

6-1-2011

Tethering the FCC: The Case Against *Chevron* Deference for Jurisdictional Claims

Daniel A. Lyons

Boston College Law School, daniel.lyons.2@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/lspf>

 Part of the [Antitrust and Trade Regulation Commons](#), [Consumer Protection Law Commons](#), [Internet Law Commons](#), [Law and Society Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Daniel A. Lyons. "Tethering the FCC: The Case Against *Chevron* Deference for Jurisdictional Claims." *Free State Foundation Perspectives* 6, no.13 (2011).

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.



THE FREE STATE FOUNDATION

A Free Market Think Tank for Maryland.....Because Ideas Matter

Perspectives from FSF Scholars

June 1, 2011

Vol. 6, No. 13

Tethering the FCC: The Case Against *Chevron* Deference for Jurisdictional Claims

by

Daniel A. Lyons*

Despite the Administration's recent rhetoric about regulatory review,¹ regulation and re-regulation seems destined to be a primary theme of President Obama's first term. From the financial markets and consumer lending to the health care industry, the President and Congress have enacted statutes designed to curb what they saw as prior Administrations' deregulatory excesses. The Federal Communications Commission has been an eager participant in this regulatory and re-regulatory wave: since 2009, under Chairman Genachowski's leadership, the agency has adopted several new initiatives, ranging from a proposal to regulate set-top box video navigation devices to various measures to regulate wireless services. Perhaps most significantly and controversially, the Commission has imposed new net neutrality regulatory mandates on broadband Internet providers. As this paper shows, the FCC's new regulatory initiatives stretch the boundaries of the Commission's jurisdiction under the Communications Act and ought not to be accorded *Chevron* deference upon judicial review.

Unlike its counterparts at the SEC or Health and Human Services, the FCC is expanding its jurisdiction without a clear congressional mandate. The distinction is important because the telecommunications world has changed dramatically since Congress last overhauled the Communications Act in 1996—an overhaul that was

largely deregulatory in focus and intent, if not always in practical effect. This jurisdictional freelancing by the FCC is familiar to veterans of past telecommunications policy battles, in particular the Commission's efforts to regulate the cable industry. The Commission initially foreswore any jurisdiction over cable, but as the industry expanded, the agency used its so-called "ancillary authority" to foist a labyrinthine set of rules on cable operators. The Supreme Court upheld certain rules but ultimately determined that the agency lacked the authority to regulate the industry comprehensively without a clear grant of authority from Congress.² Thus far, the Commission's efforts to impose net neutrality regulation have met a similar fate.³

This history, and the Commission's current push to expand its jurisdiction, highlight an important but often ignored tension in administrative law. The *Chevron* doctrine generally requires courts to defer to an agency's interpretation of ambiguous language in a statute that the agency administers.⁴ *Chevron* is premised on the assumption that agencies, not courts, should "fill any gap left . . . by Congress" in the agency's organic statute.⁵ But it strains the doctrine to apply *Chevron* to an agency's conclusions about the scope of its jurisdiction. In these cases, the agency is not merely filling a gap within a statutory framework, but is instead defining the outer limits of that framework. There is a difference in kind between the policy question "what rules should govern broadband?" and the legal question "does the Communications Act allow the Commission to make rules governing broadband?" Courts appropriately defer to agency expertise when answering the former question, but should reserve the latter question for "the province . . . of the judicial department."⁶

In the telecommunications context, courts have often viewed the Commission's efforts to expand its jurisdiction with skepticism, even though they have not reconciled their decisions with *Chevron's* seeming grant of near-plenary authority to agencies in such matters. This judicial skepticism is well-grounded. *Chevron* extends only to questions that Congress intended the agency to resolve. The nondelegation doctrine should prohibit Congress from delegating to the agency the power to determine its own jurisdiction. Agencies are designed to resolve policy questions, and are predisposed to find jurisdiction when they feel, as a matter of policy, that regulation would be useful.

The overwhelming statutory evidence suggests that Congress has not (yet) intended to give the agency general regulatory authority over broadband Internet services, no matter how much (as a policy matter) the Commission feels it needs this authority. It would be a mistake for courts to defer to the agency's conclusion otherwise because of a misappropriation of the *Chevron* doctrine. Therefore, as the Commission's net neutrality project winds its way through the judicial system, courts should not hesitate to review independently whether the agency's efforts remain within the Communications Act's confines.

***Chevron* and Congressional Intent**

The Supreme Court has never directly addressed whether *Chevron* should extend to agency jurisdictional claims. In the doctrine's early days, Justice Brennan argued that deference is inappropriate when interpreting statutes that "confine the scope of [an

agency's] jurisdiction."⁷ His argument hinges on the fact that *Chevron* applies only to statutes that Congress has "entrusted [the agency] to administer"—and agencies do not "administer" statutes that confine their jurisdiction.⁸ Justice Scalia responded that one cannot meaningfully distinguish between jurisdictional statutes and those that authorize an agency to administer authority entrusted to it.⁹ This is consistent with Justice Scalia's general view that *Chevron* deference should govern any interpretation of an agency's organic statute that reflects the agency's "authoritative" position.¹⁰

While Justice Scalia is correct that the line between "jurisdictional" and "policy" questions is somewhat murky, his argument goes too far. In *United States v. Mead*,¹¹ the Court explained that *Chevron* deference stems primarily from congressional intent. As Professor Cass Sunstein has written, "[c]ourts defer to agency interpretations of law when, and because, Congress has told them to do so."¹² With respect to jurisdictional claims however, the very question *presented* is whether Congress intended the agency's authority to extend as far as the agency seeks. Professors Ernest Gellhorn and Paul Verkuil explain that "[t]he more significant the question and the greater the impact that expansion of the agency's jurisdiction is likely to have, the greater the likelihood that Congress did not intend implicitly to delegate that determination to an agency."¹³

If, as *Mead* suggests, *Chevron* deference stems from congressional intent, then it is somewhat illogical to extend this deference to an agency's conclusions regarding its jurisdictional limits: it would imply that Congress intended the agency to determine what Congress intended. This circularity illustrates the distinction between jurisdictional claims and the more routine policy questions that lie at *Chevron*'s core. Once the scope of an agency's jurisdiction is determined, it may be wholly appropriate to defer to the agency's efforts to fill gaps in the agency's organic statute, if Congress intended the agency to do so. But such policy questions are different in kind from the question of where Congress intended the outer limits of the statute to be. Before a court defers to an agency's conclusion as to the best way to regulate a service, it should satisfy itself that Congress has told it to do so, by independently determining whether the agency has jurisdiction over the service.

Nondelegation Concerns

Of course, one could argue that Congress did indeed intend the agency itself to determine the scope of its jurisdiction. Telecommunications would seem to be a field where Congress would find "dynamic statutory interpretation" useful: technology changes so rapidly that Congress may intend the Commission to remain nimble and flexible, by allowing it to determine its own jurisdiction. But a self-defining jurisdictional scheme would run afoul of the principles underlying the nondelegation doctrine.

The nondelegation doctrine prevents Congress from delegating the legislative power to another branch of government, and in the process assures that Congress, not agencies, decide basic, critical policy choices.¹⁴ As the Court has explained, the doctrine "is rooted in the principle of separation of powers that underlies our tripartite system of government."¹⁵ The Constitution vests Congress alone with the power to make laws

because of its unique position as an elected deliberative body. “Therefore the integrity and maintenance of [that] system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.”¹⁶

Beyond mere formalism, there are strong policy reasons why the legislative power should not be delegated to agencies. First, Congress is politically accountable in a way that agencies are not. While agencies are indirectly politically accountable, in the sense that they work for an elected president, this noisy signaling mechanism is not a substitute for the direct access that citizens have to their representatives. Political accountability requires the legislative process to be more open to public inspection than rulemaking at many agencies. Moreover, legislation must go through the constitutionally mandated process of bicameralism and presentment. By requiring a bill to pass both houses of Congress and the President before becoming effective, the legislative process divides the legislative power and makes it more difficult for particular interest groups to “capture” the rulemaking process for private gain.¹⁷ The process also encourages a measure of deliberation and restraint in rulemaking, assuring “that the legislative power would be exercised only after opportunity for full study and debate in separate settings.”¹⁸

These safeguards should seem particularly significant to students of telecommunications, as the FCC has a reputation for somewhat dysfunctional operation. As Professor Phillip Weiser has noted, the Commission has, in the past, developed a reputation for being unduly influenced by special interests—former Chairman Reed Hundt once suggested that FCC stood for “Firmly Captured by Corporations.”¹⁹ The D.C. Circuit has chastised the agency for relying heavily on ex parte proceedings rather than notice-and-comment rulemaking procedures, which permits well-connected special interests to wield undue influence over agency procedures.²⁰ The court stated that “[e]ven the possibility that there is here one administrative record for the public and this court and another for the Commission and those ‘in the know’ is intolerable.”²¹ Finally, critics have chided the Commission for ad-hoc decision-making rather than deliberate, reasoned strategic planning, a reputation that the agency is consciously trying to overcome.²²

Unfortunately, while the nondelegation doctrine has strong formal and functional rationales that would appeal to the Commission’s critics in particular, the Court has found the doctrine notoriously hard to enforce. As the *Mistretta* Court explained, “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”²³ Yet the Court refuses to abandon nondelegation principles altogether: it has used the nondelegation doctrine as a canon of statutory construction, to narrow the scope of a statute that would otherwise raise a serious nondelegation question.²⁴ These tea leaves suggest the Court still takes seriously the principles underlying the nondelegation doctrine, even if it struggles to apply the doctrine itself to individual cases.

Midwest Video II, the 1979 Supreme Court decision that struck down certain FCC cable regulations, reflected strong nondelegation themes. The Court emphasized that “[t]hrough afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority” under the Communications Act.²⁵ The Court also acknowledged that its prior cable-related decisions only “cautiously” recognized the Commission’s efforts to regulate cable and stressed that those regulations “strain[ed] the outer limits” of its jurisdiction.²⁶ Specifically, the Court held that the Commission could regulate cable only if the regulation was reasonably ancillary to its statutorily mandated responsibilities to regulate broadcasting or the telephone. It rejected the Commission’s efforts to impose a common carriage-like regime on cable because the regime was inconsistent with Section 3(h), which protected the editorial discretion of broadcasters. Importantly, the Court rejected the Commission’s assertion that because Section 3(h) applied only to broadcasters, it imposed no limitations on cable companies: “without reference to the provisions of the Act directly governing broadcasting, the Commission’s [ancillary] jurisdiction . . . would be unbounded.”²⁷ In the process, the court rejected the agency’s broad interpretation of an ambiguous statutory phrase, and instead interpreted the statute in a way that avoided an unlimited delegation of authority over cable.

The D.C. Circuit’s recent *Comcast* decision, which struck the Commission’s first attempt to impose net neutrality-like restrictions on broadband providers, sounded a similar theme. First, the court rejected the Commission’s claim to an unbounded general power to regulate broadband service under Title I: while the Supreme Court had previously implied, at least in dicta, that Title I could allow the agency to impose some regulations on cable broadband, this does not mean that the agency has “plenary authority over such providers.”²⁸ It also rejected the Commission’s claim that general statements of congressional policy were sufficient to support the Commission’s jurisdiction over broadband, because such statements are not delegations of regulatory authority.²⁹ Extending the Commission’s ancillary authority based upon such broad, nonbinding statements “would virtually free the Commission from its congressional tether.”³⁰ If accepted, the Commission would be free to enact the same requirements on Internet service providers that the Commission places on telephone service, broadcasting, or cable services, without any direction from Congress to do so. The court explained that if *Midwest Video II* exceeded the outer limits of the Commission’s jurisdiction, this claim “seeks to shatter them entirely.”³¹

In both cases, the reviewing court rejected the Commission’s broad jurisdictional claim at least in part because of nondelegation-flavored concerns about boundless agency regulatory authority. Although complainants did not raise a nondelegation challenge, and the court has famously upheld the Communications Act’s charge to regulate in the “public interest” as a sufficiently intelligible principle,³² both *Midwest Video II* and *Comcast* express concern that the agency must remain tethered to specific statutory directives rather than be permitted the broad authority of a roaming telecommunications lawgiver. Given the important constitutional and policy provisions underpinning the doctrine, this skepticism about agency claims to broad jurisdiction is both expected and welcome, even against the backdrop of a general deference toward agency interpretations of its organic statute.

Institutional Competence

Professor Elizabeth Foote highlights another reason why courts should differentiate between jurisdictional and policymaking questions. Foote notes that agencies and courts are fundamentally different institutions, with institutional strengths and weaknesses tailored toward performing different functions.³³ Courts are dispassionate and neutral arbiters of the law, designed to carefully weigh both sides of a legal argument and decide impartially what the law is. By comparison, agencies are public bureaucracies charged with “carrying out” Congress’s statutory schemes.³⁴ Unlike courts, agencies perform an “operational, policy-implementing role” by “choos[ing] from among a variety of possible solutions to a particular set of specialized problems or challenges.”³⁵ When doing so, agencies do not mimic the court’s dispassionate neutrality when divining Congress’s intent in a particular case. On the contrary, agencies act with a particular (often politically-motivated) goal in mind, rely on their own expert judgments, and remain cognizant of accountability to the political branches.³⁶ Agency alchemy synthesizes “law, politics, expertise and management” into a policy prescription in a way that courts could not, and should not, attempt to imitate.³⁷

Looking at each institution’s comparative strengths, courts are better positioned to answer the legal question of where Congress set the boundary of an agency’s jurisdiction.³⁸ The Administrative Procedure Act expressly instructs courts to “decide all relevant questions of law” and “interpret . . . statutory provisions,” and further instructs reviewing courts to “hold unlawful and set aside agency action” found to be “in excess of statutory jurisdiction.”³⁹ Defining the jurisdictional limits of an agency’s organic statute is a quintessential legal question, involving the use of traditional tools of statutory interpretation to find fixed meaning in a statutory text. Deferring to the agency’s own conclusion regarding its jurisdiction replaces dispassionate legal analysis with a process that is consciously “mission oriented and politically directed.”⁴⁰ Such deference is wholly appropriate when determining which of two legitimate policy objectives the agency should adopt, but it is misplaced when applied to more basic legal questions of the scope of an agency’s authority.

Political Accountability

Finally, courts may view the jurisdictional claims of independent agencies such as the Commission with particular skepticism, because independent agencies are less politically accountable. As Randolph May, President of the [Free State Foundation](#), has noted in earlier [Perspectives](#) entries and elsewhere,⁴¹ the *Chevron* Court was motivated in part by the fact that “federal judges—who have no constituency—have a duty to respect the legitimate policy choices made by those who do.”⁴² This political accountability rationale appears often in both cases and academic literature discussing *Chevron*. Justice Kagan, for example, has noted the rise in presidential involvement in the daily operations of executive agencies, and has suggested that *Chevron* deference be “link[ed]” to such presidential involvement to encourage greater political “control as mitigating the potential threat that administrative discretion poses.”⁴³ This logic suggests

that courts should be less deferential to the conclusions drawn by independent agencies, which are structurally designed to be insulated from executive political control.

This lack of political accountability weighs especially strongly in the context of jurisdictional questions. The Progressive-Era Congresses shielded the FCC and other independent agencies from political influence so they could bring their professional expertise to bear on important questions without fear of being corrupted by politics.⁴⁴ Of course, no question is more important to an agency than the scope of its authority. But when answering such questions an agency is susceptible to corruption of a different sort—the temptation to maximize influence and aggrandize power. A broad *Chevron* doctrine would limit the Court’s ability to rein in wayward agencies that succumb to this natural temptation. As Justice Kagan notes, this is usually not a fatal flaw because a strong President will discipline agencies that overreach in ways that generate a political backlash.⁴⁵ But the President’s power over independent agencies has been intentionally blunted, making the Executive a less useful check on overreaching independent agencies. This logic suggests the need for less deference to an independent agency’s jurisdictional claims, which would allow the Court to discipline agencies that the President is unable to reach.

Identifying and Deciding Agency Jurisdictional Claims

But what of Justice Scalia’s observation that it is difficult to differentiate between the questions of whether an agency can regulate a service and whether the agency’s choice among policy alternatives is permissible? After all, courts may find it difficult to decide at the margin whether (for example) the question presented in *Comcast* is best understood as a legal question of the agency’s jurisdiction to act, or a policy question of whether net neutrality is appropriate, particularly given that *Chevron* does not carefully distinguish between the two. Ultimately, however, the fact that a legal inquiry is hard should not alone constitute a reason to abandon it. There is no reason why distinguishing between jurisdictional and policy questions presents any more difficult a challenge for the judiciary than ascertaining whether a particular action is an “unreasonable search” or any other difficult constitutional standard. The “hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power” is no less prevalent in administrative agencies, and both constitutional and policy concerns demand that this pressure “be resisted.”⁴⁶

While it may be challenging to identify jurisdictional questions that lay beyond *Chevron*’s scope, the *Mead* Court suggests both the need and the pathway to do so. In any given case involving a statutory interpretation question, the Court should ask whether the issue presents a question as to the agency’s jurisdiction. However, this inquiry is simply one species of the broader inquiry that *Mead* demands of all such cases: before the Court defers to the agency’s interpretation, how can it be sure that Congress meant for the agency to issue rules on this topic that carry the force of law?⁴⁷

Naturally, the most obvious indication of congressional intent is the statute itself: do the words Congress chose indicate clearly that it intends agency jurisdiction to extend to the subject at issue? The clearer and more specific Congress's jurisdictional grant is, the easier it is to conclude that it intended the agency to issue rules on the topic with the force of law. But where, as is typical, the statute is unclear or broad, the Court must draw upon other tools of statutory interpretation. Such tools could include the larger context in which the specific jurisdictional grant appears, the purpose of the statute as a whole, or perhaps the statute's legislative history.

Other decisions suggest that the Court should also look at the "importance" of the agency's proposed course of action, compared to the statute from which the agency claims its jurisdiction. The more significant or monumental the agency's action is, the more evidence the Court should require that Congress meant the agency to act in this sphere. In *MCI v. AT&T*, for example, the Court rejected the FCC's claim that its authority to "modify" tariff filings included the power to excuse all non-dominant telephone companies from the tariff requirement: tariff filings were an integral part of the Act's rate-regulation regime, and the Court simply did not believe that Congress gave the agency discretion to eliminate the carefully-designed rate regulation regime through so benign a word as "modify."⁴⁸ Similarly, in *FDA v. Brown & Williamson*, the Court recognized that tobacco is a significant and controversial industry whose regulation presents many politically-charged questions. It therefore rejected the agency's claim that tobacco fell under the agency's authority to regulate "drugs" and "devices," even though the statutory language could have been read as doing so.⁴⁹

Finally, as Professors Gellhorn and Verkuil note, one way to determine whether the agency's proposed regulation presents a jurisdictional question is how far the regulation strays from the agency's "core regulatory assignment."⁵⁰ If an agency has not previously regulated a product or service, or asserted jurisdiction to do so, congressional intent to regulate is less likely to be found. The same is true the less the product or service resembles those things that the agency does regulate. The more the agency strays from its jurisdictional core, the more evidence is required before concluding that Congress intended the agency to reach as far as it seeks to.⁵¹

***Skidmore* and the Jurisdictional Inquiry**

Of course, while the agency's jurisdictional claims do not warrant *Chevron* deference, this does not "place [the agency's action] outside the pale of any deference whatever."⁵² Under *Skidmore v. Swift & Co.*, "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency."⁵³ "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."⁵⁴

The agency remains an expert in the administration of its organic statute and its views regarding the breadth of the statute and its extension to the service in question may warrant some deference. *Skidmore* allows the court to take these views into account but

without mechanically giving this opinion the substantial deference owed under *Chevron*. *Skidmore* allows the court to determine the extent to which the agency's views are a product of its expertise and to discount those views to the extent they reflect the agency's self-interest in aggrandizing power to itself. It also allows the court to determine independently the extent to which the agency's legal conclusion regarding its jurisdiction is colored by its policy conclusion that regulation is necessary or beneficial to society.

Determining the Commission's Authority to Regulate Broadband

The above framework yields important insights as the Commission turns its attention to the next phase in telecommunications regulation. First and foremost, courts should continue to recognize that the Commission remains the nation's foremost authority on telecommunications and should continue to accord deference to reasonable policy decisions that are clearly within the scope of the agency's authority. Yet courts should not be afraid to scrutinize claims by the Commission that expand its jurisdiction or that effect dramatic departures from its historical core regulatory duties. A court ultimately may find that such expansion is permissible under the Act but constitutional and institutional concerns demand that this scrutiny be performed without *Chevron's* customary thumb on the scale of agency deference.

More specifically, the D.C. Circuit was correct to scrutinize closely the Commission's attempt to regulate Comcast's network management practices.⁵⁵ The agency claimed near-plenary authority to regulate broadband providers under Title I and under general statements of Congressional policy. But while Title I generally gives the FCC jurisdiction over "communication by wire or radio," a statutory grant that would seem to encompass broadband service, this broad interpretation is inconsistent with the structure of the Act as a whole.⁵⁶ Titles II, III, and VI, governing telecommunications service, broadcasting, and cable, respectively, each represent a complex, meticulously designed regulatory scheme governing the service in question. A plenary power over other communication by wire or radio is inconsistent with these intricate congressionally-mandated schemes, which is why courts have required the FCC to tie its Title I authority to a specific grant of authority within its jurisdictional core.⁵⁷ Given the Internet's prominence and its distance from the agency's core industries of broadcasting, telephones, and cable, the Court was correct to conclude that Congress did not intend the agency to exercise substantial regulatory authority under Title I *sub silentio* through general statements of policy.⁵⁸

Nor should the level of scrutiny change if the Commission instead reclassifies the transmission component of broadband service as a Title II service. Pundits and the Commission itself have put forth this possibility as a way to escape the close scrutiny of the *Comcast* decision.⁵⁹ But the Commission has not historically regulated broadband service under Title II, and in fact it has defended the proposition before the Supreme Court that broadband service is an unregulated "information service" rather than a Title II "telecommunications service."⁶⁰ While the transmission component of broadband service may fit textually within the statute's definition of "telecommunications," there is ample evidence from the statute that the service does not map well onto the Title II regulatory scheme. Reclassifying broadband under Title II would subject broadband

providers to a host of regulations that were clearly written for telephone companies and would be irrelevant at best (and possibly harmful) to the broadband industry. The fact that most of Title II clearly pertains to telephones suggests that it is “unlikely” that Congress intended its Title II delegation to cover Internet access as well. The Commission’s claims would run afoul of the deregulatory emphasis of the 1996 Telecommunications Act generally and Section 230 in particular, which emphasizes Congress’s desire that the Internet remain free of regulation.⁶¹

The Commission has suggested it could solve this problem by exercising its forbearance authority to relieve broadband providers from those portions of Title II that would be inappropriate to enforce against the industry.⁶² But the use of forbearance to whittle a comprehensive telephone regulatory scheme into a custom-fit law of the Internet suggests that the Commission is venturing dangerously close to the type of unbounded regulatory authority that the *Midwest Video II* and *Comcast* courts rightly feared. The Commission may be correct that broadband transmission resembles telephone service and its expertise may be entitled to some deference under *Skidmore*, but the overwhelming statutory evidence suggests that Congress has not (yet) intended to give the agency general regulatory authority over broadband, no matter how much (as a policy matter) the Commission feels it needs this authority. It would be a mistake to defer to the agency’s conclusion otherwise because of a misappropriation of the *Chevron* doctrine.

* Daniel A. Lyons, a member of the Board of Academic Advisors for the Free State Foundation, is an Assistant Professor of Law at Boston College Law School. The Free State Foundation is a non-partisan Section 501(c)(3) free market-oriented think tank located in Rockville, Maryland.

For a more detailed discussion of this topic, please see Daniel A. Lyons, *Tethering the Administrative State: The Case Against Chevron Deference for FCC Jurisdictional Claims*, 36 J. CORP. L. (forthcoming 2011), a draft of which is available at <http://papers.ssrn.com/abstract=1800209>.

¹ <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.

² *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

³ *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

⁴ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁵ *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁷ *Miss. Power & Light Co. v. Miss. ex rel Moore*, 487 U.S. 354, 386 (1988) (Brennan, J., dissenting). Justices Marshall and Blackmun joined Justice Brennan’s dissenting opinion. *Id.*

⁸ *Id.* at 386.

⁹ *Id.* at 380 (Scalia, J., concurring in the judgment). No other Justices joined Justice Scalia’s concurrence; the majority decided the case on other grounds. *Id.*

¹⁰ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (Criticizing the majority opinion for ‘setting aside’ a standard in which “a reasonable application had to be sustained so long as it represented the agency’s authoritative interpretation”).

¹¹ 533 U.S. 218, 239 (2001).

¹² Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 198 (2006).

¹³ Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1008 (1999).

¹⁴ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989).

¹⁵ *Id.* at 371.

¹⁶ *Id.* at 371–72 (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

¹⁷ See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (discussing the “fear that special interests could be favored at the expense of public needs”).

¹⁸ *Id.*

¹⁹ Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 *ADMIN. L. REV.* 675, 683–84 (2009).

²⁰ See *Home Box Office v. FCC*, 567 F.2d 9, 56–58 (D.C. Cir. 1977).

²¹ *Id.* at 54.

²² Weiser, *supra* note 19, at 681 (relating statement by former FCC Commissioner Nicholas Johnson that “[t]oo often decisions are the product of an ad hoc disposition”).

²³ *Mistretta*, 488 U.S. at 372.

²⁴ See *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 641–59 (1980).

²⁵ *FCC v. Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689, 706 (1979).

²⁶ *Id.* at 699, 708.

²⁷ *Id.* at 706.

²⁸ *Comcast Corp. v. FCC*, 600 F.3d 642, 650 (D.C. Cir. 2010).

²⁹ *Id.* at 654.

³⁰ *Id.* at 655.

³¹ *Id.*

³² See *NBC v. United States*, 319 U.S. 190, 216 (1943) (stating that the public interest is “a criterion as concrete as the complicated factors for judgment in such a field of delegated authority permit”); but see Randolph May, *The Public Interest Standard: Is It Too Indeterminate to be Constitutional?*, 53 *FED. COMM. L.J.* 427 (2001)(recommending the “indeterminate public interest standard” be replaced with “more specific fundamental policy guidance tailored to the new competitive communications environment”).

³³ Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 *ADMIN. L. REV.* 673, 679 (2007).

³⁴ *Id.*

³⁵ *Id.* at 650.

³⁶ *Id.* at 692–93.

³⁷ *Id.* at 684.

³⁸ *Id.* at 712.

³⁹ 5 U.S.C. § 706.

⁴⁰ Foote, *supra* note 33, at 712.

⁴¹ See, e.g., Randolph May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 *ADMIN. L. REV.* 429 (2006).

⁴² *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

⁴³ Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2369, 2376 (2001).

⁴⁴ May, *supra* note 41, at 445.

⁴⁵ Kagan, *supra* note 43, at 2363.

⁴⁶ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

⁴⁷ See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

⁴⁸ *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 231 (1994).

⁴⁹ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

⁵⁰ Gellhorn & Verkuil, *supra* note 13, at 1011.

⁵¹ *Id.*

⁵² *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

⁵³ *Id.* at 234 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)).

⁵⁴ *Id.* at 228.

⁵⁵ *Comcast Corp. v. FCC*, 600 F.3d 642 (2010).

⁵⁶ *Id.* at 650.

⁵⁷ *Id.* at 661.

⁵⁸ *Id.*

⁵⁹ See, e.g., Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, May 6, 2010, available at <http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html>.

⁶⁰ *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 968 (2005).

⁶¹ 47 U.S.C. 230.

⁶² See Genachowski, *supra* note 59.