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

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ABSTRACT

Last year saw the passing of Justice Scalia. It also saw the D.C. Circuit's latest attempt to make sense of how the Communications Act applies to new forms of technology—the Internet in particular. As many begin to think about Justice Scalia's legacy, I wanted to use this brief essay to reflect, through the prism of some of his better known telecommunications opinions, on what those opinions reveal about the Justice's approach to applying old statutes to new issues, particularly those brought about by technological innovation. And I'll suggest that some of Justice Scalia's insights may usefully be brought to bear as the Commission considers the best way forward following the changeover in administration.

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

Second, where the scope of the original delegation *did* include the power to rewrite, repeal, or "forbear from" statutory requirements (as in express delegations of such power), Justice Scalia championed the broad use of such authority for purposes of statutory updating. This is seen most clearly in his *Brand X* dissent, where, as is well known to the telecom crowd, Justice Scalia sketched out the basics of the "Title-II-plus-forbearance" approach that the Commission eventually adopted. Indeed, Justice Scalia's vision in *Brand X* was in some ways even broader than has been recognized. As he described it, the Commission could forbear from *all* of Title II's rules as applied to Internet Service Providers, essentially reaching the same regulatory end-point the Commission had in the *Cable Broadband Order* without resort to the interpretive tricks the Justice found unconvincing. And doing so, Scalia thought, would allow the Commission to focus on the right questions—namely, the policy rationales for particular statutory requirements as applied to ISPs—not on arcane issues of statutory interpretation governed by a statutory text written in 1996 (or even 1934).

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