

JUSTICE SCALIA ON UPDATING OLD STATUTES (WITH PARTICULAR ATTENTION TO THE COMMUNICATIONS ACT)

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INTRODUCTION

The year 2016 saw the passing of Justice Scalia.¹ It also saw the D.C. Circuit’s latest attempt to make sense of how the Communications Act applies to new forms of technology – the Internet in particular.² As many begin to think about Justice Scalia’s legacy, I want to use this brief Essay to reflect, through the prism of some of his better-known telecommunications opinions, on what those opinions reveal about the Justice’s approach to applying old statutes to new issues, particularly those brought about by technological innovation. And I’ll suggest that some of Justice Scalia’s insights may usefully be brought to bear as the Federal Communications Commission (FCC) continues

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1. See Eva Ruth Moravec et al., *The death of Antonin Scalia: Chaos, confusion and conflicting reports*, WASH. POST (Feb. 14, 2016), https://www.washingtonpost.com/politics/texas-tv-station-scalia-died-of-a-heart-attack/2016/02/14/938e2170-d332-11e5-9823-02b905009f99_story.html [<https://perma.cc/98EV-8X5K>].

2. See *U.S. Telecom. Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

to consider the best way to adapt the Communications Act going forward.³

This Essay has three Parts. First, through an examination of his opinion for the Court in *MCI Telecommunications Corporation v. AT&T*, I will show that Justice Scalia was skeptical of agency attempts to reconfigure statutes in the face of new problems using authority implied—though not expressly granted—by the statute in question. That Justice Scalia would not allow an agency to “rewrite” the terms of its statute in order to adapt to new circumstances is, of course, not surprising, given the Justice’s well-known defense of textualism.⁴ Later cases applying *MCI*, however, have read that decision to deny agencies deference altogether in certain circumstances, a result arguably in tension with his defense of *Chevron*’s domain against various in-roads.⁵ *MCI* is instead best understood not as a case about *Chevron* “Step Zero,” but as an expression of a kind of “originalism” in statutory interpretation. The scope of an agency delegation is set at the time the statute in question was passed and cannot be altered by subsequent events, including (as in *MCI*) by technological innovations unknown to the enacting Congress.

Second, where the scope of the original delegation *did* include the power to rewrite, repeal, or “forbear from” statutory requirements (as in express delegations of such power), Justice Scalia accepted, and even championed, the broad use of such authority for purposes of statutory updating. This is seen most clearly in his *Brand X* dissent, where, as is well-known in telecommunications law circles, Justice Scalia sketched out the basics of the “Title-II-plus-forbearance” approach that the Commission eventually adopted and is now seeking to undo.⁶ Indeed, Justice Scalia’s vision in *Brand X* was in some ways even broader than has been recognized. As he described it, the FCC could forbear from *all* of Title II’s rules as applied to Internet Service Providers (ISPs), essentially reaching the same regulatory endpoint the Commission had in the *Cable Broadband Order* without having to resort to the interpretive tricks the Justice found unconvincing.⁷ And doing so, Scalia thought, would allow the Commission to focus on the right questions—namely, the policy rationales for particular statutory requirements as applied to ISPs—not

3. The FCC, under the leadership of Chairman Ajit Pai, recently promulgated a Notice of Proposed Rulemaking that would reverse the FCC’s prior reclassification of Internet Service Providers as Title II “common carriers.” See *Restoring Internet Freedom*, WC Dkt. No. 17-108, Notice of Proposed Rulemaking, FCC 17-60 (adopted May 18, 2017). The FCC has recently published an order doing so. See *Restoring Internet Freedom*, WC Dkt. No. 17-108, Declaratory Ruling, Report & Order, and Order, FCC 17-166 (2018).

4. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann, ed., 1997).

5. See *infra* notes 26-32 and accompanying text.

6. See *supra* note 4.

7. See *infra* note 56 and accompanying text.

on arcane issues of statutory interpretation governed by a statutory text written in 1996 (or even 1934).⁸

The final Part of this Essay will use the prior insights to develop two normative points related to the ongoing dispute regarding the treatment of broadband ISPs under the Communications Act. First, and more narrowly, I will argue that comparing the *MCI* opinion to the later dissent in *Brand X* undermines one of the legal arguments made against the FCC's 2015 *Title II Reclassification Order* and based around a third (and most recent) Justice Scalia opinion, *Utility Air Regulatory Group v. EPA*. Second, I will suggest that Justice Scalia's professed views have something important to add to the debate over how the Commission should proceed forward in what is likely to be an era of deregulation. Justice Scalia's dissent in *Brand X* has thus far been primarily relied on by those who wished to *enable* the regulation of ISPs under Title II.⁹ But now that we had a Title II framework that has been upheld, I will suggest that *deregulation* is also best pursued through the explicit authority provided by Title II's forbearance provision. That is because forbearance provides the Commission with the ability to focus on the right policy questions regarding the regulation of broadband ISPs while avoiding the kind of discontinuities and awkwardness associated with updating statutory language through interpretation.

I. THE PROBLEM OF OLD STATUTES: *MCI v. AT&T*

The problem of "old statutes" is a recurrent one in administrative law generally,¹⁰ as well as an issue felt acutely in the field of telecommunications in particular. Statutes are written for a specific time. Congress may be (and often is) unaware of potential changes that may disrupt the regulatory landscape. In time, changes come, making statutes obsolete or, at worst, actually counterproductive. In the area of communications regulation, one such change stands out above all others—technological innovation.

The regulatory history preceding the Supreme Court's decision in *MCI* illustrates the general issue. Prior to 1996, the last major statute governing wireline communications was the 1934 Communications Act, which created the FCC.¹¹ By the 1990s that statute had become "antique" when judged by present "standards of the technological and socio-economic structure," as one scholar and for-

8. *See id.*

9. *See generally* Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548 (2016) (discussing this and other uses of forbearance).

10. *See generally, e.g.,* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

11. For a short history of communications regulation leading up to the 1934 Act, *see* Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934* (Max D. Paglin ed., 1989).

mer FCC commissioner put it.¹² In particular, Title II of the 1934 Communications Act placed a number of regulatory obligations on communications providers—such as the obligation to file and charge tariffed rates—that were widely thought justified because communications markets were and would remain strongly monopolistic and that all carriers should therefore be regulated under common-carriage principles.¹³ While that may have been true in 1934, by which time AT&T had consolidated its national monopoly on telephone service, competitive and technological changes since that time had rendered some of those obligations obsolete and even counter-productive if applied across the board.

Such problems became especially acute when the FCC faced how to regulate new entrants into traditionally monopolistic markets. Most famously, MCI (then known as Microwave Communications, Inc.) developed, in the 1970s, an innovative microwave relay system that came to compete with AT&T's long-distance telephone services.¹⁴ The FCC struggled with how to regulate MCI and other emerging long-distance providers, which the 1934 Act had not anticipated but which were facially subject to Title II common-carriage obligations.¹⁵ The Commission eventually forbade such carriers—under a policy described as “mandatory detariffing”—from filing rate schedules, finding that, in an increasingly competitive environment, the costs associated with allowing upstart competitors to file tariffs outweighed any benefits.¹⁶ But the Commission's mandatory detariffing policy proved legally unsound when, in 1985, the D.C. Circuit

12. *Id.* at 23.

13. Interestingly, the original justifications for common-carriage regulation of communications markets may not have depended exclusively on the presence of a monopoly provider. See Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provisions—A Product of Evolutionary Development*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, *supra* note 11, at 25–40 (describing legislative history behind the 1934 Act and predecessor statutes); see also Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 883–84 (2009) (“There appears to be only a weak correlation between market power or natural monopoly and the historical imposition of non-discrimination obligations.”). However, in the ensuing decades the perceived need for the core common-carrier obligations, including in particular tariffing and retail rate regulation, became increasingly dependent on the existence of a dominant firm. See Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World*, 51 HOUS. L. REV. 545, 560 (2013) (arguing that monopoly power has become “the dominant, if not the sole, criterion for determining the scope of common carriage”); see also *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 477 (2002) (explaining that “[a]t the dawn of modern utility regulation, in order to offset monopoly power and ensure affordable, stable public access to a utility's goods or services, legislatures enacted rate schedules to fix the prices a utility could charge” and that later such power was often transferred to administrative agencies).

14. See JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE* 44–46 (2d ed. 2013) (chronicling MCI's rise as a competitor to AT&T).

15. See generally Scott M. Schoenwald, *Regulating Competition in the Interexchange Telecommunications Market: The Dominant/Nondominant Carrier Approach and the Evolution of Forbearance*, 49 FED. COMM. L.J. 367 (1997).

16. See *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, CC Dkt. No. 79-252, Sixth Report & Order, 99 F.C.C.2d 1020 (1984).

struck it down for violating the Communications Act.¹⁷ The court stressed that the relevant statutory language provided that “every” communications common carrier “shall” file tariffs,¹⁸ and that the FCC’s power to “modify” the tariffing requirement “suggest[ed] circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement.”¹⁹ The Commission then reverted to a permissive detariffing policy, under which carriers such as MCI were allowed but not required to file tariffs.²⁰

The permissive detariffing policy went back into the courts, eventually culminating in a 5-3 decision by the Supreme Court, with the majority opinion written by Justice Scalia.²¹ *MCI* ruled that the Commission’s permissive detariffing policy was also in violation of the Communications Act.²² Using much the same reasoning that the D.C. Circuit had employed in prior iterations of the controversy, the Court held that the FCC’s authority—found in 47 U.S.C. § 203(b)—to “modify any requirement” found in section 203(a) could not be used to render 203(a)’s tariff-filing requirement null and void *in toto*, even for a limited class of carriers.²³ The heart of the Court’s analysis, one that has been reproduced in countless administrative law casebooks, is its parsing of various dictionary definitions of the word “modify,” finding that (outside of one “peculiar” definition found in Webster’s Third) the word was used to connote only minor changes and not “radical or fundamental” ones.²⁴ And because of the central importance of the tariff-filing requirement to the Communications Act, the FCC’s abolishment of that requirement could not be considered a minor change.²⁵

MCI has since taken on a life of its own, as the progenitor of the “major questions doctrine,” which operates to limit the deference normally owed to agency legal interpretations under *Chevron*.²⁶ In its most extreme form, the major questions doctrine limits the applicability of *Chevron* at so-called “Step Zero,” thereby licensing the court to undertake its own *de novo* analysis of the question at issue.²⁷ The rationale for this move appears to be that the underlying rationale for *Chevron*—which focuses on agencies’ institutional advantages vis-à-vis courts—does not apply when questions are sufficiently “big” that

17. See *MCI Telecomm. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

18. *Id.* at 1191 (quoting 47 U.S.C. § 203(a)) (emphasis in original).

19. *Id.* at 1192.

20. See *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 222 (1994).

21. *Id.* at 218.

22. *Id.* at 234.

23. *Id.* at 233–34.

24. See *id.* at 227–29.

25. See *id.* at 229–30.

26. See, e.g., Josh Chafetz, *Gridlock?*, 130 HARV. L. REV. F. 51, 52–54 (2016) (tracing evolution of the doctrine).

27. See *King v. Burwell*, 135 S. Ct. 2480 (2015).

Congress should not be presumed to have delegated them to an agency.²⁸

A slightly different, but no less modest, version of the major questions doctrine was recently championed by Judge Kavanaugh in his dissent from the D.C. Circuit's decision not to grant rehearing from the panel decision upholding the FCC's Title II reclassification.²⁹ In Judge Kavanaugh's view, which draws heavily on the Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*³⁰ in addition to *MCI*, Congress must "clearly authorize" agencies to promulgate "major rules," defined as those with "great economic and political significance."³¹ Unlike the first version of the major questions doctrine, this version would not transfer ultimate decision-making authority to the courts but would rather operate as an *absolute bar* to certain regulatory decisions, absent clear congressional authorization.

There is indeed some language in *MCI* to support these more aggressive forms of the major questions exception.³² For example, Justice Scalia wrote that, given the importance of tariffing to the regulatory scheme, "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."³³ But such a reading is also in some tension with Scalia's elsewhere expressed aversion to limiting *Chevron's* domain, most relevantly in *City of Arlington*, where he penned a majority opinion rejecting a "jurisdictional" exception to *Chevron* for, as he described it, "the big, important" questions.³⁴

For this reason, I favor a different reading of the case or, at least, a different emphasis. That reading takes us back to the topic of this Essay: how to treat old statutes in the face of changed circumstances. Indeed, the primary point of disagreement between the majority and Justice Stevens' dissent was on the question of how much flexibility

28. Why Congress would have preferred such questions to be resolved instead by a court is not explained. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 243 (2006) (criticizing major questions exception in part because "expertise and accountability, the linchpins of *Chevron's* legal fiction, are highly relevant to the resolution of major questions; it follows that so long as the governing statute is ambiguous, such questions should be resolved by agencies, not by courts").

29. See *U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

30. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

31. See *U.S. Telecomm. Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc) (emphasis in original).

32. A more modest version of the major questions doctrine would hold simply that "majorness" is one factor to consider when deciding whether an agency has overstepped the bounds of its *Chevron* authority, deploying the commonsense presumption that "Congress does not . . . hide the delegation of elephant-like regulatory powers in the mousehole-like landscape of obscure and technical statutory provisions." Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 788 (2017).

33. *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994).

34. *City of Arlington v. FCC.*, 133 S. Ct. 1863, 1868 (2013).

to allow the Commission to interpret the Communications Act in light of technological innovation.³⁵ Not surprisingly, given their different views on matters of statutory interpretation, Justice Stevens was more willing than Scalia to grant such flexibility. Indeed, he framed his dissent by asserting that “the Court’s consistent interpretation of the Act has afforded the Commission ample leeway to interpret and apply its statutory powers and responsibilities” in order to “meet new and unanticipated problems.”³⁶

The majority opinion, by contrast, can be read as a sort of exercise in “originalist statutory interpretation.”³⁷ For Justice Scalia, the entire question was whether Congress had, in 1934, granted the power in question through use of the word “modify.” Subsequent technological and/or linguistic³⁸ evolution could not alter the answer to that question. In other words, *MCI* stands for the proposition (among other things) that the scope of an agency’s discretion under *Chevron* is set at the point in time the statute is passed and does not expand or contract based on subsequent events. If the original statutory compact can reasonably be read to authorize the power in question, the agency is within its rights to exercise it. If not, too bad. That this may result in statutes falling out of step with the times is a consequence that the Court in *MCI*, led by Justice Scalia, was willing to accept.

Read in this light, *MCI* brings into focus a broader point, which is the difficulty of updating statutory frameworks through “interpretation” as such. Over the years, there have been various academic attempts to empower non-legislative actors—courts or agencies—to interpret statutes dynamically to account for changed circumstances.³⁹ And the issue has come into particular focus due to a recent (perceived?) uptick in congressional gridlock.⁴⁰ *MCI* shows the limits of such strategies, particularly in an age where textualism is ascendant. Even under the deferential *Chevron* standard, words matter. And the words that Congress has used may create a set of limits on agency discretion that appear arbitrary when judged against current conditions. What may be necessary, at least where available, is stronger medicine. The next Part turns to one such form, examined through Justice Scalia’s dissent in *Brand X*.

35. *MCI*, 512 U.S. at 235 (Stevens, J., dissenting).

36. *Id.*

37. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1488 (1987).

38. Justice Scalia specifically noted that Webster’s Third was published some decades after the Communications Act, and he joined in criticisms of the dictionary that faulted it for including modern and/or colloquial uses of certain words. See *MCI*, 512 U.S. at 228–29 n.3.

39. See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Eskridge, *supra* note 37; Freeman & Spence, *supra* note 10.

40. See Freeman & Spence, *supra* note 10.

II. A POTENTIAL CURE: THE *BRAND X* DISSSENT

On a conceptual level, the emergence of the Internet as a communications platform resembled the emergence of competitive long-distance carriers like MCI in the prior generation, if inarguably exceeding the latter in importance. Like those competitive carriers, ISPs and other Internet players allowed for communication to occur (at least partially) outside the traditional telephone system. And like those competitive carriers, Title II of the Communications Act, designed for the traditional system, applied imperfectly.

The big difference, of course, is that it was less clear in the Internet context whether ISPs or others were subject to Title II in the first place. The history of that controversy is well-tread and not the focus of this Essay. Briefly, the Telecommunications Act of 1996, passed after *MCI*, codified the pre-1996 Act distinction between providers of basic service (henceforth, “telecommunications carriers”) and providers of enhanced services (henceforth, “information service providers”), and clarified that the former but not the latter were subject to Title II regulation.⁴¹ But it did not definitively resolve how to treat providers of Internet Protocol-based services and broadband Internet access providers in particular. For several years, the FCC punted on the issue, before deciding in the 2002 *Cable Broadband Order* that broadband Internet access providers were not telecommunications carriers, but instead provided solely an information service, and thus were presumptively outside of the Title II framework.⁴²

The subsequent challenge to the Commission’s classification decision ultimately resulted in 2005’s *Brand X* decision, where the Court upheld the Commission’s classification of broadband providers under *Chevron*.⁴³ In particular, the Court deferred to the FCC’s judgment that broadband providers offered a unitary information service that did not include a separable telecommunications component that could be regulated under Title II.⁴⁴ What customers bought from broadband providers, in other words, was a single service in which basic telecommunications was inextricably linked with a variety of “enhanced” data-processing-type functions. Under Commission precedent, which the Court accepted, such integrated services—and their providers—were not subject to Title II.⁴⁵

Justice Scalia dissented. As is well known, Justice Scalia’s dissent provided the blueprint for what became known as the “third way”

41. See generally NUCHESTERLEIN & WEISER, *supra* note 14, at 190.

42. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Dkt. No. 00-185, CS Dkt. No. 02-52 Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4819 para. 33 (2002).

43. See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967 (2005).

44. *Id.*

45. See, e.g., *Federal-State Joint Board on Universal Service*, CC Dkt. No. 96-45, Report to Congress, 13 FCC Rcd. 11,501, 11,507-08, para. 13 (1998).

proposal for the regulation of ISPs.⁴⁶ Under that approach, the FCC would say that broadband providers offer a telecommunications service that could be regulated under Title II (a conclusion Scalia thought was mandated), but simultaneously forbear from most provisions of Title II as applied to such providers using the authority granted by 47 U.S.C. § 160. This is, of course, the system the Commission settled on in 2015's *Title II Reclassification Order*.⁴⁷

More broadly, like in *MCI*, the *Brand X* dissent can be seen as a case about the proper method for statutory updating in the face of regulatory obsolescence. Indeed, the dissent begins by quoting *MCI* and accusing the Commission of “once again attempt[ing] to concoct ‘a whole new regime of regulation (or of free-market competition)’ under the guise of statutory construction.”⁴⁸ The end-result—the non-regulation of broadband ISPs under Title II—did not bother him. But he went on: “The important fact . . . is that the Commission has chosen to achieve this [end result] through an implausible reading of the statute, and has thus exceeded the authority given to it by Congress.”⁴⁹

What would Justice Scalia suggest instead? Treat ISPs as Title II common carriers while forbearing from most or all of the regulation attaching to that status.⁵⁰ But that is precisely what the Commission had been forbidden to do, in the context of competitive common carriers, in *MCI*.⁵¹ What had changed? Well, in 1996, as part of its general overhaul of the Communications Act, Congress granted the FCC express “forbearance” authority.⁵² Indeed, the legislative history suggests that Congress did so in order to overturn the result in *MCI* and thus allow the Commission an ability to update the statute in light of new developments and new technologies.⁵³

46. See Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, FCC 8 (May 6, 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf [<https://perma.cc/2DFL-HJKA>].

47. See generally *Protecting and Promoting the Open Internet*, GN. Dkt. No. 14-28, Report & Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) [hereinafter *Title II Reclassification Order*]. As noted above, the Commission may be poised to reverse that decision. See *supra* note 3.

48. *Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting).

49. *Id.*

50. *Id.* at 1013.

51. *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994).

52. Telecommunications Act of 1996, 47 U.S.C. § 160(a) (2012) provides: “Notwithstanding section 332 (c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.”

53. See S. REP. NO. 103-367, at 117 (1994) (remarking that “[p]rovisions of S. 1822 seek directly to reverse” the Supreme Court’s decision in *MCI*); 141 CONG. REC. S7881-02, 7888

Scalia's issue with the FCC was thus not about the result that has been reached as a policy matter but with the *method* that had produced that result.⁵⁴ This is one reason I think it is misleading to portray Scalia as somehow a champion of net neutrality or other forms of regulation, as he has sometimes been painted to be by supporters of such regulation.⁵⁵ In fact, the dissent seems to endorse the possibility of using forbearance to achieve total nonregulation of ISPs, remarking that "the statutory criteria for forbearance . . . correspond well with the kinds of policy reasons the Commission has invoked to justify its peculiar construction of 'telecommunications service' to exclude cable-modem service."⁵⁶ In other words, the Commission could, using forbearance, completely deregulate ISPs even under Title II, leaving the framework in place, but otherwise draining it of content.

The key difference, then, between the Communications Act as the Court confronted it in 1994, in *MCI*, and in 2005 was the presence of a broad statutory forbearance provision. Because the statutory compact settled on in 1996 had such a dynamic updating power built into it, there was no need to resort to a power through implication or interpretation. And, crucially, the kind of statutory originalism that had penned in the FCC in *MCI* could be overcome.

III. LESSONS

This Part applies some of the insights gleaned from the above discussion to aspects of the current controversy regarding the regulatory classification and treatment of broadband ISPs.

A. *The Legal Irrelevance of UARG to the Title II Reclassification*

As mentioned above, in 2015 the FCC—following a high-profile public comment period—redesignated broadband ISPs as telecommunications carriers under the Communications Act.⁵⁷ And following Justice Scalia's dissent in *Brand X*, it forbore from a number of obligations that otherwise apply through Title II of the Act,⁵⁸ though (of course) it did not opt for total nonregulation of ISPs, leaving enough of the framework in place to support a set of net neutrality rules as

(1995) (statement of Sen. Pressler) ("The Federal courts have ruled that the FCC cannot deregulate. This bill solves that problem and makes deregulation legal and desirable."). The new forbearance provision was also likely modeled on the authority previously provided by section 332(c) of the Communications Act, added in 1993, which subjects commercial mobile services—i.e., cellular telephony—to common carrier status, but allows the Commission to render most of those obligations "inapplicable" to mobile carriers "by regulation."

54. *Brand X*, 545 U.S. at 1005.

55. See, e.g., Robinson Meyer, *Antonin Scalia Totally Gets Net Neutrality*, ATLANTIC (May 16, 2014), <http://www.theatlantic.com/technology/archive/2014/05/net-neutralities-little-known-hero-antonin-scalia/361315/> [https://perma.cc/QAE5-LLQQ].

56. *Brand X*, 545 U.S. at 1012 (Scalia, J., dissenting).

57. See *Title II Reclassification Order*, *supra* note 47, at 5614.

58. See *id.* at 5616–18 (describing scope of forbearance).

well as a number of other obligations.⁵⁹ The D.C. Circuit, in a consequential panel decision, upheld the Commission's underlying reclassification decision.⁶⁰ The D.C. Circuit subsequently denied a petition for rehearing en banc,⁶¹ and the ISPs have petitioned for Supreme Court review.⁶² In early 2018, with the ISPs' petitions still pending, the Commission rescinded the reclassification, in a decision that will surely prompt another round of appeals.⁶³

One legal argument lodged against the Commission's 2015 reclassification decision, popular among some academics and picked up in slightly altered form in Judge Williams' dissent,⁶⁴ revolves around a third Justice Scalia opinion involving statutory updating (though not the Communications Act)—*Utility Air Regulatory Group v. EPA (UARG)*.⁶⁵ I want to explain here why I think that argument is wrong.

UARG involved the applications of various parts of the Clean Air Act (CAA) to emitters of greenhouse gas.⁶⁶ To boil down a complex regulatory scheme (and history): The Supreme Court had previously held in *Massachusetts v. EPA* that the generic definition of "air pollutant" in the Clean Air Act included greenhouse gases.⁶⁷ Following that decision, the EPA concluded that it had to regulate such gases as "air pollutants" under parts of the CAA that were not at issue in *Massachusetts* and that govern stationary sources of pollution.⁶⁸ The problem for the EPA was that, under the statute, regulation under those parts was triggered whenever a source emitted 100 (or, for certain sources, 250) tons of pollutant annually.⁶⁹ Because greenhouse gases are emitted in much greater volumes than traditional kinds of pollutants, application of the statutory triggers would have massively increased the scope of the Act, which would now apply to commercial buildings, hotels, and the like that were not historically regulated under the CAA, with very high economic costs.⁷⁰ To get around this obstacle, the EPA simultaneously promulgated a "tailoring rule," which applied much higher triggers in the context of greenhouse gas emissions, though it indicated those triggers would be gradually de-

59. Technically, the Commission based the new rules on section 706 of the Telecommunications Act of 1996 as well as on Title II of the Communications Act. *See id.* at 5614.

60. U.S. Telecomm. Ass'n v. FCC, 825 F.3d 674 (2016).

61. U.S. Telecomm. Ass'n, 855 F.3d 381, 382 (D.C. Cir. 2017).

62. *See* John Eggerton, *NCTA Appeals Net-Neutrality Decision to SCOTUS* (Sept. 28, 2017) <http://www.multichannel.com/news/courts/ncta-appeals-net-neutrality-decision-supremes/415586> [<https://perma.cc/2KVD-CE82>].

63. *See supra* note 3.

64. *See* Justin (Gus) Hurwitz, *Net Neutrality: Something Old; Something New*, 2015 MICH. ST. L. REV. 665 (2015).

65. *Utility Air Regulating Group v. EPA*, 134 S. Ct. 2427 (2014).

66. *Id.* at 2427–28.

67. *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007).

68. *UARG*, 134 S. Ct. at 2437.

69. *Id.* at 2436.

70. *Id.* at 2436 n.2.

creased over time.⁷¹ The consequence was exempting many sources of greenhouse gas emissions that were facially subject to the Clean Air Act once greenhouse gases were classified as air pollutants under the provisions of the Act at issue.⁷²

As it came to the Supreme Court, the litigation in *UARG* posed a question similar to that in both *MCI* and *Brand X*: how to adapt a statute to a set of issues to which it applied imperfectly? The essential problem was that the Clean Air Act, written in large part in the early 1970s, had not anticipated pollutants like greenhouse gases, the characteristics of which diverged in significant ways from traditional, locally concentrated pollutants. The issue was thus how much leeway should be given to the EPA to adapt the statute in light of that fact.

The Court, led by Justice Scalia, determined that the EPA did not have the leeway it claimed.⁷³ The Court held that although the Act-wide definition of air pollutant included greenhouse gases, it was (in the parlance of *Chevron*) “unreasonable” for the EPA to conclude that greenhouse gases constituted air pollutants in the particular context of the stationary-source provisions at issue in the case.⁷⁴

A large part of the Court’s reasoning in this respect was driven by the EPA’s tailoring rule. According to the Court, the President’s constitutional authority to faithfully execute “the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.”⁷⁵ Thus,

We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. EPA therefore lacked authority to ‘tailor’ the Act’s unambiguous numerical thresholds to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers. Instead, the need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn.⁷⁶

The “wrong interpretative turn” the Court spoke of was the classifying of greenhouse gases as air pollutants under the provisions of the CAA in question.⁷⁷

The analogy to the FCC’s decision to reclassify broadband ISPs is easily seen. By reclassifying ISPs, the Commission would, absent forbearance, have had to apply a range of requirements to them that

71. *Id.* at 2437.

72. *Id.*

73. *Id.* at 2446.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

few reasonable people thought appropriate. The fact that it had to forbear from a broad swath of those requirements rendered the reclassification decision itself unreasonable or at least dubious.

I believe the panel majority was correct to reject this analogy, and the discussion of *MCI* and *Brand X* provided above supplies a more fulsome explanation of why. *UARG*, like *MCI*, involved a refusal to bend the terms of a statute—through interpretation or otherwise through implication, such as by use of tools such as the absurd results canon—to update an old statute to new situations. It involved a rejection of dynamic forms of statutory interpretation in favor of a kind of statutory originalism. If such originalism resulted in an unworkable statute, so be it.

The move in the *Title II Reclassification Order*, by contrast, involved use of an expressly granted power that, crucially, was built into the terms of the original statute itself—the “original intent” or “original meaning” of the statute, in other words, contained the very authority being invoked.⁷⁸ That this makes all the difference is demonstrated by the underlying separation of powers concerns invoked in *UARG*.⁷⁹ There, the Court explained that the executive cannot be said to be faithfully executing the law when it rewrites the terms of its statute for new contexts—no matter how good the policy rationale might be.⁸⁰ But what about when the statute in question itself contains such an “updating” power, expressly granted? There, the executive is faithfully executing the law *when* it exercises such a power, for the delegation is itself part of the statute. It is thus not “rewriting” the statute but implementing it.⁸¹

Further evidence that Justice Scalia, at least, would agree comes from his dissent in *Clinton v. New York*, the Line Item Veto Act case.⁸² That case involved a statute delegating authority to the President to “cancel” (i.e., render null and void) certain tax and spending provisions within five days of him signing a bill containing one.⁸³ Dissenting from the Court’s holding that the Act violated the Constitution, Justice Scalia drew a distinction between a claimed inherent executive authority to “cancel” or otherwise depart from a law and an authority that was itself granted by statute.⁸⁴ And he signed on to Justice Breyer’s statement, in his separate opinion, that “[w]hen the President ‘canceled’ the two appropriation measures now before us, he did not *repeal* any law nor did he *amend* any law. He simply fol-

78. See *U.S. Telecomm. Ass’n v. FCC*, 825 F.3d 674, 706 (2016).

79. *UARG*, 134 S. Ct. at 2446.

80. *Id.*

81. See Deacon, *supra* note 9, at 1567 (making similar point in context of forbearance-like delegations generally).

82. See *Clinton v. City of N.Y.*, 524 U.S. 417, 453 (1998) (Scalia, J., concurring in part in the judgment and dissenting in part).

83. See *id.* at 436.

84. *Id.* at 467–68 (Scalia, J., dissenting).

lowed the law, leaving the statutes, as they are literally written, intact.”⁸⁵

B. Managing Regulation Through Interpretation Versus Forbearance

I want to suggest in this final section some reasons why I think that, at least now that the Title II framework has been legally sustained, it makes sense to work within that framework, even for those who favor a deregulatory path. Under the approach I propose, future statutory updating, including deregulation, would be done through the forbearance process. This approach has two main, and related, benefits. First, it would allow the Commission to focus on the right policy questions: whether particular requirements should be applied to particular actors in the broadband world, or whether issues should be left to background law such as antitrust. Second, reliance on forbearance can, at least to some extent, avoid the kind of discontinuities and arbitrary outcomes associated with statutory updating through alternate forms, particularly statutory interpretation of an aging statute that has fallen out of step with the times.

As an initial matter, it is a mistake to assume that extending forbearance is inherently more proregulatory than the alternative—overturning the Commission’s *Title II Order* in total and backtracking on the interpretive steps that the Commission engaged in to place broadband ISPs within the Title II framework, as the current Commission has done. Either approach will require the FCC to explain its reversal, or at least the reasons for the new policies. And as Justice Scalia acknowledged in *Brand X*, there is no reason in theory why forbearance could not achieve the total nonregulation of ISPs provided the Commission could articulate reasons for that outcome.⁸⁶ There seems to be a sense among critics of FCC regulation that going back to the old framework would be more permanent, in that a future, more regulatory Commission could, with the reclassification in place, simply “unforbear” from various requirements, and that reclassification would prevent it from doing so. I think that is mistaken. Just as a future Commission could unforbear, it could also reinstate Title II. To be sure, the Commission would have to go through another round of notice and comment rulemaking to readopt the Title II framework, but the same would be true as well for any “unforbearance.” And, with the D.C. Circuit’s decision upholding the Title II classification in place, there is no reason in theory it could not revert to Title II. In other words, one approach does not inherently tie the Commission’s hands more than the other.

85. *Id.* at 474 (Breyer, J., dissenting).

86. *National Cable & Telecomm. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting).

So what are the benefits I see in the Title II-plus-forbearance approach, even for those who favor deregulation? First, the approach has the benefit of focusing the Commission's attention on the right set of issues. Whether broadband ISPs should be regulated in this or that way does not depend, in my view, on whether they "offer" a telecommunications service as the Act defines it, or on such sub-issues as whether DNS or caching fall within the telecommunications management exception.⁸⁷ Moreover, at some point, the courts are going to start looking skeptically at the Commission's continued revising of the answers to these ultimately interpretive—but, importantly, also factually-informed—questions.

Accepting, at least *arguendo*,⁸⁸ the applicability of Title II while lessening regulation through the exercise of forbearance, by contrast, allows the Commission to focus on the right questions. The forbearance factors themselves are quite broad, and allow the Commission a fair amount of discretion.⁸⁹ But they point toward what should be the central inquiry: Does FCC regulation provide a valuable addition to background forms of regulation, such as antitrust? And answering this question properly focuses the Commission on whether regulatory interventions are, at least in a rough sense, cost-benefit justified, or whether other institutions, such as the courts or FTC, are better able to police the issue.

The FCC has not always done a very good job teeing up this comparative question. For example, in my view the FCC's *Title II Order* devoted too little discussion to the question of why antitrust law was insufficient to handle net neutrality-type issues.⁹⁰ But the outlines of that approach are there, particularly in the Commission's early forbearance decisions under section 332, which allowed the Commission to forbear from Title II requirements as applied to mobile carriers.⁹¹ It is also broadly in line with principles of regulation widely accepted and enshrined in the executive orders governing executive agencies (though not, at least formally, independent agencies like the FCC).

87. See *Title II Reclassification Order*, *supra* note 47, at 5758 n.972 ("DNS is most commonly used to translate domain names, such as 'nytimes.com,' into numerical IP addresses that are used by network equipment to locate the desired content.").

88. Indeed, the Commission has the power to forbear from requirements without taking a position on whether those requirements apply in the first place. See *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006).

89. See Telecommunications Act § 160(a) (quoting factors); see also *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006).

90. See generally Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate* 7 J. TELECOMM. & HIGH TECH. L. 19 (2009) (arguing for a largely antitrust focused regime).

91. See, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Carriers*, GN Dkt. No. 93-252, Second Report & Order, 9 FCC Rcd. 2156, 1414-17, para 3-10 (1994), <https://www.gpo.gov/fdsys/pkg/FR-1994-11-21/html/94-28199.htm> [<https://perma.cc/LFG8-YP4M>].

The second main benefit of the approach is that it lessens the need for creative interpretations of the Communications Act that arise under the prior Title I framework. Crucially, this point assumes that all Commissions will want to keep *some* issues related to broadband within their purview. For example, the FCC is unlikely to completely abandon its role in addressing public safety or universal service-related issues. Thus, even under Title I, there is a certain amount of “building up” that the Commission must engage in. This is seen, not only in the pre-Title II history of broadband regulation, but also in the Commission’s treatment of Voice over Internet Protocol (VoIP), to which it has applied various requirements while remaining agnostic on whether VoIP is a telecommunications service.

The issue with this kind of statutory updating is that it requires bending the Act itself—possibly past the breaking point—and also risks arbitrary outcomes that arise from the limits of statutory adaptation through interpretation. Take, for example, the FCC’s pre-Title II efforts to extend universal service funding to broadband providers and to require recipients to offer broadband service under section 254 of the Communications Act. The Commission’s legal theory for doing so required a number of convoluted steps and stretches.⁹² And, although the theory was ultimately successful in front of a deferential court, there was a rub: Because only “eligible telecommunications carriers” (under section 214) are entitled to universal service support, the Commission’s theory depended on a provider offering a telecommunications service in addition to an (at that point) Title I broadband or VoIP service in order to qualify for funding. Though the Tenth Circuit did not ultimately decide whether non-telecommunications carriers could receive support, finding the issue unripe, this potential discontinuity creates a serious problem for the Commission’s theory when in the future providers increasingly provide all-IP services.⁹³

The other possible basis for building up regulation in the absence of Title II involves the use of section 706.⁹⁴ But section 706 has its own set of potentially arbitrary limitations. For one, it requires the Commission to tie its exercise of authority to “infrastructure investment,”⁹⁵ which may not always correspond to the relevant policy

92. I won’t bore you with the details here. For more, see *In re FCC 11-161*, 753 F.3d 1015, 1044–49 (10th Cir. 2014); NUECHTERLEIN & WEISER, *supra* note 14, at 312–14.

93. See also NUECHTERLEIN & WEISER, *supra* note 14, at 314.

94. Telecommunications Act § 1302(a) directs the Commission to:

[E]ncourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

95. Telecommunications Act § 1302(b) similarly provides that:

goal. Second, the Commission's exercise of authority under section 706 does not allow it to "treat" information service providers as "common carriers."⁹⁶ As I have written elsewhere, what this limitation entails is highly unclear.⁹⁷ What is clear, however, is that the limitation corresponds only very roughly with any policy justification for limiting the range of the Commission's actions.

CONCLUSION

This Essay has attempted to shed some light on a recurring issue in administration law and communications regulation in particular—the problem of aging statutes and what to do about them. In particular, it has showed that the tools agencies use in order to update the statutes they administer may be as important as the substantive results rendered and that, indeed, the substantive results are in important ways the product of the tools. And although today's controversies are destined to recede from view, the general problem of old statutes, we can be assured, will remain.

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

96. See *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

97. See Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133 (2015).

