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Net Neutrality's Path to the Supreme Court: *Chevron* and the "Major Questions" Exception

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by

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I. Introduction and Summary

The D.C. Circuit Court's *Open Internet* opinion[1] is a significant victory for the Federal Communications Commission and for the Obama Administration following a long string of losses in this area. The opinion is remarkable not for its result, which many had predicted, but for the breadth of the agency's victory. At every turn, the court approached petitioners' arguments with a posture of deference toward agency action and showed considerable reluctance to ask the hard, searching questions that marked Judge Williams' partial dissent. While American administrative law generally gives agencies a presumption of correctness, the extent of this decision's deference is nonetheless surprising to those familiar with the FCC, which has a long history of withering under blistering D.C. Circuit scrutiny and a far worse track record at the court than most other agencies.

At least some petitioners immediately vowed to take their claims to the Supreme Court.[2] Of course, because the Supreme Court takes only a small fraction of the cases that seek review each year, it is difficult to predict which petitions the Court will accept. But the *Open Internet* case presents one issue that might pique the interest of the Justices, and it's lurking in the very deference that was key to the agency's victory: the "major questions" exception to *Chevron*.

The Supreme Court announced a "major questions" exception in the 2015 Affordable Care Act decision, *King v. Burwell*.[3] But its origins go back to the Food and Drug Administration's efforts to regulate tobacco during the 1990s.[4] In essence, the Court explained then that *Chevron*'s assumption that Congress implicitly delegated to agencies the authority to resolve statutory ambiguities should not apply in cases involving "deep economic and political significance."[5] But the precise contours of this murky exception remain unclear. The D.C. Circuit's *Open Internet* opinion provides an excellent vehicle for the Justices to provide greater detail and helpful guidance on a question that goes to the very heart of the rule of law and the role of the courts in our constitutional republic. To be specific, the question to be put to the Supreme Court goes to the role of the courts, as Chief Justice Marshall put it over 200 years ago in *Marbury v. Madison*, "to say what the law is."[6]

II. The Commission's Classification, and Reclassification, of Broadband

Arguably the most controversial, and far-reaching, portion of the *Open Internet Order* was the Commission's decision to reclassify broadband providers as common carriers. Not part of the original proposed rule, reclassification occurred in the eleventh hour of the *Open Internet* proceeding to effectuate the Obama Administration's demand for the "strongest possible" net neutrality rules.[7] More specifically, the agency needed to label broadband providers as common carriers to secure a blanket ban on paid prioritization, which the D.C. Circuit had previously held could not be applied to non-common-carrier networks.[8]

But reclassification required the agency to revisit the statutory question it had answered definitively over a decade ago: how is broadband Internet access classified under the Communications Act? The statute distinguishes between two categories of services:

- Telecommunications service: offering for a fee to the public "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received,"[9] and

- Information service: "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[10]

This distinction is rooted in the FCC's 1980 *Computer II* decision,[11] in which the agency sought to distinguish traditional "basic" telephone service from new "enhanced" services such as database access that technology was then making available via the telephone. The agency determined that it did not want these new enhanced services to be inhibited through innovation-killing regulation.[12] In the 1996 Telecommunications Act, Congress borrowed the basic/enhanced distinction to define telecommunications and information services, respectively. But it was not clear how these telephone-era definitions applied to broadband service, which was in its infancy as the ink dried on the 1996 Act.

In 2005, the agency classified broadband as an information service, a decision it defended, successfully, before the Supreme Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Services.*[13] The agency explained that Internet service providers combine the transportation of information to and from the Internet (a telecommunications service) with the ability to use that information to accomplish things online – obvious services such as ISP-provided email accounts as well as behind-the-scenes services such as DNS lookup (which allows consumers to browse the web by translating domain names into IP addresses). The agency explained that consumers view this offering as a single bundled service, Internet access, which should be classified as an information service. The Supreme Court found that the statute was ambiguous and deferred to the agency's reasonable interpretation under *Chevron*, over the dissent of Justice Scalia, who would have found that broadband access is unambiguously a Title II telecommunications service.

But this decision would later prove a complication for the net neutrality movement. A significant goal of the movement was to secure a ban on paid prioritization, to wit: a requirement that ISPs carry all legal traffic from content providers at the same rate ($0), without differentiating on the basis of content or sender. In an earlier round of litigation, the D.C. Circuit determined – correctly – that this amounted to imposing common carriage on ISPs.[14] The rule thus ran afoul of the Communications Act's clear prohibition that "[a] telecommunications carrier shall be treated as a common carrier…only to the extent that it is providing telecommunications services."[15] The court explained that while the agency had some authority to regulate ISPs' network management practices, whatever rules it adopted had to leave room for individualized negotiations between ISPs and content providers.[16]

In response, the agency issued a Notice of Proposed Rulemaking that, "consistent with the court's decision, may permit broadband providers to engage in individualized practices, while prohibiting those broadband provider practices that threaten to harm Internet openness."[17] The Notice also indicated that the agency would "seriously consider the use of Title II…as a basis for legal authority" if this was "the best approach to protecting and promoting Internet openness."[18] Net neutrality supporters, critical of the flexibility inherent in the proposed rule, seized upon this alternative path to sidestep the court's earlier decision and impose a ban on paid prioritization. Their efforts received a significant boost from President Obama, who released a video message after the comment period closed calling for a paid prioritization ban by reclassifying broadband under Title II.

The agency followed those cues, abandoned its proposed rule crafted with the court's guidance, and instead reclassified broadband service as a "telecommunications service." To justify its decision, the agency suggested that consumer perceptions of the industry have changed since *Brand X*. Specifically, the agency found that many of the additional services that ISPs bundle with data transport (such as email access and their own web content) are also available from third-party providers, some of which are more popular than ISP offerings. Therefore, according to the FCC, today's consumers recognize ISPs as offering two distinct services, namely high-speed Internet access and other applications and services.[19]

But the agency did not approach this as a pure exercise in statutory interpretation, asking in isolation whether Congress intended that broadband access be classified as a telecommunications

or an information service. Rather, it was frank that its reclassification decision flowed from its desire to impose a paid prioritization ban: "An agency's evaluation of its prior determinations naturally includes consideration of the law affecting its ability to carry out statutory policy objectives."[20] Because the D.C. Circuit had invalidated its earlier ban, the agency decided it "must use multiple sources of legal authority to protect and promote Internet openness," including reclassification.[21] The agency did not classify broadband and then ask what rules flowed from that analysis; rather, it decided which rules it wanted and then asked how the statutory analysis might fit its desired outcome.[22]

III. The Court's Highly Deferential Response

The petitioners challenged the agency's statutory analysis before the D.C. Circuit. They argued that broadband service is unambiguously an information service because it inherently combines data transport with an "offer" of the capability to perform the sorts of services online that fall under the information services umbrella. The fact that consumers often choose instead to get these services from third-party vendors does not change the fact that ISPs "offer" them bundled with data transport and therefore they fit the information services definition.

But the court explained that in resolving this argument, it was bound by the Supreme Court's *Brand X* decision, which found that the statute was ambiguous as to whether broadband service is a telecommunications or an information service. Once so determined, *Chevron* inexorably required the court to defer to the agency's interpretation of the statute as long as the interpretation is reasonable. Though the FCC has failed at this task before (see *Iowa Utilities Board*),[23] the bar for reasonableness is low, and the court concluded, on a perfunctory basis, that the agency's determination that shifting consumer perceptions undermined the rationale for its initial classification was sufficient to support reclassification.

The court's decision is an unsurprising application of the *Chevron* doctrine if no consideration is given to recent developments in the Supreme Court. Though the petitioners offered technical arguments explaining how DNS lookup, caching, and other intricacies of Internet architecture compelled an information services classification, the court was reluctant to wade into these nuances and instead professed to be unable to revisit the *Brand X* court's deference to the agency's expertise. Even Judge Williams, who dissented after analyzing closely the agency's underlying evidence and concluding the rules were arbitrary and capricious, nonetheless concurred with the court's *Chevron* analysis.

But in the years since *Brand X*, the Supreme Court has shown interest in reining in *Chevron*'s deferential regime. Perhaps most notably, last year's Affordable Care Act opinion *King v. Burwell* recognized explicitly a doctrine that had been lingering in the background for almost two decades: the idea that *Chevron* deference should not apply to so-called "major questions" of economic and political significance. Intervenor TechFreedom raised this argument before the D.C. Circuit, as did an amicus brief co-authored by Professor Gus Hurwitz (a member of FSF's Board of Academic Advisors) that FSF President Randolph May and I both signed. The court punted on this argument, and given that *Brand X* was on point, perhaps it is hard to be too critical of the court for finding it was bound by the decision. But the Supreme Court would not necessarily find itself so constrained.

IV. The "Major Questions" Exception

To understand the contours of the "major questions" exception, one must understand the principles animating the *Chevron* doctrine itself. Over the years, both the Court and academics have offered numerous rationales, including respect for the agency's expertise and the sense that agencies are more politically accountable than courts (a rationale that, as Randolph May has suggested, undermines its application to independent agencies such as the FCC). But since the Supreme Court's decision in *United States v. Mead Corp.*,[24] the leading explanation is a theory of congressional intent. The Court recently explained that *Chevron* is "premised on the theory that a statute's ambiguity constitutes an implied delegation from Congress to the agency to fill in the statutory gaps."[25]

The fact that *Chevron* is an *implied* delegation theory suggests an important limit to the doctrine. In *Chevron* cases, the court is presuming from Congress's silence that any ambiguity in the statute is intentional, and intended to be treated just like an express delegation of interpretative authority. But this is a significant presumption, as statutes can be ambiguous for any number of other reasons, stemming from negligent drafting to intentional political compromise. Given the scope of *Chevron*'s outcome-determinative power, the *King v Burwell* Court explained that "[i]n extraordinary cases…there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[26]

The doctrine has its roots in *FDA v. Brown & Williamson Tobacco Corp.*,[27] which involved the Food and Drug Administration's attempt to regulate cigarettes in the 1990s after several decades of eschewing such jurisdiction. On its face, the broad statutory language strongly suggested that cigarettes could fall within its portfolio. At a minimum, the statute was ambiguous on the question, suggesting the Court should defer under *Chevron*. But tobacco regulation was a politically volatile topic, one that affected a significant industry worth millions of dollars and occupying a unique space both emotionally and historically in the American economy. In these circumstances the Court paused, noting that "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[28] Ultimately, it concluded that "[g]iven the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter."[29] While it seemed clear that the statute was broad enough to encompass cigarettes, it seemed equally clear that Congress had no such intent in mind when the statute was passed. If Congress had meant the FDA to assume such a political hot potato, it would have said so explicitly.

The Court styled its analysis as a *Chevron* step 1 decision, suggesting that it simply took an exceptionally long look at the statute before concluding that it unambiguously precluded the FDA's interpretation. But some scholars saw the case as a greater departure from the *Chevron* doctrine. In an influential 2006 article, Harvard Law Professor Cass Sunstein referred to the case as establishing a "major questions exception" to *Chevron*.[30] Debate raged in administrative law circles whether the holding arose from the unique facts of tobacco regulation, or whether Sunstein was correct that it stood for a larger principle.

That question went largely unanswered for sixteen years, until the Court adopted Sunstein's construction last term in *King v. Burwell*.[31] At issue was the Internal Revenue Service's determination under the Affordable Care Act that tax credits for purchasing plans from an "exchange established by the State" should include exchanges established by the federal government. The Court ultimately agreed with the agency's interpretation of the statute, but went out of its way to assert that it was *not* doing so because of *Chevron*. Rather, citing *Brown & Williamson*, the Court explained that this was "one of those cases" where the Court should "hesitate" before concluding that Congress intended *Chevron* to apply. Like tobacco, the Affordable Care Act was a politically volatile issue, and the tax credits at issue were "among the Act's key reforms, involving billions of dollars in spending each year" and affecting "millions of people." Given the "deep economic and political significance" of the issue so "central to this statutory scheme," the Court refused to imply that Congress intended to delegate this important question to the IRS: "had Congress wished to assign that question to an agency, it surely would have done so expressly." Unlike *Brown & Williamson*, the *King v. Burwell* Court did not style its analysis as a searching review at Chevron step 1, but instead unambiguously embraced Professor Sunstein's conception of the doctrine and for the first time explicitly declared that such questions were simply issues to which *Chevron* does not apply.

While *Chevron* critics hailed this new "major questions" exception, *King v. Burwell* offered far more questions than answers. What constitutes an issue of economic and political significance? Are these sufficient or merely necessary conditions to trigger the exception? What role does agency expertise play when applying the exception? (*King v. Burwell* noted that it is "especially unlikely" that Congress intended to delegate health policy to the IRS, which has no expertise in this area; *Brown & Williamson* expressed no similar doubts about the FDA's expertise over drug policy). Court-watchers eager to learn the contours of this new counter-revolution must wait until the next *Chevron*-related question of "economic and political significance" percolates up to the Court and gives the Justices an opportunity to expound further upon the doctrine.

V. Applying the Major Questions Exception

The FCC seems to have given the Justices a near-perfect case to discuss the issue further. Like *Brown & Williamson*, the agency reversed course to assert jurisdiction over a politically volatile issue. And like the Affordable Care Act's insurance exchanges, the Internet is a matter of "deep economic and political significance." The FCC has explained that the Internet "drives the American economy and serves, every day, as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them."[32] Like the ACA, it involves "billions of dollars"[33] and affects "hundreds of millions of consumers across the country and around the world."[34] Once relegated to a wonky corner of regulatory utility law, the question of how to regulate broadband providers has become a "policy decision" of considerable "economic magnitude," as evinced by both the four-million-plus comments filed in the *Open Internet* proceeding and President Obama's unprecedented decision to publicly pressure an independent agency into adopting it. Like the ACA, the far-reaching ramifications of the FCC's jurisdictional power grab strongly suggests that this is "one of those cases" where the Court should "hesitate before concluding that Congress intended such an implicit delegation" of authority to the agency.

The Court's hesitation to find implied delegation would be especially pronounced where, as here, the technology in question post-dates the statutory language. As noted above, the FCC borrowed its definitions of "telecommunications service" and "information service" from a 1980 FCC decision involving services provided over the telephone network. Congress enacted the relevant language in 1996, at a time when less than half of all Americans had Internet access, and the vast majority who did accessed the Internet via dial-up connections. The 1996 Telecommunications Act focused primarily upon the telephone network, seeking to promote competition in the now-defunct market for local exchange service. The Internet was barely mentioned in the statute, and modern broadband networks like those of today resided, if at all, mostly in the dreams of engineers and entrepreneurs—especially with regard to mobile networks. Admittedly, the statutory definitions are not explicitly limited to telephone service, and the act's forbearance provisions suggest a Congressional desire to allow the FCC significant policymaking authority over telecommunications networks. Nonetheless, it stretches the limits of credibility to assert that Congress foresaw that the Internet would displace so many aspects of social life, and that it intended the FCC to assert jurisdiction over this significant swath of the economy as it saw fit—and if Congress did so intend, it would raise significant nondelegation-related questions.[35]

One might ask whether, in the end, invoking the major questions exception would affect the outcome of the case. Following *King v. Burwell*, the Court's decision that this is "one of those cases" where *Chevron* does not apply merely leaves the Court to decide *de novo* how broadband Internet service should be classified under the statute. It is quite possible that the Court would decide, using the traditional tools of statutory interpretation, that broadband access is a Title II telecommunications service. That is, after all, the conclusion that Justice Scalia reached in his dissent in *Brand X*.

But this may not be the ultimate result, for two reasons. First, the petitioners gave strong technical arguments why modern broadband access is unambiguously an information service – arguments to which the D.C. Circuit gave only passing attention because of *Chevron* and the *stare decisis* effect of *Brand X*. The definition requires only that the company "offer[] a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Most broadband providers offer many services alongside data transport, such as web browsing, email, and cloud storage, which meet one or more of the enhanced services identified in the statutory definition. The fact that consumers may purchase some of these services from third parties instead does not change the fact that the ISPs "offer" them – and ISPs bundle data transport with some information services such as DNS lookup and caching that consumers cannot get elsewhere.

Second, the machinations the agency undertook to craft a broadband code from bits and pieces of Title II suggest that this was not the scheme Congress had in mind in 1996. One must remember that Title II was written to cover the telephone system, not broadband. Many parts of Title II simply *cannot* apply to broadband providers. For example, broadband providers do not employ telephone operators, do not offer pay-per-call services, or operate payphones. Reading the full panoply of Title II restrictions, it quickly becomes obvious that the Commission has tried hard to fit a square peg into a round hole.

While it has used its forbearance power to waive any Title II requirement that seemingly made no sense when applied to broadband networks, the fact that so many Title II provisions were waived raises questions about whether Congress had broadband networks in mind when it crafted Title II. As the Supreme Court recently noted in *Utility Air Regulatory Group v EPA*,[36] "[a]gencies are not free to 'adopt ... unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.'"[37] *UARG* is another case casting doubt on the extent of *Chevron's* continuing domain. In that case, the Court invalidated the EPA's standards for greenhouse gas emissions under *Chevron* step 2, in part because the EPA "tailored" the statute's general permit requirements to avoid regulations that did not make sense as applied to greenhouse gases. Although the FCC, unlike the EPA, has forbearance authority (which mattered to the D.C. Circuit in the *Open Internet* decision), both agency actions "would bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization."[38] Here, as in *UARG*, the Court has the opportunity to "reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."[39]

VI. Conclusion

The D.C. Circuit's *Chevron* analysis, like much of the other analysis in its decision, is perhaps unsurprising given the current state of American administrative law. But the decision overall illustrates the ease with which agencies can reverse long-standing statutory interpretations and upset well-settled expectations of regulated entities in pursuit of their newfound policy objectives. The FCC is hardly the only agency to engage in this type of overreach: in the past two years alone, significant controversies have arisen with regard to the EPA (greenhouse gases, clean power plan), the Department of Education (transgender rights), and the Department of Homeland Security (immigration) as these agencies have used ambiguous statutory or regulatory language to bypass Congress and enact sweeping regulatory changes.

The "major questions" exception in *King v. Burwell* may be viewed as part of a larger movement by the Court in recent years to cabin the *Chevron* doctrine and agency deference in general. It remains to be seen whether the Court will take advantage of the opportunity the FCC has given it to provide additional guidance on the scope of the exception. If it does, the resulting decision has the potential to safeguard continued innovation in broadband markets, which is important in and of itself. But it also has the potential to bend the arc of administrative law in the direction of restoring to the courts their proper role with respect to the review of agency decisions. This is a fundamental rule of law issue for, as Chief Justice John Marshall declared over 200 years ago in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."

When the petition for *certiorari* arrives at One First Street, the Justices will have an opportunity to land a blow for the rule of law. I hope they seize it.

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[1] *United States Telephone Ass'n v. FCC,* __ F.3d. __, No. 15-1063 (D.C. Cir. June 14, 2016).
[2] See AT&T Statement on U.S. Court of Appeals Net Neutrality Decision, http://www.attpublicpolicy.com/broadband-classification/att-statement-on-u-s-court-of-appeals-net-neutrality-decision/ (June 14, 2016).
[3] 576 U.S. ___ (2015).
[4] See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[5] *Id.*
[6] 6 U.S. 137 (1803).
[7] See "Net Neutrality", https://www.whitehouse.gov/net-neutrality.
[8] Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
[9] 47 U.S.C. §153(50).
[10] *Id.* §153(24).
[11] In re Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer II"), 77 F.C.C. 2d 384, 420 ¶ 96 (1980).
[12] See, e.g., *id.* at 395 ¶ 28 ("We therefore focused our attention on the establishment of a regulatory structure under which carriers could provide 'enhanced non-voice' services free from regulatory constraints"); *id* at 423 ¶ 103 ("we recognized the need for clearer delineations in order to minimize uncertainties for those making business decisions related to the provision of new and innovative enhanced services.").
[13] 545 U.S. 967 (2005).
[14] See Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
[15] 47 U.S.C. § 153(51).
[16] *Verizon*, 740 F.3d at 657.
[17] Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561, 5599-5600 ¶ 111 ("2014 NPRM").
[18] *Id.* at 5561 ¶4.
[19] Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5757 ¶ 356 (2015) ("2015 Final Rule").
[20] *Id*. at 5741 ¶ 329.
[21] *Id*.
[22] To be fair, many could argue that a similar desire to achieve deregulatory policy goals drove the agency's initial decision in 2005. See, e.g., High-speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798, 4870 (dissenting statement of Commissioner Michael J. Copps) ("[T]he Commission had a predetermined agenda to deregulate dominant providers in the market."). But importantly, that decision at least acknowledged that "[o]ur analysis begins, as always, with the language of the statute" and only after "[h]aving determined that cable modem service is an interstate information service [do] we now address the regulatory implications of our determination." *Id*. at 4820, 4839.
[23] AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999).
[24] 533 U.S. 218 (2000).
[25] King v. Burwell, 576 U.S. ___, ___ (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000)).
[26] *Id*.
[27] 529 U. S. 120, 159 (2000).
[28] *Id.* at 133.
[29] *Id.* at 147.
[30] See Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006).
[31] __ F.3d __ (2015).
[32] 2015 Final Rule at ¶1.
[33] *Id.* ¶ 360; see also *id*. ¶ 39 ("Moreover, more recently, Verizon Wireless has invested tens of billions of dollars in deploying mobile wireless services…").
[34] *Id.* ¶ 5.
[35] Cf. City of Arlington v. FCC, 133 S.Ct. 1863, 1879 (Roberts, CJ, dissenting) ("It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed.").

[36] 134 S.Ct. 2427 (2014).
[37] *Id.* at 2446 (citation omitted).
[38] *Id.* at 2444.
[39] *Id.* at 2446.