SUPREME COURT OF THE UNITED STATES

Nos. 97–826, 97–829, 97–830, 97–831, 97–1075, 97–1087, 97–1099, AND 97–1141

AT&T CORPORATION, ET AL., PETITIONERS
97–826 *v.*
IOWA UTILITIES BOARD ET AL.;

AT&T CORPORATION, ET AL., PETITIONERS
v.
CALIFORNIA ET AL.

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER
97–829 *v.*
IOWA UTILITIES BOARD ET AL.;

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER
v.
CALIFORNIA ET AL.

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, ET AL., PETITIONERS
97–830 *v.*
IOWA UTILITIES BOARD ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, PETITIONERS
97–831 *v.*
IOWA UTILITIES BOARD ET AL.;

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, PETITIONERS
v.
CALIFORNIA ET AL.

AMERITECH CORPORATION, ET AL., PETITIONERS
97–1075 *v.*
FEDERAL COMMUNICATIONS COMMISSION ET AL.

GTE MIDWEST, INCORPORATED, PETITIONER
97–1087 *v.*
FEDERAL COMMUNICATIONS COMMISSION ET AL.

U S WEST, INC., PETITIONER
97–1099 *v.*
FEDERAL COMMUNICATIONS COMMISSION ET AL.

SOUTHERN NEW ENGLAND TELEPHONE COMPANY, ET AL., PETITIONERS
97–1141 *v.*
FEDERAL COMMUNICATIONS COMMISSION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 25, 1999]

JUSTICE THOMAS, with whom the CHIEF JUSTICE and JUSTICE BREYER join, concurring in part and dissenting in part.

Since Alexander Graham Bell invented the telephone in 1876, the States have been, for all practical purposes, exclusively responsible for regulating intrastate telephone service. Although the Telecommunications Act of 1996 altered that more than century-old tradition, the majority takes the Act too far in transferring the States' regulatory authority wholesale to the Federal Communications Commission. In my view, the Act does not unambiguously indicate that Congress intended for such a transfer to occur. Indeed, it specifically reserves for the States the primary responsibility to conduct mediations and arbitrations and to approve agreements between carriers See 47 U. S. C. §§252(c); (e) (1994 ed., Supp. II). I therefore respectfully dissent from Part II of the majority's opinion.[1]

I

From the time that the commercial offering of telephone

[1] I agree with the majority's analysis of the unbundling and pick-and-choose rules, which were not challenged on jurisdictional grounds.

service began in 1877 until the expiration of key patents in 1893 and 1894, Alexander Graham Bell's telephone company– which came to be known as the American Telephone and Telegraph Company– enjoyed a monopoly. J. Brooks, Telephone: The First Hundred Years 59, 67, 71–72 (1976). In the decades that followed, thousands of independent phone companies emerged to fill in the gaps left by the telephone giant and, in most larger markets, to build rival networks in direct competition with it. *Id.*, at 102–111. As competition developed, many municipalities began to adopt ordinances regulating telephone service. See, *e.g.*, K. Lipartito, The Bell System and Regional Business 177–186 (1989).

During the 1900's, state legislatures came under increasing pressure to centralize the regulation of telephone service. See, *e.g.*, *id.*, at 185–207. Although the quasi-competitive system had significant drawbacks from the consumers' standpoint– principally the refusal of competing systems to interconnect– perhaps the strongest advocate of state regulation was AT&T itself. *Ibid*. The company's arguments that telephone service was naturally monopolistic and that competition was resulting in wasteful duplication of facilities appealed to Progressive-era legislatures. Cohen, The Telephone Problem and the Road to Telephone Regulation in the United States, 3 J. Policy Hist. 42, 55–57 (1991); see generally, Lipartito, *supra,* at 185–207. By 1915, most States had established public utility commissions and charged them with regulating telephone service. Brooks, *supra,* at 144. Over time, the Bell Companies' policy of buying out independent providers coupled with the state commissions' practice of prohibiting competitive entry led back to the monopoly provision of local telephone service. See R. Garnet, The Telephone Enterprise: The Evolution of the Bell system's Horizontal Structure, 1876–1909, 146–153 (1985).

Early federal telecommunications regulation, which

began with the Mann-Elkins Act of 1910, did not displace the States' fledgling efforts to regulate intrastate telephone service. To the contrary, the Mann-Elkins Act extended the jurisdiction of the Interstate Commerce Commission (ICC) to cover *only* interstate and international telecommunications services.[2] As a result, state and federal agencies were required to meticulously separate the intrastate and interstate aspects of telephone services. Accordingly, in *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133 (1931), this Court invalidated an Illinois Commerce Commission order establishing rates for the city of Chicago because it failed to distinguish between the intrastate and interstate property and business of the telephone company. In so doing, the Court emphasized that "[t]he separation of the intrastate and interstate property, revenues and expenses of the Company is . . . essential to the appropriate recognition of the competent governmental authority in each field of regulation." *Id.*, at 148.

In the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. §151 *et seq.*, Congress transferred authority over interstate communications from the ICC to the newly created Federal Communications Commission (FCC or Commission). As in the Mann-Elkins Act, Congress chose not to displace the States' authority over intrastate communications. Indeed, Congress took care to preserve it explicitly in §2(b), which provides, in relevant part, that "nothing in this chapter shall be construed to apply to or give the Commission jurisdiction with respect

– – – – – –

[2] The Mann-Elkins Act provided, in relevant part, that "the provisions of this Act shall apply to . . . telegraph, telephone, and cable companies . . . engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act." Act of June 18, 1910, ch. 309, §7, 36 Stat. 544–545.

to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U. S. C. §152(b). We have carefully guarded the historical jurisdictional division codified in §2(b). See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U. S. 355 (1986). In *Louisiana*, we held that §2(b) precluded the FCC from pre-empting state depreciation regulations. In so doing, we rejected the FCC's argument that §220 of the Communications Act of 1934 provided it with authority to displace state regulations that were inconsistent with federal depreciation standards. We instead concluded that §2(b) "fences off from FCC reach or regulation intrastate matters– indeed, including matters 'in connection with' intrastate service," *id.*, at 370, and we further indicated that the FCC could breach §2(b)'s jurisdictional "fence" only when Congress used "unambiguous or straightforward" language to give it jurisdiction over intrastate communications. *Id.*, at 377.

Congress enacted the Telecommunications Act of 1996 (Act), Pub. L. 104–104, 110 Stat. 56, against this backdrop. To be sure, the 1996 Act marked a significant change in federal telecommunications policy. Most important, Congress ended the States' longstanding practice of granting and maintaining local exchange monopolies. See 47 U. S. C. §253(a) (1994 ed., Supp. II). It also required incumbent local exchange carriers to allow their competitors to access their facilities in three different ways. As the majority describes more completely, *ante*, at 3, n. 1, incumbents must: interconnect their networks with requesting carriers' facilities and equipment, §251(c)(2); provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, §251(c)(3); and offer to resell at wholesale rates any telecommunications service that they provide to subscribers who are not telecommunications carriers, §251(c)(4). The Act sets forth additional obligations applicable to all

telecommunications carriers, §251(a), and all local exchange carriers, §251(b). To facilitate rapid transition from monopoly to competitive provision of local telephone service, Congress set forth a process to ensure that the incumbent and competing carriers fulfill these obligations in §252.

Section 252 sets up a preference for negotiated interconnection agreements. §252(a). To the extent that the incumbent and competing carriers cannot agree, the Act gives the state commissions primary responsibility for mediating and arbitrating agreements. Specifically, Congress directed the state commissions to mediate disputes between carriers during the voluntary negotiation period, §252(a)(2), and– after the negotiations have run their course– to arbitrate any "open issues," §252(b)(1). In conducting these arbitrations, state commissions are directed to ensure that open issues are resolved in accordance with the requirements of §251, "establish . . . rates for interconnection, services, or network elements" according to the standards that Congress set forth in §252(d), and to provide a schedule for implementing the agreement reached during arbitration. §252(c). The state commissions are also to approve or reject any interconnection agreement, whether adopted by negotiation or arbitration, §252(e)(1), guided by the standards set forth in §252(e)(2). The 1996 Act permits the FCC to intervene in this process only as a last resort, when "a State commission fails to act to carry out its responsibilit[ies]." §252(e)(5). In that event, "the Commission shall issue an order preempting the State commission's jurisdiction . . . and shall assume the responsibility of the State commission . . . and act for the State commission." *Ibid.*

To be sure, the Act directs the state commissions, in conducting arbitrations, to ensure that open issues are resolved in accordance with the "regulations prescribed by the [FCC] pursuant to section 251," §252(c)(1), and pro-

vides that the state commissions may reject an arbitrated agreement if it does not meet the requirements of §251, "including the regulations prescribed by the Commission pursuant to section 251," §252(e)(2)(B). But the scope of the FCC's rulemaking authority under the Act is quite limited. Section 251(d)(1) directs the Commission to "complete all actions necessary to establish regulations to implement the requirements of this section" within a certain time period. I believe that this subsection is a time limitation upon, and a mandate for, the exercise of rulemaking authority conferred elsewhere. The source of that authority, as I describe below, is not §201(b), but rather, §251 itself. Section 251 specifically identifies those subjects upon which the FCC may regulate. The FCC has authority to regulate on the subject of number portability, §251(b)(2); those network elements that the carrier must make available on an unbundled basis for purposes of §251(c), §251(d)(2); numbering administration, §251(e); exchange access and interconnection requirements in effect prior to the Act's effective date, §251(g); and treatment of comparable carriers as incumbents, §251(h)(2).

II

The regulations that are the subject of respondents' jurisdictional challenge contravene the division of authority set forth in the 1996 Act and disregard the 100-year tradition of state authority over intrastate telecommunications. In the introduction to its First Report and Order, the FCC peremptorily declared that §§251 and 252 *"require* [it] to establish implementing rules to govern interconnection, resale of services, access to unbundled network elements, and other matters, and direct the states to follow the Act and those rules in arbitrating and approving arbitrated agreements under sections 251 and 252." In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd

15544–15545 (1996) (emphasis added). In fulfilling its perceived statutory mandate, the FCC promulgated painstakingly detailed regulations dictating to the state commissions how they must implement §§251 and 252. I agree with the Eighth Circuit that the FCC lacked jurisdiction to promulgate the regulations challenged on jurisdictional grounds.[3]

A

In endorsing the FCC's claim that it has general rulemaking authority to implement the local competition provisions of the 1996 Act, the majority relies upon a general grant of authority that predates the Act, 47 U. S. C. §201(b). The last sentence of that provision, upon which the majority so heavily relies, provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." This grant of authority, however, cannot be read in isolation. As the first Justice Harlan once observed: "[I]t is a familiar rule in the interpretation of . . . statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.'" *Neal* v. *Clark*, 95 U. S. 704, 708 (1878). Section 201(a) refers exclusively to "interstate or foreign communication by wire or radio," and the first sentence of §201(b) refers to "charges, practices, classifications, and regulations for and in connection with such communication service." "Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with spe-

[3] I agree with the majority, *ante*, at 18, that respondents' challenge to the FCC's assertion that it has authority under 47 U. S. C. §208 to consider complaints arising under the 1996 Act is not ripe for review. It appears to me, however, that the Court of Appeals conclusion that the FCC lacks such authority carries considerable force.

cific enumeration." *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 129 (1991). Applying this principle here, it is clear that the last sentence of §201(b) only gives the FCC authority to promulgate regulations governing interstate and foreign communications. By failing to read §201(b)'s grant of rulemaking authority in light of the limitation that precedes it, the majority attributes to the provision "a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breath to the Acts of Congress.'" *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995) (quoting *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961)).

That Congress apparently understood §201(b) to be so limited is demonstrated by the fact that the FCC is specifically charged, under the 1996 Act, with issuing regulations that implement particular portions of §251, as I have described, *supra*, at 7. If Congress believed, as does the majority, that §201(b) provided the FCC with plenary authority to promulgate regulations implementing all of the 1996 Act's provisions, it presumably would not have needed to make clear that the FCC had regulatory authority with respect to particular matters.

B

Moreover, I cannot see how §201(b) represents an "unambiguous" grant of authority that is sufficient to overcome §2(b)'s jurisdictional fence. In my view, the majority's interpretation of §201(b) necessarily implies that Congress *sub silentio* rendered §2(b) a nullity by extending federal law to cover intrastate telecommunications. That conclusion is simply untenable in light of the fact that §2(b) is written in the disjunctive. Section 2(b), 47 U. S. C. §152(b), provides that "nothing in this chapter shall be construed to apply to *or to give the Commission jurisdiction with respect to*" intrastate telecommunications service (Emphasis added.) Contrary to the majority's suggestion,

ante, at 12, there is nothing "subtle" or "imaginative" about the principle that "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used. Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise . . . ." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979) (citation omitted). Nor is the majority correct that *Louisiana* supports its reading of §2(b). Indeed, the disjunctive structure of the provision led us to conclude in *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U. S. 355 (1986), that §2(b) contains both "a rule of statutory construction" and a "substantive jurisdictional limitation on the FCC's power." *Id.*, at 372–373. It follows that we should give independent legal significance to each. Thus, it is not enough for the majority simply to demonstrate that the 1996 Act "appl[ies] to" intrastate services; it must also point to "unambiguous" and "straightforward" evidence that Congress intended to eliminate §2(b)'s "substantive jurisdictional limitation."

This they cannot do. Nothing in the 1996 Act eliminates §2(b)'s jurisdictional fence. Congress has elsewhere demonstrated that it knows how to exempt certain provisions from §2(b)'s reach; indeed, it has done so quite recently. For example, in 1992, Congress enacted legislation providing that §2(b) shall apply "except as provided in sections 223 through 227" of the Communications Act of 1934. Pub. L. 102–243. The following year, Congress also exempted §301 from §2(b)'s purview. Pub. L. 103–66. With the 1996 Act, Congress neither eliminated §2(b) altogether nor added §§251 and 252 to the list of provisions exempted from its jurisdictional fence. I believe that we are obliged to honor that choice.

C

Even if the rulemaking authority granted by §201(b) was not limited to interstate and international communi-

cations *and* the 1996 Act rendered §2(b) a nullity, the FCC's argument would still fail with respect to its pricing rules and its rules governing the state commissions' approval of interconnection agreements. We have made it clear that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, 445 (1987) (emphasis omitted; internal quotation marks omitted). Section 201(b) at best gives the FCC general rulemaking authority. But the 1996 Act gives the state commissions the primary responsibility for conducting mediations and arbitrations and approving interconnection agreements. Indeed, as I have described, Congress set forth specific standards that the state commissions are to adhere to in setting pricing, §252(d), and in approving interconnection agreements, §252(e). The majority appears to believe that Congress expected that the FCC would promulgate rules to "guide the state-commission judgments." *Ante*, at 18. I do not agree. It seems to me that Congress consciously designed a system that respected the States' historical role as the dominant authority with respect to intrastate communications. In giving the state commissions primary responsibility for conducting mediations and arbitrations and for approving interconnection agreements, I simply do not think that Congress intended to limit States' authority to mechanically apply whatever methodologies, formulas, and rules that the FCC mandated. Because Congress set forth specific provisions giving primary responsibility in certain areas to the States, and because the subsections setting forth the standards that the state commissions are to apply make no mention of FCC regulation, I believe that we are obliged to presume that Congress intended the specific

grant of primary authority to the States to control.[4]

D

My interpretation, of course, would require the state commissions to interpret and implement the substantive provisions of the 1996 Act in those instances where the 1996 Act gave the state commissions primary authority. Several parties have suggested that it is inappropriate for the States to do so. One of the many petitioners in this case goes so far as to suggest that under our decision in *Printz* v. *United States*, 521 U. S. 898 (1997), the "legitimacy of any such delegation of federal substantive authority [to the States] would be suspect." Brief for Petitioner in No. 97–829, p. 40. To be sure, we held in *Printz* that the Federal Government may not commandeer state executive agencies. But I do not know of a principle of federal law that prohibits the States from interpreting and applying federal law. Indeed, basic principles of federalism compel us to presume that States are competent to do so. As Justice Field observed over 100 years ago in a decision upholding a federal law delegating to the States the authority to determine compensation in takings cases:

> "[I]t was the purpose of the Constitution to establish a general government independent of, and in some respects superior to, that of the State governments– one which could enforce its own laws through its own officers and tribunals . . . . Yet from the time of its establishment that government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents. Their use

– – – – – –

[4]My conclusion applies with equal force to other FCC regulations that trump the state commissions' responsibilities, including exemptions, suspensions, and modification, §251(f); approval of agreements predating the Act, §252(a); and pre-emption of state access regulations that are inconsistent with FCC dictates, §251(d)(3).

> has not been deemed violative of any principle as in any manner derogating from the sovereign authority of the federal government; but as a matter of convenience and as tending to a great saving of expense." *United States* v. *Jones*, 109 U. S. 513, 519–520 (1883).

When, in 1996, Congress decided to attempt to introduce competition into the market for local telephone service, it deemed it wise to take advantage of the policy expertise that the state commissions have developed in regulating such service. It is not for us– or the FCC– to second-guess its decision.

* * *

Contrary to longstanding historical practice, this Court's precedents respecting that practice, and the 1996 Act's adherence to it, the majority grants the FCC unbounded authority to regulate a matter of state concern. Because I do not believe that Congress intended such a result, I respectfully dissent from Part II of the majority's opinion.