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HOW MIGHT THE SUPREME COURT, IF IT REVIEWS THE FEDERAL COMMUNICATIONS COMMISSION'S 2015 OPEN INTERNET ORDER, UTILIZE THE *CHEVRON* AND THE ARBITRARY AND CAPRICIOUS TESTS?

John B. Meisel*

PART I. INTRODUCTION.

The Supreme Court, in the 1984 case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹ outlined a general framework regarding judicial deference to an administrative agency's interpretation of an ambiguous statutory provision that the agency administers.² In 2005, in *National Cable & Telecommunications Association v. Brand X Internet Services*,³ the Court held that the *Chevron* framework continues to apply when an administrative agency changes a prior interpretation of an ambiguous statute that it administers.⁴ However, an unexplained change in statutory interpretation can be a reason for concluding that the new interpretation fails to pass the arbitrary and capricious test enacted by Congress in the Administrative Procedure Act (APA).⁵ The Court recognized that a change in policy is not necessarily invalidating because the judicially created *Chevron* doctrine values agency flexibility to respond to

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¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

² *Id.* at 842-45.

³ *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet*, 545 U.S. 967 (2005).

⁴ *Id.* at 983.

⁵ Administrative Procedure Act §109(2)(e)(B)(1), 5 U.S.C § 706(2)(A) (2012).

changing circumstances.⁶ Thus, in light of these two key administrative law cases, when a court reviews the legality of a change in statutory interpretation by an administrative agency, it conducts both the *Chevron* test for the new statutory interpretation and the arbitrary and capricious test for the resulting change in policy.

In 2002, the Federal Communications Commission (hereinafter the Agency) classified broadband service as an information service.⁷ In justifying the classification, the Agency argued that the statutory term “offer” in the definition of telecommunications services⁸ was ambiguous. Moreover, the Agency presented facts and reasons why broadband service should not be regulated under Title II of the Communications Act as a telecommunications service, but under Title I as a lightly regulated information service.⁹ In 2005, the *Brand X* decision utilized the *Chevron* framework to review the Agency’s decision, held that the statute was ambiguous, and found the Agency’s information service classification decision lawful.¹⁰ Still, the Agency believed that regardless of the classification decision, it retained statutory authority, under Title I, to intervene in the broadband market if it felt that some regulations may be necessary to further the public interest.¹¹

It was not until the U.S. Circuit Court of Appeals for the District of Columbia’s decision in 2014, in *Verizon v. FCC*,¹² that the Agency found the statutory authority to impose regulations on broadband service providers, specifically to

⁶ See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 521 (1985) (“Changes in the underlying social and economic circumstances on which the rules were originally premised, the discovery of new empirical data, the reanalysis of old data, and even the reconsideration of an agency’s mandate within a zone of discretion permitted by Congress were all held to provide acceptable grounds for an agency’s regulatory reversal.”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 518 (1989) (“...the capacity of the *Chevron* approach to accept changes in agency interpretation *ungrudgingly* seems to me one of the strongest indications that the *Chevron* approach is correct.”); Sunstein, *supra* note 6, at 206 (“For banking, telecommunications, national security, and environmental protection—among many other areas—changing circumstances often require agencies to adapt old provisions to unanticipated problems.”).

⁷ *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4831 ¶56 (2002) [hereinafter 2002 Cable Order].

⁸ 47 U.S.C. § 153(53) (2012).

⁹ 2002 Cable Order, *supra* note 7, at 4802 ¶5.

¹⁰ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet*, 545 U.S. 967, 972 (2005).

¹¹ *Id.* at 980-81.

¹² *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014) (reviewing Agency action in Report and Order, Preserving the Open Internet); *In re Preserving the Open Internet*, GN Docket No. 09-191, Report and Order, 25 FCC Rcd. 17905, 17907 (2010).

achieve the statutory goal of improving broadband infrastructure and deployment.¹³ However, in judicial review of the Agency's rulemaking action, the D.C. Circuit concluded that two of the regulations the Agency had proposed (the anti-blocking and the anti-discrimination rules) treated broadband service providers as common carriers, which was inconsistent with the Agency's prior 2002 classification of the service as an information service.¹⁴ In response, drawing on this newly sanctioned statutory authority¹⁵ and responding to the problems with its 2010 order, the Agency conducted a notice-and-comment rulemaking proceeding that culminated in its decision in 2015 to reclassify broadband service as a telecommunications service.¹⁶ The reclassification decision meant that providers of the reclassified service were considered to be common carriers and, thus, became subject to Title II regulation.¹⁷ In 2016, in *United States Telecom Association v. Federal Communications Commission*, the D.C. Circuit upheld the reclassification decision (by a vote of 2 to 1)¹⁸ which has generated intense criticisms by academics, the dissent in the reclassification decision, and broadband industry participants.¹⁹ It is likely that the D.C. Circuit's decision in 2016 will be appealed to the Court.²⁰ The purpose of this article is to analyze arguments concerning whether the Agency's Open Internet Order is likely to (1) be subject to the *Chevron* test for the reclassification decision in light of a 2015 Court decision *King v. Burwell* and (2) pass the arbitrary and capricious test²¹ for the change in its policy in light of a 2009 Court decision.

¹³ *Verizon*, 740 F.3d at 628.

¹⁴ *Id.* at 650.

¹⁵ Telecommunications Act of 1996 §706(b), 47 U.S.C. §1302(b) (2012).

¹⁶ *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5619 ¶ 394(2015) [hereinafter *Protecting and Promoting the Open Internet*].

¹⁷ *Id.* at 5615 ¶ 43 (relaxing many Title II regulations with use of its statutory forbearance authority in conjunction with the reclassification of broadband Internet service).

¹⁸ *United States Telecomm. Ass'n v. FCC*, 825 F.3d 674, 739 (D.C. Cir. 2016).

¹⁹ Justin Hurwitz, *Regulating the Most Powerful Network Ever*, Vol. 10, No. 9, THE FREE ST. FOUND. 7 (2015), [tp://freestatefoundation.org/images/Regulating_the_Most_Powerful_Network_Ever_021815.pdf](http://freestatefoundation.org/images/Regulating_the_Most_Powerful_Network_Ever_021815.pdf) (anticipating the release of the Open Internet Order, Professor Hurwitz powerfully critiqued the forthcoming order, anticipating many of the subsequent criticisms of the order); Robert W. Crandall, *Regulation Won't Preserve a Dynamic and "Open Internet"*, Vol. 10, THE FREE ST. FOUND. 1 (2015) (surrounding the granting of *Chevron* deference to the Agency's reclassification decision, several of the author's criticisms are addressed in Part II).

²⁰ Cecilia King, *Court Backs Rules Treating Internet as Utility, Not Luxury*, N.Y. TIMES, June 15, 2016, at B1.

²¹ 5 U.S.C. § 706(2)(A) (2012) (requiring that a court will "set aside agency action" which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

Part II first provides a brief summary of the *Chevron* framework and its major questions exception. It then analyzes the possibility that, in light of the 2015 Court decision, the Court could bypass the *Chevron* test and provide its own *de novo* interpretation of an ambiguous statutory provision. Part III first summarizes the lessons of the 2009 Court decision that provided a new standard for analyzing an agency's change in policy. Then, these lessons are applied to evaluate the controversy surrounding the D.C. Circuit's review in *US Telecomm* and the justification offered for the Agency's change in policy resulting from its reclassification of broadband service. Part IV offers a short conclusion.

PART II. *CHEVRON* TEST.

The 1984 *Chevron* decision identified the following process for judicial review of an administrative agency's statutory interpretation:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.²²

Initially, the *Chevron* framework was described as comprised of two steps. *Chevron* step one is the sole responsibility of the reviewing court using the traditional tools of statutory interpretation²³ to ascertain whether the statute has a clear meaning. Three possible answers to the question are possible: (1) the court determines that the statute unambiguously means what the agency interpreted the statute to mean, (2) the statute unambiguously does not mean what the agency interpreted it to mean, or (3) the statute is ambiguous or silent with respect to the precise question at issue.²⁴ Answers (1) and (2) indicate that the

²² *Chevron, U.S.A. Inc., v. Nat. Res. Def. Council*, 467 U.S. 838, 842-43 (1984).

²³ DANIEL SHEDD & TODD GARVEY, CONG. RESEARCH SERV., R43203, *CHEVRON DEFERENCE: COURT TREATMENT OF AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTES* 5-6 (2013) (regarding exactly what tools are acceptable in *Chevron* step one for the purposes of statutory interpretation is subject to a wide variety of answers. Statutory interpretive tools such as the plain meaning of the text under examination, the whole of the statutory framework and/or structure, related statutes, legislative history, regulatory history, the agency's prior readings of the text, and the importance of the issue have been used to construe the meaning of statutes).

²⁴ *Chevron*, 467 U.S. at 842-43.

court can unambiguously make a determination regarding how the agency interpretation matches up to the precise question at issue.²⁵ However, if the court determines that answer (3) applies to the question at issue, then the court proceeds to *Chevron* step two to determine if the administrative agency's interpretation is a reasonable interpretation of the statute.²⁶

Chevron step two is the step in the procedure in which the court grants deference to the agency's statutory interpretation if it determines the interpretation to be reasonable.²⁷ A reasonable interpretation is one that falls within a zone of acceptable interpretations with the boundaries of the zone determined by the court. If the agency's interpretation falls within that zone, the interpretation does not have to be the one that a court would necessarily select. This is the part of the process that deviated from prior judicial practice and, thus, represented the revolutionary aspect of the *Chevron* decision.²⁸ It represents a transfer of interpretive authority from the judicial branch of government to the executive branch. Why would the judiciary voluntarily transfer interpretive power to the executive branch?

The answer to the question contains a legal and a policy component. Most importantly and in a legal sense, deference is in order because when a statutory provision is determined to be ambiguous, it is the implicit intent of Congress to allocate the authority to interpret the ambiguity to the executive branch.²⁹ Moreover, Congress assigns this interpretive-power allocation decision to administrative agencies for two policy reasons: the relative expertness of agency personnel and the political accountability of the executive branch compared to the judiciary.³⁰ The policy rationales are based on the *Chevron* assumption that statutory ambiguity often results from competing interests contained in the statute and the choice for the best way to resolve the competing interests should be made by a politically responsive institution with intimate and expert knowledge of the industry.³¹

²⁵ *Id.*

²⁶ *Id.* at 843.

²⁷ *Id.* at 842-843.

²⁸ *Id.* at 844.

²⁹ Sunstein, *supra* note 6. For background on this implicit assumption, one can compare the views of two Supreme Court justices who are also eminent administrative law scholars (the late Justice Scalia and Justice Breyer). Both justices agreed that *Chevron* deference is only justified when it is the intent of Congress to have the agency make the interpretation. However, they disagree about the circumstances when such an implicit intent is likely. Justice Scalia argued for a broad presumption of delegation in contrast to Justice Breyer who developed a checklist of factors influencing the likelihood of congressional delegation of interpretive authority that he applied (and still applies) on a case-by-case basis.

³⁰ *Chevron*, 467 U. S. at 865.

³¹ *Id.*

The *Chevron* decision, interpreted broadly, suggested that as long as the statute under consideration was determined by the court to be ambiguous, this was a necessary and sufficient condition to grant deference to any reasonable statutory interpretation made by an administrative agency.³² However, as the *Chevron* framework evolved, statutory ambiguity by itself was no longer assumed to be a sufficient condition for deference. Specifically, more clarity from the courts was needed regarding the circumstances in which an implied delegation from Congress to an administrative agency was a reasonable assumption for the court to make.³³ One approach to cabin the reach of the *Chevron* framework identified threshold conditions that must be satisfied before the court utilized the two-step framework to review an agency's statutory interpretation.³⁴ These conditions are examined in what is denoted as *Chevron* step zero.³⁵

A second class of interpretive cases that raise questions about whether an implied delegation from Congress to an agency is intended is referred to as the "major questions" exception.³⁶ Until 2015, the Court's reliance on the "major questions" exception occurred within the context of the *Chevron* two-step framework and, thus, was not considered part of the *Chevron* step zero analysis.³⁷ However, in what could be an important development in administrative

³² *Id.* at 866. The *Chevron* doctrine contains its own internal limitations that retain interpretive power with the judiciary. In *Chevron* step one, if a court finds the statute to be unambiguous, there is no need to proceed to the next step. In *Chevron* step two, if the court finds the agency's interpretation to be unreasonable (a rather weak constraint), there is no deference to the agency.

³³ *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1875 (2013).

³⁴ *Chevron* step zero became the third step in the judicial procedure for the review of an agency's statutory interpretation. The Court developed *Chevron* step zero conditions to identify when an implied delegation from Congress to an agency is likely in the following case: *U.S. v. Mead Corp.*, 533 U.S. 218, 241-43 (2001). The two *Mead* conditions are (1) whether Congress had granted general rulemaking and/or adjudicative power to the agency and (2) whether the agency's statutory interpretation utilized that authority.

³⁵ This term was created by two prominent legal scholars in the following article: Thomas W. Merrill & Kristen E. Hickman, *Chevron's Domain*, 89 *GEO. L. J.* 833, 836 (2001). *See also* Sunstein, *supra* note 6, at 191 n. 19 (showing that Professor Sunstein borrowed the term for the title of his article).

³⁶ In general, a "major question" is one in which an agency's statutory interpretation has significant economic and political effects and/or is likely to change significantly a regulatory scheme. There is no quantitative scale available to distinguish between a "major question" and all other interpretive questions (what might be called "minor questions").

³⁷ For instance, in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000), the Court, in examining whether the FDA had statutory authority to extend regulation to tobacco products, relied on the unlikelihood of an implied delegation from Congress to the FDA for such an economically and politically significant question as the regulation of tobacco products in conjunction with other statutory interpretive tools to find, in its *Chevron*

law doctrine, the Court used the “major questions” exception in *King v. Burwell*³⁸ in the context of its pre-*Chevron* analysis, i.e., as another *Chevron* step zero requirement. The remaining discussion in Part II of this article examines whether the Court might use this novel approach utilized in the *King* decision, instead of relying on the *Chevron* framework and the *Brand X* decision as the D.C. Circuit did in *US Telecomm*, to resolve for itself the broadband service classification issue in the Open Internet Order.³⁹ Such a move would deny the power to the next administration to reverse the Agency’s reclassification decision, although, of course, the Court could decide to interpret the statute to classify broadband service as a telecommunications service.

step one analysis, that the statute was unambiguous in ruling out the FDA’s interpretation. In *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442-43 (2014), the Court, in examining whether the EPA had authority to expand permitting requirements for greenhouse gases emissions for non-stationary sources once it had determined that regulation of these gases from mobile sources was within its legal authority, expressed great concern about the EPA’s interpretation since it would cause large economic effects on the agency and the industries it regulated (imposing a permitting requirement on millions of small sources) to find, at *Chevron* step two, that the EPA’s interpretation of an ambiguous statute was unreasonable. Both uses of the “major questions” exception impacted the Court’s reasoning in concert with its application of the two-step *Chevron* framework. In these cases, the exception helped the Court interpret the statute as the Court had real doubt about whether Congress would implicitly delegate such an economically and politically significant question to an agency.

³⁸ *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015).

³⁹ In *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 704 (D.C. Cir. 2016) the court argued that *Brand X* controlled the court’s review of the reclassification decision and discounted the role of the “major questions” exception (citing the *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2001)) because its use in the tobacco case was in conjunction with achieving clarity in the Court’s *Chevron* step one decision. The majority and dissent (*United States Telecom Ass’n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016)) accepted the *Brand X* holding that the definition of a telecommunications service was ambiguous.

Application of the *King* decision to the Open Internet Order.⁴⁰

In *King*, the Court reviewed an IRS interpretation⁴¹ of an Affordable Care Act (ACA) provision involving eligibility for federal tax credits when a customer purchased health insurance on a federal health-care exchange.⁴² To develop the IRS's interpretation, the agency had satisfied the *Chevron* step zero *Mead* threshold conditions since Congress had granted the agency general rulemaking power and it had exercised that power in a notice-and-comment rulemaking proceeding. Nonetheless, in an unprecedented move, the Court invoked the "major questions" exception by casting aside the *Chevron* framework.⁴³ Specifically, the Court argued:

"When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach "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

⁴⁰ See generally Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56 (2015); see also Leandra Lederman & Joseph C. Dugan, *King v. Burwell: What Does It Portend for Chevron's Domain?* 2015 PEPP. L. REV. 72 (2015); Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479 (2016); *Major Questions Objections*, 129 HARV. L. REV. 2191 (2016); Brief for Respondent, U.S. Telecom Ass'n v. FCC, Nos. 15-1063, (D.C. Cir. filed July 29, 2016); Daniel A. Lyons, *Net Neutrality's Path to the Supreme Court: Chevron and the "Major Questions" Exception*, Vol. 11 No. 21 THE FREE ST. FOUND. (2016), http://www.freestatefoundation.org/images/Net_Neutrality_s_Path_to_the_Supreme_Court_-_Chevron_and_the_Major_Questions_Exception_062416.pdf; Jody Freeman, *The Chevron Sidestep*, EMMETT ENV'T LAW & POL'Y CLINIC (2016), <http://environment.law.harvard.edu/2015/06/the-chevron-sidestep/>; Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. (forthcoming 2017) <http://ssrn.com/abstract=2757770>; Nathan Richardson, *Safety Valve: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV., (forthcoming 2017), http://administrativestate.gmu.edu/wp-content/uploads/sites/29/2016/09/Richardson_Safety-Valve-RC4_distrib.pdf; Catherine M. Sharkey, *In the Wake of Chevron's Retreat*, GEORGE MASON CSAS REVISITING JUDICIAL DEFERENCE CONF. (May 20, 2016), http://administrativestate.gmu.edu/wp-content/uploads/sites/29/2016/06/Sharkey_In-the-Wake-of-Chevron_5_20_16.pdf.

⁴¹ *King*, 135 S. Ct. at 2483 (concluding after de novo review that the provision in question was ambiguous); see also *Id.* at 2496-97 (Scalia, J., dissenting) (disagreeing that the provision was ambiguous).

⁴² Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 26 and 42 U.S.C.).

⁴³ See Heinzerling, *supra* note 40, manuscript at 18-19 ("The Court, in the *Chevron* era, never before put the *Chevron* framework entirely to the side in circumstances presented in *King*: an interpretation of a statute deemed ambiguous, arrived at after notice-and-comment rulemaking, by the agency charged by the statute with making rules to implement the provision interpreted.").

intended such an implicit delegation.” This is one of those cases.”⁴⁴

The Court cited the following factors to justify its extraordinary characterization of the case and that may have application to the Agency’s interpretation in the Open Internet Order: (1) a major question of economic and political significance, (2) a question that was central to the statutory scheme, and (3) Congress would be expected to have expressly delegated such an important question to an agency, if its intent was to give the agency interpretive power over the provision.⁴⁵

The Open Internet Order arguably satisfies these three factors and, thus, the Court could decide to set aside the *Chevron* framework in its entirety if it follows the *King* precedent.⁴⁶ The Internet is a revolutionary innovation that touches many economic and political aspects of our society.⁴⁷ For instance, the public debate generated by the reclassification rulemaking proceeding involved over four million comments and intense controversy between political parties.⁴⁸ Although there is no objective way to demonstrate the economic and political significance of an issue, it is at least arguable that the reclassification decision could be so classified. Next, the way the Agency decides to classify broadband service is a central aspect of the Agency’s statutory scheme for the Internet. With an information service classification, the Agency has little regulatory power to intervene and correct what it views as problems caused by such a classification. For example, one of the Agency’s on-going concerns is that, given a broadband service provider’s position as a gateway to the Internet end user, the nature of a customer’s access to edge providers is controlled by the customer’s broadband access provider.⁴⁹ If, instead, broadband service is clas-

⁴⁴ King, 135 S. Ct. at 2488-89 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

⁴⁵ King 135 S. Ct. at 2489 (citing *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (The Court added to factor (3) with its doubt about whether the IRS was the appropriate expert agency to address the statutory question even if Congress had made an express delegation)).

⁴⁶ It should be noted that there is no question that the Agency has a general grant of rulemaking power from Congress and that it exercised that power in developing the reclassification decision. That is, the interpretation satisfied the *Mead* threshold conditions. The question in this article is whether there still is a lack of implicit delegation for the Agency to decide the question of reclassification of broadband service.

⁴⁷ Hurwitz, *supra* note 19, at 4 (attributed to Tom Wheeler, former chairman of the Agency).

⁴⁸ Simone A. Friedlander, *Net Neutrality and the FCC’s 2015 Open Internet Order*, 31 BERKELEY TECH. L.J. 905, 924 (2016); see also Tom Risen, *FCC Enacts Title II Net Neutrality Rules With Partisan Vote*, U.S. NEWS (Feb. 26, 2015), <http://www.usnews.com/news/articles/2015/02/26/fcc-enacts-title-ii-net-neutrality-rules-with-partisan-vote>.

⁴⁹ The nature of a customer’s broadband access is controlled by the customer’s broadband service provider who controls the answer to questions such as whether an end user has

sified as a telecommunications service, then the statutory scheme is fundamentally different. The Agency has significant power to control the nature of access to end-users.⁵⁰ In fact, this is the main reason why cable and telephone broadband companies are so adamantly opposed to the Open Internet Order and are hoping and predicting that the new administration will reverse the reclassification decision.⁵¹ Finally, the Agency relied on statutory ambiguity and, thus, an implied delegation to justify its interpretive authority and, clearly, did not possess an explicit grant of authority from Congress.⁵²

If the Court sets aside the *Chevron* framework, and thus the *Brand X* precedent relied on by the D.C. Circuit in *US Telecomm*, when it reviews the Agency's reclassification decision, then the Trump administration would be unable to reverse the reclassification decision through an Agency reinterpretation given the *stare decisis* effect of a judicial determination.⁵³ Interestingly, in *King*, the Court set aside the agency decision even though it ultimately arrived at the same interpretation as the agency.⁵⁴ Some see the *King* decision as another signal of increasing judicial unease with the growth of the administrative state and the role that the *Chevron* framework has played in that growth.⁵⁵ The *King* de-

access to all edge providers, whether access to end users can be throttled, or whether edge providers can or must pay for priority access, say over rival edge providers, to end users. Edge providers, such as Google and Amazon, provide content and applications over the Internet to end users.

⁵⁰ Communications Act of 1934, 42 U.S.C. § 157(b) (2012).

⁵¹ See Brian Fung, *Cable and telecom companies just lost a huge court battle on net neutrality*, WASH. POST (June 14, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/06/14/the-fcc-just-won-a-sweeping-victory-on-net-neutrality-in-federal-court/?utm_term=.766aa9726c0b (cable and telecommunications companies argue that reclassification creates new obligations to consumers).

⁵² See Eric Geller, *Here's the FCC's full legal defense of its net neutrality rules*, THE DAILY DOT (Dec. 11, 2015), <http://www.dailydot.com/layer8/fcc-net-neutrality-legal-defense/> (explaining how the crux of the FCC's argument over its net neutrality regulations is based on *Chevron* deference).

⁵³ See Brendan Bordelon, *Net Neutrality Rollback Under Trump Will Face Hurdles*, MORNING CONSULT (Dec. 21, 2016), <https://morningconsult.com/2016/12/21/net-neutrality-rollback-trump-will-face-hurdles/> (referring to federal appellate litigation upholding net neutrality regulations). *But see* Russell Brandom, *Will net neutrality survive Donald Trump?*, THE VERGE (Nov. 30, 2016), <http://www.theverge.com/2016/11/30/13795030/net-neutrality-donald-trump-fcc-repeal-open-internet> (proposing that previous court rulings upholding FCC net neutrality regulations do not explicitly prevent its regulatory rollback).

⁵⁴ *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015).

⁵⁵ Scholars have expressed this sentiment. See Sharkey, *supra* note 40, at 1-2 ("Recent U.S. Supreme Court opinions, eliding *Chevron* altogether or declining to defer for one reason or another, have led scholars to proclaim the "terminal" state of the venerable doctrine of agency deference in statutory interpretation. Some have linked the Court's push-back to wider hostility toward the ever-approaching administrative state, threatening individual

cision also can be viewed as another effort (after an unsuccessful attempt to do so in *City of Arlington v. FCC*) by Chief Justice Roberts to scale back *Chevron* deference. The question whether Congress has delegated authority in an implicit way to an agency to make an interpretive decision (a step zero question) seems to be of growing importance to the Court and, if the pattern continues, calls for a greater interpretive role by the courts.⁵⁶ The Open Internet Order may be a good test case for the Court to identify in more explicit terms the parameters of this potentially new role for the “major question” exception that scales back use of the *Chevron* framework.⁵⁷

PART III. ARBITRARY AND CAPRICIOUS REVIEW OF AN AGENCY’S CHANGE IN POLICY.

The *Fox* Standard

The standard an agency must satisfy to pass the arbitrary and capricious test for a change in policy is explained in *FCC v. Fox Televisions Stations Inc.*⁵⁸ The authority a court has to conduct the test is found in the APA and the majority in *Fox* explained that the standard must be consistent with the text of the statute as understood when it was enacted in 1946.⁵⁹ The statute is clear that an agency change in policy is not subject to a more heightened standard compared to the standard for an agency’s initial policy position.⁶⁰ Following precedent, the Court should employ a narrow standard of review and require an agency to “examine the relevant data and articulate a satisfactory explanation for its ac-

liberty and democratic governance. Knocking down *Chevron*, a pillar of the administrative state, deals a blow to over-exuberant regulators and promises to stem the tide of over-regulation of the economy and health and safety.”)

⁵⁶ See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, C., concurring) (adding to the increasing concern with whether Congress would implicitly delegate “major questions” to an agency, there appears to be a growing discussion within the Court with whether Congress can delegate legislative authority to an agency).

⁵⁷ Lyons, *supra* note 40, at 1, 2 (making a similar point).

⁵⁸ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 503 (2009).

⁵⁹ *Id.* at 514.

⁶⁰ See *Id.* at 550-51 (Breyer, S.G. dissenting) (agreeing that the standard was not heightened but still maintained that the fact of change is a relevant factor that must be addressed. Thus, the agency should be required to provide an explanation for the change in policy. For instance, the agency should explain why it has decided to change its policy and the reasons that led it to adopt the initial policy. Justice Breyer did seem to leave open the possibility that an agency could change a policy just because it weighs the relevant considerations differently but was unwillingly to accept that explanation in *Fox TV Stations, Inc.*, 556 U.S. at 514).

tion.”⁶¹

In order to provide a reasoned explanation for the new policy, the agency must:

- Display an awareness that it is changing policy,
- Show that there are good reasons for the new policy, and
- Believe the new policy to be better than the prior policy.⁶²

The third element of the explanation for the new policy is clear in that it does not require the agency to explain how the new policy is better than the prior policy but only that the agency believes that to be the case. Thus, there is no need for a comparative policy analysis.⁶³ This leads to a concern, by some, that the change in policy could be largely attributable to undue political influence.⁶⁴ This objection can be rebutted in two ways; one, the new policy still must be reasonable and be accompanied by good reasons, and two, the political system is structured to have political appointees as the leading policymakers in administrative agencies, inevitably inviting political concerns into the agency decision-making process. In sum, the first lesson from *Fox* instructs that comparative judgments among reasonable policy choices are not necessary in an agency’s explanation for a change in policy.

The second lesson of *Fox* addresses the question of what constitutes a good reason for a new policy. It should be noted that these two lessons capture different dimensions of the new *Fox* standard that can be usefully distinguished by means of a conceptual framework. The framework distinguishes between two dimensions of the arbitrary and capricious test, the breadth and depth of the analysis. The new *Fox* standard limited the breadth dimension (the scope of relevant elements that are examined) and reduced the depth dimension (the degree of intensity of the analysis for a relevant element) for judicial review of an agency’s change in policy.⁶⁵ The breadth dimension of the arbitrary and ca-

⁶¹ *Motor Vehicle Manufacturers Ass’n Inc. of U.S. v. State Farm Mutual Automotive Ins. Co.*, 463 U.S. 29, 43 (1983).

⁶² *Fox TV Stations*, 556 U.S. at 515-16.

⁶³ See Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1388-93 (2016).

⁶⁴ For an example of this concern, see Richard Murphy, *Politics and Policy Change in American Administrative Law*, 28 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 325, 341 (2010) (“In short, it is perfectly reasonable for courts, when exercising the discretionary judgment needed to apply arbitrariness review, to eye agency policy changes with more suspicion where there are grounds for thinking that the agency’s judgment was distorted by strong political preferences.”).

⁶⁵ See, Ronald M. Levin, *Hard Look, Policy Change, and Fox Television*, 65 UNIV. OF MIAMI L. REV. 555, 574 (2011) (distinguishing between the “breadth” and “depth” dimensions of the scope of judicial review as this terminology will be used in the discussion in this article).

pricious test refers to “what aspects of an administrative decision must be weighed for their persuasiveness or reasonableness.”⁶⁶ Aspects of the breadth dimension include elements such as the requirement that an agency demonstrate that it developed a complete factual record, responded to objections to the policy selected, considered viable alternatives to the policy selected, indicated how the relevant factors identified in the statute are accommodated, and explained how the policy selected is consistent with statutory goals.⁶⁷ The failure by an agency to address a breadth dimension in the justification for its action can lead a court to find the action arbitrary and capricious. The *Fox* standard excluded the element (over the objections of the minority) that an agency, when changing a policy, explain why the reasons for the original policy are no longer valid or explain how the new policy achieves the statutory goals better than the previous policy.⁶⁸ In short, comparative policy evaluation is not a necessary aspect of the breadth dimension when an agency justifies a change in policy.⁶⁹ As a result of the contraction of the breadth dimension, the *Fox* standard should make it easier for an agency to change a policy.⁷⁰

The depth dimension deals with “the question of how reasonable these respective determinations must be.”⁷¹ In other words, for each relevant factor of the breadth dimension of the administrative action, what is the magnitude of the detail and the intensity of the depth analysis expected to meet the reasonableness standard?⁷² In *Fox*, the majority and the dissent disagreed about how exacting judicial review should be with respect to the depth dimension of the administrative action. The majority seemed intent to return to the original meaning of the APA which is to engage in a highly deferential approach when a court reviews an agency’s policy decision.⁷³ The dissent advocated closer scru-

⁶⁶ *Id.*

⁶⁷ *See* Garland, *supra* note 6; *See id.* at 535-61 (explaining an extensive discussion of various aspects that comprise substantive review by courts of an agency decision-making process to arrive at its policy action).

⁶⁸ Levin, *supra* note 65.

⁶⁹ *Id.* One could describe the placing of limits on the breadth dimension as “narrowing” the scope of review.

⁷⁰ *Id.* (“The basic argument of the essay is that *Fox* will at least slightly broaden the capacity of an administration to pursue an agenda of change and that this development is, on the whole, salutary.”).

⁷¹ *Id.*

⁷² *Id.* Professor Hurwitz provides an excellent example of how the expectations for what is considered to be a reasonable explanation of a policy differ between the majority and the dissent in the Open Internet Order. The differences over how intense judicial review should be are addressed in the application section of Part III. Gus Hurwitz, *DC Circuit Court of Appeals: So deferential it’s “asleep at the switch”*, TECHPOLICYDAILY (June 20, 2016), <http://www.techpolicydaily.com/communications/dc-circuit-appeals-asleep-switch/>.

⁷³ Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L.

tiny of the agency's reasoning process, more reflective of the expectations of an agency acting as a judicial body.⁷⁴ The majority only required that the agency's reasons for the policy change were "rational" and did not require the agency to use additional procedures or gather additional data, staples of the demands of a court that utilizes a hard look approach.⁷⁵ Some scholars see this relaxed approach to what is acceptable as a good reason to be too deferential.⁷⁶ Regardless, the second lesson of *Fox* instructs that the requirements of what constitutes a good reason should reflect a highly deferential approach, appropriate for an agency acting as a policymaker, not as a judicial body, as revealed in the text of the governing statute, the APA.⁷⁷

A third lesson of *Fox* identifies two special cases in which both the majority and dissent agree that an agency's change in policy must provide a more detailed explanation than that expected for an initial policy decision; "when, for

REV. 419, 424-25 (2009) ("Consequently, after *Fox Television*, courts should replace *State Farm*'s dicta and the hard look doctrine with a doctrine for reviewing agency rulemaking that examines the agency's purpose in regulating and the means used by the agency to achieve that purpose—instead of requiring the agency to use additional procedures and scouring the rulemaking record to make up insignificant problems with that record . . . this shift would coincide with the modern Court's insistence that the APA be interpreted as it was when Congress enacted it in 1946.").

⁷⁴ *Id.* at 455-56 ("The dissent's position could be described as a more searching standard of review of the agency's reasoning process. "The majority did acknowledge "the requirement that an agency provide *reasoned explanation* for its action," but the majority's analysis clarified that its idea of "reasoned explanation" required much less than the "reasoned decision-making contemplated by the D.C. Circuit's hard look doctrine.").

⁷⁵ *Id.* at 456.

⁷⁶ For example, for a critical view of the new standard for what is deemed to be sufficient for a good reason. See Charles Christopher Davis, *The Supreme Court Makes It Harder to Contest Administrative Agency Policy Shifts in FCC v. Fox Television Stations, Inc.*, 62 ADMIN. L. REV. 603, 614 (2010) ("Judicial review in this area is now very deferential; . . . the only thing left for an agency to do is provide good reasons for changing. And these reasons—it would seem from the opinion—can be contradictory to experience and unsupported by empirical evidence yet still be acceptable as adequate justification when an agency turns its back on prior policies.").

⁷⁷ Mr. McKarcher provides an interesting difference between the adjudication versus rulemaking roles of administrative agencies. See Joshua McKarcher, *Restoring Reason: Reformulating the Swerve Doctrine of Motor Vehicle Manufacturers v. State Farm*, 76 GEO. WASH. L. REV. 1342, 1370 (2008) ("The essential point is that the standard that Congress set in the APA—and has long left untouched—is not one requiring "reasoned analysis" but an absence of arbitrariness, capriciousness, or abuse of discretion under the APA. Words matter, especially words used by appellate courts. "Reasoned analysis" is certainly appropriate when agencies act as judicial bodies to adjudicate cases because the neutrality desired of an adjudicator requires them to be free from political influence. . . . But that hardly means that in an administrative policymaking context—an inescapable political context—that mere "reasons" cannot sufficiently indicate the absence of arbitrary, capricious, or abusive policymaking.").

example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.⁷⁷⁸ In other words, the breadth dimension of the arbitrary and capricious test is expanded to include the need for an agency to provide a reasoned explanation that addresses these relevant factors. The specifics of what is expected for the detailed explanation requirement will be apparent only when the *Fox* standard is applied to a particular set of circumstances in a case. For instance, the extent to which the new facts need to contradict the old facts and what is the threshold level where a reliance interest is deemed “serious” remain unaddressed.⁷⁹

Application of the *Fox* standard to the D. C. Circuit’s review of the Open Internet Order.

It is apparent that in *US Telecomm* the majority and the dissent (echoing many of the views of broadband industry participants and allies) disagree in a fundamental way how to apply the lessons of the *Fox* standard for evaluating an agency change in policy in the context of the Open Internet Order. First, “US Telecom contends that the Commission lacked good reasons for reclassifying broadband....”⁸⁰ The specific complaint is expressed along two dimensions discussed above. For one, the Agency fails to include in the breadth analysis relevant factors and, two, for the relevant factors considered, the depth of the analysis lacks appropriate intensity. In short, opponents of the new rules argue that the D.C. Circuit’s majority review was too deferential and, thus, did not meet the requirements of a reasoned decision-making process called for in *Fox*.⁸¹ Second, the dissent maintains that the Agency failed to give reasoned attention to the broadband service providers’ claims of disrupted reliance interests resulting from the reclassification decision and that the factual changes the Agency asserted were not real.⁸² These complaints capture the essence of the

⁷⁸ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁷⁹ *Id.* One critic of the *Fox* standard describes the general “detailed justification” requirement as insufficient to prevent an arbitrary or capricious decision by an agency. See Catherine E. Bell, *FCC v. Fox: Has the Supreme Court Sanctioned Political Influence in Agency Decision-making?*, 61 *MERCER L. REV.* 643, 661 (2010).

⁸⁰ *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 707 (D.C. Cir. 2016).

⁸¹ Agreeing with this too deferential argument see Jonathan H. Adler, *Net neutrality and the changing of the guard on the D.C. Circuit—guest post by Daniel Lyons*, *WASH. POST* (June 16, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/16/net-neutrality-and-the-changing-of-the-guard-on-the-d-c-circuit-guest-post-by-daniel-lyons/?utm_term=.3bf03903aee8 (“The majority opinion is dripping with agency deference.”).

⁸² See *United States Telecom Ass’n*, 825 F.3d at 756-60.

call by the dissent and critics for the Agency's decision to be found arbitrary and capricious. Four specific complaints are addressed below: the likely negative effect of reclassification on broadband investment, the failure of the Agency to discuss the role of market power in the decision-making process, the failure to address reliance concerns and changed facts, and the lack of economic analysis in the Agency's decision-making process.

It is clear that the promotion of broadband investment is one of two equally prominent objectives of the Telecommunication Act of 1996.⁸³ According to the majority, the Open Internet Order is focused on one of these statutory objectives: the promotion of telecommunications investment and technologies.⁸⁴ The Agency provided a theory grounded in economics involving the determinants of broadband investment, to justify the new rules in the form of what is called the virtuous cycle.⁸⁵ It is the prediction of the Agency that the most effective way to stimulate the quantity of broadband investment is to identify factors that increase the demand for broadband investment and, thus, it developed a broadband policy intended to increase the demand for broadband.⁸⁶ The policy created rules (anti-blocking, anti-throttling, anti-paid-prioritization) to facilitate access to broadband consumers by edge providers who create and provide the content and applications that broadband consumers desire.⁸⁷ In the view of the Agency, some regulation is necessary to preserve the virtuous cycle.⁸⁸ On the other hand, the dissent focused on how the new regulation could

⁸³ The Act is a significant amendment to the Communications Act of 1934. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) (“An Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”); *see also* 47 U.S.C. § 151 *et seq.* (2012) (“An Act [t]o provide for the regulation of interstate and foreign communication by wire or radio, and for other purposes.”).

⁸⁴ United States Telecom Ass’n, 825 F.3d at 694.

⁸⁵ The theory is based on a supply and demand model for broadband investment. *See id.* at 694, 707 citing *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (explaining that under the Commission’s “virtuous circle” theory, “Internet openness spurs investment and development by edge providers, which leads to increased end-user demand for broadband access, which leads to increased investment in broadband network infrastructure and technologies, which in turns leads to further innovation and development by edge providers.”).

⁸⁶ The non-exhaustive list of factors provided by the Commission to guide the determination of what constitutes unreasonable interference with, or disadvantaging of includes: “end-user or edge-provider access: end-user control; competitive effects; consumer protection; effect on innovation, investment, or broadband deployment; free expression; application agnosticism; and standard practices.” United States Telecom Ass’n, 825 F.3d at 736; *see* *Protecting and Promoting the Open Internet*, *supra* note 16, at 5661-64 ¶¶ 138-145.

⁸⁷ United States Telecom Ass’n, 825 F.3d at 707.

⁸⁸ *See id.* at 733.

directly dampen broadband providers' incentive to invest in broadband infrastructure.⁸⁹ In economic terms, regulation could decrease the supply of broadband (attributable to supply-side factors such as the costs of regulatory compliance and the uncertainty created by vague rules) which, if considered in isolation, would work against achieving the statute's objective to increase the quantity of broadband investment.⁹⁰ The Agency countered this concern by predicting that the positive effects on the demand for broadband investment will outweigh the negative effects on the supply of broadband from the new rules, so that, on balance, the effect on broadband investment will be positive.⁹¹ The majority, drawing on case precedent, deferred to the Agency's expertise with respect to its predictive judgments whereas the dissent seemed to engage in second guessing.⁹² The majority's position is more consistent with the second lesson of *Fox* that calls for deference when an agency provides an adequate rationale for how the new rules will accomplish a legitimate objective of the statute. The majority may not have given the Agency's analysis a "hard look" but the look that it did provide is more consistent with Congress's intent as expressed in the APA.⁹³

The dissent is concerned with the failure of the Agency and the majority to account for the role of market power in the explanation of the new rules.⁹⁴ The basic argument of the dissent is that Title II regulation was originally designed for and its subsequent use is dependent on a provider possessing market power,

⁸⁹ See *id.* at 754-56 (Williams, J., dissenting).

⁹⁰ *Id.* at 771, 776 (Williams, J., dissenting). The critics' prediction of a negative effect on the equilibrium quantity of broadband investment is based on a partial equilibrium analysis that ignores the stimulating effects on the demand for broadband from the new rules. See also Emma N. Cano, *Saving the Internet: Why Regulating Broadband Providers Can Keep the Internet Open*, 2016 BYU L. REV. 711, 728 (2016).

⁹¹ United States Telecom Ass'n, 825 F.3d at 707. The majority's prediction, relying on the Agency's economic analysis, allows for the simultaneous influence of multiple factors (factors on both the demand-side and supply-side of the market) on the equilibrium quantity of broadband investment. See Protecting and Promoting the Open Internet, *supra* note 16, at 5791 ¶ 410.

⁹² See United States Telecom Ass'n, 825 F.3d at 707, 734, 744-48. It could be that the dissent will be vindicated in the future but the majority did not wish to second guess the Agency's predictions, as called for in the *Fox* decision, to find the new rules arbitrary and capricious.

⁹³ See *id.* at 727; 5 U.S.C. § 553(c) (2012). An economist, critical of the Open Internet Order, calls for, in line with a textbook hard look requirement, more evidence on the likely investment effects of a reclassification scheme. See Hal Singer, *Court Lets FCC Ignore Economics In Net Neutrality Ruling; Congress Must Ensure That It Can't Ever Again*, FORBES (June 15, 2016), <http://www.forbes.com/sites/halsinger/2016/06/15/in-open-internet-ruling-the-d-c-circuit-defers-to-an-economics-free-agency/>.

⁹⁴ See generally United States Telecom Ass'n, 825 F.3d at 770-75 (Williams, J., dissenting) (stating that there is no proffered evidence that consumers have market power).

that is, the ability to sustain an increase in price above a competitive level. The dissent provides preliminary evidence that broadband service providers do not possess market power.⁹⁵ In addition, the dissent faults the Agency and the majority for failing to measure the substitutability of wireline and wireless broadband.⁹⁶ In short, to justify the reclassification decision, the dissent argues that the Agency needed to make a finding of market power by broadband providers and that, if the Agency had bothered to conduct such an analysis, there is sufficient evidence of a robustly competitive access market.⁹⁷ The majority counters that if a service satisfies the requirements to be classified as a telecommunications service, which they conclude broadband service in fact does satisfy, there is no requirement in the definition for a finding of market power.⁹⁸ Moreover, in prior decisions, a finding of market power provided supplemental support (and not necessary support) for a recommendation to impose Title II regulation.⁹⁹ The dissent's criticism can be conceptualized as a failure of the Agency to consider a relevant factor in the analysis. Such a failure can be a reason for a finding that the administrative action is arbitrary and capricious. However, the Agency and the majority did not believe that examining market power was necessary to understand how a broadband service provider acts as a bottleneck to a broadband customer and the bottleneck position is what can lead to impediments to unfettered access for end users to Internet content and applications.¹⁰⁰

The third lesson of *Fox* requires an Agency to account for how the new policy may contradict prior factual findings or engender reliance interests.¹⁰¹ The dissent argues that the Agency failed to explain adequately why its prior factual findings are no longer binding and that the Agency ignored the reliance interests of broadband providers created by its prior classification.¹⁰² The dissent and majority disagree over the magnitude of the impact of the prior information services classification on the incentive for broadband providers to in-

⁹⁵ *Id.*

⁹⁶ *Id.* at 750.

⁹⁷ *Id.* at 744.

⁹⁸ *Id.* at 708.

⁹⁹ *Id.* at 749.

¹⁰⁰ See *Verizon v. FCC*, 740 F. 3d 623, 647-50 (D.C. Cir. 2014) (discussing the difference between a finding of market power in broadband markets and the Agency's theory of the gatekeeper relationship between a broadband provider and a broadband customer).

¹⁰¹ United States Telecom Ass'n, 825 F. 3d at 745.

¹⁰² *Id.* Both of these concerns are echoed by other critics of the Open Internet Order. See generally *In re Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Petition for Reconsideration of NCTA – The Internet & Television Association (2017).

vest in the development of broadband infrastructure. The majority explains that it is the position of the Agency that two other economic factors are considerably more significant drivers of broadband investment, the increased demand for broadband and increased competition to provide it.¹⁰³ The regulatory status of broadband has an indirect and much smaller effect, as do many other factors, on investment.¹⁰⁴ The dissent mischaracterizes the Agency's position by countering that it is obviously true that many factors influence broadband investment without recognizing that the majority emphasized the major contributions of two specific economic factors, neither of which is the regulatory status of broadband service.¹⁰⁵

In addition, the majority and dissent disagree on the question whether a rational business should base a major component of its Internet business plan on a regulatory agency's interpretation of an ambiguous term.¹⁰⁶ The dissent describes a regulatory scenario in which the information services classification reflects a "longheld" commitment by the Agency to the information service classification decision, one on which it could rationally rely on to make significant investment decisions.¹⁰⁷ The majority describes a different regulatory history, one in which the Agency had changed its policy with respect to companies that integrated transmission and information services in the 2002 Cable Order and was engaged in a continuous reexamination of the benefits and costs of a different policy toward integrated broadband providers.¹⁰⁸ In sum, the majority has the stronger arguments if regulatory status is not a significant driver of broadband investment and policy uncertainty resulting from the agency's interpretation of an ambiguous statutory term mitigates reliance interests caused by an initial agency interpretation.

The Agency argues that it has observed changes in factual circumstances as broadband technology evolved since its initial interpretation.¹⁰⁹ After reviewing

¹⁰³ United States Telecom Ass'n, 825 F. 3d at 710.

¹⁰⁴ *Id.* at 709.

¹⁰⁵ *Id.* at 710.

¹⁰⁶ *Id.* at 731; *see generally* Nat'l Cable & Telecom Ass'n. v. Brand X Internet Serv., 545 U.S. 967, 981 (2005) (finding that an agency's interpretation of an ambiguous term should be subject to continuing reevaluation by the agency and subject to change if circumstances so indicate. "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations.").

¹⁰⁷ United States Telecom Ass'n, 825 F. 3d at 747.

¹⁰⁸ *Id.* at 710.

¹⁰⁹ Protecting and Promoting the Open Internet, *supra* note 16, at 5744 ¶330 (The three factual changes are "(1) consumer conduct, which shows that subscribers rely heavily on third-party services . . . (2) broadband providers' marketing and pricing strategies, which emphasize speed and reliability of transmission . . . and (3) the technical characteristics of

the evidence of factual changes, the majority concludes that the Agency “cited ample record evidence supporting its current view that consumers perceive a standalone offering of transmission.”¹¹⁰ The dissent is not persuaded that there have been factual changes in delivery and consumers’ perception of broadband services.¹¹¹ Once again, there is a fundamental disagreement between the majority and the dissent over how deferential the court should be when it reviews the Agency’s factual conclusions.¹¹² In general, the majority favors the Agency’s views of the facts when it concludes that they are based on expertise and are within the discretion of Agency personnel.¹¹³ The dissent conducts a more intense scrutiny of the Agency’s factual decisions and imposes a more in-depth review of the Agency’s reasoning process.¹¹⁴ The approach taken by the majority is one that is more consistent with the general lessons of *Fox*.¹¹⁵

The dissent and other critics are highly critical of the rigor of the economic analysis contained in the Open Internet Order.¹¹⁶ One reason for this view is the failure of the Agency to give fuller consideration to alternatives to the chosen course of action. This criticism is directed at the Agency’s failure to rely only on Section 706 authority to develop new rules and the failure to consider options to the specific rule that imposed a ban on paid prioritization.¹¹⁷ The dissent describes this as a failure to engage in rigorous economic analysis.¹¹⁸ The majority was not persuaded by the dissent’s arguments and did not believe (correctly) that its role should be to act as economics referees when it engages in judicial review of an administrative action.¹¹⁹ The majority believes that the

broadband Internet access service.”)

¹¹⁰ United States Telecom Ass’n, 825 F. 3d at 680.

¹¹¹ *Id.* at 744 (“To the extent that the Commission relied on changed factual circumstances, its assertions of change are weak at best and linked to the Commission’s change of policy by only the barest of threads.”).

¹¹² *Id.* (Williams, J. dissenting).

¹¹³ *Id.* at 706.

¹¹⁴ *Id.* at 744-45 (Williams, J. dissenting).

¹¹⁵ FCC v. Fox Television Stations, Inc., 556 U.S. 502, 517-21 (2009).

¹¹⁶ See Gus Hurwitz, *Economic Analysis in an Age of Deference*, AEI (July 19, 2016), <https://www.aei.org/publication/economic-analysis-in-an-age-of-deference/>.

¹¹⁷ United States Telecom Ass’n, 825 F. 3d at 769-70 (Williams, J. dissenting) (providing extensive criticisms of the paid prioritization rule and presents as supporting evidence the views of several economists. This specific rule is the one that the dissent and its allies would most like to eliminate or significantly weaken.)

¹¹⁸ *Id.* at 760-61.

¹¹⁹ *Id.* at 697 (“Nor do we inquire whether “some or many economists would disapprove of the [agency’s] approach” because “we do not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressional delegated authority.”). The dissent’s

Agency articulates an explanation for how the rules are rationally related to the statutory purpose.¹²⁰

The critics argue that a rigorous economic analysis would require the Agency to “...do a fuller accounting of the costs and benefits of, and the alternatives to, its chosen course of action. In other words, the agency needs not just explain why its conduct is proper, but also why reasonable alternatives aren’t better.”¹²¹ This is inconsistent with the first lesson of *Fox* that concluded that, consistent with congressional instructions contained in the APA, there is no need for a comparative policy evaluation. The standard only demands that there be good reasons for the new policy and that the policy, by itself, is a reasonable choice, meaning that it is consistent with the agency’s statutory authority.¹²²

The dissent is applying a scope of review, in both the breadth and depth dimensions, that is more expansive and intense than that called for in *Fox*.¹²³ A good description of the underlying complaint captured in the dissent’s opinion is provided by a proponent of the Open Internet Order, Public Knowledge Senior Vice President Harold Feld: “[the] real complaint wasn’t that the commission failed to conduct an economic analysis, but that the commission’s analysis differed from the one that they would have done, that it differed from the one that would have yielded their preferred policy outcome.”¹²⁴ Economic analysis should be a part of the Agency’s justification of the chosen policy but it does not necessarily require the level of detail the dissent demands.¹²⁵

entire opinion provides a plethora of examples of criticisms that an economics referee would make such as why did the Agency fail to consider the implication of another theoretical model, the two-sided model, why did the Agency fail to include empirical studies of broadband substitution between wireline and wireless, and why did the Agency fail to conduct additional empirical studies on the effect of regulatory status on broadband investment. These are interesting criticisms but the Agency was not submitting its broadband policy for publication in an economics journal.)

¹²⁰ *Id.* at 710, 714.

¹²¹ See Hurwitz, *supra* note 116.

¹²² *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 503 (2009).

¹²³ *United States Telecom Ass’n*, 825 F. 3d at 744-45 (Williams, J. dissenting); see also *Fox Television Stations, Inc.*, 556 U.S. at (2009).

¹²⁴ Hurwitz, *supra* note 116.

¹²⁵ *United States Telecom Ass’n*, 825 F. 3d at 744-45 (Williams, J. dissenting). As an academic economist, I am well aware of the benefits and limitations of the economic models that the critics rely on to make their case. A balanced approach to judicial review should account for economics but only in conjunction with the requirements that Congress details in congressional statutes. To some extent, the critics want economic analysis to have more weight in the agency decision-making process but that position is not consistent with the holdings of *Fox*. Instead, the critics should try to amend through legislative action the APA to achieve their desire for a less deferential approach to judicial review of an agency’s policy choice.

PART IV. CONCLUSION.

Two Court cases focused on in this article, *King* and *Fox*, provide diametrically different models for how a court conducts judicial review of administrative action.¹²⁶ In *King*, no deference is given to an agency's interpretation of an ambiguous statute in defiance of the *Chevron* doctrine that calls for deference in such a case.¹²⁷ In *Fox*, an agency's change in policy is considered reasonable as long as it provides merely a rational explanation for how the new policy achieves legitimate statutory objectives. In short, the agency only needs to make an affirmative case for its chosen policy.¹²⁸

The Court seems to be on a path that increasingly questions the basic *Chevron* assumption that statutory ambiguity is a grant of interpretive power to an administrative agency. The Court's recent action in *King* reflects a preference to retain interpretive power within the judiciary when it decides, based on its own perception of the importance of the issue and regardless of the procedures the agency used to arrive at its interpretation, to reserve resolution of an ambiguity for itself.¹²⁹ Among the conservative justices on the Court, limiting administrative action that qualify for the *Chevron* framework appears to be part of a judicial strategy to provide more checks on the exercise of executive power.¹³⁰ The Open Internet Order is an opportunity for the Court to provide more specific guidelines for when such a significant transfer of interpretive power is in order.¹³¹ The proper classification of broadband service arguably could be described as a question with large economic and political ramifications. If the Court decides to reserve for itself the interpretive question regarding the proper classification of broadband service, then there will be no need to apply the *Fox* standard to the Agency's reclassification decision.¹³²

¹²⁶ *King v. Burwell*, 135 S. Ct. 2480, 2483, 2484 (2015); *see also* *Fox Television Stations, Inc.*, 560 U.S. at 502.

¹²⁷ *King*, 135 S. Ct. at 2489.

¹²⁸ *Fox Television Stations, Inc.*, 560 U.S. at 515.

¹²⁹ *King*, 135 S. Ct. at 2483-84.

¹³⁰ Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 488-89 (1989) (If Congress chooses to delegate regulatory authority to agencies, part of the price of delegation may be that the court, not the agency, must hold the power to say what the statute means. The transfer back of interpretive power to the courts is a counterbalancing response to the continuing expansion of the administrative state).

¹³¹ Protecting and Promoting the Open Internet, *supra* note 16, at 5732 ¶ 298 (For instance, what are the factual assumptions that cause an interpretive question to be one that is classified as a "major question." What are the threshold conditions for when an interpretive question passes from an interstitial one to a major one?).

¹³² *Fox Television Stations, Inc.*, 560 U.S. at 514-15.

If, however, the Court decides that the question of statutory ambiguity of broadband service is appropriate for resolution by the Agency, then the proper application of the *Fox* standard should be highly deferential in the evaluation of the reasonableness of the agency's chosen policy.¹³³ This limited judicial role is consistent with the view of an agency as a policymaker with ample discretion to decide interstitial questions, a role where its expertise and political accountability rise to the fore. If the Open Internet Order goes to the Court and the Agency's statutory interpretation is granted *Chevron* deference, then it is highly likely that the reclassification of broadband service will be found to be reasonable if the Court follows the model it created in *Fox*.¹³⁴

¹³³ *Id.* at 515-16; see also Lyons, *supra* note 40, at 2 (The post by Professor Lyons, *supra* note 63, agrees that the two contrasting opinions in *US Telecomm* reflect this assessment that ("...the two opinions may evince a changing of the guard at the D.C. Circuit. Historically, the court has been unafraid to perform the type of close, critical review of the record that Judge Williams undertook...The majority opinion, co-authored by Democratic appointees over the dissent of a senior Reagan nominee, suggests that the court may finally be losing its appetite for more intrusive judicial review."). The majority seems to be following the instructions of the *Fox* decision.

¹³⁴ *Fox Television Stations, Inc.*, 560 U.S. at 514-16.