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by JOHN MEISEL*

I. Introduction

The Federal Communications Commission ("FCC" or "the Commission") is an independent regulatory agency charged with regulation of interstate communications by wire and radio in order to promote efficient, widespread, and economically priced communications services in the Communications Act.[1] The FCC issued a highly controversial statutory reinterpretation in a recent order in which the FCC subjected providers of broadband Internet access service ("BIAS") to Title II regulations.[2] The previous interpretation of cable modem broadband access service classified the service as a Title I information service, subject to light-handed regulation.[3] In 2005, the Supreme Court upheld the previous interpretation

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1. Communications Act of 1934, 47 U.S.C. §§ 151 et seq. (2012).

2. Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24 (rel. Mar. 12, 2015), 30 FCC Rcd. 5601 (2015) [hereinafter 2015 Open Internet Order].

3. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband

in *National Cable & Telecommunications Association v. Brand X Services* and granted deference to the FCC's interpretation.[4]

The reclassification decision is currently under review by the D.C. Circuit.[5] At issue is whether the FCC has the authority to issue such a reinterpretation of an Internet-based service despite the fact that the regulatory framework that was originally designed for the telephone system. Deference to an agency's interpretation is rooted in judicial precedent established by the Supreme Court's landmark 1984 decision, *Chevron U.S.A. v. Natural Resources Defense Council, Inc*.[6] The Court held that an agency's reasonable interpretations of ambiguous congressional regulatory statutes are entitled to deference from reviewing courts.[7] Nonetheless, one might expect reviewing courts to exhibit deference to the FCC's reclassification decision given the precedent established by the *Brand X* decision. However, recent Supreme Court decisions have cast doubt on the Court's willingness to apply the two-step *Chevron* test to the FCC decision. These post-*Brand X* decisions establish that the ultimate outcome of the reclassification decision is unclear because if an agency's statutory interpretation implicates an issue of great economic and political significance, reviewing courts may not grant deference to an executive agency's decision.[8] The characterization of a question as one of great economic and political significance will also be referred to as a "major question."

The goal of this article is to assess whether the FCC's reclassification decision will receive deference under *Chevron*, which ,since its inception in 1984, has been increasingly subject to limitations.[9] Part I describes the framework and the two-step test presented in *Chevron*, as well as the

Access to the Internet Over Cable Facilities, GN Docket No. 00-185, CS Docket No. 02-52 (rel. Mar. 15, 2002), 17 FCC Rcd. 4798 (2002).

4. 545 U.S. 967, 1003 (2005).

5. U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, Case No. 15-1063 (D.C. Cir. filed Aug. 6, 2015); *see also* Harold Feld, *My Amazingly Short (For Me) Quickie Reaction to Oral Argument*, WETMACHINE: TALES OF THE SAUSAGE FACTORY (Dec. 4, 2015), http://www.wetmachine.com/tales-of-the-sausage-factory/my-amazingly-short-for-me-quickie-reaction-to-oral-argument/ (providing a summary of the oral argument before the D.C. Circuit).

6. Chevron USA v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

7. *Id.* at 842–43.

8. Usually, such a characterization refers to an agency interpretation that considerably expands the power of the agency or changes the existing regulatory structure in a fundamental way. *See, e.g.*, Food & Drug Agency v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

9. "Although the Supreme Court often disagrees over how *Chevron* applies to resolve a given case, in the thirty years since deciding *Chevron*, the Court has never wavered significantly from its commitment to the validity of the *Chevron* standard." Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56 (2015). Nevertheless, there are substantive differences over the extent of the standard's applicability.

emergence of limits on the use of the test. The limitations are manifested in the creation of a "step zero" which identifies necessary conditions that must be satisfied before proceeding to the two-step test. Part II introduces and analyzes recent Supreme Court decisions that are likely to affect the 2015 Open Internet reclassification decision. Part II also discusses the growing concern among members of the Supreme Court over the expansion in size and authority of the administrative state and the future reliance on agency deference. Part III provides a brief conclusion.

II. The *Chevron* Framework.

The *Chevron* decision was highly innovative with its development of a two-step test for balancing interpretive power between agencies and the courts. Statutes contain instructions from Congress as to how a specific regulatory regime should be implemented. Some of these instructions clearly state the intent of Congress, while others (if not most) contain an element of ambiguity.[10] In step 1 of *Chevron* analysis, the reviewing court is solely responsible for determining whether the statutory language clearly expresses the intent of Congress in answering the specific question under consideration.[11] If the intent is clear, then Congress's interpretation must be given full effect, and the court's analysis ends.[12] Both the court and the agency must adopt the unambiguous intent of Congress. This step enforces Congress's legislative power when the legislative intent is clear. However, a statute often contains ambiguous language that is open to different reasonable interpretations, requiring an analysis of step two.

If the court finds that the statutory language is ambiguous as to Congress's intent, then the court begins step 2 of the *Chevron* analysis.[13] Ambiguous language presumes that Congress has given the agency the discretion to choose its preferred option from the set of policy options. These policy options, referred to as the "policy space," are considered to be reasonable interpretations of the unclear statute.[14] The court is responsible for determining the boundaries of the policy space available for the agency.

10. For purposes of the article, ambiguity is defined to be present when more than one reasonable interpretation of the statute in question exists. The focus of the article concerns which federal government institution should have the interpretive authority to resolve the ambiguity.

11. *Chevron* at 842–43.

12. *Id.* at 842.

13. *Id.* at 843.

14. The descriptive term "policy space" is adopted from legal scholar E. Donald Elliott. *See* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 12 (2005). The article is a highly insightful account of the real world effects of *Chevron* regarding how actual policy choices are made and who has the power within an agency to influence such decisions as an administrative agency administers a regulatory statute characterized by significant ambiguity.

If the agency selects a policy option from within that space, the option is deemed a permissible and reasonable interpretation of the ambiguous language.[15] The court then defers to the agency's interpretation regardless if the court agrees it is the best option within the policy space.[16] However, if the court determines that the policy option selected by the agency is outside the bounds of a reasonable policy option—outside the policy space—the court may reject the agency's interpretation.[17] The two-step *Chevron* analysis provided a novel solution to help determine which branch of government Congress has delegated power to interpret ambiguous statutory language, based on a critical implicit assumption that interpretation of ambiguous language is a resolution of a policy dispute.[18]

In *Chevron*, at issue was the meaning of the term "stationary source."[19] Using the ordinary tools of statutory construction, the D.C. Circuit determined that the term was ambiguous.[20] The Environmental Protection Agency ("EPA") considered two interpretations of "stationary source" within the policy space—single source or bubble concept—and the EPA selected the bubble concept option.[21] The D.C. Circuit rejected the EPA's interpretation because it determined that it was not the best of the reasonable options.[22] The Supreme Court disagreed, stating that the D.C. Circuit "misconceived the nature of its role in reviewing the regulations at issue," and instead found the EPA's policy choice to be the appropriate interpretation since it was deemed a reasonable interpretation of ambiguous language.[23]

The 2015 Open Internet Order involves the statutory definition of telecommunications service and its application to the factual particulars of BIAS to determine if broadband access service qualifies as a telecommunications service.[24] In *Brand X*, the Supreme Court analyzed a similar order to determine whether the factual particulars of cable modem Internet access service were such that the service contained a distinct

15. *Chevron*, 467 U.S. at 843.

16. *Id.* at 845.

17. *See id.*

18. Richard J. Pierce Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L. J. 2225, 2228–29 (1997) ("Thus, the [*Chevron*] Court recognized that the process of adopting constructions of an ambiguous statute is not resolution of an issue of law, but resolution of a policy dispute. The Court assigned the task of resolving such policy disputes to agencies.").

19. *Chevron*, 467 U.S. at 840.

20. *Id.* at 841.

21. *Id.* at 840.

22. *Id.* at 842.

23. *Id.* at 845. It is not clear that the D.C. Circuit misconceived its role based on pre-Chevron jurisprudence but rather that the Supreme Court in its opinion changed the role of reviewing courts.

24. 2015 Open Internet Order, *supra* note 2.

telecommunications service component.[25] The Court first determined that the statutory definition of "offer" in terms of telecommunications service was ambiguous under its *Chevron* step 1 analysis.[26] Under *Chevron* step 2 analysis, the Court deemed two options were reasonable choices within the policy space for the FCC to select: (1) cable modem service did not contain a distinct telecommunications service but instead was an integrated information service; or (2) cable modem service contained two distinct components, a telecommunications service and an information service.[27] The FCC chose the integrated information service classification, and the Supreme Court upheld the interpretation.[28] In the 2015 Open Internet Order, the FCC reconsidered this previous interpretation characterized by changing facts and circumstances, and reclassified BIAS solely as a telecommunications service subject to Title II regulations.[29] However, the FCC felt it was unnecessary to impose all of the regulations and used its forbearance authority to exempt them from several major Title II regulations in order to adapt the regulatory regime to the realities of the Internet.[30]

Chevron identified three main justifications for allocation of interpretive authority to agencies: (1) agency expertise and familiarity with the intimate details of the regulatory regime; (2) the political accountability of agencies, under the supervision of the President, for the resolution of policy disputes; and (3) the intent of Congress to delegate interpretive authority to agencies to resolve ambiguities in statutory language.[31] The *Chevron* framework assumes that agencies are better prepared to resolve questions of interpretation that implicate policy tradeoffs attributable to statutory ambiguity compared to unelected judges with general knowledge.[32] A strength of the *Chevron* framework is that it works to prevent the judiciary from intruding on policy disputes that are the proper responsibility of the political branches of government. It is unquestionably true that initially *Chevron* significantly increased the authority of executive

25. Nat'l Cable & Telecomms. Ass'n v. Brand X Servs., 545 U.S. 967, 989–91 (2005).

26. *Id.* at 986–87.

27. *Id.* at 970.

28. *Id.* at 971.

29. Pierre C. Hines, *The Third Way 2.0: Evaluating the Title II Reclassification and Forbearance Approach to Net Neutrality*, 103 GEO. L.J. 1609, 1628 (2015) (explaining the factual circumstances that have changed since the FCC's 2002 order).

30. 2015 Open Internet Order, *supra* note 2, ¶¶ 331–409, 456–536. The FCC has granted forbearance from some of the stricter Title II regulations such as no unbundling of last-mile facilities, no tariffing, no rate regulation, and no cost accounting rules.

31. *Chevron*, 467 U.S. at 865–66.

32. *See id.* at 865.

agencies by granting deference to their statutory interpretations.[33] It thus disrupted the prevailing balance of power between the branches of the federal government because *Chevron* transferred lawmaking power from Congress to agencies, and interpretative power from the courts to agencies.[34] At the same time, a weakness of the *Chevron* framework is the judiciary's limited ability to ensure that the executive branch does not encroach on the policymaking responsibilities of the legislative branch. This concern has resulted in ongoing judicial efforts to limit the executive branch's legislative and judicial powers in order to restore proper power back to Congress and the courts.

Attempts to limit the balance of power consequences of *Chevron* resulted in the creation of "step zero" prior to invoking the *Chevron* analysis.[35] Step zero identifies conditions that must be satisfied prior to utilizing the two-step framework.[36] One prior condition of interest is whether, in the case of statutory ambiguity, Congress intended to delegate interpretive authority to an agency. The *Chevron* decision was viewed as expanding, in the face of ambiguity, the power of agencies in a relatively unconstrained manner.[37]

Whether a congressional delegation exists is often connected to whether the issue requiring interpretation is one of significant economic and political interest, or a "major question."[38] This connection was first discussed by the Supreme Court when the Food and Drug Agency ("FDA") interpreted the Food, Drug, and Cosmetic Act to authorize regulation of tobacco products.[39] The Supreme Court considered the statutory language,

33. *See* Linda D. Jellum, *The Impact of the Rise and Fall of* Chevron *on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141 (2012).

34. *Id.*

35. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) (coining the term "step zero"); Cass R. Sunstein, Chevron *Step Zero*, 92 VIRGINIA L. REV. 187 (2006) (explaining the historical development of the step zero conditions in relevant Supreme Court cases).

36. A complete step zero inquiry would include important issues such as the form of the agency interpretation and whether the agency used its general lawmaking or adjudicatory powers in forming its interpretation. *See* United States v. Mead Corp., 533 U.S. 218 (2001). These two threshold requirements in *Mead* are not explored below since they are unlikely to be subject to dispute in the 2015 Open Internet case.

37. Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 759 (2014) ("Taken literally, the idea that any gap or ambiguity is an implied delegation to an agency would represent a massive expansion of administrative authority."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 460 (1989) ("*Chevron*'s language so narrowly circumscribed the judicial function in statutory interpretation that it was difficult, at first, to believe Justice Stevens' opinion could be taken literally."). Justice Stevens, of course, was the author of the *Chevron* decision.

38. *See* Food & Drug Agency v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

39. Food & Drug Agency v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

regulatory structure, and subsequent congressional action.[40] In its *Chevron* step 1 analysis, the Court concluded the statute's intent was clear, and thus the FDA lacked jurisdiction to regulate tobacco products.[41] The Court placed the greatest weight on its evaluation of the actual intent of Congress rather than on the literal wording of the disputed statute.[42] Although resolving the issue at *Chevron* step 1, the Court then discussed the idea that Congress was unlikely to delegate such an important question to an agency.[43] This suggests that the concerns that led to the creation of step zero motivated the Court to pursue a more aggressive step 1 statutory interpretation. The presence of a "major question" has played a key role in recent Supreme Court cases, and will likely affect how the D.C. Circuit rules in the challenge to the 2015 Open Internet Order. In order to facilitate the analysis, this article presumes that the 2015 Open Internet case can be described as including a major question, that is, a case with significant economic and political ramifications.

III. Lessons from Supreme Court Cases Applicable to the FCC's Reclassification Decision

A. Three Cases with Lessons for the 2015 Open Internet Order

Utility Air Regulation Group v. EPA concerned the EPA's statutory interpretation of an ambiguous provision in the Clean Air Act ("CAA").[44] The Court analyzed the case under the *Chevron* framework, and rejected the EPA's interpretation because it exceeded the boundary of a reasonable interpretation.[45] The lessons generated by *UARG* and subsequent cases will be applied in Part II.b to examine the 2015 Open Internet Order.

In *UARG*, the EPA argued that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the CAA's Prevention of Significant Deterioration ("PSD") and Title V programs for stationary sources solely on the basis that stationary sources

40. *Id.*

41. *Brown & Williamson*, 529 U.S. 120.

42. There are different views (such as focusing on the text of the statute versus focusing on the intent of Congress) regarding the proper way to conduct statutory interpretation when a reviewing court conducts the search for statutory clarity in *Chevron* step 1.

43. *Brown & Williamson*, 529 U.S. at 159. ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."). Apparently, the question in the tobacco case was extraordinary.

44. Utility Air Regulatory Group v. EPA (*UARG*), 134 S. Ct. 2427, 2453 (2014).

45. *Id.* at 2443–44

emit greenhouse gases.[46] The Court rejected EPA's assertion under *Chevron* step 2 analysis, finding that interpretation was not permissible.[47] The Court reasoned that, in order to determine if an interpretation is reasonable, the agency's interpretation of the ambiguous provision must be consistent "with the design and structure of the statute as a whole."[48] The first lesson from *UARG* is that a reasonable statutory interpretation must account for both the specific language in the provision under investigation and the overall design and structure of the governing act. The EPA acknowledged that its interpretation would unreasonably incorporate a tremendous number of small stationary sources into the two programs when the permitting requirements were clearly intended by Congress to apply only to a handful of large sources.[49]

Second, the Court reasoned that the EPA's interpretation was unreasonable given its significant impact on the economy, and it was unclear whether Congress intended the EPA to have the discretion to make such a major decision.[50] *UARG* indicates that Congress unlikely delegated interpretive authority to an agency for such a major question as it had earlier concluded in *Brown & Williamson*. This lesson is a manifestation of the failure of the *Chevron* framework to provide for an effective judicial check on interpretations by the executive branch that may aggrandize its quasi-legislative power.

Finally, the EPA tried to save its interpretation by tailoring language in another part of the CAA, which contained unambiguous numerical thresholds that trigger PSD and Title V permitting.[51] The EPA adjusted "the levels at which a source's greenhouse-gas emissions would oblige it to undergo PSD and Title V permitting."[52] Specifically, the EPA raised these numerical thresholds in order to accommodate its interpretation to the realities of the much higher volume of greenhouse-gas emissions than those of conventional pollutants.[53] The majority was dismayed at such a

46. *Id.* at 2434. The EPA first argued that its interpretation was compelled but the Court disagreed. The analysis in this article focuses on EPA's alternative position, based on an assumption that the statute is ambiguous.

47. *Id.*

48. *Id.* at 2442.

49. *Id.* at 2443.

50. *Id.* at 2444. The Court's reasoning relied on its analysis in *Brown & Williamson*: "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" 529 U.S. 120, 159 (2000).

51. *UARG*, 134 S. Ct. at 2444.

52. *Id.* at 2444–45.

53. *Id.* at 2445.

transparent assertion of legislative power by the EPA, and in harsh words concluded that the tailoring rule was a blow to the Constitution's separation of powers doctrine since the agency had no authority to rewrite unambiguous language of Congress.[54] The third lesson of *UARG* shows that when Congress provides unambiguous language in one part of a statute, an agency is not free to amend that language in order to make its interpretation of another part of the statute reasonable.

King v. Burwell[55] provides additional insight to how the Court may approach its review of the 2015 Open Internet Order. *King* involved the Internal Revenue Service ("IRS") interpretation of a provision in the Affordable Care Act ("ACA").[56] The majority rejected use of the *Chevron* framework and developed its own de novo interpretation of what constitutes an ambiguous statute; ironically, the same interpretation the IRS had proposed.[57] Rejecting use of the *Chevron* framework is surprising at first blush, because the IRS's interpretation involved a political decision involving a policy tradeoff between two objectives—universal health insurance and federalism—of the ACA. The *Chevron* framework typically applied to situations involving an ambiguous provision with alternative interpretations that each resolve a policy conflict—the conflict between economic growth and environmental protection—in a different way.[58] A policy conflict emanating from alternative interpretations involving predominantly political, not legal, considerations is a prototypical candidate for *Chevron* deference.

The Court rejected utilizing the *Chevron* two-step test for two reasons. First, the Court invoked the major question exception using *Brown & Williamson* language denoting a question of deep "economic and political significance," and thus characterized the case as extraordinary.[59] This allowed the Court to reject the *Chevron* assumption that statutory ambiguity meant that Congress intended for an agency to fill in the gaps in the statute.[60] The Court may refuse to use the *Chevron* framework if it concludes that the question at issue is so important or major that the Court should have the power to resolve any ambiguity.[61] This approach may be

54. *Id.* at 2445–46.

55. 135 S. Ct. 2480 (2015).

56. *Id.*

57. *Id.*

58. Abigail R. Moncrieff, King, Chevron, *and the Age of Textualism*, 95 B.U. L. REV. ANNEX 1, 4 (2015).

59. *King*, 135 S. Ct. at 2488–89.

60. *Id.*

61. *See id.* A common objection to this position is whether one can identify a standard to distinguish major from minor questions that is administrable. It is at least arguable that the

repeated in future cases as the Court becomes increasingly concerned with encroachment by the executive branch on the powers belonging to the two other branches of government.[62]

The second reason offered in *King* for rejecting *Chevron* deference is that the IRS lacked expertise in crafting health insurance policy.[63] This directly challenges an assumption of *Chevron* that politically accountable agencies are more qualified to resolve policy conflicts than unelected judges. The takeaway appears to be that it is now the prerogative of the courts to decide if the agency that Congress has charged with administering a statute is qualified to do so. This opens up a new avenue of attack, with no specified boundaries, for courts to challenge the legitimacy of the *Chevron* framework.[64]

City of Arlington v. FCC[65] predicts a likely outcome of the challenge to the FCC's 2015 Open Internet Order. *City of Arlington* addressed whether *Chevron* deference is appropriate in a situation where the question of interest concerned the scope of the FCC's jurisdiction.[66] Using the *Chevron* framework, the Court ultimately found the statute to be unambiguous and thus the FCC's interpretation of its own statutory jurisdiction was a reasonable construction.[67] In short, *Chevron* deference applies to questions both plainly within an agency's authority and to those that test the boundaries of that authority.[68]

Both sides of the opinion seem to indicate that it is futile for the Court to attempt to distinguish jurisdictional from nonjurisdictional interpretations.[69] Instead, the disagreement centered on the majority's position that general grant of rulemaking power was sufficient to indicate that Congress intended for the agency to resolve the ambiguity, or the

interpretation in *Chevron* had economic and political consequences for the American economy that were major.

62. Leandra Lederman & Joseph C. Dugan, King v. Burwell*: What Does It Portend for* Chevron*'s Domain?*, 2015 PEPP. L. REV. 72, 80–81 (2015) ("*King* may also suggest that our one-time expectations regarding judicial deference to agency interpretations may require reevaluation.").

63. *King*, 135 S. Ct. at 2489.

64. Another unusual aspect of the case is the ACA seem to give the IRS authority to resolve an ambiguity over the specific provision in question. Lederman & Dugan, *supra* note 62, at 75.

65. City of Arlington v. Fed. Commc'ns Comm'n, 133 S. Ct. 1863 (2013).

66. *Id.* at 1866.

67. *Id.* at 1874.

68. *Id.* at 1868.

69. Justice Scalia most eloquently described why the distinction is without merit: "The argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations-—the big, important ones, presumably—define the agency's 'jurisdiction.' Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between 'jurisdictional' and 'nonjurisdictional' is a mirage." *Id.*

dissent's position that the Court should decide de novo that Congress delegated authority to resolve the specific provision and question of interest. In short, the dissent unsuccessfully argued for adding another threshold step zero condition prior to application of the *Chevron* framework.[70]

The controversy in *City of Arlington* illuminates the majority's interest in preserving *Chevron* deference because it allocates interpretative power to the executive branch at the expense of the judiciary. However, the dissent's concern is that the judiciary retains an ability to monitor the distribution of legislative power from the legislative branch to the executive branch. The lesson of *City of Arlington* shows that beneath the surface of the case is a simmering, ongoing disagreement among the Supreme Court regarding the most important role of the judiciary in an era of a growing administrative state, the increasing tendency of Congress to write complicated and ambiguous statutes, and a well-established judicial precedent in *Chevron* which favors allocation of interpretive power to agencies.[71] The majority won this battle for retaining the interpretative power of an agency, but a similar battle will likely take place over the interpretative power exercised by the FCC in its reclassification decision in the 2015 Open Internet Order.

B. Application of the Lessons to the FCC's Reclassification decision

Under the *Brand X* decision, the Court may determine that it should apply the *Chevron* framework, or at least the threshold conditions for the framework to analyze the reclassification decision. The Court could strike down the FCC's decision at step zero (as in *King* and the dissent in *City of Arlington*), at *Chevron* step 1 (as in *Brown & Williamson*), or at *Chevron* step 2 (as in *UARG*). On the other hand, *Brand X* and the majority decision in *City of Arlington* seem to favor the FCC's position.

Following a lesson from *UARG*, one argument for invalidating the FCC reclassification decision centers on whether an interpretation that BIAS is a telecommunications service can be determined to reside outside the policy space of reasonable interpretations, given the design and structure of the statute as a whole. Arguably, the FCC interpretation is inconsistent with

70. *Id.* at 1883 (Roberts, C.J., dissenting).

71. Andrew M. Grossman, City of Arlington v. FCC*: Justice Scalia's Triumph*, CATO SUPREME COURT REV. 331, 332 (2012-2013) ("Scalia's majority opinion sets the stage for a heated debate with Chief Justice John Roberts, writing in dissent, on the role of the courts in policing the administrative state. Where Scalia is concerned about marking the boundary between the judicial branch and the political branches, the chief justice frets over Congress's unbounded delegation of authority to administrative agencies, which themselves are barely checked by the president or the courts.").

the deregulatory objective of the 1996 Telecommunications Act amendments[72] to the Communications Act.[73] If the Court agrees that a telecommunications service interpretation is inconsistent with the design and structure of the 1996 Act as a whole, a reviewing court is likely to reject the FCC interpretation at step 2 of the *Chevron* analysis.

However, this argument can be rebutted in several ways. First, one can view the development of broadband access technologies as the next step in the technological evolution of communications networks. Instead of separate networks dedicated to the delivery of voice (telephones), video (cable), and data (Internet), broadband networks are capable of delivering any type of digital content. The traditional FCC focus on last-mile access networks has remained consistent. Second, it is likely that Congress, when it enacted the 1996 Act, expected last-mile access networks would continue to be subject to regulation.[74] Paradoxically, the prior FCC 2002 decision to refrain from regulating broadband access networks may have come as a surprise to Congress. Third, the FCC's decision to regulate broadband access networks is tied to substantial forbearance from Title II regulations in order to adapt telephone regulation to the evolution of convergent broadband communications networks. The FCC has expansive authority to utilize its forbearance power without violating congressional intent.[75] Finally, an equally important objective of the 1996 Act is to promote the development and deployment of advanced communications technologies. Thus, the FCC interpretation can be characterized as an example of the prototypical *Chevron* policy tradeoff between competing objectives—deregulation and broadband deployment—which is best resolved by an agency using its expert training and political values and judgments. In summary, the Court in *UARG* rejected the EPA's interpretation because it was an unreasonable interpretation of an unambiguous statute. Here,

72. Pub. L. No. 104-104, 110 Stat. 56 (1996).

73. Justin Hurwitz, *Regulating the Most Powerful Network Ever*, 10 PERSPECTIVES FROM FSF SCHOLARS 1, 2 (Feb. 19, 2015), http://freestatefoundation.org/images/Regulating_the_Most_Powerful_Network_Ever_021815.pdf ("It is hard to square the application of Title II . . . to the Internet, or even to just broadband Internet access service. This is particularly hard to justify following the 1996 Act, which was enacted 'to promote competition and reduce regulation' . . . ."). Of course, it is an exaggeration to say that the FCC has proposed to regulate the Internet as opponents to the FCC's reclassification often try to frame the issue. Rather, regulation is narrowly targeted to providers of last-mile broadband access services to end users.

74. Verizon v. Fed. Commc'ns Comm'n, 755 F.3d 623, 638 (D.C. Cir. 2014) ("[W]hen Congress passed section 706(a) in 1996, it did so against the backdrop of the Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet."). Section 706 is a provision of the 1996 Act that together with Title II form the basis of the FCC's authority to regulate BIAS. The D.C. Circuit remanded the case back to the FCC, and after an extensive notice-and-comment proceeding, the agency issued the 2015 Open Internet Order.

75. This point about forbearance authority will be developed further below.

however, the Court is unlikely to strike down the FCC's interpretation on those same grounds.

Perhaps the greatest challenge to the 2015 Open Internet Order concerns the economic and political significance of the reclassification decision. This issue has played a role in the aforementioned lessons identified in all three of the Supreme Court cases discussed above. The D.C. Circuit addressed this specific issue in its examination of the FCC's previous effort to impose open internet rules and concluded that "[t]he circumstances here are entirely different."[76] The D.C. Circuit distinguished the tobacco case: "[t]he Court emphasized that the FDA had not only completely disclaimed any authority to regulate tobacco products, but had done so for more than eighty years, and that Congress had repeatedly legislated against this background."[77] There is no similar denial of regulatory authority or subsequent legislation by the FCC or Congress, respectively, that involves the Internet. Although the D.C. Circuit recognized that regulation of BIAS can be described as involving decisions of great economic and political significance, it concluded that there was "little reason given this history to think that Congress could not have delegated some of these decisions to the Commission."[78] Thus, in the opinion of the D.C. Circuit, the step zero threshold that Congress had intended to assign authority to the FCC to resolve an ambiguous statute was satisfied.[79]

On the other hand, the Court rejected utilization of the *Chevron* framework in *King*. One reason was based on the perceived lack of competency of the assigned agency to deal with the health insurance issues under consideration. This argument should not apply to the FCC because there is little doubt that the FCC possesses the expertise to address complex communications issues and the general rulemaking power to issue rules carrying the force of law.

The second reason involved the major question nature of the issue and the *King* majority's finding that the intent of the enacting Congress was clear, despite the arguably ambiguous language in the provision at issue.[80] If the majority had granted deference to the IRS under *Chevron* Step 2, then, a future administration would retain the option to consider changing

76. *Verizon*, 755 F.3d at 638.

77. *Id.*

78. *Id.* at 639.

79. *Id.* In different words, the D.C. Circuit found the question of regulating broadband access providers could not be described as an "elephant" and the FCC's authority for such regulation is not contained in statutory language described as a "mousehole."

80. Moncrieff, *supra* note 58, at 5–7. The majority could not resolve the question under *Chevron* step 1 given the ambiguous statutory language.

the interpretation. In fact, this flexibility is a significant advantage of the *Chevron* framework. The majority did not want to permit this flexibility given their understanding of the intent of Congress. The circumstances of this case are rather unique[81] and it is unlikely that such reasoning would be applicable to the FCC reclassification decision. In short, the lessons of the *King* decision probably have little relevance to the evaluation of the 2015 Open Internet Order.

Another threat to the legitimacy of the FCC's reclassification decision is based on a lesson from *UARG*, where the EPA developed a tailoring rule in hope of making its interpretation reasonable. In *UARG*, the EPA rewrote clear statutory terms to change how the statute would operate.[82] The FCC's reliance on forbearance to adapt Title II regulations to the Internet may be subject to a similar criticism.[83] This objection can be effectively rebutted.[84] First, the EPA's tailoring rule was deemed unconstitutional because it violated the separation of powers doctrine. In contrast, the FCC has unambiguous statutory authority to tailor Title II regulations for a class of carriers such as providers of BIAS.[85] In addition, the FCC has considerable discretion and flexibility in its use of its forbearance power. Particularly, the FCC has expansive authority to use predictive judgments as an expert agency regarding its assessment of the need for specific Title II regulations, given the adequacy of other protections to control the behavior of broadband service providers.

Second, in his *Brand X* dissent, Justice Scalia argued that the FCC should have classified cable modem access service to include a telecommunications component and used its forbearance authority to the extent that it thought necessary to limit the Title II regulations imposed on cable modem Internet access providers.[86] To a large extent, this is the path chosen by the FCC in the 2015 Open Internet order. In sum, the *UARG* lesson about unauthorized editing of a statutory provision—use of forbearance power—to adopt an unreasonable interpretation of a statutory provision—definition of telecommunications service applied to BIAS—is

81. The ACA became law without a single vote from the party in the minority.

82. *UARG*, 134 S. Ct. 2427, 2445 (2014) (Scalia, J., dissenting).

83. Hurwitz, *supra* note 73, at 12 ("The Chairman's proposed 'modernization' of Title II is clearly an effort to 'revise clear statutory terms that turn out not to work in practice' and to 'rewrite clear statutory terms to suit its own sense of how the statute should operate.'").

84. Daniel Deacon, *Title II Reclassification: A Reply to Gus Hurwitz*, YALE J. ON REG.: NOTICE & COMMENT BLOG (Feb. 16, 2015), http://www.yalejreg.com/blog/title-ii-reclassification-a-reply-to-gus-hurwitz-by-daniel-deacon.

85. 47 U.S.C. § 160 (2012).

86. Nat'l Cable & Telecomms. Ass'n v. Brand X Servs., 545 U.S. 967, 1011–12 (2005) (Scalia, J., dissenting).

likely irrelevant given the significant differences in legal authority of the two agencies.

Given the *Brand X* decision, it is unlikely that the courts will conclude that the definition of telecommunications service is unambiguous in a *Chevron* step 1 analysis, and thus exclude the possibility that BIAS could be reasonably classified as a telecommunications service.

The final consideration based on the lessons of the all three aforementioned cases, particularly the disagreement between Justice Scalia and Chief Justice Roberts in the undertones of *City of Arlington*, concerns the future of *Chevron* deference in an environment in which more Supreme Court justices are questioning the constitutional basis of the doctrine. The *Chevron* framework has been subjected to close scrutiny since its inception. Judicial efforts have successfully placed limits on *Chevron.* A judicial decision that significantly disrupts the existing equilibrium in the distribution of power between the branches of government is going to be subjected to feedback efforts to distribute power back to the previous equilibrium. Each of the cases reviewed manifested these equilibrating tendencies in some form. The main focus of the conflict seems to be between proponents regarding the proper allotment of power vested in the executive or the judicial branches, with the legislative branch relatively detached from the dispute.

Presently, a particular focus of interest centers on a case involving what is claimed to be a major question issue, or question about an agency's jurisdiction. In *City of Arlington*, the majority was comfortable with the idea that the *Chevron* framework is capable of addressing these types of issues.[87] It is incumbent on the judges to perform three judicial functions consistent with the *Chevron* framework: (1) use the ordinary tools of statutory interpretation to search for clear congressional intent in the statutory language in question;[88] (2) ensure that an agency's interpretation is located within the set of reasonable policy options; and (3) ensure that the agency did not engage in arbitrary or capricious decision making given the policy option selected. If judges perform these functions diligently, the

87. City of Arlington v. Fed. Commc'ns Comm'n, 133 S. Ct. 1863, 1872 (2013) ("The U.S. Reports are shot through with applications of *Chevron* to agencies' constructions of the scope of their own jurisdiction. And we have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee: in cases where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme.").

88. It is predicted that for questions implicating the scope of an agency's jurisdiction, judges might be more likely to engage in aggressive statutory interpretation in a search for clear meaning. In such a case, they can apply the *Chevron* framework but not defer to the agency interpretation. *See* Peter M. Shane, City of Arlington v. FCC*: Boon to the Administrative State or Fodder for Law Nerds?*, BLOOMBERG BNA (June 7, 2013), http://www.bna.com/city-of-arlington-v-fcc-boon-to-the-administrative-state-or-fodder-for-law-nerds/.

Chevron framework should continue to be utilized to resolve cases involving statutory ambiguity even in cases involving major questions.[89]

There are indications that some justices are likely to take a more critical view of the ongoing viability of *Chevron* deference, especially in circumstances involving major questions. Critics believe that the balance of power between the branches of government is considered to be seriously off balance and *Chevron* deference is in part responsible.[90] At minimum, the Court is looking for ways to increase the boundary maintenance responsibility of the judiciary to ensure that an agency is acting within its delegated authority. Perhaps the most immediate challenge to the *Chevron* framework is captured in Justice Thomas' concurring opinion in *Michigan v. EPA*. There, Justice Thomas questioned the constitutionality of the Court's practice of deferring to agency interpretations of federal statutes.[91] Specifically, he questions the legislative and interpretative power transferred to the executive branch as a result of *Chevron* deference. As a potential direct threat to the 2015 Open Internet Order, Justice Thomas concluded his concurrence with the following sentence: "We should stop to consider that document [the Constitution] before blithely giving the force of law to any other agency 'interpretations' of federal statutes."[92] This concern reflects much more than a concern with agency deference in cases involving major questions. Ironically, this warning comes from a justice who wrote the majority opinion in *Brand X*, a case that can be viewed as a model for the application of the *Chevron* framework, which is not a good sign for a doctrine's future if it loses one of its greatest proponents.

There are additional signs among other conservative justices that the future viability of the *Chevron* framework may be in trouble.[93] Clearly, Chief Justice Roberts prefers to limit the reach of the doctrine. His use of the major questions exception in *King* and his increasing concern with the growth of the administrative state could portend efforts to continue to narrow the reach of agency deference. Critics are concerned about the lack

89. It may well be that an agency because of its expertise and politically accountability is better prepared than courts to resolve major questions. Sunstein, *supra* note 35, at 231–44.

90. Professor Merrill argues that *Chevron* hampers the ability of courts to police the boundary between the executive and legislative branches of government. Merrill, *supra* note 37.

91. Michigan v. EPA, 135 S. Ct. 2699 (2015) (Thomas, J., concurring).

92. *Id.* at 2714 (Thomas, J., concurring).

93. Examples of unrest with agency deference has been reflected in opinions by conservative justices in the Court's last term. Joel Alicea, *The Supreme Court's 2014-2015 Term: The Year the Administrative State Trembled*, PUB. DISCOURSE (Sept. 2015), http://www.thepublicdiscourse.com/2015/09/15594/.

of presidential involvement in supervision of agency interpretations.[94] This leads to the charge that agencies are unsupervised and unaccountable to the electorate which violates a fundamental assumption of the *Chevron* framework that agencies should rely on the President's views regarding wise policy.[95] There is no question that the President was involved in the FCC's reclassification decision, which suggests that such a criticism in the 2015 Open Internet case lacks merit.[96] Thus, even though the reclassification decision was made by an agency based on its expertise and subject to political accountability, there is still a chance that, because of a general discontent among some on the Court about the growing power of the administrative state in general, the reclassification decision will not receive *Chevron* deference.

IV. Conclusion

If one would ignore recent history, the 2015 Open Internet Order would be very likely to receive *Chevron* deference. However, in light of recent Supreme Court opinions, it is now less likely that deference will be granted. A critical issue will be how the Court chooses to address the significant economic and political consequences of the reclassification decision. A broad reading of the reach of the *Chevron* framework will favor the executive branch in general and the FCC in particular. For those who have more faith in the judiciary, especially in an era of a growing administrative state, a narrow reading is more likely. A narrow reading increases the probability that the importance of the issue will cause the reviewing court to undertake a thorough step zero analysis to determine if Congress intended to assign authority to the FCC to resolve the issue. This increases the likelihood that the reviewing court will side with the opponents of reclassification. In conclusion, taking into consideration all

94. Randolph J. May, *Defining Deference Down, Again: Independent Agencies,* Chevron *Deference, and* Fox, 62 ADMIN. L. REV. 433, 442–46 (2010). May is particularly concerned with the lack of presidential control over regulatory decisions made by independent agencies. *Id.*

95. *Chevron*, 467 U.S. 837, 855–56 (1984) ("[A]n agency to which Congress has delegated policymaking responsibilities may, within limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

96. From a different vantage point regarding presidential involvement, it has been argued that because of the President's involvement with the agency, the FCC may have at the last moment changed its policy recommendation and this may mean that the FCC will receive little or no deference. Randolph J. May, *Why* Chevron *Deference May Not Save the FCC's Open Internet Order—Part II*, 10 PERSPECTIVES FROM FSF SCHOLARS, (May 4, 2015).

of the arguments for and against the FCC's decision to regulate BIAS, the best guess to the *Chevron* deference question posed in the title of the article is yes—or in probability terms, about a seventy-five percent chance—the FCC will be granted *Chevron* deference.