. at 6.
105. Id. at 2.
106. Id. at 6.
108. Id. at 4.
109. Id. at 10.
versial matters listed in Section 623. By one count, thirty-four parties commented on the definitions, of which twenty agreed with the FCC and fourteen with Senator Stevens. It is not hard to guess the positions taken by the corporate and trade association commenters. Internet and information service companies and trade groups generally supported the FCC interpretation, stressing that allowing an overlap of the definitions of "telecommunications" and "information service" would cause uncertainty and subject the Internet to Title II regulation, which Congress had clearly wanted to avoid. To the extent that they addressed the legislative history, these parties stressed the lack of Congressional expression of intent to overturn the FCC's conceptual framework and the origins of the definitions themselves. Telephone company commenters, on the other hand, generally argued that it was unfair to exempt Internet access providers from paying universal service and access charges, even though their services closely resembled traditional telecommunications services. They particularly stressed the anomaly of Internet telephony, which would have a similar impact on the public switched telephone network as compared with conventional long-distance service, but would not pay comparable charges. Echoing Senators Stevens and Burns, these parties argued that the FCC was clinging to outmoded concepts and that its framework would be unable to cope with rapid technological change, which was merging the concepts of basic and enhanced services. Their legislative history arguments closely tracked those of Senators Stevens and Burns.

A number of other parties took part in the proceeding, but most did not focus particularly on the definitions question. These parties included various states and the National Telecommunications and Information Administration, an executive branch agency in the Department of Commerce.

Other members of Congress also submitted comments on the definitional issues. Senator McCain, then Chairman of the Commerce Committee and one of the crucial players in the enactment of the 1996 Act, submitted comments supporting the FCC's position and rejecting the legislative history arguments made by Senators Stevens and Burns. His main concern seemed to be that Congress was intent on keeping the Internet unregulated, and that the Stevens interpretations would subject it

110. See, e.g., Letter from Harris N. Miller, President, Information Technology Association of America, to the Hon. William E. Kennard, Chairman, FCC 1 (Feb. 27, 1998) (particularly good on legislative history issues); Comments of America Online, Inc. 2 (Jan. 26, 1998); Comments of Compuserve, Inc. 8 (Jan. 26, 1998) (all available in FCC Electronic Comment Filing System <http://www.fcc.gov/e-file/ecfs.html>).


to Title II, or at the very least, great regulatory uncertainty.\(^\text{113}\) He explicitly backed the FCC’s interpretation of the legislative history. Senators Ashcroft, Ford, Kerry, Abraham, and Wyden submitted a bipartisan letter taking generally the same position and emphasizing that nothing in the legislative history indicated congressional intent to radically change the definitions scheme.\(^\text{114}\) Congressman Rick White, one of the most outspoken advocates for the Internet in Congress and a member of the Telecommunications Subcommittee of the House Commerce Committee, submitted comments emphasizing the importance of allowing the Internet to develop free of government regulation.\(^\text{115}\)

The FCC held two days of oral argument in February 1998 on the issues in the Report to Congress. One day was centered almost solely on the definitions questions and advanced services such as Internet telephony. Senator Stevens’s former telecommunications staffer, Earl Comstock, was the star witness on February 19, 1998. He forcefully argued the Stevens-Burns position and was treated by the Commissioners as one of the most knowledgeable people in Washington on the legislative history of the 1996 Act.

In formulating its Report to Congress, the FCC found itself in a delicate position. The subject of universal service aroused passions on Capitol Hill, yet prominent members were pulling from opposite directions. The newly confirmed members of the Commission could not afford to

\(^{113}\) Id. at 2.

\(^{114}\) Letter from U.S. Senator John Ashcroft et al., to Hon. William E. Kennard FCC 1 (March 20, 1998) (available in FCC, Electronic Comment Filing System, Proceeding 96-45 <http://www.fcc.gov/e-file/ecfs.html>) [hereinafter Ashcroft Letter]. These Congressional communications arguing for differing interpretations of the 1996 Act raise interesting questions when measured against the usual standards of legislative history analysis, which attempt to assign weight to a member’s statements based on his or her role in the original enactment of the language. Here the commenters are a decidedly mixed bag of key players and newcomers. Senator Pressler, who as Chairman of the Commerce Committee in 1995-96 played a key role in formulating the legislation, was no longer in the Senate in 1998. Senators Ashcroft and Kerry were members both of the Commerce Committee and the Communications Subcommittee, and continued in those positions into the 105th Congress. Senator Ford was a member of the Committee and Subcommittee in 1995-96 but was not on Commerce at all when the letter was written. Sen. Abraham was in the Senate in 1996 and joined the Commerce Committee in 1997; at the time the letter was written, he was a member of both the Committee and the Communications Subcommittee. Sen. Wyden was a new member of the Senate Commerce Committee and Communications Subcommittee, but had been on the House Commerce Committee during consideration of the 1996 Act (not a member of the Telecommunications Subcommittee). Whose views should be given more weight? Which members were the most conversant with the intended meanings of the definition sections?

antagonize the powerful Chairman of the Senate Governmental Affairs Committee, Senator Stevens. But they had to live on a daily basis with the equally influential Chairman of the Commerce Committee, Senator McCain, who opposed the Stevens view of the 1996 Act. A vocal and powerful group from both sides of the Hill was ready to pounce on the FCC at the first mention of regulating the Internet. Senators from sparsely populated states wanted major emphasis given to universal service support for rural and high-cost areas, and an equally vociferous group stood guard over the new E-rate program.

According to conversations with staff members who worked with the FCC Task Force, the staff worked mostly on its own from January to March 1998, keeping in touch with the Commissioners' personal staffs and meeting occasionally with various interested parties to discuss the issues. Representatives of the Task Force met with Stevens's key staffer, Earl Comstock, and held some general briefings for Capitol Hill staff. As is the FCC's usual procedure, the first draft of the Report was prepared for Chairman Kennard and only circulated to the other Commissioners three weeks before the meeting at which the FCC voted on the Report. Kennard, formerly FCC general counsel, was undoubtedly familiar with the crucial legal arguments. At the time it was circulated to the other Commissioners for comments, the staff draft contained some unfinished sections, dealing with controversial topics that would probably be dealt with by the Commissioners themselves anyway. The definitions section, our principal concern, was not particularly controversial, and apparently did not undergo significant change in the reworking process that led to the final Commission version.

The finished Report to Congress is important for its style and tone as well as for its resolution of contested issues. The tone is conciliatory, and takes the arguments of Senator Stevens and other critics seriously. The 157-page document is extremely careful and thorough in its arguments, exhibiting what seems to be a genuine willingness to amplify and even reexamine the positions the FCC had already taken in its universal service and access charge proceedings. It even comes close to conceding that phone-to-phone Internet telephony might have to be regulated as a telecommunications service—paying access charges and making universal service contributions, though leaving final resolution of that issue for later.

On the merits of the definitions issue, the Commission stands firm. It notes the vital importance of the contested definitions as follows: “All of

116. Telephone conversation with Jonathan Weinberg, Professor, Wayne State University Law School (July 1999). The general characterizations of the process and the contents of the draft report in this section come from the Weinberg conversation and from a conversation with Melissa Waksman, team leader of the FCC task force, in September 1999.

117. See Report to Congress, supra note 79, at ¶¶ 83-93. The Report deals at length with the other controversial issues addressed in Section 623, such as which entities will pay into the fund and receive funding from it and the percentage of federal funding, but these are not the focus of this Article.
the specific mandates of the 1996 Act depend on application of the statutory categories established in the definitions section.\textsuperscript{118} While conceding that the interpretive issues are difficult, the Report argues that its earlier decisions were correct: "telecommunications" and "information service" are mutually distinct categories under the 1996 Act, roughly equivalent to the FCC's own "basic" and "enhanced" categories.\textsuperscript{119} In addition to dealing with each of the items of legislative history raised by Senator Stevens and others, the Report takes pains to argue that the FCC's interpretation of these terms will not harm universal service. It once again analyzes at length the Commission's own regulatory history and that of the MFJ process, repeatedly referring to the basic goal of the contamination theory as articulated since Computer II: to keep the Internet and all other information services free of burdensome regulation.

The Commission's political strategy is clear from the text of its Report to Congress: impress its critics with the thoroughness of its analysis; emphasize its intention to preserve and strengthen universal service; and treat its opponents' arguments with respect, without giving ground on the merits, hoping that the criticism from Congress will diminish over time. While this has apparently happened with regard to the definitions controversy, it clearly has not been the case with regard to its broader universal service policies. Through 1999, the agency continued to be buffeted by criticism about various aspects of universal service from Senator Stevens and others.\textsuperscript{120} Calls for reorganization of the FCC and other draconian measures mark this period as one of the worst for the Commission's relations with Congress.

\textsuperscript{118} Id. at \S 21.
\textsuperscript{119} See id. at \S\S 13, 21-32.
\textsuperscript{120} See, e.g., FCC Must "Redo" Universal Service Funding Plan, Senate Aide Says, COMM. DAILY, June 22, 1998 (reporting telecommunications seminar including Senate staffers and Commissioner Furchtgott-Roth); Furchtgott-Roth Blasts FCC's Universal Service Plans, COMM. DAILY, May 18, 1999 (reporting Commissioner Furchtgott-Roth's speech blasting FCC universal service policies); Frank James, Divided FCC Hikes Funding for Linking Schools to Internet, CHIC. TRIB., May 28, 1999, at 3 (reporting controversial FCC decision to increase funding for E-rate program); Notebook COMM. DAILY, Apr. 9, 1999 (stating arguments over aspects of E-rate plan); Senate Panel Wants FCC to Revamp Universal Service Funding, COMM. DAILY, Mar. 18, 1998 (reporting Senate Appropriations Committee vote to require FCC to restructure universal service administration); Senate Wants New E-Rate Investigation, COMM. DAILY, June 11, 1999 (reporting Senate Appropriations Committee vote on new E-rate investigation); Senators Eye July Action for New USF Assault, COMM. TODAY, June 26, 1998 (explaining rural state Senators planned assault on universal service); Senators Suggest Expanding Universal Service Contributions, COMM. DAILY, April 23, 1998 (explaining Senators' arguments that providers of advanced services should contribute to universal service); David L. Sieradzki & Michele C. Farquhar, Universal Disappointment: Effort to help Rural and Low-Income Consumers Has Gone Awry, LEGAL TIMES, May 3, 1999, at S34 (criticizing generally FCC's universal service policies); Paul J. Sinderbrand & Robert G. Kirk, Telephony Triggers Oversight, LEGAL TIMES, May 3, 1999, at S39 (stating FCC's problems with the Internet).
III. THE SEARCH FOR STATUTORY MEANING

With the long and complex background of this dispute behind us, it is now time to uncover the multiple layers of meaning that lead to the solution to our interpretive problem. Simply stated, the key question is whether the definitions of "telecommunications" and "information service" in the 1996 Act describe two mutually exclusive categories, and whether the demarcation line between the two categories is the same as that maintained by the FCC since Computer II. To return to the archaeological metaphor we began with, it is now necessary to uncover and examine carefully each occasion on which the language in question has been used by Congress, the FCC, and the courts, and to see what light those uses shed on the definition sections of the 1996 Act. Each of these layers of meaning adds something to our overall understanding.

A. THE PLAIN STATUTORY TEXT

Whether a judge is described as textualist or intentionist, she usually starts with the so-called "plain meaning" of the statutory terms in question; indeed, common sense dictates that we make an effort to discover whether our supposedly sophisticated question of statutory meaning is in fact easily answered by the text itself.

As we have seen, the terms "telecommunications" and "information service" are absolutely crucial to the application of the statutory scheme enacted by Congress in the Telecommunications Act of 1996. Many of the important regulatory requirements of the Act turn on whether an entity is delivering one service or the other.\(^{121}\) Moreover, the related terms "telecommunications service" and "telecommunications carrier," also important touchstones of regulation under the Act, are derived from "telecommunications" and thus depend on it for their meaning. None of these terms was defined in the original 1934 Act. The newly added definitions are found in Section 3 of the 1996 Act, codified as 47 U.S.C. § 153:

(20) Information Service. The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.\(^ {122} \)

(43) Telecommunications. The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.\(^ {123} \)

\(^{121}\) For example, the requirement of interconnection with competitors in section 251 of the 1996 Act applies only to telecommunications carriers and telecommunications services. 47 U.S.C. § 251 (Supp. III 1998).


Telecommunications Carrier. The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.¹²⁴

Telecommunications Service. The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.¹²⁵

Do the definitions themselves, then, determine clearly which interpretation of the statutory language is correct—the FCC's or Senator Stevens's? At the outset it is clear that these are terms of art, without any common meaning obvious to the layman. Indeed, the meaning of "telecommunications" is especially troublesome. For many years that term was used exclusively to refer to the telephone business, but more recently it has come into currency as an over-arching term referring to broadcast, cable, and telephones. The 1996 Act itself, which uses the term "telecommunications" but encompasses all three areas, is illustrative of this point. But its predecessor was titled the "Communications Act of 1934," though it also covered broadcast, telephone, and cable regulation. As for the other terms, it is hard to see how terms like "information service" and "telecommunications carrier" could have a commonly understood meaning outside the world of the FCC.

Likewise, the words themselves do not seem to resolve the central question whether the two key concepts of telecommunications and information service are mutually exclusive. Common sense would certainly suggest that the telecommunications definition above excludes many types of computer services, since the user would not always specify the routing of the information (or even be aware of it), and it would be obvious that the form and content of the information is changed by the computer processing applications. On the other hand, "without change in the form or content of the information as sent and received" seems to suggest that some incidental changes to the information along the way would not take a service out of the "telecommunications" category.

The "information service" definition seems to refer to add-on functionality that is delivered by means of telecommunications ("making available information via telecommunications"), which certainly suggests that they are two different things. On the other hand, the Stevens argument that some information services are mostly information transmissions with only a small functional add-on does not seem entirely inconsistent with this

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definition. In his comments, Senator Stevens points to the limiting words "as sent and received" in the definition of telecommunications as evi-
dence of congressional intent to change the FCC basic/enhanced concep-
tual dichotomy, and to include certain types of computer processing
under the rubric of telecommunications.\textsuperscript{126} The argument collapses, how-
ever, when we note that the "as sent and received" language was not new
to the 1996 Act. In fact, it first appears in the MFJ definition of telecom-
munications in 1984, and was viewed by Judge Greene as consistent with
the FCC's definition of basic service.\textsuperscript{127}

Finally, the second sentence in the definition of "telecommunications
carrier" is certainly suggestive of the Stevens interpretation, since it sug-
gests that "telecommunications" and "information service" can be inter-
twined. It would not be necessary to point out that in such a case a
carrier will only be a telecommunications carrier "to the extent that it is
engaged in providing telecommunications services" if the two concepts
were totally separate. On the other hand, it is possible to interpret this
phrase to refer only to a particular business entity that provides both
types of services to customers, as indeed the Bell companies do. Part of
its business, in other words, could be regulated under Title II as telecom-
munications and the rest would be unregulated information service.

In fact, analysis of the bare language does not yield a clear answer to
the subtler point at issue. It is simply not possible to ascribe clear mean-
ing to the key phrases "as sent and received" or "via communications,
for example, without examining the origin of the language, how similar
provisions have been understood in the past, and the intentions of the
drafters of the 1996 Act.

Even broadening one's search, as a textualist would, to an examination
of the rest of the 1996 Act does not add much clarity. The Act makes
some other references to "telecommunications and information serv-
ices,"\textsuperscript{128} which might suggest that they are separate categories, but these
references do not clearly rule out the kind of modest overlap in the defi-
nitions argued for by Senator Stevens. They certainly do not negate the
subtler point sometimes made as an alternative theory — the definitions
do not overlap, but the dividing line between them has been moved from
the position outlined by the FCC before the 1996 Act was passed. Sena-
tor Stevens in his letter argues that the drafters' addition of the new defi-
nition of "telecommunications carrier," which did not exist in the 1934
Act, and their omission of a definition of "information service carrier" in
and of themselves show a desire to create a new conceptual frame-
work,\textsuperscript{129} but these seem like obvious makeweights. All of these defi-
nitions are new to the Act, so defining "telecommunications carrier" is not

\begin{itemize}
\item \textsuperscript{126} Stevens & Burns Letter, \textit{supra} note 99, at 3-4.
\item \textsuperscript{127} See MFJ discussion, \textit{infra} note 179 and accompanying text. The difficult subject of
protocol conversion and its relation to telecommunications and information service has
been omitted from our discussion for simplicity.
\item \textsuperscript{129} Stevens & Burns Letter, \textit{supra} note 99, at 3-6.
\end{itemize}
surprising. It specifies the category of entities subject to extensive Title II regulation, so its contours are important. Since providers of information services are not common carriers, but unregulated end-users of common carrier transmission services, it surely did not seem necessary to create a definition of “information service carrier;” the term would have no function under the Act’s scheme.

Senator Stevens points to another textual change that, in his view, shows the intent of Congress to include Internet service providers and Internet telephony in the telecommunications category. In addition to adding the new definitions described above, the House bill amended the existing definition of “telephone exchange service.” To the existing words that define a telephone exchange service as “service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange,” the House bill as drafted and reported added an alternative definition: “or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service. . . .”

Unfortunately, there is nothing in the House Committee Report or in the floor debate to explain the purpose of this change. In conference, the amendment was accepted without explanation. In its report the FCC notes this lack of explanation, and suggests that the best interpretation of this amendment is much simpler—it was merely intended to recognize that telecommunications services by telephone companies could be delivered by means other than traditional land lines. Thus, the new definition makes it clear that high-tech wireless exchange service is still covered by the Act. While this amendment is somewhat troubling to the advocates of the FCC’s position, it is difficult to believe that such a small change, without explanation, could signal a complete rejection of the FCC’s traditional Computer II conceptual framework.

The only other section of the 1996 Act that may shed light on the central policy debate is section 230(b)(2), which was part of a provision called “Online Family Empowerment” grafted onto the telecommunications reform bill at the last minute in the House and later adopted by the conferees. This section is drafted like a separate bill. The relevant language, along with the preliminary finding, is as follows:

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130. See id. at 2.
134. As noted in Section F infra, the same language appeared in earlier House and Senate bills.
(a) **Findings.** - The Congress finds the following:

... 

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

... 

(b) **Policy.** It is the policy of the United States to:

(2) preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unlettered by State or Federal regulation.\(^{136}\)

This language is cited by the Commission in its report\(^ {137}\) by Senate Commerce Committee Chairman McCain,\(^ {138}\) and by House Internet advocate Rick White\(^ {139}\) as evidence of Congress's intent to preserve the FCC's distinction between regulated basic services and unregulated enhanced services, albeit with different terminology. It certainly lends support to this philosophical position, but of course begs the question whether the Stevens interpretation of key definitions would actually harm or even unduly regulate the Internet. Stevens's position is that the FCC can still use its forbearance authority to keep the Internet free from burdensome regulation.\(^ {140}\) It seems clear, however, that the Stevens position would lead to some regulation of information services under Title II, including the Internet, and would therefore run afoul of this general statement of Congressional concern. Whether such an abstract statement of policy can resolve a highly technical question of statutory interpretation is another matter.

**B. The Conference Report**

The next logical place to look for answers to our interpretive problem is the next layer down in the archaeological history of the 1996 Act, the House-Senate Conference Report, and its accompanying Joint Explanatory Statement of the Committee of Conference. Such joint statements explain, to the extent the conferees wish to explain, how the final form of the legislation emerged from the differing House and Senate bills, and why particular portions of each were chosen for inclusion.\(^ {141}\) They can be extremely helpful in answering questions of statutory meaning as under- 

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\(^{136}\) H.R. 1555, §§ 104(a)(4), (b)(2).

\(^{137}\) Report to Congress, *supra* note 79, at ¶ 95.


\(^{141}\) H.R. REP. No. 104-458 (1996), *reprinted in* 1996 USCAN 124. Though the Conference Report is technically only the text of the proposed Act as presented to both houses for final passage, I follow common usage in referring to both the text and the Conferees' explanation as the "Conference Report." Language in conference must be agreed upon by a majority of each house's conferees. While the rules restrict conferees from introducing new matter or compromising outside the scope of textual disagreement on a particular number or item, in practice there is considerable latitude.
stood by the conferees, who were by definition key players in the horse trading that resulted in the final legislative language. Unfortunately, joint statements need not explain each crucial choice made by the conferees, and often for political reasons do not. In addition to explaining why something was done in conference, however, the conference report must be mined for another type of evidence: the decisions conferees make in accepting or rejecting language from one bill or the other. Everyone who has ever tried to interpret a conference report knows that it is perilous business to judge by such actions, without accompanying explanation, but they constitute a type of evidence of intent that cannot be ignored entirely. And since they represent the final phase in drafting a piece of legislation, they are especially significant in establishing the meaning of statutory language.

In our case, the conference report says nothing at all about the key point at issue, the relationship between the definitions of telecommunications and information service. It neither adopts the Stevens theory nor rejects it. As for the definitions, the joint statement first summarizes the approaches of the House and Senate, and then concludes as follows: "Section 3(a) of the conference agreement both amends and adds definitions to Section 3 of the Communication Act . . . . The Senate recedes to the House with amendments regarding the definitions of 'Bell Operating Company,' 'exchange access,' 'information service,' and 'local exchange carrier.'" 142 In contrast, "the House recedes to the Senate with amendments with respect to the definitions of 'number portability,' 'telecommunications,' 'telecommunications carrier,' and 'telecommunications service.'" 143

The conferees did not explain either the nature of or the reasons for the amendments to the House or Senate definitions incorporated into the final bill. We must, therefore, look to differences in the language to shed light on this interpretive problem.

As for telecommunications, though the conferees selected the Senate version with amendments, the two versions were so similar that it is hard to ascribe much meaning to their choice. The House definition reads:

[T]he transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without change in the form or content of the information as sent and received, by means of an electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission. 144

Similarly, the Senate version defines telecommunications as: "the transmission, between or among points specified by the user, of information of the user's choosing, including voice, data, image, graphics, and

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143. Id.
video, without change in the form or content of the information, as sent and received, with or without benefit of any closed transmission medium.”

The changes of the Senate definition include deletion of the phrases “including voice, data, image, graphics, and video” and “with or without benefit of any closed transmission medium.” As modified, it is almost identical to the first part of the House definition. As we shall see, it is also closer to the MFJ definition. None of these changes are consequential, and it is hard to argue that the House and Senate versions were ever materially different.

As to the definition of “information service,” the House version prevailed. Though the joint statement refers to adoption of the House language with amendment, there is no difference between the House definition and the final language. The rejected Senate version is close to the FCC’s Computer II language. It is basically the same as the House version, except that it clarifies the status of protocol processing—it is clearly an information service. By contrast, the House version does not specify the status of protocol processing, an omission considered important by Stevens in his argument to the FCC.

In his letter to the Commission during the Section 623 proceeding, Senator Stevens made much of the refusal of the conferees to accept the House definition of telecommunications services, which explicitly excludes information services. Stevens staffer Earl Comstock relied heavily on this point in oral argument before the Commission during the proceeding. A glance at the House and Senate definitions shows that adoption of the House language would have clinched the argument that the two categories were intended to be mutually exclusive. The House version defines telecommunications services as:

the offering, on a common carrier basis, of telecommunications facilities, or of telecommunications by means of such facilities. Such term does not include an information service.”

The Senate version provides that telecommunications services are: “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used to transmit the telecommunications service.”

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146. See infra, Section III (G) (discussing the Modification of Final Judgment leading to the 1984 breakup of the Bell System).
148. As noted in footnote 127, the issue of protocol processing is being omitted for simplicity.
150. See Report to Congress on Universal Service En Banc, transcript at 24 (Feb. 19, 1998) (statement of Earl Comstock, former special counsel for telecommunications to the Senate Commerce Committee) [hereinafter Testimony of Comstock].
152. S. 652, 104th Cong. § 8(b)(mm) (1995).
If the conferees had simply deleted the second sentence of the House definition from a portion of the statutory text, the argument that they intended to reject the meaning embodied in it would be strong. But here their action was to choose one entire definition over the other—they adopted the Senate definition of this critical term. No explanation was given, and no statement was made that the conferees considered telecommunications and information service to be overlapping categories. Nor does the accepted Senate definition speak to the question of overlap. In its Report to Congress, the FCC argues that we simply do not know why the conferees took one definition over the other—since the Senate definition is close to the MFJ version, it might have been for consistency. In order to shed additional light on this question, it is necessary to examine the Senate Report to see how the Senate interpreted its definition of telecommunications services, which is the definition that made its way into the final version of the legislation.

C. THE FLOOR DEBATE

There is virtually no discussion of these definitional issues, or the policy disagreement which underlies them, in the House or Senate floor debates. If it means anything, this absence of discussion about the relationship between information service and telecommunications and its implications for universal service makes it hard to accept the Stevens argument that the 1996 Act represents a rejection of a long-standing FCC and court interpretation of these concepts. But if, as Stevens argues, his overlap theory wasn't clarified until the conference, the absence of debate might be more understandable (though in process terms more troublesome).

Only in one case is a significant definitional change made in floor debate. The Senate amended the definition of “telecommunications service” in the reported bill by deleting the language specifying that a telecommunications service “includes the transmission, without change in the form or content, of information services and cable services, but does not include the offering of those services.” Stevens argued that the deletion of this language bolsters his overlap theory, since its inclusion would have clearly supported the mutual exclusivity of information services and telecommunications. Earl Comstock wrongly argues that the language was deleted by the conference, lending greater support to the Stevens version of how the “new” definitions were hammered out. In fact, as the FCC Report points out, the provision was deleted by the Senate before final passage of its version, not in conference. The question,

155. See Stevens and Burns Letter, supra note 99, at 5.
156. See Testimony of Comstock, supra note 150, at 24.
157. See Report to Congress, supra note 79, at ¶ 43.
therefore, is whether that action indicates Senate acceptance of the overlap theory.

Examination of the debate shows that this language change was made by a manager's amendment. In a colloquy between the bill manager, Senator Pressler (then Chairman of the Senate Commerce Committee) and Senator Kerrey, Senator Kerrey asks whether the change will affect the scope of any of the bill's substantive provisions.\textsuperscript{158} Replying in the negative, Senator Pressler explained that: "The deletion of this sentence is intended to clarify that the carriers of broadcast and cable services are not intended to be classified as common carriers under the Communication Act to the extent they provide broadcast services or cable services."

The FCC Report labors mightily to explain this amendment, and does not quite succeed.\textsuperscript{159} While it is one of the strongest arguments Senator Stevens presents for congressional intent to change the regulatory landscape, the colloquy seems to negate any such far-reaching purpose. Also, this change was not part of a grand bargain among the conferees, as Senator Stevens and his assistant argue, but was a routine amendment on the floor of the Senate. All in all, it seems less than decisive in establishing the Stevens view of the statutory definitions.

\textbf{D. The Senate Report}

Continuing our journey back in time to the origins of the key statutory language, the next logical point in the legislative process is examination of the written reports of the House and Senate committees responsible for considering and reporting the legislation. These reports have traditionally been viewed as authoritative sources of interpretations, at least of their own versions of a bill. Where the conference committee indicates that the House recedes to the Senate on a particular provision, for example, it seems appropriate to examine the Senate Report as evidence of the meaning as accepted by the entire conference, and therefore of the meaning of the completed legislation.

As noted above, the joint statement of managers states that the House receded to the Senate on the definition of "telecommunications." The Senate Report states explicitly that its concept of telecommunications "excludes those services . . . that are defined as information services."\textsuperscript{161} Note here that this explanation of the meaning of the Senate version of the definition lends further support to the argument that the conferees were not choosing between alternative meanings when they rejected the House version of "telecommunications." We can see now that both the House and Senate committees believed that telecommunications and information service were mutually exclusive.

\textsuperscript{158} See 141 Cong. Rec. 15,386 (1995).
\textsuperscript{159} Id.
\textsuperscript{160} See Report to Congress, supra note 79, at ¶ 42-43.
Likewise, the conference accepted the Senate version of "telecommunications services." The Senate Report says that the term "does not include information services . . . but does include the transmission, without change in the form or content, of such services." While this language again clearly supports the FCC interpretation, it relies on the portion of the committee definition deleted on the floor. If that deletion had an unrelated purpose, this explanation still clarifies the overall definition and lends further support to the FCC view. But if Stevens is right and the deletion supports an overlap theory, then it can be argued that this language is superseded by the amendment and should be disregarded. As noted above, Stevens is probably wrong. Moreover, since the Senate Committee also interpreted "telecommunications" to exclude "information services," and this definition remained unchanged in the final bill, it is fair to conclude that the Senate Report supports the FCC theory.

Further evidence of the Senate's understanding of the relationship between telecommunications and information service is found in its discussion of Section 253(c) of the Senate bill. That section specifies that all telecommunications carriers should contribute to universal service. The joint statement of managers says that the House receded to the Senate on this section, and therefore, the Senate committee's report is relevant. Its explanatory language is quite telling:

New section 253(c) does not require providers of information services to contribute to universal service. Information services providers do not "provide" telecommunications services; they are users of telecommunications services. The definition of telecommunications service specifically excludes the offering of information services (as opposed to the transmission of such services for a fee) precisely to avoid imposing common carrier obligations on information service providers.

Again, the second sentence above refers to a portion of the definition of telecommunications service deleted on the floor of the Senate. Even so, the overall intent of the Senate committee here clearly rejects the Stevens overlap interpretation and supports the FCC position as articulated in its Report to Congress.

Finally, as to the Senate Report, it is instructive to note that Senator Burns included a separate statement expressing concerns about aspects of the bill, but he does not discuss the definitions, universal service, or Internet service providers generally. This is a curious omission if, as he says in his joint letter with Senator Stevens, he supported an overlap theory which would subject ISPs and other information services providers to universal service charges.

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164. Id. at 28.
E. The House Report

As we have seen, the House version of the 1996 Act, H.R.1555, was the source of the "information service" definition in the final legislation. Nevertheless, the House Committee Report contains little of relevance. As noted above, the House Committee version of "telecommunications" clearly supported the FCC view of mutual exclusivity, but that definition was not chosen by the conferees. The Report offers little explanation for its definition of "information service," which was incorporated into the Act, except to say that it, along with the definition of "telecommunications," "[is] defined based on the definition used in the Modification of Final Judgment." 

F. Precursor House and Senate Bills

The Telecommunications Act of 1996 was the culmination of many years of effort on the part of key legislators in both the House and Senate. The House Committee Report notes the antecedent bills, and conversations with staffers who worked on the legislation confirm that S. 642 and H.R. 1555 were in fact modifications of earlier legislation. Analyzing how these earlier bills dealt with the key issue at hand may aid us in understanding the Act.

The most important Senate antecedent of the 1996 Act was S. 1822, the so-called Hollings-Danforth bill reported out by the Senate Committee on Commerce, Science and Transportation on September 14, 1994. Though it was developed and reported out by the Committee while the Senate was under Democratic control, S. 1822 bears a strong resemblance to the final form of the 1996 Act, passed under Republican leadership. The principal issues addressed—local telephone interconnection, entry into long-distance, cable regulation, and universal service, to name a few—are the same, though the details often differ. The same deregulatory, pro-competition thrust is present in both bills, and the definitions section bears out the close relationship.

As reported by the committee, the definitions of telecommunications and information service in S. 1822 clearly adopt the FCC contamination theory and reject the Stevens overlap theory. "Telecommunications" is the MFJ definition, with the addition of the explanatory phrase "including voice, data, image, graphics, or video." The language is close to the final Senate version of the 1996 Act, and the first clause is the same as the final language of the 1996 Act. Likewise, "telecommunications service" embodies the same general concept as the 1996 Act, but uses different phrasing. The definition provides unequivocally that "[s]uch term

169. S. 1822, 103d Cong. § 301(ii) (1994).
The Report makes it clear that the "regardless of the facilities used" language, which Stevens interpreted to encompass internet service providers, was in fact intended to include alternate means of delivering telecommunications services, such as wireless systems and mobile phones. The definition of "information service" is basically the FCC's Computer II definition, clearly the precursor to the later Senate version of the 1996 Act.

The Senate Report also contains a helpful discussion of the scope of its telecommunications carrier definition, which is the same as the first sentence of the final language in the 1996 Act. The report points out that a company might provide to customers both telecommunications service and information service as separate services, in which case only the former would be subject to common carrier regulation. In other words, it draws a crucial distinction between commercial combinations of telecommunications and information services and an actual blurring of the line between the two concepts. This point, as we have seen, was then written into the final definition of telecommunications carrier in the 1996 Act.

Interestingly, S.1822 contains a provision not found in the bills introduced during the next Congress that led to the 1996 Act. Section 234(a) regulates the provision by the Bell Operating Companies of "gateway" services, which provide access to the Internet, and clearly defines them as information services, not telecommunications. This is the precise point raised by Senator Stevens in the Section 623 proceeding five years later—one of his principal interpretive goals was to classify such services as telecommunications.

There were also House precursors to the 1996 Act. The most important were two closely-related bills passed by the House in 1994 dealing with the same issues as the 1996 Act. H.R. 3626 was reported out by both Judiciary and Commerce, and major portions of it dealt with the MFJ process. It contained the addition to the definition of "telephone exchange service" referred to above, and again there was no explanation in the Committee Report as to the reason for the change. The bill's basic definitions paralleled those of H.R. 1555 in 1996. Further, the Report notes that they were intended to have the same meaning as those in the MFJ. H.R. 3636 was reported only by the Commerce Committee, but has many sections that are similar to those in H.R. 3626. The definitions are the same.

171. S. 1822, 104th Cong. § 301(jj) (1994).
173. Id. at 55; S. 1822, 103d Cong. § 301(mm) (1994).
175. See Section III (A), supra.
G. THE MODIFICATION OF FINAL JUDGMENT

All the bills leading up to the final version of the 1996 Act referred to the Modification of Final Judgment in the Bell System antitrust case, which led to the breakup of the system and the creation of the separate Bell Operating Companies in 1984. Examination of Judge Greene's operating definitions in the MFJ show that he and the FCC agreed on the relationship between telecommunications and information services. The issue was not just of academic concern to Judge Greene, as he was called upon repeatedly to pass upon requests for waivers by AT & T and the Bell Operating Companies allowing them to enter various new data processing businesses.

Clearly, the 1996 definitions which found their way into the Act were based upon the MFJ definitions. This is not surprising, given that a key purpose of the reform legislation was to modify and supplant the MFJ process, returning full regulatory authority over the telephone business to the FCC. This was especially apparent in the House, where the final version of H.R. 1555 represented a compromise between the ideas of the Commerce and Judiciary Committees and a managers' amendment folded in some of the key parts of a pending Judiciary Committee bill dealing with the MFJ.

The MFJ definitions clearly adopted the FCC's key distinction in Computer II between pure transmission capacity, treated as a regulated common carrier activity, and enhanced functionality of any kind, treated as an unregulated end-user activity. For Judge Greene, the distinction was also important for the antitrust theory of the Bell System case, since the core idea was to confine the Bell Operating Companies to regulated common carrier businesses and to prohibit their entry into other competitive

180. See id. at 229.
181. See id. Judge Greene defined the terms relevant to this discussion as the following:

"Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

... "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

... "Telecommunications service" means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.

Id.
businesses. Provision of information services, as broadly defined, was one of the lines of business forbidden to the Bell Operating Companies. As we have seen, this is exactly the same distinction as that articulated by the FCC in Computer II in walling off enhanced services from regulation.

In the years that followed the original decree, Judge Greene was often called upon to rule on requests for waivers of the line-of-business restrictions on the Bell Companies. In allowing them to build advanced transmission systems for the information services provided by others, and to engage in such information services as e-mail, he reiterated the distinction between pure transmission capacity and enhanced functionality by making it clear that even basic protocol processing and transmission of information services technically qualified as “information services” and thus required a waiver. In other words, he enforced the same conceptual regime described in the FCC Report to Congress in 1998. Because the House and Senate went out of their way in drafting the definitions to adopt the MFJ language, the implication is strong that they also adopted the conceptual framework—that telecommunications and information services were mutually exclusive categories.

H. S. 898 in 1981

Our search for the ultimate source and meaning of the key definitions found in the 1996 Act requires the uncovering of one more layer of pot shards. That involves an attempt to find Judge Greene’s sources for the definitions he included in the MFJ.

After the FCC promulgated its Computer II decision in 1980, adopting for the first time the mutually exclusive categories of basic and enhanced services that are at the root of this study, key senators introduced a bill to write the FCC approach into law. As the committee report on S. 898 makes clear, the Senate was concerned that the FCC might change its approach and begin to regulate the emerging information services industry, and it wanted to head off any such result.

While the definition of “telecommunications” in this bill contains some additional language, it is clearly the source not only of the MFJ definitions, but also of the final language in the 1996 Act. The crucial omission here, added in the MFJ definition and carried forward into the 1996 Act, includes “as sent and received” language modifying the notion of

184. See id. at 143.
185. Id.
187. S. 898 was introduced in 1981 by Sen. Packwood. Original co-sponsors were: Senators Goldwater, Kassebaum, Pressler, Stevens, Kasten, Inouye, Schmitt, and Cannon.
format and content change. The definition of "information service" is identical in all important respects to the final one in 1996, and again appears to be the source of the MFJ language. The definitions of "telecommunications service" and "telecommunications carrier" differ somewhat from the later versions, but clearly provide that one who is a telecommunications carrier cannot be a provider of information services.

I. Summary

Further attempts to find the sources of the definitions used by the Senate in 1981 have not been successful. What is clear at the end of this search for statutory meaning is that nearly all of the evidence points strongly toward the FCC's conclusion in its Report to Congress. The language used by Congress in the 1996 Act to define these crucial terms was drawn from the Modification of Final Judgment, which accepted the conceptual framework, but not the language of the FCC's 1980 decision in Computer II. That decision and its distinction between regulated basic services and unregulated enhanced services were well known to all of the main actors in our story, including the members of the two Commerce Committees and industry representatives. In the end, the FCC's most powerful argument is that acceptance of the Stevens view of the definitions would mean that Congress reversed the well-known, eighteen-year-old regulatory framework of the FCC without any explicit acknowledgment of its doing so. In the face of the many positive indications that both the Senate and House committees intended to maintain the mutual exclusivity of telecommunications and information services, such an implied repeal seems highly unlikely and quite unreasonable.

More recent developments in Congress indicate that Senator Stevens's view of the statute remains a distinctly minority one. Throughout the rest of 1998, after the FCC Report was delivered in April, the battle over including Internet services in universal service funding continued. Stevens and Burns and their rural-state allies stood on one side, and their definitions argument was only one weapon of several employed. On the other side stood a large group of House and Senate advocates of an unregulated Internet, and they included most of the congressional leadership.

In debate over the explosive issue of taxation of Internet commerce, the definitions issues emerged again, because defining which services were "information services" and thus outside of the states' taxing authority and which were traditional "telecommunications services" subject to

191. Id. at 229.
195. "A person engaged in any non-telecommunications activities, in providing any information service or information software . . . shall not, insofar as such person is so engaged, be deemed a [telecommunications] carrier." Id.
state taxing authority, was crucial. This time Senator McCain and the Internet advocates left nothing to chance. The Internet Tax Freedom Act enacted in October 1998 contains the following definition:

(7) Internet Access. - The term “internet access” means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

Even acknowledging that this definition does not technically change the Communications Act of 1934, it is persuasive evidence that the FCC’s reading of overall congressional intent was correct. The statutory terms are the same, and precisely the same policy issues are involved. There is no sign in the record that Senators Stevens and Burns even attempted to gain acceptance of their overlap theory in the Internet Tax Freedom Act. Indeed, as a policy matter, the overlap concept would have made the Act’s prohibitions on taxation of the Internet extremely difficult to implement.

This is not to say, of course, that Senators Stevens and Burns are wrong as a matter of sound telecommunications policy, but only that Congress did not intend such a result. Time will tell whether their prediction that the FCC’s approach will weaken universal service funding to the detriment of rural areas will prove correct. Professor Weinberg, who played a key role in drafting the sections of the FCC Report dealing with the definitions, has since argued that the FCC’s policy, while legally justifiable, is too rigid and has been overtaken by technological change. He argues for a more subtle line between telecommunications and information services. An extended discussion of the policy aspects of the debate is beyond the scope of this Article, but suffice it to say that the 1996 Act may well have to undergo significant amendment to deal adequately with the myriad regulatory and policy issues raised by the Internet and the convergence of telecommunications technologies.

IV. IMPLICATIONS

In this section we will attempt to sketch some of the implications for law and policy emerging from this particular search for statutory meaning. We will not focus any significant attention on its implications for the Telecommunications Act of 1996 itself. Rather we will ask whether our study sheds light on similar problems of statutory interpretation and on future agency processes for interpreting statutes. While a full-dress consideration of interpretive theory is beyond the scope of this Article, we

199. See id. at 229.
will also examine briefly some implications for *Chevron* and the Supreme Court's approach to statutory interpretation by agencies.

**A. WHAT DID SECTION 623 ACCOMPLISH?**

Initially, we might well ask whether Senator Stevens accomplished anything with his unique statutory provision ordering the FCC to formally reconsider and explain its interpretation of key terms of the 1996 Act. He did not, as we have seen, persuade the new commissioners to adopt his view of the interrelationship between telecommunications and information service. He certainly did force the FCC to justify its approach in more detail, and he focused attention on the absolute centrality of the definitions to the statutory scheme. He succeeded, in parts of the FCC Report not relevant to our discussion, in forcing the FCC to explain some of its other regulatory choices in carrying out the universal service mandate and in prolonging and deepening the arguments over the E-rate program in Congress. While it may not have been his intention, he also succeeded in broadening the debate over definitions to a variety of industry groups, state entities, and others.

Ironically, though Senator Stevens lost the argument before the FCC, his view may well prevail in the end. By forcing the FCC to adopt a fully articulated contamination theory, he may have deprived it of the flexibility to deal with the raging convergence taking place among the Internet, cable, and traditional telephone systems. As it becomes increasingly clear that new regulatory techniques are necessary to deal with the Internet and Internet access businesses, pressure will increase on Congress to amend the 1996 Act so as to more easily accommodate the new technological reality. While Stevens is almost certainly wrong in his view of what Congress intended to do in the 1996 Act, he may turn out to be right about what it ought to have done.

**B. GENERAL LESSONS FOR THE THEORY OF STATUTORY INTERPRETATION**

On a more general level, what does this in-depth look at an important dispute over the meaning of a recent statute teach us about the process of statutory interpretation? By probing the many layers of statutory, regulatory, and judicial activity relevant to an interpretive problem, I hope that we can see some obvious points that are sometimes lost in the often-abstract intellectual disputes over methods of statutory interpretation. For example, we should take from this study a lesson often forgotten in the law review debates—that disputes over statutory meaning are almost always debates over policy, not law. The Supreme Court recognized this truism in its *Chevron* opinion, but, as I will argue below, drew the

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201. See *supra* discussion accompanying note 94.
wrong conclusions from it. Because most important disputes over statutory meaning are arguments over competing policy alternatives, the process of statutory interpretation must fundamentally be a practical one. Too often in debating whether we are seeking the intention of Congress, or the intention of some hypothetical Congress, or the meaning some average observer would give to a phrase, we ignore the underlying reality. As this case study shows, a common sense approach stripped of unnecessary doctrinal baggage is usually best. Congress passed a statute containing certain legal mechanisms affecting important private and public interests, and we should ask ourselves how Congress wanted those mechanisms to work.

Our study also shows another important truism about many, though not all, problems of statutory meaning—they can be complex, involving many layers of meaning developed over time, each affecting the next. Much of the theoretical writing about statutory interpretation, and many court opinions, give insufficient attention to the development of meaning as a dynamic process. The strict textualists, who cut themselves off artificially from the dynamic process of meaning development illustrated in our study, are those most likely to miss this point, and therefore to arrive at a “wrong” result. Cases such as *MCI v. AT&T*, which pitch the debate at the level of competing dictionary definitions, carry this unreality to the ultimate absurdity.202

Consider again, as an illustration of the dynamic process of developing meaning over time, the capsule history of the key terms analyzed in this study. The FCC develops the concepts of basic and enhanced services through a series of open APA rulemakings, with wide industry and expert participation. The relevant industry actors operate under these definitions in making important business decisions over many years, interacting with the FCC. Federal courts adopt the Commission’s conceptual framework using different words, and use it to decide cases. Congress finally legislates in the area, once more using slightly different wording. The FCC then interprets the new language in the course of continuing its regulatory work, again with wide outside participation. Congress makes a formal demand for reconsideration of the conceptual framework. The FCC then opens a final debate on the meaning of the statute, this time with Congress itself participating, along with the industry, the states, experts and even the Executive Branch. The Commission, finally, continues its regulatory activity in light of its restated interpretations. While we should not expect that every problem of statutory meaning will present interpreters with such a rich and diverse history, statutory interpretation in the regulatory context often shows the same kind of dynamic characteristic.

202. Of all the hundreds of articles written about statutory interpretation in the last twenty years, the one that makes this point most convincingly is William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990). It should be required reading in the chambers of every federal judge.

Can our current theories of statutory interpretation accommodate this kind of complex process of statutory development? I would argue in the case of textualism that it cannot, and that consequently, textualism is an unrealistic theory for many real world problems of statutory meaning. But even those who look at traditional legislative history materials in resolving an issue of statutory meaning must broaden their interpretive scope when faced with a complex history like this one. Certainly a judge needs an approach that allows her to look at regulatory history as well as legislative activity and court decisions. This same judge should be able to take into account the views of industry groups operating under the statute and other outside interpreters, particularly if the views come in as part of a formal process. Our abhorrence of post-enactment legislative history should also give way to the extent that there was a formal post-enactment dialogue between Congress and an agency, as occurred in this case. Finally, a court should feel comfortable looking at the policy arguments involved as well, so long as those arguments are analyzed in the context of the entire historical process of meaning development.

If a court were to consider the full range of history, encompassing all layers of meaning uncovered in our archaeological expedition, how would it characterize its interpretive theory? It would certainly not be textualist. It is not really intentionalist either, since the relevant question is much broader than what was meant by a particular legislative enacting group in 1996. Perhaps a new term is needed to identify a much more process-oriented institutional sense of statutory meaning. I leave that for another article.

A final broad lesson for those who work with the theory of statutory interpretation is that all questions of statutory interpretation, all searches for statutory meaning, are not alike. Indeed, the differences in the various kinds of interpretive problems may justify different approaches. Most court decisions and many scholarly writings treat these issues as if all questions of statutory meaning are essentially similar and would benefit from the same interpretive techniques and the same allocation of interpretive authority. I would argue, however, that there are at least three different kinds of situations in which a substantial dispute over statutory meaning can arise, and that each can benefit from a slightly different treatment.

First, there is the question of interpreting a broad enabling term enacted by Congress to guide agencies or the courts. Most of these “enabling” phrases appear in regulatory statutes, like the Communications Act of 1934, but some appear in court-administered statutes such as Section 1983 or the Sherman Act. All are characterized by extremely broad language with a wide latitude for different interpretations. Examples are “public, convenience, interest or necessity” in the Commu-


These phrases do not really present interpretive problems at all, because they embody broad delegations of policy making power to agencies and the courts. Instead of articulating a specific meaning or set of meanings, Congress has, through its broad language, handed over interpretive power to an expert agency. While we sometimes debate whether these phrases run afoul of the delegation doctrine, over time we have become comfortable with the idea that agencies give content to these empty legal vessels, using both caselaw and informal rulemaking. We come to realize that it is simply not helpful to ask what Congress meant, or means today, by the phrase "public convenience, interest or necessity." Its meaning is what the FCC has determined it to be over many years of regulatory activity.

Second, we recognize instinctively that some statutory terms are more important than others, and I call those "defining" terms. Disputes over defining terms raise different issues and must be approached in a different way than the enabling terms discussed above or the more mundane ones discussed below. A defining term is one that determines the scope of a statutory scheme, either by defining the entities subject to government power or the scope of the regulatory power granted to an agency. The dispute analyzed in this study is over defining terms, since the definitions in the 1996 Act are the key to the entire regulatory scheme. Obviously, jurisdictional terms have the same characteristic. Professor Clark Byse, Justice Breyer, and others have observed that all statutory terms should not be treated alike, but too often the special requirements of defining terms are overlooked.

As argued below, this issue is of special relevance in applying Chevron. Indeed, the distinction between defining terms and other less important ones may explain the difference between the celebrated Hearst and Packard cases – it is surely more important to the statutory scheme to decide the scope of managerial employees under the labor laws (Packard) than to decide whether a particular group of newsmen are employees or independent contractors (Hearst). The term also echoes the discussion of

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209. A footnote is not the place to explain the delegation (or non-delegation) doctrine, which in theory at least prohibits Congress from giving policy-making powers to agencies. After a brief flirtation with enforcement during the New Deal years, the Supreme Court has virtually abandoned the doctrine in the last sixty years. Scholarly critics and judges concerned about the excessive policy discretion granted to agencies have recently been attempting to resurrect the delegation doctrine. See, e.g., Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring in the judgment).
jurisdictional facts in *Crowell*, where the Supreme Court determined that some facts are simply too critical to the statutory scheme to be decided finally by the agency administering it. Defining terms call into play important considerations of a court's role under the APA, and the need to exercise some control over the administrative agency under our constitutional scheme.

If defining terms can be thought of as law-establishing, the third category of statutory interpretation questions can be thought of as law-applying. These disputes tend to arise at lower levels of detail in the statutory scheme, and their implications are less far-reaching. Philosophers and legal scholars have argued at length over what it means to say that a term is "ambiguous," but at this level I am seeking a more practical morphology. What are the broad categories of problems that agencies and courts confront when they seek to apply statutory language to real world situations? Though it is not centrally important to our study, I would argue that there are at least four different categories of ambiguity that arise at this law-applying level.

A first common situation is where Congress apparently intend to set down a particular standard, mechanism or direction, but left its meaning unclear. The ambiguity, if that is what we choose to call it, may stem from many sources. The statute may contain a word or words that have more than one common meaning, leaving the court or agency to discover Congress's intention, if possible. Sentence structure or punctuation may produce two or more ways of reading a sentence, and the interpreter must choose between or among them based on some standard. Likewise, Congress may simply have made an error and used the wrong word—sometimes this is obvious and sometimes it only becomes apparent after close analysis of the statutory mechanism.

Aside from these linguistic ambiguities, in which more than one meaning might be the "correct" one, situations may arise where a word or sentence or whole paragraph seems clear on its face, and was intended to deal with a specific question, but may be inconsistent with other provisions of the statute. There the interpreter must search for an overall meaning, if possible, that makes the statute work toward the desired end. Agencies often confront such problems, particularly in complex statutes or statutes that have been amended multiple times. The 1996 Act itself contains a good example of this in Section 254(h)—its provisions regarding universal service payments to schools, libraries, and rural health providers were written by a different group of senators and staffers, and do not fit well with the rest of the section.

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213. The FCC in its Universal Service Order faced such a conflict in deciding whether Internet service providers, though they are exempted from paying universal service charges, might nonetheless be eligible to receive payments under § 254(h) in serving schools and libraries. The statutory provisions at issue seem conflicting. See *Universal Service Order, supra* note 67, ¶ 590-591.
Another type of as-applied ambiguity arises where the statutory text simply does not address a particular question. Congress may not have written the statute at this level of detail, or may have known about a problem but avoided dealing with it for political reasons. More commonly, we recognize that complex statutes like environmental laws or the 1996 Act cannot possibly address every issue that will arise later in application. In any case, the agency or court is left with a gap-filling role. It often must infer from the existing terms of the statute how the unaddressed question should be answered. Again, the 1996 Act is filled with such instances.214

A final type of as-applied ambiguity arises from the use of terms of art. Particularly in complex regulatory statutes, Congress may use terms that have no obvious meaning except in the context of the industry or regulatory scheme involved. An interpreter must step inside the particular conceptual world of that statute and its context in order to give a business or technical term its "correct" meaning. The 1996 Act abounds with examples—"unbundled network elements" in the interconnection sections is perhaps as good an example as any. In these cases, Congress presumably had a specific meaning in mind, but simply used the term of art as an agreed-upon short-hand rather than supplying a full definition.

Textualists and intentionalists will approach these different types of interpretation questions differently, and as argued below, the role of agency expertise will vary for each. At some level, even the committed textualist must admit that help is needed. For example, while Justice Scalia generally eschews the use of legislative history to resolve any variety of ambiguity, he seems to allow extensive use of legislative history materials when faced with a term of art.215 It is at this level that textualist approaches are the least helpful, since their relatively narrow focus cannot give meaning to terms of art, and dictionaries are often not helpful.

There is overlap, of course. For example, the dispute in this study is arguably over terms of art, but the particular terms of art are crucial definitions that determine the contours of the regulatory scheme. Some of the lessons learned dealing with highly technical but relatively unimportant terms, therefore, can be applied to cases where the technical mean-

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214. A good example of a gap-filling question is the controversy over the "pick and choose" rule in the interconnection provisions of the 1996 Act. Section 251(i) provides that local telephone companies must provide any network element bargained for by one competing company to others on the same contract terms. The provision does not address the real life situation in which the local company enters into several contracts for different combinations of network elements with companies seeking interconnection. May the next competitor "pick and choose" among the best prices in each contract, or is the local carrier obliged only to match the best overall contract terms it has given someone else? The FCC's rules said that competition could indeed pick and choose, even though the local companies complained that such a rule destroys any give-and-take among terms in an overall interconnection agreement. The Supreme Court ruled that the FCC's rule was reasonable, reversing the Eighth Circuit. Iowa Utilities Board v. FCC, 119 S. Ct. 721, 738 (1999).

ings to be found define the scope of the statute. Nonetheless, these three broad categories of meaning disputes call into play a different balancing of the crucial legal interests involved—the proper roles of court, Congress, and agency; the expertise of the agency; and respect for Congress as the ultimate fount of policy judgments.

C. **Chevron Issues**

Since the Court decided *Chevron v. NRDC* in 1984, courts hearing statutory interpretation cases involving an administrative agency have had to consider the implications of that now-famous decision. There the Court held that in cases in which an agency's interpretation of a statute it administers is at issue, the judge must first determine if the Congress has spoken on the precise issue in question and resolved it in the statute. If it has, Congress's meaning controls. If it has not resolved the question, but rather written a statutory term that is ambiguous or silent, then the agency's interpretation of it must be accepted by the court if it is "permissible." Prior to *Chevron*, as one who has taught Administrative Law over the years can attest, the federal courts' decisions on matters of statutory interpretation were hard to reconcile. One line of cases stood for substantial deference to agency interpretations, and another asserted the ultimate primacy of a federal judge in deciding questions of statutory interpretation. It was possible for commentators to identify various factors that would lead a court to defer or decide, including, in Professor Jaffe's words:

1. the degree to which the framing of a rule appears to depend on expertise,
2. the clarity with which a rule can be made to emerge and be given a stable form and content,
3. the importance of the rule in the statutory and administrative scheme,
4. the possible psychological advantage of judicial as compared with administrative pronouncement, and
5. the role of the court as the guardian of the integrity of the legal system.

*Chevron* changed that calculus forever, substituting a deceptively simple two-step process of decision when agency interpretations are at issue. The case has been the subject of much comment and analysis. Supporters have claimed that it recognizes the reality of agency primacy in policy matters and superior agency expertise, while detractors have protested that it represents an abdication by the federal courts of their constitutional role to decide what the law is. The certainty promised by the

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217. *Id.* at 843.
decision has been an illusion. This is partly because the Supreme Court itself doesn't always use it, and partly because the two steps have proven capable of flexible interpretation. The decision was widely seen as shifting power from Congress to agencies and the Executive Branch, but recent scholarship has cast doubt on that premise. In particular, the tendency of Justice Scalia and other conservative judges to stop at step one, finding no ambiguity where ambiguity seems to exist, has tended to shift interpretive power to the courts. Thus, Justice Scalia has said that he is a strong supporter of the *Chevron* doctrine, but he has also observed that a textualist like himself is prone to avoid its result altogether by finding no ambiguity in the statutory provision in step one.

Based on my reading of the cases and many years of discussions in Administrative Law classes about *Chevron*, I much prefer the old case-by-case approach to presumptive agency deference in statutory interpretation cases. The decision has, in my view, four serious flaws that are ultimately fatal.

First, *Chevron* errs conceptually by forcing courts to treat all statutory interpretation questions alike, when in fact there are great differences among them that call for differing treatment by a reviewing court. As noted above, there are at least three types of controversies over statutory meaning. Disputes rarely center on enabling phrases, because they have little substantive content and are intended to delegate broad interpretive power to agencies or courts. As to defining terms, as I have described them, I would argue that *Chevron* deference is inappropriate. Because these terms define the outer limits of delegated power and delineate the basic structure of the particular regulatory scheme, it is important that the federal courts play their law-declaring role and that agency power be checked. While an agency's view as to the scope of its regulatory power is relevant, and its arguments ought to be considered carefully, courts must ultimately decide such questions. Complete deference to agency interpretations, on the other hand, makes more sense in dealing with ambiguities, gap-filling disputes, or the meaning of terms of art. Those cases deal with the detailed application of the statutory mechanisms. The agency has a legitimate interest in preserving its power to make consistent interpretations throughout the statute, and its expertise is more relevant. Here too, the views of industry groups and outside experts familiar with the statutory scheme often emerge in the regulatory process, and it makes sense to give them considerable weight, unlike cases dealing with defining terms. Congress obviously has an interest in these cases, but agency in-

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223. None of these points is original with this author—all are made in the various articles cited supra note 220.
SOURCES OF STATUTORY MEANING

interpretations carry less risk of distorting the overall statutory scheme or exceeding the limits of Congress’s delegation of power. For these types of disputes, the *Chevron* approach works well.

A second flaw in *Chevron* is that it encourages, and indeed demands, that courts ignore important process issues before the agency. If Congress has not spoken directly on the statutory issue in question, says the opinion, the agency’s interpretation will prevail as long as it is permissible. In practice, that is an easy standard to meet, meaning that almost all agency interpretations are deferred to. Yet the quality of an agency’s decision-making process should be highly relevant in these cases, and along with the regulatory history should play a major role in the court’s judgment. Such issues as the range of outside views considered and the depth of the agency’s analysis should weigh heavily in a decision to defer to an agency interpretation, yet rarely do. Agency interpretations of ambiguous statutory terms ought not to be deferred to if they lack wide outside input and in-depth analysis—mere rationality should not be enough to displace the traditional primacy of the court over issues of law.

Third, *Chevron* proceeds from the highly questionable premise that ambiguity in a statutory term implies congressional desire to cede interpretive authority to the relevant agency. This is perhaps the most serious theoretical flaw in the opinion, and a number of commentators have pointed out that the premise defies logic and experience. In fact, there are many reasons for statutory ambiguity, including conscious political decision, compromise, inadvertence, technical ignorance, and contextual change over time. As Professor Farina has pointed out, there are a number of possibilities regarding the intent of Congress in any such situation, including the possibility that Congress left an ambiguity but didn’t want the agency to resolve it.\(^\text{224}\) *Chevron’s* two-step analysis assumes that ambiguity equals an intent to allow the agency to resolve the ambiguity. As Judge Mikva has observed, sometimes the assumption should be exactly the opposite.\(^\text{225}\) In our case, for example, the intensity of Congress’s interest in these definitions, and the passage of Section 623 itself, may be taken to signal a desire to keep the interpretation within Congress and not to defer to agency interpretations. In my view, a case-by-case approach on this question, the practice before *Chevron*, is much more desirable.

Fourth, the *Chevron* two-step framework gives insufficient weight to the importance of federal courts as interpreters of federal law. This interest stems not just from the Constitution, as interpreted in *Marbury*, but also from the Administrative Procedure Act. Section 706 of the APA, after all, says clearly that the court shall determine all questions of law.\(^\text{226}\)

\(^{224}\) See Farina, supra note 1, at 468-76.


\(^{226}\) “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706 (Supp. IV 1998).
The *Chevron* opinion, then, is inconsistent with separation of powers and with the thrust of the APA.

Ultimately, the interpretive problem presented by this study is one of those that is inappropriate for *Chevron* deference because it goes to the very heart of the 1996 Act and defines the limits of the regulatory scheme devised by Congress. As a reviewing court, I would give careful consideration to the arguments raised by the FCC in its Report to Congress under Section 623, but make my own independent analysis of the legislative history in search of the meanings of the terms “telecommunications” and “information services.”

But let us assume for a moment that a judge faithfully tried to carry out the *Chevron* mandate in this case. How would she go about it, and what would be the result?

First, it is not at all clear how a judge would apply step one to this situation. Has Congress actually spoken to the precise question at issue here? As I have attempted to show above, I believe the evidence is overwhelming that Congress designed a statutory scheme in which these two key terms were mutually exclusive. However, that conclusion is not evident on the face of the definitions, or even from the surrounding statute. The conclusion is sound only if you are willing to consider all of the layers of meaning we explored, and it is not at all clear that a court conscientiously attempting to apply *Chevron* would go that far. A major open question in *Chevron* jurisprudence is, after all, the meaning of ambiguity itself, and here the Justices are at odds. Justice Stevens would clearly use all available tools of statutory interpretation to determine whether Congress's meaning is clear, whereas Justice Scalia and those sharing his views would ordinarily look only to the terms, their ordinary meanings, and the immediate statutory context.

In this particular case, as it happens, the ultimate conclusion should be the same whether the case is resolved at step one or step two. If a court were to defer to agency interpretation, the completeness of the agency opinion, the openness of its process, and the cogency of its reasoning all compel acceptance of its conclusion as a “permissible” interpretation of the statute.

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227. The *Chevron* opinion, written by Justice Stevens, carefully examines legislative history in order to determine whether the statutory term at issue is ambiguous for purposes of step one. 467 U.S. 837, 851-53, 862-64 (1983).

228. The conservatives' later restatements of the *Chevron* doctrine show this change in the meaning of step one: "If the agency interpretation is not in conflict with the plain language of the statute, deference is due. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole. If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable." Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992) (emphasis added) (Kennedy, J.) (citations omitted).
Perhaps the most intriguing questions to emerge from our study of this particular disagreement about statutory meaning revolve around the unique dialogue created by the enactment of Section 623 and the FCC's response. How should a court later called upon to resolve the question of statutory meaning treat this unique process? Is it a useful device for the future?

Assume now that in future challenges to the FCC's universal service policies, its decision to exempt Internet service providers from regulation, or its treatment of Internet telephony, a court is called upon to decide whether the definitions of "telecommunications" and "information service" in the 1996 Act are mutually exclusive. What role might the enactment of Section 623 and the FCC's response play in that decision?

First, a court might ask whether the enactment of 623 itself says something about the correctness of the FCC's original interpretation of the terms. Certainly the pugnacious tone of the section suggests that Congress was unhappy with the FCC's interpretation. Yet if it could muster the votes to pass this report requirement, why didn't Congress simply clarify the definitions if it thought the Commission was on the wrong track? Will an inquiring judge look more closely at the history of Section 623 and discover that it in fact does not signal widespread dissatisfaction with the FCC's initial interpretations, but rather the dissatisfaction of two key senators who were in a position to force the report requirement through in conference? As reflected in the Chevron discussion above, will the reviewing court read Section 623 as a declaration by Congress that it does not wish to cede interpretive authority on these crucial definitions to the FCC, but rather wants to ensure that they stick close to discernable congressional intent? More broadly, does Section 623 signal a different view toward the FCC's traditionally broad role in interpreting the Communications Act, suggesting instead that with a largely new Act the Congress wishes to keep the FCC on a much shorter leash?²²⁹

In fact it is extremely difficult to infer any clear expression of congressional attitude from the fact of Section 623's enactment. I suspect that a court would give no special weight to the fact of enactment, but would rather look more closely at what Congress did during the entire sequence of events. It is significant, therefore, that Congress, after challenging the

²²⁹. In Iowa Util. Bd., the Supreme Court in its first try at interpreting the 1996 Act argued that the FCC should receive wide latitude in interpreting its provisions, because of the statute's complexity and many ambiguities:

It would be a 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... But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency.

FCC to justify its interpretations and then participating in the process of reassessment, did not even try to amend the definitions after receiving the Commission's report in April 1998. This fact, coupled with the enactment of definitions in the Internet Tax Freedom Act six months later that ratify the FCC's position, suggests that Congress agrees with the FCC's analysis. It lends weight to the view (undoubtedly correct) that the formal call for a report on the definitions did not mean that Congress as a whole disagreed with the earlier FCC attempts at interpretation, but rather was one skirmish in the complex battle over universal service policies as a whole.

A related question might also occur to the reviewing court. Should it treat the FCC's report in this situation any differently than it treats other formal agency opinions interpreting a statute, when making its *Chevron* analysis? I suspect here that the answer would be yes. A reviewing court could not help but be impressed with the depth and completeness of the dialogue in this case, and should give especially heavy weight to the FCC's conclusions. After all, the agency not only interpreted the key definitions in the statute initially, after an elaborate rulemaking proceeding, but after a formal direction by Congress it went over the same ground in even more depth. A reviewing court considering *Chevron* deference should give heavy weight to agency interpretations arrived at through such a participatory process, including the views of key members of Congress, the Executive Branch, industry groups, states, and other entities.

One tricky element in a court's consideration of the FCC Report to Congress might be the fact that one of the five FCC Commissioners dissented, but that issue alone is probably not enough to significantly modify the deference otherwise due in light of the FCC's elaborate interpretive process.

Finally, what can be said about the utility of this kind of interpretive dialogue? My guess is that it will remain a rare event for Congress to formally enact a specific demand for agency interpretation of a statute, but our study shows that the process has much to recommend it.230 If the point is to ensure that the FCC carries out the statutory mechanism as Congress intended, then this give and take makes it much more likely that it will happen. Not only do key congressional actors get a second or third chance to influence the FCC's thinking, but the Commission is

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230. Actually, Congress used the same report device again while waiting for the Sec. 623 report from the FCC. In the 1998 Emergency Supplemental Appropriations Bill, the Senate required the FCC to do another report on universal service funding and administrative structure. S. 1768, 105th Cong. (1998). Section 2005(b)(3)(g) of the bill required the FCC to explain how to reconcile Secs. 254(d) and 254(h) of the 1996 Act in determining the revenue base for universal service funding. Cong. Rec., S. 2459 (Mar 24, 1998). Incidentally, the provision directs the FCC not to use rulemaking in preparing its report, presumably because the report was due in less than sixty days. Id. Sec. 2005(b)(2)(B). In a bizarre procedural twist, the House-Senate conference on the final bill, H.R. 3579, deleted the Senate provision, but in report language directed the FCC to, among other things, comply with "the reporting requirement of the Senate bill." The FCC then prepared another report to Congress. See infra note 85.
forced to justify in great detail its statutory interpretations and to openly examine the legislative history. In addition, the Commission is forced to articulate its policy goals more explicitly, so that Congress might amend the statute if it finds them unacceptable. Certainly Senator Stevens's initial goal of pushing the FCC into a clear position on these issues is often desirable in other contexts, enabling Congress to act more formally if it wishes.

The other advantage of the process under study is its openness and wide participation. It should be recalled, however, that this is not necessarily a requirement in cases where agencies are called upon to report to Congress on matters of statutory interpretation. The FCC wisely concluded that its interpretations would carry more weight, both with Congress and with the courts, if it conducted a participatory proceeding under APA Section 553. Future Congresses attempting to use this device would be well advised to require such procedures and not leave them to the discretion of the agency. This openness ensures that a genuine policy debate will take place, and that the views of industry trade groups, technical experts, and a wide variety of other interested parties will be taken into account in making crucial decisions on the meaning of these statutory terms. Because they are defining terms, as noted above, much turns on the definitions, and the FCC's open process helps ensure that the right decisions are made.

Of course such a formal give-and-take is not really desirable or necessary for less important issues of statutory meaning. It is simply too time-consuming and cumbersome. Given that agencies' interpretations are likely to prevail under *Chevron* in many cases, however, Congress might well turn to the formally enacted report requirement as a way of controlling the interpretive process where genuinely significant terms are in question. It can then leave for more informal processes, such as hearings at which administrators are required to justify statutory interpretations, or even more informal calls for reports, the less important interpretive issues. Given the amount of agency effort devoted to the Section 623 Report over five months, it certainly seems unwise to require such efforts casually for unimportant statutory terms.

V. CONCLUSION

We began this expedition in search of the meanings of "telecommunications" and "information service" with the observation that some problems of statutory interpretation may not present comparably complex backgrounds. If the Telecommunications Act of 1996 is any gauge, however, these especially demanding interpretive tasks are no longer a

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231. Ironically, *Chevron* deference means that an unhappy Congress that forces an agency into formal statutory interpretation and still doesn’t like the result may well have made it more likely that the courts will side with the agency.
Despite the currently fashionable political rhetoric about deregulation and less government, Congress continues to pass regulatory legislation of bewildering complexity. Gaps, ambiguities, and inconsistencies are inevitable. I have presented this interpretive case study in its full multi-layered glory to demonstrate that judges and agencies should not be shut off artificially from any sources that shed light on the meaning of a statutory provision. While some may be more reliable or probative than others, all the layers of legislative, administrative, and judicial activity can help to lead the careful interpreter to the most reasonable and practicable reading of a statute. And when they do not, when assiduous efforts to uncover the sources of particular text lead to hopeless confusion and inconsistency, at least we can be certain that the agency or court has done all it could to discern Congress’s scheme before turning the issue back for amendment or clarification.

I hope this case study has also shown that the literature on statutory interpretation can benefit from more exposure to in-depth analysis of real legislative, judicial, and administrative materials. We need more archaeology, in other words, and less hermeneutics. This is particularly true, as in this case, when we deal with difficult regulatory statutes administered by experienced and expert agencies. It is here where, as I have argued, the narrow textualist who limits himself to the text itself, its commonly understood meanings, and closely related statutory language, is most likely to leave the real world behind and distort Congress’s regulatory plan.

If, as I predict, subtle and difficult issues of statutory meaning will continue to arise in the regulatory arena, then the four-way dialogue among congressional actors, agency personnel, judges and interested outside parties can be expected to continue. *Chevron* has not disposed of all the issues of assigning interpretive responsibility; indeed it seems to have created as many questions as it has answered. Because the stakes are so high with statutory schemes such as the Telecommunications Act of 1996, all of the interested parties have incentives to develop new devices to “win” the interpretive contest. Congress, frustrated that agencies and the courts do not carry out its regulatory desires, will explore new means of oversight and may turn again to creative statutory mechanisms like the one

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232. The Court of Appeals grappled with a difficult question of statutory interpretation concerning two different ways for incumbent local telephone companies to comply with the interconnection requirements of the 1996 Act, and thus be permitted to enter the long distance market, in SBC Comm., Inc. v. FCC, 138 F.3d 410 (D.C. Cir. 1998). It deferred to FCC judgments in part because of substantial linguistic confusion and poor statutory drafting by Congress. Here there were no clear guides in the legislative history and no long regulatory experience to draw on. Another example in the 1996 Act, sure to reach the Court of Appeals, is the proper interpretation of Sec. 202(g) concerning television local marketing agreements. The text, as well as its relation to other provisions, is quite confusing. Congress tried to influence the FCC’s interpretation in a free-standing item of report language unrelated to statutory language, in a conference report: 143 Cong. Rec. H6175 (daily ed. July 19, 1997). In its recent Report and Order on TV Ownership Rules, the FCC interpreted the provision and ignored the later instructions. Commission’s Regulations Governing Television Broadcasting, 1999 WL 591756 (F.C.C.) (Aug. 6, 1999).
used in this case. Agencies will develop better internal procedures for developing and justifying their interpretations. Interested industry groups and public interest organizations will take advantage of new opportunities like the Section 623 rule making proceeding in this case to influence interpretation. And the courts will continue to struggle with *Chevron* and to modify it. Hopefully the public interest in rational, purposeful, and efficient government will be the ultimate beneficiary.