Arising Under Jurisdiction in the Federalism Renaissance: Verizon Maryland Inc. v. Public Service Commission of Maryland
“Arising Under” Jurisdiction in the Federalism Renaissance: *Verizon Maryland Inc. v. Public Service Commission of Maryland*

I. INTRODUCTION

Over the past decade, the Republican Congress and the Rehnquist Court have combined to restore the constitutional understanding and stature of federalism. From the Court contracting federal jurisdiction to the Congress expanding the use of state regulatory agencies to federal schemes, it seems that both institutions have sought to fuse the formerly split “atom of sovereignty.” states have ever increasing power and autonomy in the federalism renaissance.

To protect both state and federal sovereignty, Congress has increasingly relied on a novel scheme in which the primary regulating law is federal, but state agencies are charged with its interpretation and implementation. Thus, state sovereignty is protected, but federal standards are implemented. Such schemes have resulted from years of negotiation and serious compromise between the

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1. While this Note was in the final stages of publication, the Supreme Court issued its decision in *Verizon Maryland v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002). Consistent with the policy articulated in this Note, the Supreme Court found that the federal district court had jurisdiction under 28 U.S.C. § 1331 (1994).


3. For years, Congress has been innovative in its attempt to allocate power between state and federal government. See, e.g., Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. Pitt. L. Rev. 607, 643 (1985) (“Congress is not limited to a choice between allocating all power to regulate an area of conduct to state or federal agencies. It can combine federal and state regulatory power through any form of cooperative or creative federalism it finds appropriate to a particular field of regulation.”). One scholar concisely detailed four benefits of cooperative federalism schemes:

   Traditionally, cooperative federalism programs have four basic purposes. First, they respect long-standing state interests and autonomy. Second, they facilitate local participation and greater accountability. Third, they allow for local experimentation and interstate competition where appropriate. Finally, they rely on the economy of local agencies (rather than creating or expanding a new national bureaucracy).

Republicans and the Democrats. Nevertheless, the question remains whether states will ever be federally accountable under such cooperative federalism schemes.

The Telecommunications Act of 1996⁴ ("the Telecom Act" or "the Act") represents one such scheme, radically changing the telecommunications market by advancing local telecommunication market competition.⁵ Therein, Congress provided a federal regulatory scheme that would be implemented and interpreted by state public utility commissions.⁶ However, the stakes regarding opening up the telecommunications market are high and are therefore fiercely litigated. Despite the fierce litigation, several critical questions remain unanswered: Do federal district courts have jurisdiction under the Act to review state public utility commission decisions? If not, do federal district courts have jurisdiction under the general grant of federal question jurisdiction found in 28 U.S.C. § 1331? If jurisdiction exists, is a state public utility commission immune from suit under the Eleventh Amendment?⁷ If the

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⁷. In a parallel dispute, Mathias v. WorldCom Technologies, Inc., 179 F.3d 566 (7th Cir. 1999), cert. granted, 532 U.S. 903 (2001), the court focuses on the critical question of whether states waive their sovereign immunity when the state regulatory commissions voluntarily agree to regulate local telecommunications under the 1996 Act.

However, the question of sovereign immunity may only be adjudicated once the federal court determines the question of jurisdiction. Just because the sovereign immunity question is litigated second does not diminish its importance: sovereign immunity is a controversial and significant issue. The Eleventh Amendment immunizes states from suits in federal court: "The Judicial Power of the United States shall not be construed to extend to any suit . . . against one of the United States by Citizens of another State." U.S. CONSTITUTION amend. XI. Alden v. Maine, 527 U.S. 706 (1999), extends this immunization to suits against states in state courts based on a federal law cause of action.

Theorists have interpreted the Eleventh Amendment both broadly and narrowly. Narrow interpretivists argue that the language of the Eleventh Amendment is directed at the diversity clause of Article III, Section 2, which provides for federal review of “Controversies ... between a State and Citizens of another State,” as opposed to the federal question clause of Article III, Section 2, which provides for federal review of “Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”

In spite of its limited language, the Supreme Court has expansively interpreted the protection of the Eleventh Amendment by viewing it as an affirmative, constitutional limitation on the subject matter jurisdiction of federal courts for suits against the states. The Court explains: “Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to
commission is immune, may individual state public utility commissioners be sued for prospective injunctive relief for continued violations of federal law under the *Ex parte Young* doctrine?8

The federal circuits are deeply splintered on nearly all issues. In *Verizon Maryland Inc. v. Public Service Commission of Maryland*, the Fourth Circuit found that the federal district court did not have


States may waive their federal immunity and therefore be subject to suit. Indeed, “if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action.” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985).

However, the notion of constructive waiver—that states can waive sovereign immunity without explicitly indicating this waiver—was eliminated by *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 684 (1999). States waive immunity “only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.” *Id.* at 678 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Voluntarily accepting federal funds does not inherently constitute a waiver: the “mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts.” *Edelman*, 415 U.S. at 673.

8. 209 U.S. 123 (1908). The primary means by which federal rights are enforced in face of Eleventh Amendment sovereign immunity challenges is *Ex parte Young*. Under this doctrine, state officers may be sued for prospective injunctive relief where there is a continuing violation of federal law. In *Ex parte Young*, the Court held that when state officers violate the Constitution or federal laws, their illegal acts are stripped of state authority. The Court explained:

The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. . . . he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

*Id.* at 159–60.

The Court has carved out three exceptions to the *Ex parte Young* doctrine: pendent state law claims, federal statutes detailing a comprehensive enforcement mechanism, and cases involving essential sovereign concerns, such as quiet title actions. The *Mathias* case hinged on whether the Telecommunications Act of 1996 provided a comprehensive enforcement mechanism or whether subjecting state officers to suit would jeopardize an essential state concern.

jurisdiction under subsection 252(e)(6) of the Act,9 that Maryland had not waived its sovereign immunity by participating in an arbitration scheme devised by the 1996 Telecommunications Act,10 and that the plaintiff telecommunication carriers may not sue state utility commissioners for prospective injunctive relief against continuing violations of federal law.11 The Fourth Circuit’s jurisdiction determination contrasts with that of the First, Fifth, Sixth, and Seventh Circuits.12 The Fourth Circuit’s sovereign immunity decision accords with the Sixth Circuit13 but contrasts with the Third, Fifth, Seventh, and Tenth Circuits.14 Nevertheless, the courts are almost unanimous in finding that the Ex parte Young doctrine should allow continued suit against state utility commissioners.15

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10. Id. at 309.
11. Id. at 298.
14. AT&T Communications v. Bellsouth Telecomms. Inc., 238 F.3d 636, 647 (5th Cir. 2001) (“[T]he [state utility commission] voluntarily waived its state immunity when it accepted the Congressional offer of a gratuity and arbitrated the interconnection dispute in this case.”); MCI Telecomms. Corp. v. Pub. Serv. Comm’n of Utah, 216 F.3d 929 (10th Cir. 2000); MCI Telecom. Corp. v. Bell Atlantic-Pennsylvania, Nos. 00-2257, 00-2258, 2001 WL 1381590, at *16 (3d Cir. Nov. 2, 2001); Ill. Bell, 179 F.3d at 570 (citing MCI Telecomms. Corp. v. Ill. Commerce Comm’n, 168 F.3d 315 (7th Cir. 1999), aff’d on reh’g, 222 F.3d 323 (7th Cir. 2000)).
15. Mich. Bell Tel. Co., 202 F.3d at 867 (“[T]he case before this court is a straightforward Ex parte Young case.”); Pub. Serv. Comm’n of Utah, 216 F.3d at 939 (“[T]he instant suit is also a straightforward Ex parte Young case.”); MCI Telecomms. Corp. v. Ill. Bell Tel. Co., 222 F.3d 323, 345 (7th Cir. 2000) (“these suits are ‘straightforward’ Ex parte Young cases”); AT&T Communications, 238 F.3d at 647 (“[A] suit such as this one . . . is a straightforward Ex parte Young case.”); Bell Atlantic-Pennsylvania, 2001 WL 1281590, at *16; Ill. Bell, 179 F.3d at 571. But see Bell Atl. Md., Inc., 240 F.3d at 298 (“[I]n the specific circumstances of this case, we conclude that Ex parte Young does not authorize suit against the individual members of the Maryland Public Service Commission.”).
Given the split in the circuits, the Supreme Court granted a writ of certiorari for the Seventh Circuit decision in *Mathias v. Worldcom Technologies, Inc.* and for the Fourth Circuit decision in *Verizon Maryland Inc. v. Public Service Commission of Maryland,* certifying the following questions:

Whether a state commission’s action relating to the enforcement of a previously approved section 252 interconnection agreement is a “determination under section 252” and thus is reviewable in federal court under 47 U.S.C. § 252(c)(6).

Whether a federal district court has subject-matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission’s order interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996.

Whether a state commission’s acceptance of Congress’ invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

This Note addresses the question of whether the Telecom Act provides independent federal question jurisdiction under § 1331. This Note finds that under the Rehnquist Court’s interpretation of

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16. 532 U.S. 903 (2001). The change of the case name reflects the change in composition of the Illinois Commerce Commission. Richard L. Mathias, the named petitioner, was and currently is an Illinois Public Utility Commissioner at the time of the appeal from the Seventh Circuit.

17. 533 U.S. 928 (2001). The Court consolidated the *Verizon* case with *United States v. Public Service Commission of Maryland,* which was also granted cert. *Id.*


21. *Id.* The Supreme Court granted the motion of the United States to intervene with the respondents. *Mathias v. WorldCom Techs., Inc.*, 533 U.S. 968 (2001).
federal court jurisdiction, the Court will likely find that federal courts have subject matter jurisdiction over the case. This Note contends that this result is critical because continued restriction of federal court jurisdiction as a structural enhancement of federalism will erode federal law uniformity absent adequate protections by state courts.

Part II of this Note reviews the purposes of the Telecommunications Act of 1996 and the congressionally contemplated role of the state utility commissions. Part III introduces the procedural posture in the Fourth Circuit consideration of Verizon Maryland Inc. v. Public Service Commission of Maryland and sets forth the court’s argument for lack of § 1331 jurisdiction. Part IV analyzes the Rehnquist Court’s federal question jurisprudence and the likely impact of restricting federal court power.

II. BACKGROUND: THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996 dramatically altered telecommunications by disbanding local monopolies and making competition economically feasible. Under the prior regime, the Federal Communications Commission (“FCC”) regulated interstate, long-distance telecommunications while state public utility commissions regulated intrastate, local telecommunications. Local service acted as a natural monopoly and was so regulated by the state commissions.

The Telecom Act overhauled this system by creating competition procedures, including the requirement that local carriers enter into agreements with competitors to allow interconnection and access to the local network (i.e., competitors may use the local network to compete with the local carriers). The Act mandates that incumbent
local exchange carriers ("incumbents") share their networks with competitors. Reciprocal compensation agreements are an example of a competitive arrangement required by the Act—this agreement mandates that the carrier whose customer originates a telephone call compensates the carrier whose facilities are used to complete the call.27

Section 252 of the Act codifies the framework by which incumbents and competitors negotiate interconnection agreements. There are three primary steps: (1) incumbents and competitors engage in good faith negotiation;28 (2) if unsuccessful, either party may request mandatory arbitration by the state commission or, should the commission fail to act, by the FCC;29 (3) if unsatisfied with the commission’s findings, any “aggrieved” party may seek review of the agreement in federal court for compliance with the Act. Section 252(e)(6) provides:

In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

The Telecom Act strips state courts of jurisdiction to review a state commission’s decision to approve or reject an agreement.30

III. THE CASE BELOW: VERIZON MARYLAND INC. V. PUBLIC SERVICE COMMISSION OF MARYLAND

Acting pursuant to its regulatory authority, the Public Service Commission of Maryland ("MPSC") approved negotiated interconnection agreements between the local incumbent, Bell Atlantic (predecessor to Verizon Communications, Inc.), and MCI

27.  Id. § 252(b)(5).
28.  Id. § 252. Negotiated agreements must be approved by the state utility commission and only may be approved if they comply with the Act and FCC regulations, do not “discriminate[,] against a telecommunications carrier not a party to the agreement,” and are “consistent with the public interest, convenience, and necessity.” Id. § 252(e)(2)(A).
29.  Id. § 252(b). Notably, no state has yet abdicated regulatory authority to the FCC. Were the FCC to ct as regulatory under the Act, the FCC proceeding and “any judicial review of the [FCC’s] actions [would] be exclusive remedies for a State commission’s failure to act.” Id. § 252(e)(6). All FCC final orders are reviewable in the federal courts of appeals. Hobbs Administrative Orders Review Act, 28 U.S.C. §§ 2341–2352 (2000).
Worldcom and other prospective competitors. The agreement between Bell Atlantic and its competitors provided for the payment of reciprocal compensation for local calls, as required by both the Act and FCC regulations. An dispute then ensued between the parties regarding whether the agreement required reciprocal compensation for customers’ calls to Internet service providers ("ISPs") to access the Internet. The MPSC determined that calls to ISPs were local and ordered payment of reciprocal compensation. The FCC then ruled that ISP calls were not local, but that the state commissions could individually interpret contracts to provide otherwise. Bell Atlantic again sought review by the MPSC, which once more determined that the ISP calls were local.

Bell Atlantic then sought review of the decision in federal district court and named the MPSC, MPSC commissioners in their official capacities, and competitors as defendants, invoking jurisdiction under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331 (the statute in which Congress provides federal courts with subject matter jurisdiction over disputes “arising under” federal law). Bell Atlantic argued that the decision was contrary to federal law in that it violated an FCC ruling and the Telecom Act itself. The MPSC and

31. Id. § 251(b)(5); Reciprocal Compensation for Transport and Termination of Telecommunications Traffic, 47 C.F.R. § 51.701(a) (2001).

32. In the traditional situation, local calls requiring reciprocal compensation are easily identified. However, calls to ISPs require a modem to connect to an ISP, and the ISP then connects to the selected website anywhere in the world (a connection that is indisputably long distance). Because this connection is unbroken, some telecommunication companies argue that the call is not local and therefore does not mandate reciprocal compensation. See, e.g., Brief for Petitioner Verizon Maryland Inc., Verizon Md. Inc. v. Pub. Serv. Comm’n of Md., 122 S. Ct. 1753 (2002) (Nos. 00-1531, 00-1711).


commissioners moved to dismiss, arguing immunity under the
Eleventh Amendment. The district court found that the Eleventh
Amendment barred the suit against the state, that the Ex parte
Young doctrine did not apply to the individual commissioners, and
that the action must therefore be dismissed because the MPSC was
an indispensable party under Federal Rules of Civil Procedure Rule
19. The Fourth Circuit Court of Appeals affirmed, adding that
federal courts lacked subject matter jurisdiction to review state
commission decisions enforcing or interpreting previously approved
interconnection agreements and that the Rooker-Feldman doctrine
buttressed the finding of no jurisdiction.36 The court found that “in
the final analysis, the State commission determinations under § 252
involve only approval or rejection of such agreements” and found
that other determinations (such as enforcement or interpretation) are
“left for review as specified by State law.”37 The court then rejected §
1331 jurisdiction, explaining that “in light of the limited grant of
federal jurisdiction in 47 U.S.C. § 252(e)(6), the exercise of § 1331
general federal question jurisdiction would ‘flout, or at least
undermine, congressional intent.’”38

IV. THE FEDERALIST TRADE-OFF: STATE SOVEREIGNTY OR
FEDERAL ACCOUNTABILITY

The stature of federalism has increased greatly in the Rehnquist
Court. A series of decisions have increased state sovereignty by
substantively limiting the scope of congressional legislation in
traditional areas of state sovereignty.39 To do so, the Court relied

35. Bell Atl. Md., Inc. v. MCI WorldCom, Inc., 240 F.3d 279, 286–87 (4th Cir. 2001)
(summarizing the district court decision).
36. The court held that the doctrine that “lower federal courts are not authorized to
review final judgments from State court proceedings” should be extended to prohibit “in the
absence of specific federal authorization” federal court review of orders issued by a “state
quasi-judicial body, such as the Maryland Public Service Commission.” Bell Atl. Md., Inc., 240
F.3d at 308 & n.8; see also Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); D.C. Court of
37. Bell Atl. Md., Inc., 240 F.3d at 301.
38. Id. at 307 (quoting Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 812
(1986)); Judge King dissented but did not reach the question of whether § 1331
independently grants jurisdiction. Id. at 309–19.
“commandeer” the states); Printz v. United States, 521 U.S. 898 (1997) (holding that the
primarily on the structure or “spirit” of the Tenth Amendment.\footnote{40} Not surprisingly, decisions that substantively limit the scope of congressional power are controversial. Limiting the scope of federal question jurisdiction—as the Fourth Circuit did in V\textit{erizon}—is a more potent, yet effective way to distribute power to the states.

This section addresses the question of whether limiting the scope of federal court jurisdiction is consistent with Supreme Court precedent and congressional policy under § 1331. I first review the common law framework of federal question jurisdiction. Next, I analyze the possible federal question in the Act, evaluating federalized contracts, implied private rights of action, and federal preemption under the Act. Finally, I examine four potential limitations on federal question jurisdiction, concluding that the Court will likely find federal preemption under the Act and likely find that the FCC ruling supplies arising under jurisdiction.

\textit{A. Arising Under Jurisdiction Historically}

“[I]n our federal system allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy.”\footnote{41} Unfortunately, this judicial weighing game has turned jurisdiction into a tangled web, with little predictability for parties.\footnote{42} The Constitution authorizes federal question jurisdiction historically, and the Tenth Amendment is textual evidence of the constitutional concern for federalism); United States v. Lopez, 514 U.S. 549 (1995) (holding that Congress exceeded the scope of its commerce clause authority in enacting the Gun-Free School Zones Act); United States v. Morrison, 529 U.S. 598 (2000) (striking down Violence Against Women Act as an intrusion into state police powers and as an unconstitutional exercise of commerce power). All of the aforementioned cases were decided by a 5-4 split, with Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas in the majority and Justices Stevens, Souter, Ginsburg, and Breyer in the minority.

\textit{reserved power of the states cuts across all delegated congressional powers and that the Tenth Amendment is textual evidence of the constitutional concern for federalism); United States v. Lopez, 514 U.S. 549 (1995) (holding that Congress exceeded the scope of its commerce clause authority in enacting the Gun-Free School Zones Act); United States v. Morrison, 529 U.S. 598 (2000) (striking down Violence Against Women Act as an intrusion into state police powers and as an unconstitutional exercise of commerce power). All of the aforementioned cases were decided by a 5-4 split, with Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas in the majority and Justices Stevens, Souter, Ginsburg, and Breyer in the minority.}
jurisdiction in Article III, where it states that federal judicial power “shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .” From the earliest decisions, the constitutional grant of arising under jurisdiction has been construed broadly, extending to all cases where federal issues “form[] an ingredient of the original cause.”

Section 1331, passed in the aftermath of the Civil War in 1875, was symbolic of the dramatic restructuring of federal–state power after the war. The language of the statutory federal question grant is strikingly similar to that of Article III: “The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States.” In spite of the linguistic similarity, statutory federal question jurisdiction has always been construed much more narrowly than the constitutional grant of federal question jurisdiction. Yet the courts’ exercise of federal question jurisdiction remains one of their most important functions. Federal courts serve many policy ends, such as expert interpretation, sympathetic forum, uniform interpretation of federal law, and impartiality provided by the life and tenure provisions of Article III.

The federal question jurisdiction statute provides subject matter jurisdiction for two different situations: (1) where there is a federal law cause of action (a position first articulated by Justice Holmes) or (2) where there is a state law cause of action that necessarily turns on a substantial question of federal law. While the Holmes test
seems to equate jurisdiction with cause of action, jurisdiction is not synonymous with cause of action.50 Professor Patti Alleva explains:

To automatically equate the legislature’s enforcement objectives (i.e., whether a particular right or interest should be enforceable) with its forum objectives (i.e., which forum may hear that enforcement action) results in a blur of substantive and jurisdictional concerns disrespectful of the court’s delegated authority under the general federal question statute to determine whether federal forum protections are warranted in particular cases regardless of their cause of action labels.51

Thus, the court must first determine the cause of action and then evaluate whether it has subject matter jurisdiction under the federal question statute. This, however, does not mean that a right of action that will likely fail will therefore not meet the jurisdictional requirements of § 1331. “For purposes of determining whether jurisdiction exists under § 1331(a) . . . , it is not necessary to decide whether [the plaintiff’s] alleged cause of action . . . is in fact a cause of action ‘on which [the plaintiff] could actually recover.’”52 Rather, federal question jurisdiction requires analysis of whether the claim is “so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.”53

While federal courts are courts of limited jurisdiction, this does not mean that federal courts’ jurisdiction must always be construed narrowly. Indeed, “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.”54

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50. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 92 (1998) (finding that the Court has never found the existence of a cause of action “jurisdictional” and deciding the case before resolving a dispute concerning the existence of an Article III case or controversy).
54. Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967). Nevertheless, it is important to note that due process is not implicated by determining jurisdiction in the instant case because if federal question jurisdiction is denied, state court jurisdiction still exists to adjudicate the claims. This is bolstered by Testa v. Katt, 330 U.S. 386 (1947), which provided that states are obligated to enforce federal substantive provisions with the same force they would enforce state substantive provisions.
B. Uncovering the Federal Question in the
Telecommunications Act of 1996

The Telecom Act was passed with the general understanding that if there was a dispute regarding federal policy, the federal courts could compel compliance. Even the most thoughtful jurists did not question federal jurisdiction under the Act. As Justice Scalia observed, “there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.” Yet analysis of the Act leaves many still scratching their heads, trying to determine where the federal question lies in this critical area of federal regulation. At oral argument, one justice reflected, “I’m really left at sea about what is the federal question.”

Three possible theories provide federal question jurisdiction in the Telecom Act: federalized contracts law, implied private rights of action, or state breach of contract action that necessarily depends on an important FCC interpretation (i.e., federal preemption). Federal preemption most likely supplies the best argument that federal courts have subject matter jurisdiction over the Verizon dispute.

1. Federalized contracts law

In spite of federal common law’s ostensible death in Erie Railroad Co. v. Tompkins, federal common law may arguably form the basis for federal jurisdiction under the Telecom Act. In many instances where there is a strong federal interest, courts have found that rights and obligations are determined by common law created by the federal courts. Such adopted law may simply incorporate

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57. 304 U.S. 64, 78 (1938) (The Court determined that “There is no federal general common law.”).
58. See, e.g., United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (concluding that the source of law for contractual liens arising from Small Business Administration loan is federal but adopting state law as the appropriate federal law because there was no need for federal uniformity); Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) (vesting authority in federal courts to create federal common law of labor-management relations under § 301 of the Labor Management Relations Act). But see United States v. Yazell, 382 U.S. 341 (1966) (applying state law rather than devising a federal common law standard where an individually negotiated contract is between private party and Small Business Administration).
state law and vary across the country or may be developed as federal common law and be unified across federal courts of appeals.

Competitor telecommunications companies argue that because agreement claims “depend on rights and obligations derived from the parties’ interconnection agreement,” the “documents are federal contracts that implement federal policy and embody federal standards.”59 These contracts are federal for five primary reasons: (1) federal law mandates the agreement; (2) parties must enter into good-faith negotiations; (3) parties are subject to specific duties that are subject to negotiation; (4) agreements must be publicly filed; and (5) once entered into, parties have a federal duty to provide service “in accordance with the terms and conditions of the agreement.”60

These provisions of the Telecom Act are similar to § 204 of the Railway Labor Act, in which disputes over the interpretation of a mandatory labor-management agreement were determined to have arising under jurisdiction because the contracts were considered “federal contracts.”61 The Court found:

the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme.62

Several schemes have previously been found to federalize seemingly state-law contract agreements.63

60. 47 U.S.C. § 251(c)(2)(D), (c)(3).
62. Id. at 691–92.
Nevertheless, the reliance on federalized contract law theories seems to ignore the historical differences between arising under jurisdiction as defined by Article III, Section 2 and as defined statutorily under § 1331. While the constitutional grant, as interpreted by *Osborn v. Bank of the United States*,64 allows federal jurisdiction wherever federal law is an “original ingredient” in the case, the statutory grant requires more: either a specific or implied federal statutory cause of action65 or a state cause of action that necessarily turns on a substantial question of federal law.66 The mere statutory requirement that a contract be formed is an “original ingredient” and nothing more. The Act must provide some other avenue under which the contract itself is federal, is subject to substantive federal requirements or procedures, or provides a private cause of action.

Bell Atlantic also attempts to federalize these telecommunications contracts by analogizing the contracts to federal tariffs. Bell Atlantic notes that the Telecom Act mandates that incumbents negotiate interconnection agreements on demand,67 include in the agreements “a detailed schedule of itemized charges,”68 file approved agreements with state regulatory commissions for public inspection,69 offer service at the negotiated terms,70 and offer the same arrangement (terms and conditions) to all other telecommunication competitors.71 Similarly, in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*,72 a common carrier sued because a competitor had not paid all the charges required by the Interstate Commerce Act.73 Although the lower court characterized the charges as a “simple contract-collection action,”74 the Court found that where the common carrier’s claim is “predicated on the

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64. 22 U.S. (9 Wheat.) 738 (1824).
68. *Id.* § 252(a)(1); *see also* Brief for Verizon Md. Inc., at 19–20.
69. *Id.* § 252(h); *see also* Brief for Verizon Md. Inc., at 19–20.
70. *Id.* § 251(c)(2)(D), (c)(3); *see also* Brief for Verizon Md. Inc., at 19–20.
71. *Id.* § 252(i); *see also* Brief for Verizon Md. Inc., at 19–20.
73. *Id.* at 533.
74. *Id.* (internal quotation marks omitted).
The courts of appeals have generally employed the analogy between telecommunication fees and federal tariffs in finding federal question jurisdiction under § 203 of the Communications Act of 1934.  

State commissions rebut this argument by maintaining that these tariffs resemble state tariffs as opposed to federal tariffs. They argue that because the state public utility commissions broker these agreements and fees, the fees are more like state tariffs. This conclusion ignores one dispositive fact: the state regulatory commissions are the agents of the federal government in the Telecom Act. Although the state commission does determine the rates, oversee the filing, and regulate many other aspects of the interconnection agreements, it does so at the behest of the federal government. The FCC has the power to adjudicate such agreements if state utility commissioners choose not to regulate. It would be entirely inconsistent to argue that the reciprocal compensation fees would be state tariffs in those states that choose to regulate but federal tariffs in those states that choose not to regulate. Such a scenario would lead to a bifurcated scheme in which state regulatory commissions could affirmatively deny federal review by simply opting into the regulation scheme.

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75. Id. at 535 (quoting Louisville & Nashville R.R. Co. v. Rice, 247 U.S. 201, 203 (1918)); see also Great N. Ry. Co. v. Merchs. Elevator Co., 259 U.S. 285, 290 (1922) (“Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law.”). Note that both Rice and Thurston Motor Lines involved jurisdiction under 28 U.S.C. § 1337. However, for purposes of determining whether a federal question exists, the statutes are substantially similar. See, e.g., ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 520 (3d Cir. 1998) (“[A]ny action that could be brought in federal court under § 1337 could also be brought under § 1331.”).

2. **Implied private right of action**

Barring complete federalization of contracts, the Court could simply find an implied private cause of action for telecommunications competitors under the Telecom Act. Determining whether there is a private cause of action requires analyzing whether Congress intended there to be a private right of action: courts presume that absent express authorization, private causes of action do not exist. The current approach dictated in *Touche Ross & Co. v. Redington* provides that “[t]he source of plaintiffs’ rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce, not in the jurisdictional provision.” The touchstone of implied private rights of action is now congressional intent. Indeed, “the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.”

In *Cort v. Ash*, the Court set forth four factors to determine whether Congress intended to create a federal private right of action: (1) Is the plaintiff a member of the class for whose benefit the statute was enacted? (2) Does legislative intent—either explicit or implicit—indicate intention to create a remedy? (3) Would such a private cause of action be consistent with the underlying purposes of the legislative scheme? (4) “[I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?”

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77. See, e.g., La. Landmarks Soc’y, Inc. v. City of New Orleans, 85 F.3d 1119, 1123 (5th Cir. 1996). This presumption represents a change from historical framework in which private causes of action were more liberally construed (i.e., the court would supply all customary remedies necessary to effectuate the congressional purpose). *See J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).
79. *Id.* at 577.
82. *Id.* at 78. This approach is now criticized by some justices as being too expansive. *See, e.g.*, Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) (“[W]e effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co. v. Redington* . . . converting one of its four factors (congressional intent) into the determinative factor, with the other three merely indicative of its presence or absence.” (citations omitted)).
After years of negotiation and debate over the Act, considerable legislative history exists, yet none clearly answers whether the Act intended to allow private carriers to sue. The Act states its intent up front: “To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”83 Congress affirmed this in one of its numerous House reports by saying, “[t]he result will be lower prices to consumers and businesses, . . . a competitive edge for American businesses, . . . [i]ndeed, the enormous benefits to American business and consumers from lifting the shackles of monopoly regulation . . . .”84 The clearest beneficiary from this statute is the American consumer. However, it is possible to argue that Bell Atlantic, as a competitor to the Local Exchange Carrier, is also a plaintiff that the statute intended to protect from the severe disadvantage of monopolies.

Legislative history is similarly ambiguous as to whether Congress intended review. Only one area of the Act provides for federal jurisdiction—§ 252(e)(6), which itself limits federal jurisdiction to review of a state commission’s approval or rejection of an interconnection agreement. The Court has held that where Congress expressly provides a particular method of enforcing a substantive rule, Congress intends to preclude others.85 Thus, some (including the MPSC) argue that this narrow provision for federal jurisdiction is structural evidence that Congress intended only state review for all other disputes. However, this argument does not fall squarely within existing case law. With regards to interpretation of interconnection agreements, Congress did not make any explicit or particular method of enforcement. Thus, it appears that rather than having a particular remedy that would limit jurisdiction, the Act simply remains silent.86

85. Northwest Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 93–94, 97 (1981) (“The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.”).
86. MPSC argues that this silence should be interpreted as intent to affirmatively deny jurisdiction. MPSC makes a structural argument, comparing two other provisions (§§ 274 and 207) that explicitly provide private causes of actions. They note, “That Congress expressly provided for a private cause of action in these sections is evidence that when Congress wished to provide a private remedy, it knew how to do so and did so expressly.” Brief for Respondent
Finally, intrastate telecommunications agreements have been traditionally relegated to state law: state public utility commissions were the exclusive regulators of local telecommunications until passage of the Telecom Act. This suggests that the states’ already extensive regulatory scheme was the backdrop for the new federal requirements. All of these factors combine to suggest that Congress did not intend for a private cause of action; therefore, giving due consideration to separation of powers, the Court should not imply one.

3. The Telecom Act, FCC interpretation, and federal preemption

Even if the interconnection agreements are determined to be state law contracts, arising under jurisdiction may still exist under the Smith v. Kansas City Title & Trust Co. conception of arising under jurisdiction: the state law cause of action (breach of contract) necessarily depends on a substantial question of federal law (whether federal law mandates reciprocal payment for customer calls to ISPs). Thus, the most probable federal question is the MPSC’s determination that the calls to ISPs were local. If the Telecom Act or the FCC ruling requires that calls to ISPs be treated as nonlocal, then the MPSC’s finding that the calls be treated as local violates federal law. Under the Supremacy Clause, the federal interpretation must prevail.

The current uncertainties regarding the FCC’s position, given that its ruling has been vacated by the D.C. Circuit, makes the substantive question regarding the treatment of ISP calls unclear. However, whether Bell Atlantic will actually prevail on the question of reciprocal compensation is irrelevant to the determination of whether federal courts have jurisdiction to review the complaint. These uncertainties may give rise to a federal court staying the litigation until the substantive ruling is resolved, but the uncertainties do not divest federal courts of jurisdiction. The Supremacy Clause of the Constitution provides that federal law—


87. See supra note 49.
88. See cases cited supra note 34.
89. See supra notes 48–52.
including the Act and the FCC ruling—prevail over conflicting state law. To maintain this supremacy, federal courts must have the opportunity to review whether a state commission’s decision contravenes federal law.

C. Limitations on Arising Under Jurisdiction

Exceptions to the general rules of federal jurisdiction tangle the web even further. Even where federal question jurisdiction ostensibly exists, federal courts impose four limitations that would divest the court of subject matter jurisdiction: (1) the Merrell Dow/implied right of action exception; (2) the complicated bifurcated scheme limitation; (3) the pragmatic “docket control” exemption; and (4) the Rooker-Feldman abstention doctrine. Each poses a significant hurdle to complicated cooperative-federalist arrangements like the Telecom Act.

1. Merrell Dow—Implied statutory cause of action

If Congress did not intend a private right of action, the Court will likely find that Congress also did not intend for Smith-style federal question jurisdiction and that expanding the scope of the statutory jurisdictional grant would flout congressional intent. The Merrell Dow Court held that “the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ‘substantial’ to confer federal-question jurisdiction.” The Fourth Circuit contended that because federal review was specifically elucidated in § 252(e)(6), Congress did not intend for broader § 1331 jurisdiction. However, Bell Atlantic rebuts this by arguing that unlike Merrell Dow, where plaintiffs brought a state-law claim for which the standard of care was based on a federal statute, in the instant case “the rights to be protected are federal rights, arising from federal contracts, to be construed in accordance with federal law.” The Court, however, will likely find no federal

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contract; therefore, *Merrell Dow* may act to preclude federal question jurisdiction.

2. *Complicated, bifurcated jurisdictional scheme*

   Where a congressional statute creates a complicated jurisdictional scheme, bifurcated between state and federal governments depending on the situation, courts will construe the statute so as to eliminate such complications. Thus, in the instant case, just because federal law requires parties to enter into contracts does not mean that federal law governs those contracts. In *Jackson Transit*, the Court evaluated whether collective-bargaining agreements between local governments and their employees were the subject of the federal law. The *Jackson Transit* Court noted that “suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes.” The Court evaluated whether Congress intended the contract rights and obligations to be “federal in nature.” The Court found that because these local collective-bargaining arrangements were creatures of state (rather than federal) law and because the legislative history “evinces no congressional intent to upset” the exemption of these localities from federal regulation, these labor contracts were considered state law contracts controlled by state law in state courts.

   In *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, the Court opted against a bifurcated scheme and allowed all cases arising under the Expedited Funds Availability Act to fall under federal question jurisdiction. Justice Ginsburg reasoned that “All . . . claims arising out of the same transaction may be brought in a single forum—either in federal court . . . or in state court.” She noted that the alternative—forcing some adjudication to federal court and others to state court—“would yield an incoherent jurisdictional

95. *Id.* at 22 (1982).
96. *Id.* at 23.
97. *Id.* at 23–24, 29.
99. *Id.* at 275.
The jurisdictional scheme evolving from the Telecom Act appears to be even more complicated than that of Bank One. The question of sovereign immunity will make the system increasingly complicated because some claims, although proper under supplemental jurisdiction, may not be litigated in federal court.101

Jackson Transit most powerfully supports the contention that the Telecom Act did not confer general federal question jurisdiction. Telecom Act interconnection agreement disputes do not seem to have a state law basis, just as in Jackson Transit. The Supreme Court has even noted that Congress has “unquestionably . . . taken the regulation of local telecommunications competition away from the states.”102 However, the agreement between the telecommunications parties voluntarily incorporated federal law, and such federal standards were not mandatory. Because parties themselves cannot invent arising under jurisdiction, the agreement itself likely did not provide original jurisdiction for the district court.103

3. Docket control: A legitimate limiting factor?

Do simple contract disputes belong in federal court? Federal courts are indisputably overburdened,104 but this may not inherently justify denying jurisdiction. As Professor Martin Redish remarked, “The federal government cannot shirk its responsibility to assure that the federal courts perform their designated role any more than it can ignore its other essential obligations.”105 Indeed, in the instances

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100. Id. at 275–76. But see Bank One Chi., 516 U.S. at 279 (Scalia, J., concurring) (“The law is what the law says, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.”).


103. It remains an open question whether an arbitrated agreement that incorporates federal law creates a federal question.


105. Martin H. Redish, REASSESSING THE ALLOCATION OF JUDICIAL BUSINESS BETWEEN STATE AND
where the Supreme Court has considered docket control, it “has invariably been guilty of employing . . . the ‘astrological sign’ approach to docket control.”

The Court continues its narrowed approach to cases that may ultimately involve pure state contract law disputes. As Justice Stevens inquired with respect to the Telecom Act, “[If] [t]he only question is, do they have to pay on Tuesday instead of Thursday, and that’s governed by some State common law rule . . . . That, you would agree, could not be litigated in Federal court?” The Assistant to the Solicitor General was unable to answer. In *Shoshone Mining Co. v. Rutter*, the Court reasoned that “Inasmuch . . . as the ‘adverse suit’ to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact as to . . . the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution and laws of the United States.”

Some argue that *Shoshone* was correctly decided because

[t]he Court was properly concerned with the volume of litigation which a contrary decision would have loosed upon federal trial courts . . . . The Court, for pragmatic reasons, had refused to extend the jurisdiction to a large class of cases which would, in most instances, involve no clearly defined federal interest and no issue of federal law.
The policy of judicial economy suggests that if a particular construction of the statute will dump thousands of cases into the federal courts and overburden the system, it should be construed so as to limit jurisdiction. But this argument seems based only on pragmatism and not legitimate jurisdictional limitations or sound jurisprudential theory. Congress has the power to create and limit jurisdiction of federal courts. If it intended federal courts to have jurisdiction, it does not seem proper to allow the judiciary to deny such a conferral of jurisdiction. While intuitively appealing, this limiting factor results in a breakdown of the separation of powers between the judiciary and Congress.

4. Rooker-Feldman as a limit on federal question jurisdiction: Abstention and state quasi-judicial body decisions

Federalism, the principle by which both the federal and state governments' sovereignty is protected, comes full circle in the Fourth Circuit’s extension of the Rooker-Feldman doctrine. The Rooker-Feldman doctrine provides that parties may not appeal adverse state court judgments to a federal district court; Federal questions in such decisions must be appealed directly to the Supreme Court. The Fourth Circuit argued, “[I]t would violate basic tenets of federalism to conclude, in the absence of specific federal authorization, that a federal court may review a State quasi-judicial body.”112 The Court then noted that “[w]hile strict application of the doctrine requires a final judgment from State courts, the federal intrusion into State affairs is not any less when the judgment issues from a State quasi-judicial body.”113

Both state and federal administrative agencies at times act in a judicial capacity. In Prentis v. Atlantic Coast Line Co.,114 the Court explained that administrative agencies (in this instance, the Virginia State Corporation Commission) at times act judicially:

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation, on the other hand, looks to the future and

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113. Id.
114. 211 U.S. 210 (1908).
changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.115

The critical factor is not the character of the body but rather the character of the proceedings.116 In the telecommunications context, state regulatory commissions closely resemble a court when interpreting interconnection agreements. The commissions subpoena witnesses and documents, administer oaths, and exercise power to hold parties in contempt of the proceedings. Parties commence the actions, conduct discovery, and take part in a trial.117

Nevertheless, while the Fourth Circuit’s attenuated argument regarding this form of abstention does relate to federalism concerns, the lower court did not give any compelling reason why the doctrine should be extended beyond its current construct: Rooker-Feldman is an abstention doctrine that does not extend to decisions of state commissions. In City of Chicago v. International College of Surgeons,118 the Court found that federal courts do have the prerogative to review state administrative action, even if a state-law appellate procedure exists. There the Court found that suits to obtain “judicial review of state administrative decisions” are “generally encompass[ed]” within federal subject matter jurisdiction.119 Undoubtedly, where a state court renders a final judgment, the appellate procedure should be through 28 U.S.C. § 1257(a). But where, as here, there is no final judgment by the state, district court review of the matter is proper.

115. Id. at 226.
116. D.C. Court of Appeals v. Feldman, 460 U.S. 462, 477 (1983). The Supreme Court has recognized that both the states and the federal government have the power to transfer certain adjudicatory functions to administrative agencies so long as there is the availability of subsequent judicial review. Printz v. United States, 521 U.S. 898, 929 n.14 (1997) (citing Crowell v. Benson, 285 U.S. 22 (1932)).
117. See Brief for Respondent, Verizon Md. Inc. v. Pub. Serv. Comm’n of Md., 122 S. Ct. 1753 (2002) (Nos. 00-1531, 00-1711). These functions are similar to those exercised in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, 627 (1986), where the Court found that the state civil rights commission’s proceedings were “judicial” in nature.

At oral argument for the companion case Mathias, the Court indicated that this will likely have implications for any future Ex parte Young determination. The Court alludes that if an administrative body is acting in a judicial capacity rather than in an executive or legislative capacity, Ex parte Young may have no applicability. Oral Argument at 49–50, Mathias v. WorldCom Techs., Inc., opinion forthcoming (Dec. 5, 2001) (No. 00-878).
119. Id. at 169.
V. CONCLUSION

As the spirit of cooperative federalism continues in Congress and the spirit of the Tenth Amendment continues in the Court, both institutions must be aware of and vigilantly guard federal accountability. The danger of forgetting the importance of federal accountability is that few would notice or would be outraged by this erosion of accountability. This likely apathy would result because the decisions would be made on technical issues such as “jurisdiction” rather than on the more politically volatile issues such as invoking Eleventh Amendment immunity and exempting state officials from injunctive relief under the *Ex parte Young* doctrine. Yet federal uniformity and accountability has been an important goal since the first decisions of the Supreme Court. As Justice Story described:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.\(^{120}\)

Cooperative federalist programs like the Telecom Act necessarily result in state-to-state variance and innovation. But some minimal federal oversight is critical to the spirit of cooperation. Limiting federal jurisdiction has far-reaching consequences on the accountability of the states and state programs. In the 105th Congress alone, more than thirty-one bills or resolutions were proposed with serious federalism considerations.\(^{121}\) Programs ranging from environmental regulation\(^ {122}\) to insurance regulation\(^ {123}\) are being handed over to the states while ostensibly imposing federal

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Although these innovative programs are made in the spirit of cooperation, when combined with the judiciary’s new federalist approach to self-jurisdiction stripping, the result is a program with little to no federal accountability and little federal uniformity. Professor Martin Redish observed the limitations of this “astrological” approach to subject matter jurisdiction:

Any system that aims for the highest levels of fairness and efficiency must make hard choices. Random or irrational distinctions premised on no ground other than the fact that they reduce caseloads effectively skew that decisionmaking process by obscuring the comparative cost-benefit analysis. Our values and traditions of federalism demand a more careful and rational weighing process than much of our existing jurisdictional structure evinces.

The costs of denying federal jurisdiction in the 1996 Telecommunications Act and other similar cooperative federalist programs would be high. The benefit of increased state sovereignty, while a reasonable end, should not be bought at the price of fairness, efficiency, and, ultimately, federal uniformity.

Michelle Reed

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125. AMERICAN LAW INSTITUTE, supra note 41, at 488 (“The purpose of federal question jurisdiction is to promote uniformity in the application of federal law. Misunderstanding of federal law is as grave a threat to uniformity as is hostility toward that law, and it is a far more likely threat.”).

126. Redish, supra note 105, at 1831–32.