

# Textualism and Legal Process Theory: Alternative Approaches to Statutory Interpretation

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## I. Introduction

Although it has repeatedly been called upon to interpret federal statutes, the Supreme Court of the United States has not done so in a consistent fashion.<sup>1</sup> In some 1994 cases, for instance, the Supreme Court abandoned traditional interpretive methods in favor of less eclectic, textualist-based approaches.<sup>2</sup> In particular, consider *MCI Tele-*

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1. SEE ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14 (Amy Guttmann ed., 1997) (quoting from HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), “American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”). See also, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13, 37-38 (1994) [hereinafter Eskridge] (“The practice of statutory interpretation does not follow any single inquiry . . . (13) [a]s a positive matter, . . . courts . . . follow a variety of approaches to statutes over time . . .” (37-38)); Nicholas Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597, 1614-15 (1991) (“Statutory interpretation is practical reason, dynamic interpretation, civic virtue, imaginative reconstruction, common-law reasoning, hermeneutics, fact-finding, and administrative law, to name but a few of the current samplings.”).

2. See *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994); *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). See also, Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An invitation to cacaphony and incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995). These cases serve as examples of the Supreme Court choosing to derive statutory meaning solely from an ordinary reading of the statutory text in each instance— hence the term textualist-based approaches— while voicing a notable reluctance to consider non-textual sources of law, such as legislative history/purpose, policy beliefs and context, political circumstances, etc., when interpreting the statute in question. Because, however, non-textualist judges believe that they are at liberty to draw from this wide variety of sources and experience when determining statutory meaning, non-textualist approaches to statutory interpretation are said to be more eclectic than textualism. See Zeppos, *supra* note 1, at 1600-15. In *Central Bank of Denver*, the Court determined that the statutory text of Section 10(b) of the Securities Exchange Act of 1934, which prohibits fraud in inducing the purchase or sale of securities, clearly imposes liability on those who primarily engage in the fraud or deception but does not reach those who only, secondarily “aid and abet” such activity. 511 U.S. 164, 177. Here, the Court rejected the Securities and Exchange Commission’s (SEC’s) argument that because the overall policy objective/purpose of the securities laws is to punish all manipulative conduct surrounding securities transactions, Section 10(b) should be broadly interpreted to also prohibit aiding and abetting despite what an ordinary reading of its text might convey. 511 U.S. 164, 170-78. In *City of Chicago*, the Court reasoned that the plain language of Section 3001(i) of the Solid Waste Disposal Act does not exempt ash produced by a resource recovery facility’s burning of municipal solid waste from regulation as hazardous waste under Subtitle C of the Resource Conservation and Recovery Act (RCRA). 511 U.S. 328, 334-35. In the process, the petitioners’ lengthy and sophisticated explanation as to why, inter alia, the legislative and political history of Section 3001(i) justified granting the exemption in this case was vigorously discounted. 511 U.S. 328, 335-39. In *NLRB v. Health Care*

*communications Corp. v. American Tel. & Tel. Co.*<sup>3</sup> In this case, the Supreme Court embraced Justice Scalia's textualist approach, which William N. Eskridge, Jr.<sup>4</sup> calls "the new textualism,"<sup>5</sup> and rejected the well established "legal process" theory of statutory interpretation emanating from the work of Henry M. Hart, Jr. and Albert M. Sacks in the 1950's.<sup>6</sup>

At the time of this legal dispute, MCI and AT&T had been competing "common carriers"<sup>7</sup> of interstate long distance telephone service since the early 1970's.<sup>8</sup> As such, their long distance prices were presumed to be subject to regulation under section 203 of the Communications Act of 1934.<sup>9</sup> As enacted by Congress, subsections 203(a) and 203(b)(2) of the Act provided:<sup>10</sup>

- (a) [e]very common carrier, . . . shall, within such reasonable time as the [Federal Communications] Commission [FCC] shall designate, file with the Commission . . . all charges . . . for [the provision of] interstate . . . communication [services] . . ."<sup>11</sup>
- ...
- (b)(2) "[t]he Commission may, in its discretion and for good cause shown, *modify* any requirement made by or under the authority of this section . . ."<sup>12</sup>

On its face, this statutory language seems to make clear that Congress intended for the 203(a) charge filing obligation to apply both to MCI and AT&T equally as common carriers, barring, of course, a proper 203(b)(2) modification of such obligation by the FCC.

By the time *MCI v. AT&T* reached the Supreme Court, however, clear inconsistencies between regulatory actions taken by the FCC and certain judgments issued by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) had

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& Retirement Corp., the Court struck down the NLRB's (the Board) interpretation of the phrase "in the interest of the employer," as it appears in the National Labor Relations Act (Act), as contrary to the plain, or textual, meaning of such statutory language. 511 U.S. 571, 580. In so doing, the Court discredited the Board's position that its "unique" reading of this phrase was more consistent with the policy objectives of the federal labor laws than a purely textual one inevitably removed from the special circumstances surrounding employer-employee relations. 511 U.S. 571, 576-82.

3. 512 U.S. 218 (1994).

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5. *The New Textualism*, 37 UCLA L REV. 621 (1990) [hereinafter Eskridge].

6. See generally, HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994). This article compares and contrasts textualism with the Hart and Sacks legal process theory as a non-textualist approach to statutory interpretation. The theoretical discussion contained herein extends well beyond the brief commentary regarding the primary differences between textualism and non-textualist theories provided above in note 2.

7. The definition of common carrier has remained the same since 1934. Subsection 3(h) of The Communications Act of 1934, before it was amended, and as amended, provided: "Common carrier" or "carrier" is any person engaged as a common carrier for hire, in interstate or foreign communications . . . ." *Codified at* 47 U.S.C. § 153(h) (1994).

8. See *MCI v. AT&T*, 512 U.S. at 218.

9. See *id.* at 220. The Communications Act of 1934 created and provided the statutory authority for the FCC. It has been amended from its original form, as will be discussed further herein, *infra* note 35, and can now be referred to as "the Act, as amended." What remains of the original Act is *codified at* 47 U.S.C. §§ 151 *et seq.* In this article, all references to the original Act are made to "the Act," and all citations are made to the Act as it is codified in the United States Code. Section 203 of the Act is codified at 47 U.S.C. § 203.

10. As will be explained further herein, the language of subsections 203(a) and 203(b)(2) of the Act have never changed. They both appear today exactly as they did when originally enacted in 1934.

11. 47 U.S.C. § 203(a).

12. 47 U.S.C. § 203(b)(2).

created some confusion as to whether subsection 203(a) actually applied to MCI as a non-dominant carrier.<sup>13</sup> Contrary to a prior 1985 D.C. Circuit decision that all common carriers, whether dominant or non-dominant, were required to file charges under 203(a),<sup>14</sup> the FCC, relying on its 203(b)(2) modification power, lifted this filing requirement for all non-dominant long distance carriers such as MCI in a 1992 Report and Order (the 92 Order) pursuant to a rule-making proceeding.<sup>15</sup> In that same year, AT & T, which remained the only dominant carrier still apparently subject to 203(a), filed a motion for summary reversal of this 92 Order in, of all courts, the D.C. Circuit.<sup>16</sup> Considering the legal effect of section 203 for yet another time, the D.C. Circuit granted AT&T's motion on the ground that subsection 203(b)(2), although it gave the FCC authority to *modify* the 203(a) filing requirement, did not give the FCC the authority to exempt non-dominant carriers from this requirement.<sup>17</sup> Shortly thereafter, MCI, along

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13. See *MCI v. AT&T*, 512 U.S. at 220-23. See generally, *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308 (1979); *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 F.C.C.2d 1, 20-24 (rel. Nov. 28, 1980) ("distinguished between dominant carriers (those with market power) and non-dominant carriers (those without market power) – in the long distance market." *Id.* at 30-49; *MCI v. AT&T*, 512 U.S. at 220); *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Second Report and Order, 91 F.C.C.2d 59 (1982); *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fourth Report and Order, 95 F.C.C.2d 554 (1983); *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carriers Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fifth Report and Order, 98 F.C.C.2d 1191 (1984); *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carriers Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Sixth Report and Order, 99 F.C.C.2d 1020 (1985), *rev'd*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985); *In the Matter of Tariff Filing Requirements for Interstate Common Carriers*, CC Docket No. 92-13, Notice of Proposed Rulemaking in substitute for adjudication between MCI Telecommunications and American Tel. & Tel. Co., CC Docket No. 92-13, 7 F.C.C. Rcd. 804, 807 (1992), *remanded*, *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (denying the FCC's statutory authority under subsection 203(b)(2) of the Act to have issued the Fourth Report and Order by citing and affirming *MCI v. FCC*), *cert. denied*, 509 U.S. 913 (1992); *In the matter of Tariff Filing Requirements for Interstate Common Carriers*, CC Docket No. 92-13, Report and Order, 7 F.C.C. Rcd. 8072 (1992), *stayed pending further notice*, 7 F.C.C. Rcd. 7989 (Nov. 25, 1992), *motion for summary reversal granted*, *American Tel. & Tel. Co. v. FCC* 1993 WL 260778 (D.C. Cir. 1993) (*per curiam*).

14. See *MCI v. FCC*, 765 F.2d 1186. As indicated *supra* note 15, this judgment had previously overturned the FCC's *Sixth Report and Order*, which actually prohibited non-dominant carriers from filing tariffs pursuant to 203(a) of the Act. See also, *MCI v. AT&T*, 512 U.S. at 221.

15. *In the Matter of Tariff Filing Requirements for Interstate Common Carriers*, CC Docket No. 92-13, Rep. and Ord., 7 F.C.C. Rcd. 8072 (1992) [hereinafter 92 Order]. See also, *MCI v. AT&T*, 512 U.S. at 223.

16. See *MCI v. AT&T*, 512 U.S. at 223.

17. *Id.* *American Tel. & Tel. Co. v. FCC*, 1993 WL 260778 (D.C. Cir. 1993) (*per curiam*). In granting AT&T's motion for summary reversal of the 92 Order *per curiam*, The D.C. Circuit cited its previous ruling in *AT&T v. FCC*, 978 F.2d 727 (1992) as its legal basis for doing so. While this case is not addressed in the body of this article, *AT&T v. FCC*, as indicated *supra* note 13, represents the D.C. Circuit's vacation of an earlier attempt by the FCC, in its *Fourth Report and Order*, to make the 203(a) filing requirement optional for non-dominant common carriers such as MCI pursuant to its 203(b)(2) modification authority. Most importantly, the D.C. Circuit's ruling in *AT&T v. FCC* is not to be confused with its *per curiam* reversal of the Commission's 92 Order, even though the party names are framed identically in each. It is ultimately the D.C. Circuit's *per curiam* judgment that is reviewed by the Supreme Court in *MCI v. AT&T*.

with the FCC, successfully petitioned the Supreme Court for certiorari.<sup>18</sup> The Supreme Court upheld the D.C. Circuit's ruling by a five to three majority in *MCI v. AT&T*.<sup>19</sup>

*MCI v. AT&T* involves a simple question of statutory interpretation: whether the word "modify," as found in subsection 203(b)(2) of the Act, means to make "minor" changes or to make "basic and fundamental" (more substantial) changes.<sup>20</sup> Writing for the majority, Justice Scalia determines that "modify . . . has a connotation of increment or limitation," and therefore, can only mean "to change moderately or in minor fashion."<sup>21</sup> Based upon this determination Scalia ultimately holds that because the 92 *Order* eliminated the 203(a) tariff filing requirement for all long distance carriers except AT&T, the FCC had imposed a revision of the statute too substantial to qualify as a lawful 203(b)(2) modification.<sup>22</sup> In his dissenting opinion, however, Justice Stevens argues that "modify," as used in 203(b)(2), should be interpreted more broadly so as to encompass the FCC's regulatory action as a legal activity not in derogation of 203(a).<sup>23</sup>

Scalia's legal conclusion is the product of a strict and formal adherence to the statutory text of section 203. Conversely, Stevens reaches a polar legal conclusion consistent with the venerable, purposive principles of the Hart and Sacks legal process theory.<sup>24</sup> Basically, Scalia sustains the definition of "modify" that comports with what he believes to have been that word's plain meaning in 1934, the year in which the Act became law.<sup>25</sup> Stevens, however, objects to Scalia's narrow reading of "modify" primarily because he feels it defeats the Act's overall legislative purpose.<sup>26</sup> By embracing Scalia's more narrow reading of "modify," the Supreme Court clearly abandons the traditional legal process approach to statutory interpretation in *MCI v. AT&T*.<sup>27</sup>

Admittedly, a number of legal scholars have already devoted much commentary to both textualism and legal process theory individually.<sup>28</sup> Consequently, this article's objective is to focus on one aspect of the textualist - legal process debate in *MCI v. AT&T*. While Scalia concedes that a relaxation of the filing requirement for non-dominant carriers is a worthwhile proposal, he asserts that only Congress can broaden the statutory definition of modify to encompass such a fundamental alteration of 203(a) by the Commission.<sup>29</sup> In this respect, his opinion can be perceived as an attempt to force a legislative update of the existing regulatory scheme set forth in section 203. Conversely, Stevens' argument that the Supreme Court must itself interpret "modify" broadly enough to

18. See *MCI v. AT&T*, 512 U.S. at 223.

19. See 512 U.S. at 219. The majority consisted of Scalia, Rhenquist, Ginsburg, Thomas, and Kennedy. The minority included Stevens, Blackmun, and Souter. Justice O'Connor took no part in the decision.

20. See 512 U.S. at 225 (Scalia, J.).

21. *Id.*

22. See *id.* at 230-32 (Scalia, J.).

23. See *id.* at 235-44 (Stevens, J., dissenting).

24. See *id.* at 512 U.S. at 235, 241 (Stevens, J., dissenting). In attempting to effectuate purpose, Stevens follows the Hart and Sacks legal process method for attributing and inferring the statutory purpose of the Act. See HART & SACKS, *supra* note 6, at 1377-80.

25. See *MCI v. AT&T*, U.S. 512 at 228 (Scalia, J.).

26. See *id.* at 235 (Stevens, J., dissenting).

27. The Supreme Court invalidated the FCC's 92 *Order* on the ground that the Commission's interpretation of the term modify was contrary to the plain meaning of that term despite Stevens' argument that the FCC had interpreted modify in a way that enabled it to carry out the purpose of the Act. See *Pierce*, *supra* note 2, at 757.

28. For a discussion of Scalia's textualism, see Eskridge, *supra* note 5. For an excellent and thorough discussion of the legal process approach to statutory interpretation, there is perhaps no better reference than the Hart & Sacks treatise. HART & SACKS, *supra* note 6, at 1374.

29. See *MCI v. AT&T*, 512 U.S. at 234 (Scalia, J.).

encompass the 92 *Order* makes clear that he desires a judicial update of the section 203 regulatory scheme.<sup>30</sup> Drawing upon this distinction, *MCI v. AT&T* serves as a case study of whether judicial updating of obsolete statutes is better than forcing of legislative updating through textualist interpretation.

Ultimately, I reach the conclusion that the forcing of legislative updating through textualist interpretation, as advocated by Scalia, is more attractive than Stevens' legal process justifications for judicial updating. This determination is based on a survey, in Part I, of the broad-ranging theoretical justifications that Scalia and Stevens offer for their respective views on statutory updating and conclusions of law in *MCI v. AT&T*. In addition, my opinion stems from a close examination, in Part II, of the new section 10 (section 10 of the Act, as amended, or section 10)<sup>31</sup> that Congress added to the Act by passing the Telecommunications Act of 1996.<sup>32</sup> In providing the FCC with authority that the Supreme Court determined was not available to it under section 203(b)(2), section 10 can be perceived as a legislative update of the section 203 regulatory scheme. Based on the high probability that the holding in *MCI v. AT&T* induced Congress to enact section 10, I argue the validity of Scalia's principal dynamic claim that textualism will force complete and adequate legislative responsiveness.<sup>33</sup> In the final analysis, I assert that the validity of this claim is also what makes the textualist decision in *MCI v. AT&T* so much more appealing than Stevens' legal process demand for judicial updating of Section 203.

## II. The Determinacy of Theory

Both textualism and legal process are determinative approaches to statutory interpretation. This is to say that judicial adherence to either interpretive method will generally yield the arrived at legal conclusion in a given case.<sup>34</sup> Because textualists and legal process theorists have been known to reach antipodal conclusions of law, they are also inevitably prone to promote divergent arguments concerning statutory updating. Essentially, statutory updating can be explained as the practice of changing legal standards so that they make sense in light of newly developing social conditions. Bringing statutes up to date, therefore, is based on policy considerations. For a number of theoretical reasons that I will address in this Part, textualists generally prefer that Congress update the law while legal process theorists seem more eager to engage in updating it themselves by dynamically interpreting statutes.<sup>35</sup>

The case of *MCI v. AT&T* provides some valuable insight into the theoretical differences between textualism and legal process theory as systematic approaches to statutory interpretation. Fundamentally, the clear tension between Scalia and Stevens can be attributed to the counter assumptions that textualism and legal process theory advance with respect to the nature of statutory law, the proper sources of law, and the proper role

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30. See *id.* at 237-39 (Stevens, J., dissenting).

31. 47 U.S.C. § 160.

32. Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* Hereinafter, all citations to the Telecommunications Act of 1996 itself will be to the 96 Act. In addition, because the 96 Act amended the Communication Act of 1934 (the Act), there will also be references to "the Act, as amended," which represents the amended state of the Act after 1996. Where possible, statutory sections which appeared in the Act before it was amended by the 96 Act, as well as statutory provision added to the Act, will be cited as they are codified in the United States Code. Therefore, section 203 of the Act, which was not changed by the 96 Act, will be cited as 47 U.S.C. § 203. See *supra* note 9. New section 10 of the Act, as amended, which was section 401 of the 96 Act, is cited, consistent with its codification, as 47 U.S.C. § 160. See *infra* note 34.

33. See SCALIA, *supra* note 1, at 3-37.

34. See Zeppos, *supra* n. 1, at 1597-99; Eskridge, *supra* n. 5, at 640-42.

35. See SCALIA, *supra* n. 1, at 3-37; HART & SACKS, *supra* n. 8, at 1374-80.

for each institutional branch of American government. Naturally then, it seems best to discuss the debate in *MCI v. AT&T* according to these categories.

### A. The Nature of Statutory Law

Scalia's textualism seeks to vest complete legal significance in "the import that statutory language would have to a typical lay reader."<sup>36</sup> This priority appears to stem from a two-fold assumption about statutes in general: because "the legislature almost always adopts words with [their] common usage in mind," only the common usage of a statutory word is worthy of complete legal effect.<sup>37</sup> As the Justice has stated himself, "if the language of a statute is clear, that language must be given effect— at least in the absence of patent absurdity."<sup>38</sup> For Scalia, the object of construing statutes is to discover what the statute says as opposed to what the statute ought to mean.<sup>39</sup> As a result, Scalia appears to believe that statutory law is a manifestation of the plain and ordinary meaning of the statutory words, or text, in question.

In contrast, the legal process theory is based on the notion that legislators enact statutes as the means of accomplishing a particular policy goal, social end, or purpose.<sup>40</sup> As Hart and Sacks have stated, "[statutory] law is a doing of something, a purposive activity . . ."<sup>41</sup> Legal process theory, therefore, requires that courts attach legal significance to the meaning of words which best fulfills, or carries out, the overall purpose of the statute(s) they comprise.<sup>42</sup> Consequently, legal process theory appears to posit that plain, ordinary meaning cannot always be synonymous with legal, or statutory meaning. Instead, statutory words should be interpreted to legally mean what they "ought" to mean in light of statutory purpose and the facts at bar.<sup>43</sup>

Consistent with textualist principles, Scalia's narrow reading of "modify" in *MCI v. AT&T* reveals what appears to be his strong faith in the finality of plain language. Because he is convinced that the word "modify," as used in subsection 203(b)(2), is clear and unambiguous on its face, Scalia seems to view *MCI v. AT&T* as an open and shut case.<sup>44</sup> It is as though Scalia believes that the clarity of the term "modify" alone resolves the dispute between MCI and AT&T, thereby eliminating any need for extensive judicial analysis. Upon determining with relative ease that the common usage of "modify" signifies only limited change, Scalia keeps his legal analysis simple.<sup>45</sup> Aside from discussing the sources from which he derives the meaning of "modify," Scalia does little more than assert that the FCC's "wholesale abandonment" of the 203(a) filing requirement is illegal because it clearly represents a greater change of the regulatory scheme than the limited and narrow change allowed by Congress in 203(b)(2).<sup>46</sup> In this respect,

36. A. Raymond Randolph, *Looking it up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1441 (1994).

37. Zeppos, *supra* note 1, at 1621.

38. *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment). See Eskridge, *supra* note 5, at 623.

39. See SCALIA, *supra* note 1, at 13, 16-17.

40. See HART & SACKS, *supra* note 24, at 148.

41. HART & SACKS, *supra* note 6, at 148. See also, William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term— Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 96 (1994) [hereinafter Eskridge & Frickey].

42. HART & SACKS, *supra* note 6, at 148; Zeppos, *supra* note 1, at 1600.

43. HART & SACKS, *supra* note 6, at 1374.

44. See *MCI v. AT&T*, 512 U.S. at 225-34 (Scalia, J.).

45. *Id.*

46. *Id.* at 221 (Scalia, J.) (Citing *MCI v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985) (Ginsburg, J.)). Interestingly enough, Justice Ginsburg wrote the majority opinion for the D.C. circuit in this 1985 case, which

*MCI v. AT&T* can be perceived as upholding the notion that "when the text of a statute is clear, that is the end of the matter."<sup>47</sup>

In seeking to effectuate purpose, Stevens pays most attention to the statutory context in which the term "modify" is used.<sup>48</sup> He appears convinced that this term, because it is employed in a statute enacted to accomplish a clear legislative purpose, must have a special, or uniquely contextual, statutory meaning that is not necessarily narrowed by prevailing usage.<sup>49</sup> This is consistent with the legal process notion that when interpreting statutes, one should "[b]e mindful of the nature of language, and, in particular, of its special nature when used as a medium for giving authoritative general directions."<sup>50</sup> Stevens is convinced that "modify," in the context of the Act, was meant to encompass broad change even though the prevailing common usage of the term might implicate more insignificant change.<sup>51</sup> He objects to Scalia's narrow reading because Scalia does not consider that the statutory context in which Congress used the term "modify" assigns to that term a broader meaning than it otherwise may possess in a non-statutory context.<sup>52</sup>

Adherence to statutory context, in this instance, also makes Stevens appear more concerned than Scalia about reaching a desirable policy result in *MCI v. AT&T*. Stevens argues that "modify," in the context of the Act, must signify broader change than Scalia claims because the purpose of the Act itself is to allow the FCC to accommodate the prevailing policy concerns in the communications industry.<sup>53</sup> It is true that both Justices seem to concede that a relaxation of the filing requirement for non-dominant long-distance carriers may be appropriate by all conceivable standards.<sup>54</sup> However, while Stevens feels that this alone is reason enough to allow the 92 *Order* to stand, Scalia points out that policy concerns cannot supercede the plain language of section 203.<sup>55</sup> Addressing the utility of the 92 *Order*, Scalia states:

What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea that Congress enacted into law in 1934.<sup>56</sup>

Rejecting the notion that policy must prevail over the plain language of the Act, Scalia seems to interpret the word "modify," as used in section 203(b)(2), more narrowly because he cannot understand how the ordinary person could possibly read that word as broadly as Stevens.<sup>57</sup> Unable to find any evidence that "modify" commonly means "major change," Scalia, on behalf of the Court states, "[m]odify, 'in our view, connotes

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considered the same issue that the Supreme Court entertained in *MCI v. AT&T*. See note 15. Her observation at that time was that modify "suggest[ed] circumscribed alterations— not, as the FCC now would have it, wholesale abandonment or elimination of a requirement."

47. SCALIA, *supra* note 1, at 16.

48. *MCI v. AT&T*, 512 U.S. at 240-41 (Stevens, J., dissenting).

49. *Id.*

50. HART & SACKS, *supra* note 6, at 1374

51. See *MCI v. AT&T*, 512 U.S. at 241 (Stevens, J., dissenting).

52. *Id.*

53. See *id.* at 235, 237-41 (Stevens, J., dissenting).

54. See *id.* at 232-34 (Scalia, J.), 235 (Stevens, J., dissenting).

55. See *id.* at 234 (Scalia, J.).

56. *Id.* at 231-32 (Scalia, J.).

57. See *id.* at 225-26 (Scalia, J.).

moderate change.”<sup>58</sup> In true Hart and Sacks fashion, Stevens counters by attempting to identify the purpose of the Act in terms broad enough to render Scalia’s narrow interpretation of “modify” insufficient as a matter of law.<sup>59</sup> He claims that the purpose of the Act provides the FCC (with) “unusually broad discretion to meet new and unanticipated problems . . .” in regulating the rapidly growing telecommunications industry.<sup>60</sup> Stevens argues that Scalia’s reading of “modify” defeats this statutory purpose because it is not broad enough to grant “the FCC . . . the flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions.”<sup>61</sup> Viewing the changes imposed by the 92 *Order* as “fitting within” the scope of the statutory purpose, Stevens believes that the correct legal usage of “modify” is that which expands Scalia’s version enough to include the exemption of non-dominant common carriers under 203(a).<sup>62</sup>

Addressing concerns about the proper context in which to interpret section 203, Scalia asserts that the “most relevant time” for determining a statutory term’s meaning is when the statute in question was enacted into law.<sup>63</sup> Taking the premise that legal meaning should comport with plain meaning one step further, Scalia reads “modify” as he does on the ground that it meant “to change moderately” in 1934, the time at which the Act became law.<sup>64</sup> Such a reading is based on the belief that a statutory term’s plain meaning at the time of enactment should be given legal effect, for such meaning alone is what the legislature votes on.<sup>65</sup> In turn, because legislatures adopt words with common usage in mind, Scalia’s textualism posits that a statutory term’s meaning at the time of enactment maintains the most political legitimacy and should consequently be respected.<sup>66</sup> This is to say that the meaning of statutory language does not change over time, but rather applies prospectively and free from judicial alterations.<sup>67</sup> For Scalia then, valuing the plain meaning of “modify” at the time of enactment inevitably “assures that ordinary terms, used in ordinary context, will be given a predictable meaning.”<sup>68</sup> From this perspective, Scalia suggests that the FCC has been on notice, since 1934, that section 203(b)(2) does not support fundamental alterations of the 203(a) filing requirement.<sup>69</sup> Because, however, he perceives the 92 *Order* as contrary to such a clear statement by Congress in section 203, Scalia asserts that it is not entitled to the judicial deference under the standards of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>70</sup>

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58. *Id.* at 228 (Scalia, J.).

59. *See id.* at 235 (Stevens, J., dissenting).

60. *Id.* at 235 (Stevens, J., dissenting).

61. *Id.*

62. *Id.* at 241-42 (Stevens, J., dissenting).

63. *Id.* at 228 (Scalia, J.).

64. *Id.*

65. Zeppos, *supra* note 1, at 1616-17.

66. *Id.*

67. Zeppos, *supra* note 1, at 1616-20. *See* SCALIA, *supra* note 1, at 14-20.

68. Randolph, *supra* note 36, at 1441.

69. *See MCI v. AT&T*, 512 U.S. at 229-33 (Scalia, J.) (Concluding that the rate filing mechanism of the Act is the central aspect of the regulatory system that has never been altered by Congress in any way, and is therefore quite clear and important. The Commission, in Scalia’s opinion, should have understood this.)

70. 467 U.S. 837 (1984). In *Chevron*, the Supreme Court established that when courts interpret federal statutes, they must first determine whether the particular statute in question is silent, or ambiguous, with respect to an issue. *See Chevron*, 467 U.S. at 843. If so, the courts then must defer to an agency’s reasonable interpretation of a statute. *Id.* On the other hand, if the statute is clear, then courts are expected to hold agencies to the statutory standard issuing the pertinent instructions to them. *See id.* at 842-43.



Despite the prevailing usage of "modify" in 1934, Stevens advocates an entirely more "dynamic" view on interpreting section 203.<sup>71</sup> While Hart and Sacks understood law to be a "purposive process," legal process theory also demands that law "is a continuous striving to solve the basic problems of social living."<sup>72</sup> To this extent, legal process theory, through its school of thought which Hart and Sacks called "reasoned elaboration," professes that courts are to interpret law in a way that develops and rationally shapes it over time into a coherent, historical account of the rules which govern social conduct.<sup>73</sup> In this respect, reasoned elaboration advocates such as Ronald Dworkin portray law as rules that are constantly harmonized through the loose interplay of institutions, including, of course, the federal courts, which inevitably act to implement the most socially appealing, empirical, or descriptive, policy preferences.<sup>74</sup> This precept requires courts to read statutory words so as to allow a particular agency authorized by Congress to respond to a social crisis, provided that such response is consistent with the statutory purpose, particularly when the agency in question is clearly best suited to do so.<sup>75</sup>

As the beneficiary of the Act's broad purpose, and in light of its technical communications expertise, Stevens feels that the FCC is clearly such an agency in this case.<sup>76</sup> He indicates that the FCC promulgated the 92 Order only after rational and careful consideration of the state of competition in the long-distance market.<sup>77</sup> The fact that an extensive administrative record had been developed concerning the appropriate use of the tariff filing scheme is sufficient proof for Stevens to conclude that the FCC had sufficiently explained its actions, had reached a consensus on the issue, and thereby had rationally acted to accommodate the goals and needs of the communications industry and its consumers.<sup>78</sup> Even if he were to concede that the 92 Order did in fact broaden the statutory meaning of "modify", Stevens would still probably defend it as the action of a rational institutional actor— best postured to regulate long-distance competition— that, upon becoming effective, would have received the broadest social acceptance as consistent with the purpose of the Act. As such, Stevens implies that the 92 Order possesses the "integrity" that Dworkin feels all law must embody.<sup>79</sup>

Seeing emerging competition in the long distance market as a situation warranting the 92 Order as the appropriate regulatory response, Stevens seems to argue intuitively that the meaning of "modify" must be allowed to evolve in step with a communications industry that he believes to be "unusually dynamic."<sup>80</sup> For Stevens, the majority's prevention of such evolution clearly defeats the spirit, or purpose, of the Act.<sup>81</sup> In this respect, he portrays Scalia's definition of "modify" as frozen in time, unable to account for the statutory, or special, context in which Congress used the word, and thereby as

71. To the extent that legal process advocates judicial statutory interpretation on a continuous basis, it is similar to William Eskridge's "dynamic statutory interpretation." See ESKRIDGE, *supra* note 1.

72. HART & SACKS, *supra* note 6, at 148.

73. HART & SACKS, *supra* note 6, at 143-58; See Zeppos, *supra* note 1, at 1600-01.

74. See RONALD DWORKIN, *LAW'S EMPIRE* 313-54 (1986).

75. See Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 *YALE L.J.* 529, 538-57 (1997); HART & SACKS, *supra* note 6, at 1-9.

76. See *MCI v. AT&T*, 512 U.S. at 237-41 (Stevens, J., dissenting).

77. See *id.*

78. See *id.* at 239-44 (Stevens, J., dissenting).

79. DWORKIN, *supra* note 74, at 338-40.

80. *MCI v. AT&T*, 512 U.S. at 235 (Stevens, J., dissenting).

81. See *id.* See also, Zeppos, *supra* note 1, at 1618-19 (pointing out that the Supreme Court, in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), established that a textualist reading of title VII would "violate the spirit or purpose of the Act."). See *Weber*, 443 U.S. at 201. This seems to be exactly what Stevens is asserting about Scalia's textualist reading of 47 U.S.C. § 203.

insufficient to adequately address social change.<sup>82</sup> In light of this, Stevens believes that "modify", as all statutory words, must be given its purposive meaning at the time the Supreme Court is considering the dispute between MCI and AT&T.<sup>83</sup> Consistent with legal process theory, especially with its principles of reasoned elaboration, defining statutory words at the time they are presented for interpretation promotes legal efficiency and enables a rational application of law over time.<sup>84</sup> Determining the meaning of statutory language in this fashion thereby allows judges essentially to update statutes in a way that accommodates present day social values.<sup>85</sup>

### B. Proper Sources of Law

Scalia's emphasis on plain meaning at the time of enactment enables him strategically to narrow his inquiry in *MCI v. AT&T* to a specific and limited number of sources.<sup>86</sup> Conversely, because Stevens' inquiry takes place in the broader and historical context of statutory purpose, he refers to a wide-ranging variety of sources in coming to his legal conclusion.<sup>87</sup> An analysis of Scalia's sources provides an excellent discourse in textualist thinking. Determined to extract the plain meaning of the word "modify", Scalia first resorts to the text of section 203(b)(2) without ever straying too far away from it.<sup>88</sup> To reiterate, his justification for such a textual emphasis is that "modify", as it appears in 203(b)(2), is a clear and unambiguous term, the plain meaning of which is readily apparent from a simple reading of the language.<sup>89</sup> Because he is able to easily ascertain the plain meaning of "modify" from a reading of the Act, Scalia apparently feels no need to look far beyond the text for statutory meaning.<sup>90</sup> It seems that he does not consult any secondary sources such as legislative history because, on an elementary level, the ordinary meaning of "modify" is obvious and does not compel an absurd result in this case.<sup>91</sup> Based on this logic, Scalia primarily confirms his reading of "modify" by briefly citing D.C. Circuit precedent and referring to dictionaries that offer only the narrow definition of the term.<sup>92</sup>

While his inquiry as well begins with a look at the statutory text, Stevens seems to conclude that the use of the word "modify" in section 203(b)(2) is not clear, but rather, possessive of a dual meaning, almost as immediately as Scalia determines the word to be straightforwardly narrow in meaning.<sup>93</sup> Consistent with the reasoned elaboration contingent of legal process theory, Stevens attempts to clarify this language ambiguity by canvassing the background of the Act, acknowledging the overall statutory context, and seriously considering the particular facts presented in *MCI v. AT&T*.<sup>94</sup> Inevitably, Stevens, in more eclectic fashion, seems to draw from almost any source within reason that supports his purposive argument so as to fit the Act into a coherent body of communications law.<sup>95</sup>

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82. See *MCI v. AT&T*, 512 U.S. at 235-36 (Stevens, J., dissenting).

83. See *id.* at 235 (Stevens, J., dissenting).

84. See HART & SACKS, *supra* note 6, at 143-49.

85. See Zeppos, *supra* note 1, at 1600-02.

86. See *MCI v. AT&T*, 512 U.S. at 225, 230, 232 (Scalia, J.).

87. See *id.* at 235-45 (Stevens, J., dissenting).

88. See *id.* at 224-25 (Scalia, J.).

89. See *id.* at 225 (Scalia, J.).

90. See *id.* (Scalia, J.).

91. See *id.* (Scalia, J.).

92. See *id.* at 224-34 (Scalia, J.).

93. See *id.* at 241, 245 (Stevens, J., dissenting).

94. See *id.* at 235-44 (Stevens, J., dissenting).

95. See *id.* (Stevens, J., dissenting).

A large part of the debate in *MCI v. AT&T* appears focused around Scalia's extraordinary reliance on dictionaries.<sup>96</sup> Because textualists assume that "dictionaries are the best source of the common understanding of words,"<sup>97</sup> Scalia appears to base his complete understanding of the word "modify" upon the guidance provided to him from the dictionaries of his choosing.<sup>98</sup> In so doing, he does not consider arguments about policy, history, or legal efficiency. The dictionaries in which Scalia carefully places the most faith are those that (1) were at least circulating in 1934, and (2) did not propose that "modify" indicates both minor and major change.<sup>99</sup> Limiting his use of dictionaries to these qualifications in the final analysis, Scalia, without further comment, says, "[t]o our knowledge all English dictionaries provided [when the Communications Act became law] the narrow definition of 'modify,' . . . [w]e have not the slightest doubt that is the meaning the statute intended."<sup>100</sup> In so far as he does not further justify such adamant reliance upon these dictionaries, some of which were sixty years old, the general connection between dictionaries and plain meaning for Scalia is perhaps self-evident.<sup>101</sup>

In true legal process form, Stevens notes that "[d]ictionaries can be useful aids in statutory interpretation, but they are no substitute for close analysis of what words mean as used in a particular statutory context."<sup>102</sup> This is to say that, "dictionaries [are] a 'way' to identify permissible statutory meanings," but they cannot form the basis of a legal conclusion as Scalia would have it.<sup>103</sup> In addition to implying that "modify" does not have an unambiguous meaning as Scalia contends, Stevens explains that the dictionaries available for reference do not help in clarifying the meaning of the term.<sup>104</sup> He points to a number of dictionaries that include the broader definition of "modify" as a "meaning the word will bear."<sup>105</sup> In light of this, he believes that the definition of "modify" is broad enough to justify a resort to secondary sources and ultimate judicial deference under *Chevron* to the FCC's interpretation of the word as consistent with the purpose of the Act.<sup>106</sup>

Along these same lines, commentators such as William Eskridge and Philip P. Frickey have argued that in selectively choosing among dictionaries, Scalia engages in dictionary shopping that undermines his textualist theory.<sup>107</sup> To the extent that Scalia overlooks some dictionaries that were around in 1934, and that included more expansive definitions of "modify", Eskridge and Frickey have suggested that Scalia's holding in *MCI v. AT&T* is disingenuous to the plain meaning of section 203.<sup>108</sup> Because they seem convinced that the dictionaries Scalia fails to consider clearly indicate that the broader meaning of "modify" is consistent with that term's plain meaning, Eskridge and Frickey assert that Scalia's "dogmatic" reliance on a narrow class of dictionaries has less to do with his allegiance to plain meaning than with the Supreme Court's inclination to "give[] the benefit of the doubt to businesses . . . that have made it in [their respective

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96. See *id.* at 225-28 (Scalia, J.) and 240-42 (Stevens, J., dissenting).

97. Randolph, *supra* note 36, at 1442.

98. See *MCI v. AT&T*, 512 U.S. at 225-28 (Scalia, J.).

99. See *id.* (Scalia, J.).

100. *Id.* at 228 (Scalia, J.).

101. See Randolph, *supra* note 36, at 1442.

102. See *MCI v. AT&T*, 512 U.S. at 240 (Stevens, J., dissenting).

103. Randolph, *supra* note 36, at 1440. See HART & SACKS, *supra* note 6, at 1220.

104. See *MCI v. AT&T*, 512 U.S. at 241-43 (Stevens, J., dissenting).

105. HART & SACKS, *supra* note 6, at 1375. See *MCI v. AT&T*, 512 U.S. at 241 (Stevens, J., dissenting).

106. See *MCI v. AT&T*, 512 U.S. at 240-42 (Stevens, J., dissenting).

107. Eskridge & Frickey, *supra* note 41, at 73-75 (critiquing Scalia's textualist opinion in *MCI v. AT&T*).

108. *Id.* at 73-75.

service] market[s]."<sup>109</sup> In this case, AT&T, which was the lone monopolistic provider of communications services for years, was the winning business.<sup>110</sup>

Essentially, the Eskridge and Frickey argument fails to consider that none of the dictionaries relied upon by Stevens advance the broader definition of "modify" alone.<sup>111</sup> Instead, they all offer both the narrow and broad definitions together. On the other hand, the majority of the dictionaries Scalia could find offer only the narrow definition. At most, it might be said that Scalia believes that consensus is what gives rise to a term's plain meaning while inconsistency cannot have any bearing on plain meaning. Criticizing Webster's Third Edition dictionary,<sup>112</sup> Scalia states, "[W]hen the word 'modify' has come to mean both 'to change in some respects' and 'to change fundamentally' it will in fact mean neither of those things."<sup>113</sup> Furthermore, Eskridge and Frickey advocate Stevens' point that Scalia paid no mind to Black's Law Dictionary<sup>114</sup> which, in 1933, defined "'modification' as an alteration which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter in tact."<sup>115</sup> Even though Scalia might not have considered this definition directly, he clearly establishes that the 92 *Order*, in that it terminated the 203(a) filing requirement for every common carrier except AT&T, could not possibly have been construed to leave the general purpose and effect of the filing requirement in tact.<sup>116</sup> Scalia's claims do seem to be good defenses to the Eskridge and Frickey criticisms that he is not necessarily driven by text and faithful to plain meaning.

In the alternative, Stevens appears to raise a more fundamental Hart and Sacks objection to Scalia's reliance on dictionaries, and more specifically to Scalia's limited use of legal sources. Consistent with principles of reasoned elaboration, Stevens suggests that Scalia's terse analysis of statutory meaning lacks the proper explanation necessary to relate his decision in some reasoned fashion to the Act, the statute out of which the dispute between MCI and AT&T arose.<sup>117</sup> He states, "[e]ven if the sole possible meaning of 'modify' were to make 'minor' changes, further elaboration is needed to show why the de-tariffing policy should fail."<sup>118</sup> Stevens then proceeds to justify his legal conclusion upon what he clearly believes to be rational policy grounds, historical and factual accounts, and empirical observations.<sup>119</sup> In so doing, Stevens makes his legal process appeal, maintaining that nearly complete reliance on dictionaries renders Scalia's textualism in this case "an incomplete approach to statutory interpretation" because it places too much faith in the finality of language.<sup>120</sup> Throughout his opinion, Stevens refers to evidence well beyond the statutory text and dictionaries that Scalia refuses to consider.<sup>121</sup> Stevens continually emphasizes that the FCC's decision to exempt non-dominant carriers from the 203(a) filing requirement was "rational" and "measured, . . . remain[ing] faithful to the core purpose of the tariff- filing require-

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109. *Id.* at 74-75.

110. Eskridge & Frickey, *supra* note 41, at 75 n. 215. See *MCI v. AT&T*, 512 U.S. at 234 (Scalia, J. affirming the D.C. Circuit ruling).

111. See *MCI v. AT&T*, 512 U.S. at 226 n. 2 (Scalia, J.) and 240-43 n. 5 (Stevens, J., dissenting).

112. See *id.* at 227 (Scalia, J.).

113. *Id.*

114. Eskridge & Frickey, *supra* note 41, at 74-75.

115. See Black's Law Dictionary 1198 (3d ed. 1933).

116. See *MCI v. AT&T*, 512 U.S. at 230-31 (Scalia, J.).

117. See *MCI v. AT&T*, 512 U.S. at 241, 245 (Stevens, J., dissenting).

118. *Id.* at 241 (Stevens, J., dissenting).

119. *Id.* at 241-45 (Stevens, J., dissenting).

120. HART & SACKS, *supra* note 6, at cxxviii-cxxix n. 332.

121. See *MCI v. AT&T*, 512 U.S. at 235-45 (Stevens, J., dissenting).

ment.”<sup>122</sup> He is careful to point out that the 92 *Order* emerged from the Commission’s careful consideration of the tariff requirement beginning with the advent of long distance service market competition, and therefore, legally, and correctly, “relaxes a costly regulatory requirement that recent developments had rendered pointless and counterproductive in a certain class of cases.”<sup>123</sup> In this respect, Stevens postures himself to argue that, notwithstanding its plain meaning, a broader definition of “modify”, as used in 203(b)(2), is justified by the necessary consideration of all factors which come to bear on the situation at issue.<sup>124</sup> He states, “modifications may be narrow or broad, depending upon the Commission’s appraisal of current conditions.”<sup>125</sup> To this extent, Stevens’ legal process approach advocates the Hart and Sacks notion that determinations of law can indeed be based upon important empirical, or descriptive, considerations transcending the scope of the rigidly normative textualist inquiries.<sup>126</sup>

### C. Determining the Proper Role of the Courts, Federal Agencies, and the Legislature

Serving, perhaps, as the primary justifications for both textualism and legal process theory are the principles that these theories advocate concerning the proper role for the institutional branches of American government.<sup>127</sup> Fundamentally, Scalia’s emphasis on the plain meaning of the word “modify,” confirmed by, for the most part, the dictionary, is guided by strict notions of “judicial restraint, democratic accountability,” and “constitutional formalism.”<sup>128</sup> Adherence to these principles produce Scalia’s view that law arises out of the formal functioning of institutions that play finite roles: Congress makes laws, agencies implement them, and the courts interpret and enforce them.<sup>129</sup> This view, which can be seen as a formal type of institutional settlement, rejects the principle of Hart and Sacks reasoned elaboration that law is shaped by the loose interplay of institutions.<sup>130</sup> While Stevens sees the 92 *Order* as the appropriate end result of ad hoc, yet rational, agency determinations, Scalia sees it as an attempt by the FCC to legislate, a function that is exclusively reserved for Congress.<sup>131</sup> Likewise, Scalia rejects Stevens’ suggestion that the Supreme Court must defer to the FCC’s actions, even if the 92 *Order* is inconsistent with the language of the Act, because, in Scalia’s mind, only Congress may redraft the plain language of section 203 in response to new developments in the communications industry.<sup>132</sup>

As Scalia states:

[f]or better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications, and the Commission’s desire . . . to alter the well-established statutory filed rate requirement . . . ‘is a consideration[s] address[ing] itself to Congress, not to the courts.’<sup>133</sup>

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122. *Id.* at 238 (Stevens, J., dissenting).

123. *Id.*

124. *See id.* at 240 (Stevens, J., dissenting).

125. *Id.* (Stevens, J., dissenting).

126. *See* HART & SACKS, *supra* note 6, at cxxviii- cxxix n. 332.

127. *See* SCALIA, *supra* note 1, at 3-37; HART & SACKS, *supra* note 6, at 1-181.

128. Randolph, *supra* note 36, at 1441.

129. *See* SCALIA, *supra* note 1, at 3-37.

130. *See* Zeppos, *supra* note 1, at 1614-20.

131. *See* MCI v. AT&T, 512 U.S. at 232-34 (Scalia, J.).

132. *Id.* at 234 (Scalia, J.).

133. *Id.* (Scalia, J.).

Implicit in Scalia's majority opinion is that courts are constitutionally prohibited from updating statutory law in a way, as Stevens suggests, that reflect their own values.<sup>134</sup> For Scalia, judicial updating, or policy-making, usurps the function of the legislature in violation of the separation of powers doctrine.<sup>135</sup> Borrowing, to some extent, from nineteenth century formalism, Scalia believes that "judges declare what the law 'is,' [t]hey do not make new law" as if they were legislators themselves.<sup>136</sup> While Scalia might embrace judicial activism in a common law setting, he adamantly rejects it in *MCI v. AT&T* because the correct interpretation of a statute is at issue.<sup>137</sup> He also seems to suggest that Congress is far more competent than the courts to reshape statutes according to policy because it is the institution most in touch with the political forces that drive policy in the first place.<sup>138</sup>

Consequently, Scalia's sources of law for determining the meaning of modify can be seen in a sense as safe sources. They are either other official legal sources, or they are non-legal sources whose use is so widespread (e.g. dictionaries) that they do not allow the judiciary to speculate about statutory meaning at the risk of functioning as the legislature. In Scalia's mind, the further one drifts from the text, "answers to statutory cases are found not in the 'law' but the judge's own views of justice, fairness, or social welfare."<sup>139</sup> This is precisely his objection to Stevens' legal process dissent.<sup>140</sup> Scalia rejects the judicial activism promoted by legal process because a broad inquiry into the purpose, political background, statutory context, and the factual situation at issue allows Stevens to ask "what meaning ought to be given to the directions of the statute in the respects relevant to the case" as opposed to what the statute says.<sup>141</sup> This overly broad inquiry into law then allows judges, who have no business doing so, playing the role of the "Mr. Fix It" common law judge in spite of clear statutory standards.<sup>142</sup>

Furthermore, Scalia disagrees with Stevens' implicit argument, which is similar to an argument made by Cass R. Sunstein, that the FCC, as a federal agency, should be given more discretion to "adjust [statutory] text to circumstances" just as a common law court might adjust precedent to circumstances.<sup>143</sup> For Scalia, allowing the 92 *Order* to stand on such a justification in this instance would have probably been just as contrary to the separation of powers doctrine as a decision by the Supreme Court to broadly interpret the term of "modify" based on policy preferences.<sup>144</sup> Had he perceived the Act to be silent or ambiguous with respect to permissible changes of the 203(a) filing requirement, Scalia suggests that, under *Chevron*, he might have accepted the 92 *Order* as a type of common law gap filler, necessarily supplementing the act without superceding it in relevant part.<sup>145</sup> However, because he feels that the 92 *Order* creates new law in disregard for the clear statutory standard set forth in section 203, Scalia determines that the

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134. See *MCI v. AT&T*, 512 U.S. at 230-34 (Scalia, J.).

135. See SCALIA, *supra* note 1, at 3-37; Zeppos, *supra* note 1, at 1614-18.

136. See Eskridge, *supra* note 5, at 623 n. 11.

137. See *MCI v. AT&T*, 512 U.S. at 234 (Scalia, J.); SCALIA, *supra* note 1, at 23-25.

138. See *MCI v. AT&T*, 512 U.S. at 231-34 (Scalia, J.).

139. Zeppos, *supra* note 1, at 1619 (citing *Johnson v. Transportation Agency*, 480 U.S. 616, 672 (1987)) (Scalia, J., dissenting).

140. See *MCI v. AT&T*, 512 U.S. at 234.

141. HART & SACKS, *supra* note 6, at 1374. See SCALIA, *supra* note 1, at 18-22.

142. SCALIA, *supra* note 1, at 14.

143. Sunstein, *supra* note 75, at 533, 546, 553.

144. See SCALIA, *supra* note 1, at 3-37.

145. See *MCI v. AT&T*, 512 U.S. at 229-31 (Scalia, J.).

FCC, in promulgating the 92 *Order*, had imprudently assumed the policy-making role of Congress by updating the Act.<sup>146</sup>

### III. Legislative Updating Versus Judicial Updating

With its adoption of Scalia's textualist methodology in *MCI v. AT&T*, the Supreme Court gave binding legal effect to the D.C. Circuit's longstanding refusal to read the term "modify" broadly as a means of updating section 203.<sup>147</sup> Despite Stevens' plea for such an update, Scalia makes clear in *MCI v. AT&T* that any increase in the FCC's 203(b)(2) modification authority could not come from either the federal judiciary or the Commission itself.<sup>148</sup> Rather, such regulatory relief would have to come from Congress.<sup>149</sup>

#### A. The 1996 Act as a Legislative Update

As fate would have it, Congress did ultimately grant the FCC the broad regulatory authority that it had long-since sought to claim pursuant to section 203(b)(2).<sup>150</sup> Just two years after the Supreme Court's decision in *MCI v. AT&T*, Congress passed the 96 Act, which added a new section 10 to the Act.<sup>151</sup> This addition undeniably empowers the FCC to forbear from enforcing the 203(a) filing requirement altogether, if necessary.<sup>152</sup> Moreover, the authority granted under new section 10 allows the FCC to forbear from enforcing any statutory requirement, whether related to tariff filing or not.<sup>153</sup>

Fundamentally, section 10 works to diminish the importance of the merits of *MCI v. AT&T* as decided by the Supreme Court. In affording the FCC with a separate and clearer framework for forbearance, section 10 of the Act, as amended, makes the debate over the meaning of "modify" in section 203 seem like an eleven year headache that could have been avoided.<sup>154</sup> Interestingly enough, however, Congress did not directly amend the language of section 203 of the Act in any respect. On the contrary, the language of section 203 itself is no different now than it was in 1934. Furthermore, Congress did not choose to provide a new statutory definition for the word "modify". In relevant part, subsections 10(a) and (b) of the Act, as amended, provide:

... the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier [of] telecommunications service, or class of ... carriers of ... services, ... if the Commission determines that— (1) enforcement of such regulation or provision is not necessary to ensure that the charges, ... by, for, or in connection with [a carrier of service] are just and reasonable ...; (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.<sup>155</sup> (b) ... — In making the determination (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will

146. See *id.* at 231-34 (Scalia, J.).

147. See *id.* at 233-34 (Scalia, J.).

148. *Id.* at 234 (Scalia, J.).

149. *Id.* (Scalia, J.).

150. PETER W. HUBER, ET. AL., THE TELECOMMUNICATIONS ACT OF 1996: A SPECIAL REPORT 60-63 (Little, Brown and Co. 1996).

151. 47 U.S.C. § 160. See HUBER, ET. AL., *supra* note 156, at 60. See also, note 35.

152. See 47 U.S.C. § 160(a).

153. *Id.*

154. See *supra* note 15.

155. 47 U.S.C. § 160(a).

promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.<sup>156</sup>

If the FCC chooses to relax the 203(a) filing requirement pursuant to section 10, the question of whether “modify” means to make minor changes in, or to make more fundamental and basic changes in, is irrelevant to determining the legality of such an action. With the passage of the 96 Act, the FCC may now relax the 203(a) filing requirement for non-dominant carriers without having to rely on its section 203(b) modification authority to do so. Because section 10 does not at all suggest that forbearance should be limited to any extent or degree, it appears safe for the Commission to disregard *MCI v. AT&T* with a simple thought in mind: that the meaning of “modify” in Section 203 is no longer relevant. As it stands, unless the FCC is stubborn enough to once again suspend the legal effect of 203(a) under the guise of its 203(b)(2) modification power, the holding in *MCI v. AT&T* will be inapplicable.

Most important to the textualist-legal process debate for purposes of this article are some specific considerations regarding the connection between the holding in *MCI v. AT&T* and section 10. In providing the FCC with authority that the Supreme Court had determined was not available to the Commission under section 203(b)(2), section 10 can be perceived as a legislative update of the section 203 regulatory scheme. As such, it is relevant to whether *MCI v. AT&T* indicates that the forcing of legislative updating through textualist interpretation, or rather judicial updating of obsolete statutes, is the better approach.

Essentially, any claim that Scalia’s textualist approach is best because it forces legislative responsiveness seems most plausible if there is good reason to believe that the textualist decision in *MCI v. AT&T* did actually induce Congress to enact section 10 into law. If it is more clear than not that section 10 represents Congress’ attempt to correct the regulatory deficiency of the Act as exposed by Scalia in *MCI v. AT&T*—that the limited meaning of “modify” in 203(b)(2) prevents the FCC from exercising the necessary regulatory authority over the communications industry—then textualism seems to work as Scalia claims it does. Importantly enough, however, a purposivist might argue that the appeal of textualism is vulnerable to an argument implied by Stevens’ adoption of the Sunstein notion concerning administrative agencies— that consistent with legal process methodology, the broad language of Section 10 allows the FCC to act as a common law court in making its own determinations of relevant law and fact, subject to review by increasingly deferential federal courts in the wake of *Chevron*.<sup>157</sup> In this respect, Congress might be seen to have, in effect, endorsed judicial updating of the communications regulatory regime where the Commission determines, upon ad hoc policy grounds, that a particular statutory provision is no longer necessary for regulating communications carriers. In addition, even if the textualist decision in *MCI v. AT&T* actually forced Congress to respond, a purposivist might still assert that the textualist decision imposed unnecessary costs because Congress ended up giving the FCC the authority that Stevens wanted it to have anyway. To this extent, it is simply not clear why a court should require legislative updating when the court itself can produce the same result more efficiently.

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156. 47 U.S.C. § 160(b).

157. See *MCI v. AT&T*, 512 U.S. at 241-45 (Stevens, J., dissenting); Sunstein, *supra* note 75, at 531.



### B. The Nexus between *MCI v. AT&T* and Section 10

That section 10 serves as a reaction to *MCI v. AT&T* is more than plausible.<sup>158</sup> Fundamentally, an account of the statutory history of the 96 Act, together with an analysis of the factors which motivated Congress to pass the 96 Act, strongly suggest that Congress was not only aware of *MCI v. AT&T* when it enacted section 10, but in addition, that Congress enacted section 10 as a response to *MCI v. AT&T*.

Even before enactment of the 96 Act, it was widely accepted that the current communications laws needed a shot in the arm to keep pace with consumer demands of service market competition.<sup>159</sup> Slightly closer to the time of enactment, many key members of Congress, both minority and majority, had been considering the development of long distance market competition as consumer constituents were growing more and more concerned about the price of their long distance service.<sup>160</sup> In response to the growing consensus that new legislation was needed to spur competition, and thereby drive down prices, Congress was closely following a broad range of legal and regulatory activity, which was relevant to telephony, that had transpired since the divestiture of AT&T in 1984.<sup>161</sup> Because the long and hard struggle that took place between the D.C. Circuit and the FCC over the 203(a) filing requirement had been so pertinent to long-distance market competition, and no doubt, significantly less than subtle,<sup>162</sup> *MCI v. AT&T* cannot be presumed to have escaped Congress's attention.<sup>163</sup> Interestingly enough, even the lawyers for MCI, AT&T, and the FCC, during their oral arguments before the Supreme Court in the matter of *MCI v. AT&T*, acknowledged that Congress was aware of their respective interpretations of section 203 and "the decade- long tug of war between the Commission and the D.C. Circuit over the authority to relax filing requirements, . . ."<sup>164</sup> Ultimately then, it is quite conceivable that Congress was aware of the issue involved in *MCI v. AT&T*.

158. There are primarily two factors which make such a presumption reasonable: the historical and political events leading up to and surrounding the passage of the 96 Act, and the clear desire of the 104<sup>th</sup> Congress to introduce increased competition to communications service markets through an overhaul, or update, of the outdated regulatory framework of the Act.

159. See PAUL W. MACAVOY, *THE FAILURE OF ANTITRUST AND REGULATION TO ESTABLISH COMPETITION IN LONG-DISTANCE TELEPHONE SERVICES* (1996). See generally, HUBER, ET. AL., *supra* note 150; See also, THOMAS G. KRATTENMAKER, *TELECOMMUNICATIONS LAW & POLICY* (1994); Wharton Econometric Forecasting Associates, Study, *Economic Impact of Eliminating The Line-of-Business restrictions* (February 1995) [hereinafter WEFA Study]; 141 CONG. REC. H8463 (daily ed., August 4, 1995) (statement of Congressman Dingell) [hereinafter Dingell statement].

160. See Joseph Farrell, *Creating Local Competition*, 49 FED. COMM. L.J. 201(1996); WEFA Study, *supra* note 159; Dingell Statement, *supra* note 159; *Remarks of the Honorable John D. Dingell to the Computer & Communications Industry Association*, June 10, 1996 [hereinafter Dingell Remarks]; KNAUER, MACHTELY, LYNCH, ET. AL., *TELECOMMUNICATIONS ACT HANDBOOK, A COMPLETE REFERENCE FOR BUSINESS* 11-21 (1996).

161. See generally, HUBER, ET. AL., *supra* note 150; KNAUER, ET. AL., *supra* note 160, at 11-17. See also, S. REP. NO. 23, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 3 (1995); H.R. REP. NO. 204, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 49-50 (1995); Dingell Remarks, *supra* note 166.

162. See *supra* note 13.

163. This argument is, largely, based on three telephone interviews I conducted with Jim Greene, John Windhausen, and Earl Comstock. See, *infra* note 165. While Greene is an FCC official, his suggestion that section 10 was induced by *MCI v. AT&T* is corroborated by both Windhausen and Comstock, former attorneys for the Senate Committee on Commerce, who were ultimately responsible, along with few others, for drafting the language of section 10. *Id.*

164. *MCI v. AT&T*, 512 U.S. at 233 (Scalia, J.).

Building on this further, the factual accounts of three individuals who were essential in the enactment of the '96 Act, reveal that *MCI v. AT&T* can be perceived as a Supreme Court case that induced section 10.<sup>165</sup> By the account of Jim Greene, an FCC Official who served as a Congressional liaison regarding the 96 Act, the volatile battles between the D.C. Circuit and the FCC had drawn the attention of key Senators, both Democratic and Republican, who maintained a keen interest in communications law.<sup>166</sup> Furthermore, according to Greene the language that, with only a few minor changes, ultimately became section 10 of the Act as amended was put into S. 652 (the Senate version of the 96 Act)<sup>167</sup> by Senator Ted Stevens (R-AK) to alleviate the situation caused by the Supreme Court's holding in *MCI v. AT&T*.<sup>168</sup>

Consistent with this are the comments of John Windhausen who was Senior Counsel to the Committee on Commerce when the 96 Act was enacted.<sup>169</sup> According to Windhausen, *MCI v. AT&T* indicated to Congress that the Commission's current 203(b)(2) modification power was not presently sufficient to facilitate the needs of non-dominant carriers, either new or old, which could not effectively compete if forced to incur the high transaction costs of filing tariffs under 203(a).<sup>170</sup> Because they did not want the progress of service market competition to be hindered in the future, Windhausen indicated that Senators Stevens, Hollings, and Inouye spearheaded the initiative for section 10, which, as an original provision of S. 652, drew little to no opposition from either Democrats or Republicans.<sup>171</sup>

Finally, Earl Comstock, who was the Senate Commerce Committee's majority Counsel that drafted section 10 into S. 652, stated that *MCI v. AT&T*, among other things, "was certainly a consideration when constructing section 10."<sup>172</sup> Comstock, who put section 10 into S. 652 at the request of Senator Stevens, suggested that *MCI v. AT&T* provided additional insight into the regulatory shortcomings of the Act, and more clearly demonstrated how the existing forbearance standards could be updated.<sup>173</sup> Just as Windhausen had seen it, Comstock and Senator Stevens felt as if section 10 was the proper

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165. Telephone Interview with Jim Greene, Office of Legislative and Intergovernmental Affairs of the Federal Communications Commission, (Apr. 23, 1998) [hereinafter Greene Interview]; Telephone Interview with John Windhausen, former counsel to the Senate Committee on Commerce, (Apr. 24, 1998) [hereinafter Windhausen Interview]; Telephone Interview with Earl Comstock, former Majority Counsel to the Senate Committee on Commerce, (Apr. 27, 1998) [hereinafter Comstock Interview]. The content of these interviews is revealed in the body of this article.

166. Greene Interview, *supra* note 165. Although not all members of Congress may have been aware of *MCI v. AT&T*, such overwhelming knowledge is not necessary to support the argument that *MCI v. AT&T* induced the enactment of section 10. What is important is that the key members of Congress, whose staffs implemented the language of section 10 into the 96 Act did so with *MCI v. AT&T* in mind. As an FCC representative who was in constant contact with these members and their staffs, Mr. Greene has confirmed that the language of section 10 was, in large part, a reaction to *MCI v. AT&T*. He indicated that all of the legal commotion between 1985 and 1995 concerning 203(b)(2) modification was too significant for the Senators in the Committee on Commerce to ignore. *Id.*

167. S. 652, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. § 303 (1995). Section 303 of S. 652 is almost identical to section 10 of the Act, as amended. See H.R. CONF. REP. NO. 458, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 184-85. This Conference report confirms that section 10 is fundamentally based on, or essentially traces, the language of § 303 of S. 652.

168. Greene Interview, *supra* note 165.

169. Windhausen Interview, *supra* note 165.

170. *Id.*

171. *Id.*

172. Comstock Interview, *supra* note 165.

173. *Id.*

update to the Act, a statute that could not sustain, or allow for, the competition that was desired and needed.<sup>174</sup>

Based on these accounts, it seems that Congress consciously enacted section 10 to avoid a situation like *MCI v. AT&T* down the road. As alluded to earlier, *MCI v. AT&T*, in that it addressed a regulatory measure meant to stimulate long-distance service competition, was highly relevant to the number one and ambitious priority of the 96 Act: to "open[] all telecommunications markets to competition."<sup>175</sup> To the extent that the FCC had similarly promulgated the 92 Order in the interest of competition, it appears that Congress and the FCC agreed, at least from a policy standpoint, that the existing regulatory framework would have to change in order to accommodate new competition. This is to say that the Commission's interests were seemingly aligned with Congressional interests following the decision in *MCI v. AT&T*: Congress wanted service market competition and the FCC wanted the authority to adequately de-regulate through forbearance so that such competition could thrive.<sup>176</sup>

### C. Stating a Case for Legislative Updating

As the most sweeping regulatory reform legislation in communications industry history,<sup>177</sup> the 96 act is clearly a response to the public cry for Congress to provide a new order in communications.<sup>178</sup> Given the high probability that *MCI v. AT&T* induced section 10, Scalia's textualist opinion in that case is best perceived as an important voice in the crowd. By pledging strong allegiance to the text of section 203, Scalia draws attention to this statutory provision as a legal mechanism in need of legislative repair. By prohibiting the FCC from acting in a way that he felt could have very well been good for the communications industry, and by interpreting the word "modify" as narrowly as he does, Scalia implies that if the premise of the FCC Order is in the public interest, then it is high time for Congress to empower the Commission to do more for the industry.<sup>179</sup> Because section 10 does in fact empower the FCC to do more in the interest of communications competition, it appears to serve as the response to Scalia's wake-up call.<sup>180</sup>

Scalia's claim that textualism forces legislative responsiveness also seems well supported by the suggestions of Greene, Windhausen, and Comstock.<sup>181</sup> As all three admitted in some way, the holding in *MCI v. AT&T* effectively exposes the deficiencies of the Act with respect to forbearance.<sup>182</sup> While Comstock suggested that Senator Stevens had more than just the 203(a) filing requirement in mind when section 303 of S. 652 was reported out of the Senate Committee on Commerce, he did make quite clear that one of the Congressional priorities in drafting this regulatory forbearance section was to legislate around the holding in *MCI v. AT&T*.<sup>183</sup> In so far as section 10, which again, emerged primarily from section 303 of S. 652, purposively gives the FCC an alternative to the exercising its modification power under 203(b)(2), section 10 clearly is not only a

174. *Id.*; see also Windhausen Interview, *supra* note 165.

175. The 96 Act, *supra* note 32, at 1; H.R. CONF. REP. NO. 458, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 113 (1996).

176. See HUBER, ET. AL., *supra* note 150, at 60; KNAUER, ET. AL., *supra* note 160; Greene Interview, *supra* note 171. See generally, *MCI v. AT&T*, 512 U.S. 218.

177. See Farrell, *supra* note 159.

178. 142 CONG. REC. S686 (daily ed., Feb. 1, 1995) (Statement of Senator Pressler).

179. *MCI v. AT&T*, 512 U.S. at 233-34. (Scalia, J.).

180. Compare 47 U.S.C. §§ 160 and 203.

181. See *supra* notes 165-74 and accompanying text.

182. See *supra* notes 165-74 and accompanying text.

183. See *supra* notes 165, 172-74 and accompanying text.

legislative update of the Act, but it is also a legislative response to the problem that Scalia's wooden reading of section 203 rendered easily discoverable.

It is also worth noting that Congress provided section 10 without any indication that subsection 203(b)(2) was to be directly amended. While this may be evidence that Congress just forgot to address the meaning of "modify", it is more likely that Scalia convinced Congress to leave 203(b)(2) in deference to his narrow reading of "modify". Conceding that the Supreme Court was correct in concluding that 203(b)(2) does not enable the FCC to relax the 203(a) filing requirement as needed, Congress, as suggested by the three interviewees, enacted section 10 to rectify this situation. Furthermore, by leaving section 203 intact and unchanged, Congress can be presumed to have recognized that the Commission may still need to invoke its modification authority under subsection 203(b)(2) in situations that call for some intervention, but not for action as significant as forbearance. Suppose, for instance, that the Commission desires to extend the 203(a) filing deadline for certain carriers because, in light of certain circumstances, it is reasonable to do so. Or, suppose that the Commission changes the filing deadline for all carriers so that their eventually filed tariffs are adjusted to accurately reflect inflation rates in a given year. Better yet, suppose that the Commission can establish an objectively good cause for granting a certain common carrier or carrier(s) a temporary, or short of indefinite, reprieve from the filing obligation. It is possible to continue proposing certain scenarios which would justify the Commission's modification of the 203(a) filing requirement, but, what is essential to recognize is that these scenarios do not require full forbearance considerations by the Commission under subsection 10(a). On the contrary, such matters, which probably arise quite frequently, can be solved much more easily and efficiently in a 203(b)(2) modification proceeding. The fact that 203(b)(2) is still around to accommodate situations calling for less than forbearance, strongly suggests that the 104<sup>th</sup> Congress conceded to Scalia's narrow reading of "modify".

#### D. Stating a Case for Judicial Updating

Despite that section 10 can be perceived as a response to *MCI v. AT&T*, the language of section 10 might be read as a validation of the Stevens and Sunstein view that a federal agency should have the authority to continually adjust the law to fit the circumstances.<sup>184</sup> Arguably, section 10 contemplates that the Commission considers situational factors, which debatably exist outside of the codified law itself, for the purpose of effectively regulating the communications industry on a rational and on-going basis.<sup>185</sup>

As cited above, the text of section 10 appears to be very similar to the version of the statutory purpose of the Act proposed by Stevens in *MCI v. AT&T*. To reiterate, Stevens argued that the Act was meant to give the FCC broad discretion and "ample leeway to interpret and apply its statutory powers and responsibilities."<sup>186</sup> In like terms, section 10 requires the Commission to essentially nullify the legal effect of *any* provision of the Act, as amended, at any given time, based upon its own factual determinations.<sup>187</sup> Without much thought, it seems undeniable that the power to apply, or not apply, any section of the Act, as amended, gives the Commission broad discretion and ample leeway to regulate common carriers. In addition, because section 10 sets no statutory deadline by which the FCC is required to have completed its forbearance proceedings, it is not un-

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184. See 47 U.S.C. § 160(a)-(e); *MCI v. AT&T*, 512 U.S. at 240 (Stevens, J., dissenting); Sunstein, *supra* note 75, at 533.

185. See 47 U.S.C. § 160(a)-(e).

186. *MCI v. AT&T*, 512 U.S. at 235 (Stevens J., dissenting).

187. See 47 U.S.C. § 160(a)(1)-(3).

reasonable to assume that Congress has, in passing the Act of 96, adopted the Hart and Sacks view that law is a continuous striving to solve the basic problems of social living. Section 10 can easily be read as indefinitely reserving the Commission's authority to forbear in order to correct basic inefficiencies, or problems, with the existing telecommunications regulatory scheme. Making even more clear that the FCC has continuous forbearance authority under section 10, is that subsection 10(c) clearly establishes the framework by which private parties are to petition the FCC for forbearance as their regulatory concerns develop over time.<sup>188</sup> This framework is simply bereft of any stipulation that regulated entities will have waived their right to petition should they fail to do so within a particular time. On the contrary, Congress seems to have contemplated that the continuous petition process will complement the Commission's ad hoc forbearance determinations.

Stevens begins his dissent in *MCI v. AT&T* by stating a general observation, yet one that is very important for his legal process approach. As mentioned above, he opens his attack on Scalia and the majority by proposing that "[t]he communications industry has a dynamic character."<sup>189</sup> This implies that Stevens sees the communications industry as expanding, continually changing over time, and thereby likely to pose new and unforeseen problems that can only be solved as they arise.<sup>190</sup> In true Hart and Sacks fashion, Stevens then assumes that Congress, because it is "made up of reasonable persons pursuing reasonable purposes reasonably,"<sup>191</sup> enacted subsection 203(b)(2) of the Act to give the FCC the full flexibility to regulate carriers dynamically, or in a manner that is sensitive to the industry's ever-changing character.<sup>192</sup> On the whole, section 10 does seemingly provide the FCC with such "regulatory flexibility" as an apparent remedy to the Supreme Court's determination that subsection 203(b)(2) did not.

While section 10 ensures that the FCC will inevitably practice Eskridge's dynamic statutory interpretation, its language is also consistent with Hart and Sacks legal process. As suggested above, one similarity between Eskridge's dynamic approach and legal process is that they both promote statutory interpretation as a means of updating the law.<sup>193</sup> Fundamentally, both approaches adhere to the principle that "the meaning of a statute is not fixed until it is applied to concrete circumstances, and it is neither uncommon nor illegitimate for the meaning of a provision to change over time."<sup>194</sup> In essentially requiring the FCC to forbear whenever industry conditions warrant it, section 10 clearly establishes that the Commission is to prospectively interpret and apply all statutory provisions of the Act, as amended, for the purpose of updating the law, or to make it compatible with the most efficient, socially equitable, state of the communications industry.<sup>195</sup> In this respect, the framework of section 10 condones the Commission's interpretive adjustments of the meanings of statutory words to make a desired impact upon the communications industry. In almost exact terms, Stevens argued that the Commission should have been able to rely on the broader definition of "modify", as used in 203(b)(2) because an exemption from the 203(a) filing requirement for non-dominant carriers was essential to striking the appropriate competitive balance between such carriers and the dominant carrier (AT&T) in the long distance market.<sup>196</sup> Because

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188. See 47 U.S.C. § 160(c).

189. *MCI v. AT&T*, 512 U.S. at 235 (Stevens, J., dissenting).

190. *Id.* at 235-38 (Stevens, J., dissenting).

191. HART & SACKS, *supra* note 6, at 1378.

192. See *MCI v. AT&T*, 512 U.S. at 235-40 (Stevens, J., dissenting).

193. See ESKRIDGE, *supra* note 1, at 13-47.

194. *Id.* at 9.

195. See generally 47 U.S.C. § 160.

196. See *MCI v. AT&T*, 512 U.S. at 237-38 (Stevens, J., dissenting).

section 10 contemplates the overall meaning of the Act, as amended, as evolving over time, it can perhaps be argued that this provision does not embody Scalia's notion that the time most relevant to interpreting a statute is the time of enactment.

Further possible support for judicial updating comes from the fact that section 10 requires the FCC, before forbearing from enforcing a particular provision, to consider the same factors on which Stevens based his legal conclusion in the dissent.<sup>197</sup> Just as Stevens did in his dissent, section 10 makes clear that the situation concerning the state of the service market in question is highly relevant to a decision to suspend, to any degree, the legal effect of any statutory provision, including subsection 203(a). While Stevens justifies the 92 *Order* as the appropriate response to "new conditions in the communications industry, including stirrings of competition in the long distance telephone market,"<sup>198</sup> section 10 similarly requires the FCC to pay attention to the reasonableness of current service charges, the well-being of consumers, and the present state of service market competition.<sup>199</sup> Even though these background considerations are not of a legal nature, section 10 contemplates that they bear significantly on the nature of the law in communications.<sup>200</sup> In this regard, section 10 seems to discount Scalia's view that sources which are not either legal, or so widely relied on that they leave little opportunity for speculation, are not relevant in shaping the law.

Because section 10 requires the FCC to continually shape the law according to the circumstances at hand, it might be argued that it is a codification of legal process principles. Consistent with principles of reasoned elaboration, the Commission, as a result of section 10, now seems armed with the statutory authority to return to the business of responding to problems that arise in the communications industry. As such, the Commission, it might be argued, is poised to continue developing and updating communications law as a coherent story, picking up where it had left off in its rule-making proceedings when the federal courts so rudely interrupted.

### E. Why Legislative Updating Prevails over Judicial Updating

In light of the origin and nature of section 10, there are primarily two reasons why Stevens' case for judicial updating is not as appealing as Scalia's demand for legislative updating. One of these lays to rest the purposivist claim that the FCC must be perceived to operate as a common law court free to integrate policy into law despite statutory instructions to the contrary. The other consideration establishes that a judicial update of section 203(b)(2) in *MCI v. AT&T* would neither have provided the same policy result as section 10, nor done so in a more efficient and less costly manner. To the contrary, a closer examination of section 10 as the legislative response to *MCI v. AT&T* reveals that Scalia's challenge to Congress ended up producing a more desirable standard for FCC forbearance than a judicial update of section 203(b)(2) would have.

To be clear, the FCC and the federal courts should not read section 10 as contemplating common law type adjudication. Aside from a few specialized areas of the law, such as antitrust, admiralty, or labor, there is no federal communications common law despite the fact that much authority has been delegated to the FCC.<sup>201</sup> To the contrary,

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197. Compare *MCI v. AT&T*, 512 U.S. at 235-42 (Stevens, J., dissenting) and 47 U.S.C. § 160(a)(1)-(3).

198. *MCI v. AT&T*, 512 U.S. at 237 (Stevens, J., dissenting).

199. See 47 U.S.C. § 160(a)(1)-(3) and (b).

200. *Id.*

201. To date I can find no case suggesting that federal communications law is even in part common in nature as opposed to statutory. Even the price setting authority given to the individual states under 47 U.S.C. § 252, is ultimately subject to some specific, federal statutory limitations. In this respect, section 10 as amended cannot be seen to grant the kind of common law adjudicative authority to the FCC that, for instance, the Taft-

communications law comes from federal statutes.<sup>202</sup> The standards by which the Commission is to forbear are clearly prescribed by statute in subsection 10(a)(1)-(3), and, in addition, a complete reading of this provision makes clear that the Commission is not free to devise its own forbearance criteria not enumerated by Congress.<sup>203</sup> As such, the communications regulatory regime cannot possibly be altered in a way not conceived by Congress. It follows then that section 10 has not effectively condoned the judicial updating that Stevens argued was necessary in *MCI v. AT&T*. Instead, it requires the Commission carry out a very specific statutory standard. Although the analogy Stevens and Sunstein try to draw between common law courts and federal agencies seems interesting, the perception of agencies as common law courts cannot be conflated with an agency executing its statutory responsibilities. It cannot be denied that the whole point of the first *Chevron* inquiry – whether there is a clear statutory standard governing the situation at bar – is to ensure that an agency has obeyed Congress. Because section 10 is such a standard, it cannot be assumed that the FCC and the courts will be crafting their own rules as if section 10 were either non-governing or non-existent. Ultimately, because the 92 Order was not authorized under 203(b)(2), a position to which Congress has apparently conceded, the Supreme Court was correct in choosing not to update the statute itself by giving legal effect to the FCC's broad definition of "modify".

In addition, as alluded to above, the textualist decision in *MCI v. AT&T* was, more than likely, instrumental in creating a comprehensive forbearance framework that a judicial update of 203(b)(2) almost surely would not have induced. Ultimately, a broad interpretation of the term "modify" by the Supreme Court could not possibly have given the FCC with the broader, and seemingly most desirable, authority afforded to it by Section 10. While such a judicial update of section 203 would have immediately given the FCC more discretion over the enforcement of the 203(a) filing requirement, it is not clear how a legal process decision in *MCI v. AT&T* could have empowered the Commission to forbear from enforcing any statutory provision. Because Scalia's textualism seems to have induced this broad section 10 empowerment, the events that followed *MCI v. AT&T*, namely the passage of the 96 Act, work to discredit any assumption by the purposivist that judicial updating comes out in the same place as legislative updating. Frankly, because section 10 provided the FCC with more authority than it sought in *MCI v. AT&T*, it thereby granted more forbearance authority than Stevens wanted the Commission to have. In this respect, a decision by the Supreme Court to support Stevens' conclusion of law might have ended up costing the FCC, and those common carriers who benefit from regulatory forbearance, more than the textualist decision in *MCI v. AT&T* may have cost them for the short term.

Also discredited by the broad scope of section 10 is the notion that, over time, the practice of judicial updating will, more efficiently than legislative updating, result in the enforcement of equitable and balanced regulatory policy. Because section 10 allows forbearance with respect to every section of the Act, as amended, it would have taken an indeterminate amount of piecemeal, court alterations of the statutory forbearance framework for judicial updating to have produced the relief that section 10 provides. Even assuming, for the sake of argument, that judicial updating of this sort could have

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Hartley Act, or the Sherman Anti-Trust Act, grants to the courts. The provisions of the Act, as amended, such as section 10, are simply too explicit to give rise to the presumption of common law authority. For a full discussion of areas of federal common law, see HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 656-757 (Richard H. Fallon, Daniel J. Metzger, and David L. Shapiro eds., 4<sup>th</sup> ed. 1996).

202. See 47 U.S.C. §§ 151 et. seq..

203. See 47 U.S.C. § 160(a)-(e).

eventually provided what section 10 has, there is simply no way of knowing how long it might have taken for such a string of cases to develop; presumably, much longer than it took Congress to provide forbearance for all statutory provisions as a response to *MCI v. AT&T*. Based on this, the forcing of legislative updating appears entirely more efficient than the judicial updating promoted by Stevens.

Furthermore, while the age and obsolescence of the Act might generally be factors that are typically thought to support judicial updating, these factors actually enable Scalia's democracy-forcing approach to work for him. Scalia's textualism in this instance produced the most appropriate result because it exposed the real source of the legal problem at issue: the regulatory insufficiency of the Act. To reiterate, at the time of the decision in *MCI v. AT&T* Congress had been attempting to overhaul the existing communications regulatory regime that was based on the long-standing provisions of the Act.<sup>204</sup> Almost all of the industry participants, were pushing for some Act of Congress to enable service market competition and greater regulatory forbearance authority for the FCC.<sup>205</sup> Essentially, Scalia's narrow reading of the word "modify" was correct because it was perfectly consistent with the narrow scope of the Act as a statute that had been written long before there was any competition in the long distance business. Consequently, Scalia's interpretation of "modify" crystallized just how outdated, and in need of repair the Act really was. In indicating that the Act needed so much more updating than the "quick fix" that a broad reading of "modify" could have provided, Scalia convincingly made clear that Congress was the only democratic institution capable of curing the obvious deficiencies in the Act.<sup>206</sup>

To the extent that it induced the comprehensive Section 10, the wooden holding in *MCI v. AT&T* was better than any judicial attempt to stretch the language of the Act to apply to a situation that its drafters never contemplated. So obsolete was the Act that a decision by the Supreme Court to broadly interpret the term "modify" would have worked only to conceal the Act's shortcomings by portraying it as sufficient to prospectively foster forbearance compatible with the public interest. Had the Supreme Court upheld the 92 Order, it is conceivable that the Congress may have been confused in its task of providing an articulate forbearance standard.<sup>207</sup> Had Congress, in the wake of a legal process decision in *MCI v. AT&T*, enacted some less ambitious, or no additional forbearance standard at all, the FCC might still be faced with having to determine whether a particular proposed action for forbearance of 203(a) qualifies as a 203(b)(2) modification. While it would be able to rely on *MCI v. AT&T* for the authority to relax the filing requirement for non-dominant carriers, neither the Commission, nor any interested parties, could be fully certain that a never before tested attempt at forbearance would be upheld under 203(b)(2). It follows then that judicial updating in *MCI v. AT&T* would have probably served to perpetuate the legal uncertainty that had overshadowed the FCC's forbearance powers since 1985.<sup>208</sup>

Bringing this uncertainty to an end, Congress, just two years after the decision in *MCI v. AT&T*, responded by making section 10 a part of the most sweeping telecommunications reform legislation that our nation has ever seen.<sup>209</sup> Objectively speaking, section 10 is as generous, clear, sensible, and complete, as any forbearance stan-

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204. See *supra* note 160 and accompanying text.

205. See *supra* note 159 and accompanying text.

206. See *MCI v. AT&T*, 512 U.S. at 229-34 (Scalia, J.).

207. This was also something suggested by John Windhausen in the telephone interview I had with him. See Windhausen Interview, *supra* notes 165, 169-71, 174 and accompanying text.

208. See *supra* note 13.

209. See HUBER, ET. AL., *supra* note 150; Farrell, *supra* note 159; KNAUER, *supra* note 160.



dard/procedure that the FCC and industry could have hoped for. As such, section 10 makes the law concerning the Commission's authority to forbear as clear, and predictable as possible. Ultimately then, the effect of textualist decision in *MCI v. AT&T* has been to streamline the law in a way that is undeniably gracious to the FCC and quite beneficial to all carriers who really need regulatory exemptions. No longer will the legal effect of Commission forbearance Orders be unclear. They will either comply with section 10 or they will not. Consequently, the possibility that one word, the meaning of which may support rich connotations, will prevent necessary forbearance is now significantly less likely.

#### IV. Conclusion

*MCI v. AT&T* demonstrates that textualist judges and legal process judges can reach different conclusions of law, notwithstanding the simplicity of the particular issue before them. Their differences concerning law, interpretive techniques, and appropriate institutional activity simply seem too significant for them to agree where the facts of a case require the full employment of theoretical tactic.

Because, however, the holding in *MCI v. AT&T* apparently induced Congress to enact section 10, a most clairvoyant legislative response, Scalia's textualism proved to be a better approach than Stevens' legal process endorsement of judicial updating. This is to say that Scalia's textualist decision in *MCI v. AT&T* meets head on the most fundamental challenge that might be raised against it in a debate over whether legislative updating is better than judicial updating. Sunstein poses the question, "If judges interpret statutes in accordance with the original meaning of their text, will legislative drafting be improved, and will legislatures correct obvious mistakes?"<sup>210</sup> In light of the most probable nexus between *MCI v. AT&T* and section 10, the answer is yes!

From this perspective, Scalia substantially contributed to the development of sound public policy by refusing to declare what the prevailing policy should be in *MCI v. AT&T*. His textualist discipline demonstrates that law can be so much more clear when it emanates from Congress, the institution best suited for policy-making, as opposed to the uncontrollable supremacy contest between institutions. The scope and clarity of section 10 ultimately confirm Scalia's recognition that nobody, the courts and agencies included, could have addressed the need for greater forbearance more completely than Congress did. In one clean sweep, Congress has foreclosed issues concerning the extent of FCC forbearance authority. Likewise, section 10 has ended the uncertainty that for years had made a mockery out of the procedural and legal interplay between the FCC and the federal courts.

Finally, it seems that Scalia accomplished his goals of making the law more predictable, forcing the legislature to be more accountable, keeping the judiciary out of the policy-making process, and honoring his formal conceptions of institutional settlement. Even Stevens would have to agree that section 10 leaves little to be desired. While he might take issue with whether Scalia's textualism induced its enactment, it would be difficult for him to deny that section 10 embodies the perfect policy balance: it is fair to the FCC, to industry, and is thereby good for consumers. As a result, *MCI v. AT&T* demonstrates how textualism and judicial restraint can be more virtuous than legal process and judicial activism. Moreover, the probable nexus between the textualist decision in *MCI v. AT&T* and section 10 of the Act, as amended, suggests that textualism, to coin a phrase, can bring good things to those who wait; even to those who are forced to wait.

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210. See Sunstein, *supra* note 75, at 532.

