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 BREYER, concurring in part and dissenting in part.

A statute's history and purpose can illuminate its language. When read in light of history, purpose, and precedent, the Telecommunications Act of 1996 (1996 Act or Act), Pub. L. 104–104, 110 Stat. 56, is not the "model of ambiguity" or "self-contradiction" of which the majority complains. *Ante*, at 29. Neither does it permit the Federal Communications Commission to promulgate the pricing and unbundling rules before us.

I

The FCC's pricing rules fall outside its delegated authority because both (1) a century of regulatory history establishes state authority as the local telephone service ratemaking norm and (2) the 1996 Act nowhere changes, or creates an exception to, that norm. JUSTICE THOMAS' opinion describes the history that has created the norm. *Ante*, at 2–5. In my view, the Act's purposes, its language, relevant precedent, and the nature of the FCC's rules provide added support for his conclusion.

A

The Act's purposes help explain why its language and structure foresee, not national rate uniformity, but tradi-

tional local ratemaking– FCC views to the contrary notwithstanding. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, ¶113, 11 FCC Rcd 15499, 15558 (1996) (First Report & Order). To understand those purposes, one must recall that AT&T once dominated the national telecommunications industry. It controlled virtually all long-distance telephone service, most local telephone service, and a substantial amount of all telephone equipment manufacturing. See generally *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 165 (DC 1982) (describing AT&T's "commanding position" in the Nation's telecommunications business), aff'd *sub nom. Maryland* v. *United States*, 460 U. S. 1001 (1983). In 1982, however, AT&T entered into an antitrust consent decree, which ended its industry dominance. See 552 F. Supp., at 160–170.

The decree split AT&T from its local telephone service subsidiaries. By doing so, the decree sought to encourage new competition in long-distance service by firms such as MCI and Sprint. And it also encouraged new competition in telephone equipment markets. But the decree did not introduce new competition into the local telephone service markets. Rather, it left each local market in the hands of a single state-regulated local service supplier, such as NYNEX in New York, or Bell Atlantic in Washington, D.C. That circumstance may have reflected the belief, current at the time, that local service competition could prove wasteful, leading to the unwarranted duplication of expensive physical facilities by requiring, say, the unnecessary digging up of city streets to install unneeded wires connecting each house with a series of new but redundant local switches. See, *e.g.*, *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 537–538 (DC 1987); P. Huber, M. Kellogg, & J. Thorne, The Geodesic Network II: 1993 Report on Competition in the Telephone Industry pp. 2.3–2.5 (1992).

At the same time, the decree forbade most such local service suppliers from entering long-distance markets.

United States v. *American Tel. & Tel. Co., supra,* at 186–188. That prohibition, by preventing entry by local firms willing and able to supply long-distance service, risked less long-distance competition. Cf. P. MacAvoy, The Failure of Antitrust and Regulation to Establish Competition in Long-Distance Telephone Services 179–183 (1996). But the decree reflected a countervailing concern. Local firms might enjoy special long-distance advantages not available to purely long-distance companies. See *United States* v. *American Tel. & Tel., supra,* at 186–188. Perhaps a local service company would find it unusually easy to attract local customers to its long-distance service; perhaps it could use its control of local service to place its long-distance competitors at a disadvantage. See T. Krattenmaker, Telecommunications Law and Policy 411–412 (2d ed. 1998) (explaining rationale of the decree). And though some argued that any such special advantages were innocent, rather like those enjoyed by a transcontinental airline that dominates a local hub, others claimed they were unfair, like those that had once helped AT&T (through its control of local service) maintain long-distance dominance. See *United States* v. *American Tel. & Tel., supra,* at 165; see generally A. Kahn, Letting Go: Deregulating the Process of Deregulation, or: Temptation of the Kleptocrats and the Political Economy of Regulatory Disingenuousness 37–38 and n. 53 (1998) (discussing the debate). Whether the decree's trade-off made sense— *i.e.,* whether the existence of some such local-firm/long-distance-service advantage warranted the decree's prohibition limiting the number of potential long-distance competitors— became a fertile source for later argument. See, *e.g.*, MacAvoy, *supra*, at 171–177 (arguing that oligopolistic conditions in long-distance markets have produced supranormal profits that would not be sustainable with increased competition); Robinson, The Titanic Remembered: AT&T and the Changing World of Telecommunications, 5 Yale J. Reg.

517, 537 (1988) (arguing that the rationale for the decree's restrictions on local service companies was "just as persuasive" as that underlying the decree).

The Act before us responds to this argument by changing the postdecree status quo in two important ways. First, it creates a legal method through which local telephone service companies may enter long-distance markets, thereby providing additional long-distance competition. See 47 U. S. C. §271(c)(2)(B) (1994 ed., Supp. II) (listing 14 conditions that, if met, permit incumbent local firms to enter long-distance market). Second, it conditions that long-distance entry upon either (1) the introduction of competition into local markets, *or* (2) the failure of a competing carrier to request access to or interconnection with the local service supplier (or the competing carrier's failure to engage in "good faith" negotiations). §§271(c)(1)(A), (B). The existence of these two alternatives is important. In setting forth the first alternative, actual local competition, the statute recognizes that local service competition would diminish any special long-distance advantages that the local firm has, thereby lessening the need for the decree's long-distance-market entry prohibition. See *supra*, at 4; Krattenmaker, The Telecommunications Act of 1996, 49 Fed. Comm. L. J. 1, 15–16 (1996). In setting forth the second alternative, the Act recognizes that actual local competition might not prove practical; in some places, to some extent, local markets may not support more than a single firm, at least not without wasteful duplication of resources. See Note, The FCC and the Telecom Act of 1996: Necessary Steps to Achieve Substantial Deregulation, 11 Harv. J. L. & Tech. 797, 810, n. 57 (1998).

These alternatives raise a difficult empirical question. To what extent is local competition possible without wasteful duplication of facilities? The Act does not purport to answer this question. Rather, it creates a set of

legal rules which, through interaction with the marketplace, aims to produce sensible answers. In particular, the Act *permits* new local entry by dismantling existing legal barriers that would otherwise inhibit it. 47 U. S. C. §253(a) (1994 ed., Supp. II). Equally important, the Act *promotes* new local entry by requiring incumbents (1) to "interconnect" with new entrants (thereby allowing even a partial new entrant's small set of subscribers to call others within an entire local area), §251(c)(2); (2) to sell retail services to new entrants at wholesale rates (thereby allowing newly entering firms to become "resellers," competing in retailing), §251(c)(4); and (3) to provide new entrants "access to network elements," say, house-to-street telephone lines, "on an unbundled basis" (thereby allowing new entry in respect to *some* aspects of the local service business without requiring wasteful duplication of the *entire* business), §251(c)(3). The last mentioned "unbundling" requirement does not specifically state which elements must be unbundled, a difficult matter that I shall discuss below. See *infra*, at 18–21. But one can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the *remaining* aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition both as an end in local markets and as a means towards more competition, and fair competition, in long-distance markets.

For the present cases, the most important characteristic of the Act's purposes is what those purposes do *not* require. Those purposes neither require nor suggest reading the Act's language to change radically the scope of local

regulators' traditional rate-setting powers. A utility's rate structure consists of complex sets of typically interdependent individual rates, the determination of which depends upon numerous considerations, many of which are local in nature and fall outside the Act's purview. The introduction of competition into a particular locality does not diminish the importance of place-specific factors, such as local history, geography, demands, and costs. And local regulators are likely more familiar than are national regulators, for example, with a particular utility's physical plant, its cost structure, the pattern of local demand, the history of local investment, and the need for recovery of undepreciated fixed costs.

Moreover, local regulators have experience setting rates that recover both the immediate, smaller, added costs that demand for additional service imposes upon a local system and also a proper share of the often huge fixed costs (of local loops, say, or switches) and overhead needed to provide the dial tone itself. Indeed, local regulators would seem as likely, if not more likely, than national regulators to know whether, when, or the extent to which, particular local charges or systems of charges will lead new entrants to abandon efforts to use a local incumbent's elements, turning instead to alternative technologies. And local regulators would seem as likely as national regulators to know whether or when use of such alternative technologies in the local circumstances will prove more beneficial than wasteful. It is the local communities, and, hence, local regulators, that will directly confront the problems and enjoy the benefits associated with local efforts to integrate new and old communications resources and communications firms. These factors, along with the fact that the relevant technology changes rapidly, argue in favor of, not against, local rate-setting control, including local rate-setting differences, for those differences can amount to the kind of "experimentation" long thought a strength of our federal system.

At most, the Act's purposes argue for a grant to the FCC of authority to set federal limitations preventing States from adopting forms of ratemaking that would interfere with the Act's basic objectives. The Act explicitly grants the FCC a particular pre-emption tool, not here invoked, which is apparently suited to that job. 47 U. S. C. §253(d) (1994 ed., Supp. II) (permitting the FCC to pre-empt, after notice and comment, any state legal requirement that has the effect of prohibiting entry into local service). Such a grant could not help the FCC here, however, for, as I discuss below, *infra*, at 13–17, the FCC's rules do not just create an outer envelope or simply prevent the States from going too far. Rather, they effectively supplant much of a local regulator's local rate-setting work.

B

Read in light of its purposes, the Act's language more clearly foresees retention, not replacement, of the traditional allocation of state-federal rate-setting authority. *Ante*, at 6–7 (THOMAS, J., concurring in part and dissenting in part). Sections 251 and 252, which establish and provide for implementation of new local service obligations, contain the relevant language.

Section 251 lists basic obligations that the Act imposes upon local incumbents. These include obligations to interconnnect, to unbundle, to sell at wholesale rates, to provide "number portability," to assure "dialing parity," to negotiate with potential entrants in good faith, and generally to encourage local competition. Section 251 also refers to the FCC, but only in respect to *some* of these obligations. See, *e.g.*, §251(d)(2) ("[T]he Commission shall consider" certain standards in determining which network elements must be unbundled); §251(b)(2) (local firms have duty to provide "number portability in accordance with requirements prescribed by the Commission"); see *ante*, at 7 (THOMAS, J., concurring in part and dissenting in part).

It makes no mention of a regulator in respect to other matters, *which others include ratemaking*. Thus, §251's language leaves open the relevant question— which regulator has the authority to set rates.

Section 252, which specifically describes how §251's obligations are to be implemented, is less ambivalent. Its implementation system consists of negotiation between incumbents and new entrants, followed by *state* regulatory commission arbitration if negotiations fail. §§252(a), (b). Certain of §252's language, I concede, can be read to favor the majority— in particular its statement that the results of state arbitration must be consistent with §251 and with "regulations prescribed by the [FCC] pursuant to section 251." §252(c)(1). But the word "regulations" here might or might not include rate regulations. *Ante*, at 13–14. And the immediately following language indicates that it does not.

That immediately following language, beginning with the immediately subsequent subsection and including nine paragraphs, speaks separately, and specifically, of rates. §§252(c)(2), (d). And that language expressly says that the "*State commission[s]*" are to "establish any rates." It adds that they are to do so "according to" a further subsection, "subsection (d)." And this further subsection (d), headed by the words "Pricing standards" and focusing upon "charges," sets forth the pricing standards for use by the *state commissions*. It speaks of "[d]eterminations by a [S]tate commission of the just and reasonable rate" (which, it adds, must be "nondiscriminatory" and "based on . . . cost"), but it says nothing about a role for the FCC. § 252's references to the state commissions, its rate-setting detail, and its silence about the FCC's role all favor a reading of the earlier word "regulations" that excludes, rather than includes, FCC rate regulations.

Thus, §251 is silent about local rate-setting power. Section 252 speaks of state, not federal, ratemaking. As

most naturally read, the structure and language of those sections foresee the traditional allocation of ratemaking authority— an allocation that within broad limits assumes local rates are local matters for local regulators.

I recognize that the majority finds the relevant rulemaking authority, not in §§251 and 252, but in a different section containing a general grant of rulemaking authority. *Ante*, at 9–10 (citing 47 U. S. C. §201(b)). But Congress enacted that language in 1938, see 52 Stat. 588. The scope of the FCC's legal power to apply an explicit grant of general authority to make rules implementing the more specific terms of a later enacted statute depends upon what that later enacted statute contemplates. Cf. *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U. S. 355, 376–377, n. 5 (1986). And here, as just explained, the 1996 Act foresees the reservation of most local rate-setting authority to local regulators.

C

The most the FCC can claim is linguistic ambiguity. But such a claim does not help the FCC, for relevant precedent makes clear that, when faced with ambiguity, we are to interpret statutes of this kind on the assumption that Congress intended to preserve local authority. See, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 518 (1992) ("presumption against the pre-emption of state police power regulations"); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947) (requiring "clear and manifest" showing of congressional intent to supplant traditional state police powers). Moreover, the Communications Act itself, into which Congress inserted the provisions of the 1996 Act with which we are here concerned, comes equipped with a specific instruction that courts are *not* to "construe" the FCC's statutory grant of authority as

> "giv[ing] the Commission jurisdiction with respect to . . . charges . . . for or in connection with intrastate communication." 47 U. S. C. §152(b).

Thus, as JUSTICE THOMAS points out, *ante*, at 10, it is not surprising to find that this Court has interpreted the Communications Act as denying the FCC authority to determine local rate-related practices in the face of statutory language far more helpful to the FCC than anything present here. *Louisiana Pub. Serv. Comm'n* v. *FCC, supra*. That precedent requires a similar result here.

Louisiana raised a question almost identical to the one before us: Does a statute granting the FCC authority to set certain *general* rate-related rules (there, depreciation rules) also grant the FCC authority to set *primarily local* rate-related rules (*i.e.*, local depreciation rules)? Writing for the Court, Justice Brennan stated that the basic "rule of statutory construction" contained in §152(b) and just quoted above requires interpretations that favor the reservation of ratemaking authority to the States. *Louisiana, id.*, at 373. Hence, the statute did not permit the FCC to write depreciation rules that would apply to equipment insofar as it was used for local service. *Ibid.*

Consider the similarities between *Louisiana* and the present cases. The relevant rules of statutory construction— the general and explicit presumptions favoring retention of local authority— are the same. See *id.*, at 369 (asking whether "Congress intended that federal regulation supersede state law" and citing *Rice* v. *Santa Fe Elevator Corp., supra*); 476 U. S., at 371–373 (relying on §152(b)). The subject matter is highly similar— both cases involve the way in which local rates will be set for equipment used for both intrastate and interstate calls. Compare Brief for Federal Petitioners 36–38, with *Louisiana, supra*, at 374–376. And both cases involve intrastate charges that could affect interstate rates, here because of local competition's interstate impact, see First Report & Order ¶84, 11 FCC Rcd, at 15544, in *Louisiana* because more (or less) stringent local depreciation rules would affect the rate of replacement of equipment used for interstate calls, 476 U. S., at 362–363.

Consider, too, the differences. The language of the relevant statute here explicitly refers to "*State commission[s],*" which, it says, will "establish any rates." 47 U. S. C. §252(c)(2) (1994 ed., Supp. II) (emphasis added). The language of the relevant statute in *Louisiana,* by contrast, was far more easily read as granting the FCC the authority it sought. That statute said that the FCC would "prescribe" depreciation practices for the relevant local telephone companies, and it prohibited "any depreciation charges . . . other than those prescribed by the [FCC]," §220(b); it made it "unlawful . . . to keep any other [depreciation] accounts . . . than those so prescribed or . . . approved" by the FCC, §220(g); it ordered the FCC to hear from state commissions before establishing its own rules, §220(i); and it authorized the FCC to exempt state-regulated companies from its depreciation rules, §220(h). See *Louisiana, supra,* at 366–367. These differences, of course, make the argument for local ratemaking in these cases stronger, not weaker, than in *Louisiana*.

The majority says its view is "unaffected" by §152(b). *Ante*, at 11. But Congress' apparently was not, for when it enacted the 1996 Act, it initially considered amending §152(b) to make it inapplicable to the provisions that we here consider, thereby facilitating an interpretation, like the majority's, that would give the FCC the local rate-setting power it now seeks to exercise. See S. 652, 104th Cong., 1st Sess., §101(c)(2) (1995); H. R. 1555, 104th Cong., 1st Sess., §101(e)(1) (1995). The final legislation, however, rejected that proposed language. See 47 U. S. C. §152(b). It cannot be thought that Congress "intend[ed] *sub silentio* to enact statutory language that it ha[d] earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca,* 480 U. S. 421, 442–443 (1987) (internal quotation marks and citation omitted).

D

The FCC's strongest argument, in my view, is that its rate rules do not actually supplant local rate-setting authority; they simply set forth limits, creating a kind of envelope marking the outer bounds of what would constitute a reasonable local rate-setting system. The majority may accept a version of this argument, for it says the FCC has prescribed a "requisite pricing methodology" that "no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in §252(d)." *Ante*, at 16. That, however, is not what the FCC has done.

The FCC's rate regulations are not at all like §252(d)'s pricing standards. The statute sets forth those standards in general terms, using such words as, "based on . . . cost," "nondiscriminatory," and "just and reasonable." Terms such as these give rate-setting commissions broad methodological leeway; they say little about the "method employed" to determine a particular rate. *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602 (1944). The FCC's rules, on the other hand, are not general. The dozens of pages of text that set them forth are highly specific and highly detailed. See First Report & Order ¶¶672–715, *supra*, at 15844–15862. They deprive state commissions of methodological leeway. Their rate-setting instructions grant a state commission little or no freedom to choose among reasonable rate-determining methods according to the State's policy-related judgments, assessing local economic circumstance or community need. I grant the fact that the rules leave it to the state commissions to fix the actual rate, but that is rather like giving a restaurant chef the authority to choose a menu while restricting him to one dish, an omelette, and to one single favorite recipe.

Nor can the FCC successfully argue that the Act requires the particular rate-setting system that its regulations contain. The FCC's system, which the FCC calls "forward-looking," bases the charge for the use of an un-

bundled element (say, a set of local wires connecting a subscriber to a local switch) upon a hypothetical set of costs— the costs of providing that service using the incumbent's actual wire center, but otherwise assuming use of the most efficient technology that the incumbent *could* use (not the equipment the incumbent actually *does* use). See First Report & Order ¶¶682, 685, *supra,* at 15847–15849. The FCC does not claim that the statute's language (though ruling out certain kinds of rate-of-return proceedings, 47 U. S. C. §252(d)(1)(A)(i) (1994 ed., Supp. II)) forces use of this forward-looking cost determination system. Moreover, I have explained above why I do not believe the Act's purposes demand what its language denies, namely, a single nationwide rate-setting system. *Supra,* at 7–8; compare First Report & Order ¶114, *supra,* at 15558–15559 (arguing that a single pricing methodology is needed to assure uniform administration of the Act).

The FCC does argue that the Act's purpose, competition, favors its system. For competition, according to the FCC, tends to produce prices that reflect forward-looking replacement costs, not actual historical costs. *E.g.*, *id.*, ¶672, 11 FCC Rcd, at 15844. But this argument does not show that the Act compels the use of the FCC's system over any other. How could it? The competition that the Act seeks is a process, not an end result; and a regulatory system that imposes through administrative mandate a set of prices that tries to mimic those that competition would have set does not thereby become any the less a regulatory process, nor any the more a competitive one.

Most importantly, the FCC's rules embody not an effort to circumscribe the realm of the reasonable, but rather a policy-oriented effort to choose among several different systems, including systems based upon actual costs or price caps, which other systems the FCC's rules prohibit. A few examples, focusing upon some of the claimed weaknesses of the FCC's preferred system, will illustrate, how-

ever, how easily a regulator weighing certain policy considerations (for example administrative considerations) differently might have chosen a different set of reasonable rules:

– Consider the FCC's decision to deny state commissions the choice of establishing rates based on actual historic, rather than hypothetical forward-looking, costs. See First Report & Order ¶705, 11 FCC Rcd, at 15857–15858. Justice Brandeis, joined by Justice Holmes, pointed out the drawback of using a forward-looking, rather than an actual historic, cost system many years ago. They wrote that whatever the theoretical economic merits of a "reproduction cost" system (a system bearing an uncanny resemblance to the FCC's choice), the hypothetical nature of the regulatory judgments it required made such a system administratively unworkable. See *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Serv. Comm'n of Mo.*, 262 U. S. 276, 292–296 (1923) (Brandeis, J., dissenting).

The passage of time has not outdated the Brandeis and Holmes criticism. Modern critics question whether regulators can accurately determine the "efficient" cost of supplying telephone service, say, to a particular group of Manhattan office buildings, by means of hypothetically efficient up-to-date equipment connected to a hypothetically efficient New York City network built to connect with NYNEX's existing (nonhypothetical) wire center. See, *e.g.*, Kahn, Letting Go, at 93, and n. 135. The use of historic costs draws added support from one major statutory aim—expeditious introduction of competition. That is because efforts to determine hypothetical (rather than actual) costs means argument, and argument means delay, with respect to entry into both local and long-distance markets. See *supra*, at 4–5. Though the FCC disfavors actual or historic costs, it does not satisfactorily explain why their

use would be arbitrary or unreasonable.

– Consider the FCC's decision to prohibit use of an "efficient component pricing rule." See First Report & Order ¶708–711, *supra,* at 15859–15860. Where an incumbent supplies an element to New Entrant B that it otherwise would have provided Old Customer A, that rule, roughly speaking, permits the incumbent to charge a price measured by either (1) the element's market price, if it is sold in the marketplace, or (2), if it is not, the incumbent's actual costs (including the net revenue the incumbent loses from foregoing the sale to Old Customer A). See generally, *e.g.,* W. Baumol & J. Sidak, Toward Competition in Local Telephony 95–97 (1994). This pricing system seeks to assure the incumbent that it will obtain from B the contribution, say, to fixed costs or to overhead, that A had previously made. Many experts prefer such a system. See, *e.g.,* Sidak & Spulber, The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996, 97 Colum. L. Rev. 1081, 1111–1113, and nn. 75–85 (1997); Kahn & Taylor, The Pricing of Inputs Sold to Competitors: A Comment, 11 Yale J. Reg. 225, 228–230 (1994). The FCC rejected that system, but in doing so it did not claim, nor did its reasoning support the claim, that the use of such a system would be arbitrary or unreasonable. See Sidak & Spulber, *supra,* at 1095–1098.

– Consider the FCC's decision to forbid the use of what regulators call "Ramsey pricing," see First Report & Order ¶696, *supra,* at 15852–15853. Ramsey pricing is a classical regulatory pricing system that assigns fixed costs in a way that helps maintain services for customers who cannot (or will not) pay higher prices. See generally, *e.g.,* 1 A. Kahn, The Economics of Regulation: Principles and Institutions 137–141 (reprint 1988). Many experts strongly prefer the use of such a system. See, *e.g.,* Sidak & Spulber, *supra,* at 1109 (arguing that the FCC's prohibition of

Ramsey pricing will "minimize rather than maximize consumer welfare"). The FCC disfavors Ramsey pricing, but it does not explain why a contrary judgment would conflict with the statute or otherwise be arbitrary or unreasonable.

These examples do not show that the FCC's rules themselves are unreasonable. That question is not now before us, and I express no view on the matter. The examples simply help explain why the FCC's rules could not set forth the *only* rate-setting system consistent with the Act's objectives. The FCC's regulations do not set forth an outer envelope surrounding a set of reasonable choices; instead, they constitute the kind of detailed policy-related rate-setting that the statute in respect to local matters leaves to the States.

* * *

Two Terms ago the Court held that Congress could not constitutionally require a state sheriff to fill out a form providing background information about a buyer of a gun. *Printz* v. *United States*, 521 U. S. 898, 935 (1997). Dissenters in that case noted that the law deprived the States of a power that had little practical significance. See *id.*, at 961 (STEVENS, J., dissenting); *id.*, at 977 (BREYER, J., dissenting). Today's decision does deprive the States of practically significant power, a camel compared with *Printz*'s gnat. The language of the statute nowhere reveals any "clear and manifest purpose," *Rice*, 331 U. S., at 230, that such was Congress' intent. History, purpose, and precedent all argue to the contrary. I would hold that, in respect to local ratesetting, the FCC's reach has exceeded its legal grasp.

II

I agree with the Court's disposition of the FCC's "unbundling" rules. As earlier explained, the Act seeks to

introduce competition into local markets by removing legal barriers to new entry, by requiring interconnection, by requiring incumbents to sell to potential retail competitors at wholesale rates, and by requiring the sharing, or "unbundling," of certain facilities. *Supra,* at 6; see 47 U. S. C. §§251(c)(2)–(4), 253(a) (1994 ed., Supp. II). The Act expresses this last-mentioned sharing requirement in general terms, reflecting congressional uncertainty about the extent to which compelled use of an incumbent's facilities will prove necessary to avoid waste. Will wireless technology or cable television lines, for example, permit the efficient provision of local telephone service without the use of existing telephone lines that now run house to house?

Despite the empirical uncertainties, the basic congressional objective is reasonably clear. The unbundling requirement seeks to facilitate the introduction of competition where practical, *i.e.*, without inordinate waste. *Supra,* at 6–7. And although the provision describing which elements must be unbundled does not explicitly refer to the analogous "essential facilities" doctrine (an antitrust doctrine that this Court has never adopted), the Act, in my view, does impose related limits upon the FCC's power to compel unbundling. In particular, I believe that, given the Act's basic purpose, it requires a convincing explanation of why facilities should be shared (or "unbundled") where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available. §251(d)(2); see generally Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. 841, 852–853 (1989).

As the majority points out, the Act's language itself suggests some such limits. *Ante*, at 20–25. The fact that compulsory sharing can have significant administrative and social costs inconsistent with the Act's purposes suggests the same. Even the simplest kind of compelled sharing, say, requiring a railroad to share bridges, tun-

nels, or track, means that someone must oversee the terms and conditions of that sharing. Moreover, a sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor. And as one moves beyond the sharing of readily separable and administrable physical facilities, say, to the sharing of research facilities, firm management, or technical capacities, these problems can become more severe. One would not ordinarily believe it practical, for example, to require a railroad to share its locomotives, fuel, or workforce. Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement. The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious. See generally 1 H. Demsetz, Ownership, Control, and the Firm: The Organization of Economic Activity 207 (1988). And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide. The greater the administrative burden, for example, the more the need for complex proceedings, the very existence of which means delay, which in turn can impede the entry into long-distance markets that the Act foresees. See *supra*, at 5.

Nor are any added costs imposed by more extensive unbundling requirements necessarily offset by the added potential for competition. Increased sharing by itself does not automatically mean increased competition. It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share *every* resource or element of a business would create, not competition, but pervasive

regulation, for the regulators, not the marketplace, would set the relevant terms.

The upshot, in my view, is that the statute's unbundling requirements, read in light of the Act's basic purposes, require balance. Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle.

I believe the FCC's present unbundling rules are unlawful because they do not sufficiently reflect or explore this other side of the unbundling coin. See *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U. S. 29, 43 (1983). They do not explain satisfactorily why, for example, an incumbent must share with new entrants "call waiting," or various operator services. Nor do they adequately explain why an incumbent should be forced to share virtually every aspect of its business. As the majority points out, *ante*, at 22–23, they seem to assume, without convincing explanation, that the more the incumbent unbundles, the better. Were that the Act's objective, however, would Congress have seen a need for a separate wholesale sales requirement (since the "unbundling" requirement would have led to a similar result)? Indeed, would Congress have so emphasized the importance of competition? A totally unbundled world— a world in which competitors share every part of an incumbent's existing system, including, say, billing, advertising, sales staff, and work force (and in which regulators set all unbundling charges)— is a world in which competitors would have little, if anything, to compete about.

I understand the difficulty of making the judgments that the statute entrusts to the FCC and the short time that it gave the FCC in which to make them. 47 U. S. C. §251(d)(1) (1994 ed., Supp. II). I also understand that the

law gives the FCC considerable leeway in the exercise of its judgment. *E.g.*, R. Pierce, S. Shapiro, & P. Verkuil, Administrative Law and Process §7.4, p. 353 (2d ed. 1992). But, without added explanation, I must conclude that the unbundling rules before us go too far. They are inconsistent with Congress' approach. They have not been adequately justified in terms of the statute's mandate, read in light of its purposes. See 5 U. S. C. §706(2). For this reason, as well as the reasons set forth in the majority's opinion, I agree with its conclusion that Rule 319 must be vacated.