

**ABANDON JUDICIAL “NEUTRALITY”: WHY CHEVRON
DEFERENCE STIFLES TECHNOLOGICAL INNOVATION**

James J. Bernstein*

Cite as: James Bernstein, *Abandon Judicial “Neutrality”: Why Chevron Deference Stifles Technological Innovation*, 27 RICH. J.L. & TECH., no. 1, 2020.

* James J. Bernstein is a graduate of Columbia College where he served as the managing editor of the *Journal of Global Health* and is currently an operations analyst at Chronograph, a startup in New York. Mr. Bernstein has extensive research and publishing experience, contributing to articles in public health, healthcare policy, and residency selection.

ABSTRACT

In 1984, the Supreme Court decided *Chevron U.S.A v. Natural Resources Defense Council*, which determined that courts should defer to a regulatory agency's judgement when faced with interpreting an ambiguous statute. Subsequently, the Court reaffirmed this finding in *Brand X* in the early 2000s. The decision in this latter case has broad implications for the issue of net neutrality - specifically, whether the FCC can dictate policies which inherently favor those who support a neutral or competitive internet. The precedent in these cases has been followed by, in particular, the D.C. Court of Appeals in a number of more recent challenges to the FCC's authority to regulate Internet Service Providers. History notwithstanding, in this essay, I argue that the Supreme Court should reconsider *Chevron's* precedent if it is given another opportunity to do so. Specifically, this essay argues that overturning *Chevron* will allow for legislative clarity, emboldening both the judiciary and stakeholders alike. Additionally, a binding view of the law will allow for new innovations to take place: at present, internet service providers and entrepreneurs (some of those who benefit from either of the two readings of the law respectively) must anticipate frequent changes. Accordingly, the potential for a new reading limits investment and technological progress. In order to achieve this end, this essay not only calls on courts to no longer defer to agencies but also on interest groups themselves to no longer enable the continuation of *Chevron*.

I. INTRODUCTION

[1] In 1984, the Supreme Court decided perhaps the mostly widely known—and most frequently cited—case in administrative law: *Chevron U.S.A v. Natural Resources Defense Council Inc. (Chevron)*.¹ The opinion outlined how courts are to approach the legislative interpretations by regulatory agencies, namely whether an agency’s interpretation is “reasonable” so long as Congress has not directly spoken on a given issue.² The eponymous “*Chevron* deference” standard thus dictates that courts are to ultimately rely on an agency’s judgement in their interpretation of a particular statute.³

[2] This case was subsequently reaffirmed in *National Cable and Telecommunications Association v. Brand X Internet Services (Brand X)*.⁴ *Brand X* determined that the Federal Communications Commission (FCC) had the authority to interpret the ambiguous portions of the United States’ telecommunications laws. Specifically, the Supreme Court ruled that the FCC could determine what constituted a “telecommunications” or “information” service, each carrying with them different regulatory burdens.⁵ The implications for this case are particularly relevant to the debate surrounding net neutrality, whether internet service providers (ISPs) should remain neutral or be allowed to discriminate against certain content.

¹ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see *Chevron U.S.A. v. Natural Res. Def. Council*, THE U.S. DEP’T OF JUST. (May 14, 2015), <https://www.justice.gov/enrd/chevron-usa-v-natural-res-def-council> [<https://perma.cc/PH4F-K3V7>].

² See *Chevron*, 467 U.S. at 842–45, 866.

³ See Jonathan Kim, *Chevron Deference*, LEGAL INFO. INST. (Dec. 2017), https://www.law.cornell.edu/wex/chevron_deference [<https://perma.cc/VNN8-KXEP>].

⁴ *Nat’l Cable and Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

⁵ See *id.* at 986–87, 997.

[3] As a consequence of these cases, regulatory agencies, rather than the courts themselves, have been erroneously charged with interpreting what the law means.⁶ This fallacy derives not from the oft-discussed Constitutionality or usurpation of judicial authority.⁷ Instead, an apathetic judiciary—one that has reaffirmed *Chevron*'s precedent in *Brand X* and may be poised to do so in similar cases—hurts consumers and proponents of either reading of the telecommunications law. Simply, failing to offer any clarity and confirmation as to the meaning of the statute stifles forms of innovation. Now, this innovation does not refer exclusively to that which is found when the Internet is at its most competitive (say, internet service providers developing new infrastructure to increase bandwidth). Rather, even with a policy of net neutrality, there are other kinds of business innovations, like technological startups, which are incentivized to grow when they do not fear being muscled out by an established player. In light of this—and though it may be appealing to maintain pieces of the precedent—courts should reconsider *Chevron* and *Brand X* in their entirety.

[4] Net neutrality is a particularly salient issue for the purposes of this conversation. In the last twenty years, the FCC has changed how it classifies internet service providers three times.⁸ In short, the FCC's policies on this issue have been highly volatile and thus call attention to the broad discretion that regulatory agencies are afforded. While these conflicting and dynamic policies are consistent with the judgement in both cases, *Chevron* has placed budding developers and businesses in a legislative limbo. Therefore, both parties, under different circumstances, are limited to pursue the full

⁶ See Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1189, 1205 (2016).

⁷ See *id.* at 1227.

⁸ See, e.g., *Mozilla Corp. v. FCC*, 940 F.3d 1, 84 (D.C. Cir. 2019) (explaining the FCC's return to the functional equivalence test which it had used from 1994 until 2015).

potential of their course for fear of a new presidential administration's interpretation of the statute.⁹

However, proponents of either type of interpretation do not want courts to adopt a reading of the law *de novo*; to the contrary, both of the most prominent camps, supporters of neutrality and those in favor of competition, rely on the FCC's autonomy to determine what the laws say.¹⁰ This ought to be reconsidered as a strategy. Allowing the courts to determine what the law means will have a freeing quality. Within the scope defined by the courts, either camp may pursue their respective ends. The present strategy, by contrast, paradoxically results in all sides losing.

[5] To this latter point, the FCC's interpretive autonomy should leave courts looking at *Chevron* and *Brand X* skeptically if not hostilely too. After all, it is the judiciary rather than actors within the executive branch which determine what the law says.¹¹ Strangely, then, *Chevron* deference is a stance by courts which takes away their central, if not only, function.¹² With the present predicament of net neutrality, all are hurt by courts' "abdication"¹³ of their role. Taking assertive action to determine what the law says with respect to the telecommunications space in the United States

⁹ See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that the BIA revised a judicial decision with retroactive effect); Ilya Somin, *Gorsuch is Right About Chevron Deference*, WASH. POST (Mar. 25, 2017, 10:45 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/25/gorsuch-is-right-about-chevron-deference/> [<https://perma.cc/R7RS-9LAJ>].

¹⁰ See Stan Adams, *The D.C. Circuit's Opinion in Mozilla v. FCC: What Does it Mean?*, CTR. FOR DEMOCRACY AND TECH. (Oct. 24, 2019), <https://cdt.org/insights/the-d-c-circuits-opinion-in-mozilla-v-fcc-what-does-it-mean/> [<https://perma.cc/BUX7-2N6Z>].

¹¹ See *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

¹² See *id.* at 1151 (stating that because of *Chevron's* extended power in *Brand X*, the court's authority to declare law and overrule precedent is assumed by executive agencies).

¹³ See *id.* at 1152 (Gorsuch, J., concurring).

will not only provide some clarity to the issue but will embolden the judicial branch as it does those on either side of a policy debate.

[5] In order to reach this conclusion, Parts II and III will first outline the legal history framing the debate about net neutrality chronologically. Thereafter, Part IV will outline the FCC's policy changes - and the subsequent legal challenges in the Appeals Courts. Parts V will discuss why these various interpretations hurt consumers of all kinds. The constant switches cause individuals to account for the costs of a reversion which can sometimes be too much to bear for a new company. Likewise, Part VI will highlight that *Chevron* has wrongly been protected by stakeholders. This thorough outline of the history and legal challenges to net neutrality will highlight why the Supreme Court should reconsider *Chevron* if given the opportunity (Part VII).

II. ORIGINS: *CHEVRON V. NATURAL RESOURCE DEFENSE COUNCIL*

[6] The basis for granting regulatory agencies this interpretative discretion stems from the Supreme Court's decision in *Chevron v. Natural Resources Defense Council*.¹⁴ Prior to *Chevron*, Congress charged the Environmental Protection Agency (EPA) with ensuring certain requirements of the Clean Air Act Amendments of 1977, such as "nonattainment."¹⁵ In particular, this law established a permit program for "new or modified major stationary sources" of air pollution.¹⁶ As to what a "source" was in this particular case was left to the discretion of the EPA.¹⁷ During the nascent years of these amendments under President Carter, the

¹⁴ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 862–66 (1984).

¹⁵ See *id.* at 839–40.

¹⁶ *Id.* at 840.

¹⁷ See *id.* at 863.

EPA adopted a “stringent” definition of a source.¹⁸ This definition did not carry on in the years following Carter’s exit from the White House though. In 1981, under President Reagan, the EPA adopted a new, broader definition of a “source.” With this, States could now “treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single ‘bubble.’”¹⁹

[7] Ultimately, in a unanimous decision, the Supreme Court determined that “[w]hen 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.”²⁰ The Court continued, “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.”²¹ Simply, the Court found that when assessing a statute that Congress has charged a particular agency with fulfilling courts are to defer to the judgement of the agency so long as their interpretation is “reasonable.” Or, what Justice Stevens’s language of the opinion describes as a “permissible construction.”²²

[7] Yet, this standard—colloquially, known as “*Chevron* deference”—does not mean the regulatory agency has the final say. Indeed, to quote Justice Stevens again, “if Congress has directly spoken to the precise question . . . that is the end of the matter.”²³ In short, *Chevron* eases the

¹⁸ *See id.* at 850, n. 24.

¹⁹ *Id.* at 840.

²⁰ *Id.* at 842.

²¹ *Id.* at 843.

²² *Id.* at 843–44.

²³ *See id.* at 842.

burden of both the judiciary and the legislature as agencies are given immense leeway to interpret already-passed statutes.²⁴ This is appealing not to regulatory agencies but rather to the judiciary itself: instead of deciding the meaning of statutes de novo—which inherently requires a firmer understanding of the complexities of various laws—courts can allow experts to guide their thinking.²⁵

III. SYMPTOMS OF *CHEVRON*: *BRAND X*

[8] *Chevron*, however, does not stand alone in enabling a regulatory agency's interpretation of statutes.²⁶ In *National Cable and Telecommunications Association v. Brand X Internet Services (Brand X)*, the Supreme Court reaffirmed *Chevron* added a spin that particularly relates to the issue of net neutrality.²⁷

[9] To start, it is necessary to describe the legislative history that occurred in the intervening years between *Chevron* and *Brand X*. In the late 1990s, Congress passed the Telecommunications Act of 1996, revising to that point the only major piece of telecommunications legislation, the Communications Act of 1934 (Communications Act).²⁸ In short, the two laws give the FCC regulatory authority.²⁹ Under Title I of the

²⁴ See DANIEL T. SHEDD & TODD GARVEY, CONG. RESEARCH SERV., R43203, *CHEVRON* DEFERENCE: COURT TREATMENT OF AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTES 6 (2013).

²⁵ See *id.*

²⁶ See generally *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* 545 U.S. 967, 980–81 (2005) (reaffirming *Chevron* and concluding that Congress has delegated authority to agencies).

²⁷ See *id.* at 1001–02.

²⁸ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

²⁹ See *id.*; Communications Act of 1934, 47 U.S.C. §§ 151–646.

Communications Act, services found here are known as “information services.”³⁰ Conversely, under Title II, services are known as “telecommunications services.”³¹ In addition, though, when services are categorized under this latter Title, services are held to common carrier status.³² According to U.S. Code § 202, “it [is] unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular [person or group of people].”³³ Put in plain terms, if held to common carrier standards, an entity is not able to “discriminate” in various ways for particular services.³⁴ For the purposes of this essay’s discussion, if held to a common carrier status, an ISP could not “give its proprietary video streaming service priority while making access to Netflix or Hulu prohibitively slow.”³⁵

³⁰ See, e.g., Communications Act of 1934, 47 U.S.C. § 159(a)(1) (“The Commission, in accordance with this section, shall assess and collect regulatory fees to recover the costs of the following regulatory activities of the Commission: enforcement activities, policy and rulemaking activities, user information services, and international activities.”).

³¹ See, e.g., *id.* § 220 (stating uniform systems prescribed by the Commission shall require techniques for allocating costs to and among “telecommunications services”).

³² See *id.* § 202(b); see also *Mozilla Corp. v. FCC*, 940 F.3d 1, 41 (D.C. Cir. 2019) (noting that the Commission does not find it odd for multi-service or mixed-classification carriers to be regulated as “common carriers.”).

³³ Communications Act of 1934, 47 U.S.C. § 202(a).

³⁴ See Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMMS. & HIGH TECH. L. 141, 150 (2003).

³⁵ Georgia Travers, *Net Neutrality: What’s at Stake and Why It Matters*, YALE L. SCH.: MEDIA FREEDOM & INFO. ACCESS CLINIC (Jan. 11, 2018), <https://law.yale.edu/mfia/case-disclosed/net-neutrality-whats-stake-and-why-it-matters> [<https://perma.cc/ZY7T-HAJS>].

[10] 2002 saw the beginning of status changes for internet service providers generally under these two titles.³⁶ In that year, the FCC exempted cable and telephone companies from the common carrier obligations, labeling them as “information services.”³⁷ Angered by the categorization, petitioners—with Brand X Internet Services leading the charge—stated that the very phrase “telecommunication” referred to services which provide communication over distances, not unlike the internet’s predecessors, the telegraph and telephone, did.³⁸ Thus, the FCC should not have made this change.

[11] The ultimate function or category, however, did not matter per se to the Supreme Court. Writing for the majority, Justice Thomas stated that the Ninth Circuit Court of Appeals, which had sided with Brand X, should have applied the *Chevron* standard as the statute is vague as to what falls into either category.³⁹ Simply, the court determined that the FCC’s reading that cable modem services are not “telecommunications services” is a “reasonable” reading of an “ambiguous” statute, applying the language of *Chevron*.⁴⁰ Justice Thomas went on to write that, “if a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction . . . even if the agency’s reading differs from what the court believes is the best statutory interpretation.”⁴¹ *Brand X* thus achieves two different ends. First, it

³⁶ See Press Release, FCC, FCC Classifies Cable Modem Serv. as “Info. Serv.” (Mar. 14, 2002).

³⁷ See *id.*

³⁸ See Nat’l Cable & Telecomm.’s Ass’n v. Brand X Internet Serv.’s v. Brand X, 545 U.S. 967, at 978 (2005).

³⁹ See *id.* at 980.

⁴⁰ See *id.* at 996–97.

⁴¹ See *id.* at 980.

reaffirms the fact that courts are to defer to an agency's judgement when reading a given statute.⁴² Second, it calls upon courts again to reign in their interpretative tendencies, instead focusing on whether a statute can be read unambiguously.⁴³ If not, it is best, again, to rely on the agency that Congress has delegated authority to.

IV. PRACTICAL IMPLICATIONS OF *BRAND X*: THE ISSUE OF NET NEUTRALITY AND CHALLENGES TO THE FCC'S AUTHORITY

[12] The decision of *Brand X* does not find itself buried and overlooked in the annals of Supreme Court jurisprudence. To the contrary, the finding of this case relates to the practical issue of net neutrality.⁴⁴ In this way, *Brand X* offers a clear application of *Chevron*.⁴⁵ As opposed to dealing with the abstraction of a regulatory agency, *Brand X* allows us to see how its predecessor's precedent is applied in a specific context repeatedly.

[13] First, it is necessary to define our terms. Professor Tim Wu principally defines net neutrality as "to forbid broadband operators, absent a showing of harm, from restricting what users do with their Internet connection, while giving the operator general freedom to manage bandwidth consumption and other matters of local concern."⁴⁶ In plain terms, net neutrality ensures that internet service providers grant equal access to the content on the internet. In other words, the speed at which one

⁴² *See id.*

⁴³ Wu, *supra* note 34, at 167.

⁴⁴ *See* Christopher Yoo, *Beyond Network Neutrality*, 19 HARV. J. L. & TECH. 1, 3 (2005) (stating that net neutrality being a uniform guideline as to how internet service providers must deal with their users is contrasted by the current market where providers have more leeway in their dealings).

⁴⁵ Wu, *supra* note 34, at 150.

⁴⁶ *Id.* at 167–68.

accesses one website is effectively identical to the speed on which one surfs on another. Net neutrality as a policy pursuit is contrasted with what will hereafter be referred to as a “competitive net.” Competitive net is the belief that free-market enterprise should govern how internet service providers make a host of decisions.⁴⁷

[14] *Brand X* dealt specifically with the FCC’s ability to view ISPs under a particular title of the telecommunications laws, and thus whether ISPs, absolved of common carrier burdens, could discriminate as Professor Tim Wu cautioned against.⁴⁸ However, just as with Carter’s EPA directives, the very view *Brand X* upheld would not hold for long at the FCC. In 2010, the FCC of the Obama administration adopted the rules known as *Preserving the Open Internet* (the “Open Internet Order”) in 2010.⁴⁹ The FCC stated that the decision to adopt the Open Internet Order was “to preserve the Internet as ‘an open platform for innovation. . .and free expression,’ and to encourage the ‘reasonable and timely’ deployment of Internet access to all Americans.”⁵⁰ In essence, this set of rules established internet neutrality.

[15] However, the D.C. Court of Appeals largely vacated this order in 2014 with its decision in *Verizon v. Federal Communications Commission*.⁵¹ Writing for the panel of judges, Judge David Tatel stated that, though the FCC has the authority “to pass rules to encourage reasonable and timely ‘deployment of broadband infrastructure,’”

⁴⁷ See Yoo, *supra* note 44 (stating that net neutrality being a uniform guideline as to how internet service providers must deal with their users is contrasted by the current market where providers have more leeway in their dealings).

⁴⁸ See Wu, *supra* note 34.

⁴⁹ See 47 C.F.R. §§ 0.408, 8.1(a), 8.1(b), 8.1(c) (2020).

⁵⁰ See *Recent Cases: Verizon v. FCC*, 127 HARV. L. REV. 2565, 2566 (2014).

⁵¹ See *id.* at 2565.

ultimately the Open Internet Order could only be applied to common carriers.⁵²

[16] Internet service providers were not “common carriers” at the time of that hearing, based off of the 2002 FCC’s decision to classify internet service providers as “information services.”⁵³ Following this decision, the FCC changed course on a broader level. In 2015, the agency determined that internet service providers would instead be governed under Title II of the Communications Act which, as discussed, mandated that internet service providers are beholden to the common carrier rules, and, in effect must remain neutral.⁵⁴

[17] Not unlike the original attempts to bring about a new reading of the statute, this decision to classify internet service providers as “common carriers” was met with legal challenges. Petitioners in the *United States Telecommunications Association v. Federal Communications Commission (USTA v. FCC)* argued that—along with potentially violating their First Amendment rights and stating that this change was “arbitrary and capricious”—“the Commission lacks statutory authority to reclassify broadband as a telecommunications service.”⁵⁵ This was a direct challenge to *Chevron*. However, the D.C. Circuit Court of Appeals denied the petition for review citing both *Chevron* and *Brand X*.⁵⁶ Indeed, in response to the petitioners' primary claim, the court stated that “the [Supreme Court’s] instruction in *Brand X* [was] that the proper classification of broadband turns ‘on the factual particulars of how Internet technology works and how

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See generally* Protecting and Promoting the Open Internet, 30 FCCR. 5601, 5603 (2015).

⁵⁵ *U.S. Telecomm. Ass’n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016).

⁵⁶ *See id.*

it is provided,” which, in the end, the Supreme Court said (and the D.C. Circuit Court of Appeals reaffirmed here) “*Chevron* leaves to the Commission.”⁵⁷

[18] The ruling here stated that, upon following *Chevron* “step two,” determining whether the reading was “reasonable” or not, the FCC had the authority to make this switch.⁵⁸ This ruling stated that *Chevron* deference not only requires courts to err towards an agency’s interpretation, assuming the statute is ambiguous and the reading is reasonable, but to highlight that an agency’s interpretation is able to change.⁵⁹ In other words, a given agency, under particular leadership, can in good faith see the wording of a vague law differently, and courts should accept these changes accordingly. Interestingly, a number of telecommunications groups petitioned the Supreme Court on the basis that, under *Chevron*, regulatory agencies could not re-interpret a statute.⁶⁰ The court declined to hear this case.

[19] Part of the rationale, though, for choosing to leave the lower court ruling was that the rules had changed in the time since.⁶¹ Following the results of the 2016 election, the FCC reverted to its pre-Obama position with

⁵⁷ *Id.* at 702 (quoting Nat’l Cable Telecomm. Ass’n v. Brand X Internet Serv.’s, 545 U.S. 967, 991 (2005)).

⁵⁸ *See id.* at 702.

⁵⁹ *See id.* at 701 (“[T]he Commission could reach this conclusion in part by determining that certain information services fit within the telecommunications management exception.”).

⁶⁰ *See* Jon Brodtkin, *ISPs want Supreme Court to Kill Title II Net Neutrality Rules Now and Forever*, ARS TECHNICA (Sept. 29, 2017), <https://arstechnica.com/tech-policy/2017/09/isps-want-supreme-court-to-kill-title-ii-net-neutrality-rules-now-and-forever/> [<https://perma.cc/3JYC-NCG7>].

⁶¹ Amy Howe, *Divided Court Denies Review in “Net Neutrality” Cases*, SCOTUSBLOG (Nov. 5, 2018), <https://www.scotusblog.com/2018/11/divided-court-denies-review-in-net-neutrality-cases/> [<https://perma.cc/2LRS-FCAV>].

a simple majority vote. The new composition of the FCC adopted the “Restoring Internet Freedom Order” in 2017 which reclassified internet service providers under Title I and, as a result, subjected them to less regulatory scrutiny.⁶² The fundamental tenets of, and basis for, this new order, were to “return to the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth for almost two decades.”⁶³ The FCC continued on to say that it sought to “eliminate burdensome regulation that stifles innovation and deters investment.”⁶⁴

[20] Ultimately, the FCC believed that this “reclassification as an information service best comports with the text and structure of the [Communications Act], Commission precedent, and *our policy objectives*” (emphasis added).⁶⁵ Moreover, the FCC concluded “the best reading of the relevant definitional provisions of the Act supports classifying broadband Internet access service as an information service.”⁶⁶ While this new order would mention *Chevron* by name throughout, in these two instances, it is not particularly hard to uncover allusions to the precedent: the agency believed a better reading would help bring about its policy objectives.

[21] Unsurprisingly, the FCC’s decision to “read” the laws differently than it had in previous years brought about legal challenges. In the decision for this case *Mozilla Corporation v. Federal Communications Commission (Mozilla)*, the D.C. Court of Appeals sided with the regulatory agency, stating that the FCC had the authority to make this type of switch.⁶⁷ In a *per*

⁶² See *id.*; see also Restoring Internet Freedom, 33 FCCR 311, 312 (Dec. 14, 2017).

⁶³ See Restoring Internet Freedom, 33 FCCR 311, 312 (Dec. 14, 2017).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 10.

⁶⁷ See *Mozilla Corp. v. FCC*, No. 18-1051, 940 F.3d 1, at *13 (D.C. Cir. 2019).

curiam opinion, the court reasoned that “classifying broadband Internet access as an ‘information service’ based on the functionalities of [Domain Name Service] and caching is ‘a reasonable policy choice for the [FCC] to make’ [applying] *Chevron*’s precedent.”⁶⁸

[22] While other sections of the new order were reversed,⁶⁹ the principal thrust of the decision was that the FCC’s could “reasonably” interpret statutes.⁷⁰ In other words, the judgement to determine what constitutes a “telecommunications service” - or, conversely, what an “information service” is - is left in the hands of the regulatory agency that is charged with enforcing the particular laws.⁷¹ Thus, the D.C Court of Appeals followed the precedent of the Supreme Court and allowed the regulatory agency to determine how to interpret this law.

V. *CHEVRON*’S IMPACT:

[23] The decision, however, by the D.C. Court highlights a flaw and returns us to the beginning of this deferential debate. Proponents of net neutrality state that the policy is invaluable. For one, net neutrality allows small players on the internet to develop because they are granted equal access to the space.⁷² Similarly, net neutrality allows for an expanded

⁶⁸ *Id.* at 16.

⁶⁹ *See id.* at 13.

⁷⁰ *See id.* at 84.

⁷¹ *See* U.S. Telecomm. Ass’n v. FCC, 825 F.3d 674, 701 (D.C. Cir. 2016) (“[T]he Commission could reach this conclusion in part by determining that certain information services fit within the telecommunications management exception.”).

⁷² *See* Travers, *supra* note 35.

“marketplace of ideas,” allowing people to communicate various ideas without fear of silencing.⁷³

[24] For the former of these rationales, consider a neutral net as a game of music chairs. Per the structure of the game, the music will stop but those who ultimately claim seats may vary and the winners of the game rely on skill, be it guile or simple speed. No advantage is given to an individual player. Rather, the players themselves jockey against one another and the winner is determined through talent. The internet operates in a similar way under net neutrality. A site is given an equal chance to win from the outset as those with seats, to continue the analogy, do not get to keep them in perpetuity.⁷⁴ Net neutrality allows for the content of the site, what truly determines its worthiness to win, to jostle for access.⁷⁵

[25] However, the alternative policy—a competitive, free-market enterprise system—poses a threat to young internet-based companies and their ability to evolve without fear of being nudged out by longer-tenured actors. To return to the musical chairs analogy, imagine if the game proceeded as normal, with chairs slowly removed as the game continues on. However, in this new, non-neutral version, some players are allowed to pay in order to stay in their seat. As the game progresses, no matter how talented a given player may be, an already finite number of spaces will be limited if not entirely inaccessible. Practically speaking, when an entrepreneur embarks on a business venture now they do so accounting for the fact that those who currently occupy bandwidth on the internet would like to maintain it and incentivize ISPs accordingly.⁷⁶

⁷³ *See id.*

⁷⁴ *See* Lauren Culbertson, *Join the Fight for #NetNeutrality*, BLOG.TWITTER.COM (July 11, 2017), https://blog.twitter.com/en_us/topics/company/2017/Join-the-Fight-for-NetNeutrality.html [<https://perma.cc/J5CK-LX9H>].

⁷⁵ *See id.*

⁷⁶ *See* Travers, *supra* note 35.

[26] Firmly cemented companies like Twitter have entered the fray of the discussion to endorse net neutrality and raise alarms over the FCC's recent changes. In a blog post prior to the FCC's adoption of its most recent order, the company stated that the success of the Internet "has been built upon . . . open architecture, the ability of entrepreneurs to innovate without asking permission, and for such innovators to do so without fear of discrimination...[and because of these] principles . . . [a company does not] have to be a big shot to compete. Anyone with a great idea, a unique perspective to share, and a compelling vision can get in the game."⁷⁷ To this end, the company called attention to its own ability to grow in this digital petri dish saying that "it is entirely possible Twitter would not have come from a somewhat quirky experimental 140-character SMS service to where [it is] today, an international company with thousands of employees and a service that incorporates pictures, video, and live streaming and connects the world to every side of what's happening."⁷⁸ Thus, Twitter not only grew in its original form, it took on a wholly new shape due in significant part to the Internet's neutral environment. More broadly, Twitter speaks from its own experience to the type of innovation that net neutrality allows. Specifically, this innovation enables smaller or newer players to grow without fear of well-resourced competitors nudging them out of the market.⁷⁹

[27] However, opponents of net neutrality say that internet service providers themselves are not the correct piece of the puzzle to consider.⁸⁰

⁷⁷ Culbertson, *supra* note 74.

⁷⁸ *Id.*

⁷⁹ *See id.*; *see also* Travers, *supra* note 35 ("Another substantial negative of [the alternative to net neutrality] would be to radically disadvantage small websites and internet startups.").

⁸⁰ *See* Yoo *supra* note 47 (arguing that while telecommunications mergers amplify "concerns about gatekeeper control by network owners", "[t]he key inquiry is whether circumstances exist in which deviations from network neutrality would create benefits that would be foreclosed if network neutrality were imposed.").

Professor Christopher Yoo concedes that “making Internet applications and content universally accessible increases the value of the network to both end users and providers of applications and content.”⁸¹ Additionally, Professor Yoo writes that the FCC has recognized “the benefits from network neutrality are so compelling that the vast majority of network owners can be expected to adhere to it voluntarily.”⁸² This presupposes a particular problem. Instead, “the key question is not whether network neutrality provides substantial benefits” but, rather, “whether the circumstances exist in which deviations from network neutrality would create benefits that would be foreclosed if network neutrality were imposed.”⁸³ Instead of trying to choose between either in this debate, the focus should be on “identifying the link that is most concentrated and the most protected by the entry barriers and design regulations to increase its competitiveness” because “[providers] . . . [are at a] level of production that is already the most competitive.”⁸⁴ Synthesizing these ideas, yes, neutrality of some kind may be a speciously compelling route to take, yet regulating ISPs stifles competition that would, if allowed to operate, produce favorable outcomes for consumers.

[28] Such favorable outcomes, in line with Yoo’s conception of the Internet, can be seen in the present day as more and more individuals in the United States are forced online, out of both intrigue and necessity given the current pandemic.⁸⁵ A New York Times analysis of internet usage found

⁸¹ *Id.* at 5.

⁸² *Id.*

⁸³ See *id.* at 6.

⁸⁴ *Id.* at 8.

⁸⁵ See Emily A. Vogels et al., *53% of Americans Say the Internet Has Been Essential During the COVID-19 Pandemic*, PEW RES. CTR. 8 (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/> [<https://perma.cc/PA9R-DWLP>]; Olga Khazan, *Work From Home Is Here to Stay*, ATLANTIC (May 4, 2020), <https://www.theatlantic.com/health/archive/2020/05/work-from-home->

that Americans’ “[internet] behaviors shifted, sometimes starkly, as the virus spread and pushed us to our devices for work, play and connecting.”⁸⁶ What’s more, this analysis highlighted the fact that “amid the uncertainty about how bad the outbreak could get . . . Americans appear to want few things more than the latest news on the coronavirus.”⁸⁷ In order to accommodate this, there needs to be broad infrastructure development. Following the 2017 order, “reports suggest the U.S. enjoyed a distinct upswing in infrastructure investment” allowing the country to have an advantage in both “network size and quality” relative to peer countries.⁸⁸ There are distinct innovative advantages that stem from tacking towards this “light-tough” framework that the FCC has promulgated.

[29] As it relates to the issue of *Chevron* deference, it matters not which side of this debate an individual may fall. Rather, the fact that courts have de facto punted on clarifying the legal framework surrounding this issue has stifled *some* kind of innovation—be it innovation from internet service providers or Internet entrepreneurs—in allowing the FCC to have the liberty to make these changes. Courts have instead consistently applied the *Chevron* framework, and relied on the political whims of a given presidential administration to determine what the law is.⁸⁹ If the Supreme

pandemic/611098/ [https://perma.cc/QTF3-2PD8]; Maria Cramer & Mihir Zaveri, *What If You Don’t Want to Go Back to the Office?*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/business/pandemic-work-from-home-coronavirus.html> [https://perma.cc/FX38-24QP].

⁸⁶ Ella Koeze & Nathaniel Popper, *The Virus Changed the Way We Internet*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html> [https://perma.cc/L692-H33F].

⁸⁷ *Id.*

⁸⁸ Christopher Yoo, *Coronavirus Vindicates the FCC’s “Net Neutrality” Rollback*, WALL ST. J. (Apr. 14, 2020, 7:25 PM), <https://www.wsj.com/articles/coronavirus-crisis-vindicates-the-fccs-net-neutrality-rollback-11586906742>. [https://perma.cc/9249-MJ2J].

⁸⁹ See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J.

Court determined what the definition of “information service” is, laws and practices could change in line with this interpretation.⁹⁰ At present though, this abdication of judicial authority allows various interests to dominate only for a time. As a result, opponents and beneficiaries of the competing policy are hamstrung to pursue their specific ends.⁹¹ Take an ISP: as Professor Yoo correctly identifies, their business and end-users benefit when they invest in technological infrastructure.⁹² However, this investment is doubtlessly restrained due to the quick changes that a new FCC chairperson could make following the 2020 election. An ISP is not likely to invest in expanding bandwidth to the full extent it is able, because a shift in policy could occur at any moment.⁹³ The same is true for a budding business venture. Any investment made, predicated on the permanent return of net neutrality, is foolish considering a new presidential administration could return to a “light-touch” framework.⁹⁴ To this end, the FCC’s assessment that the agency brings about “innovation” and “investment” is correct. We have seen firsthand how these practices contribute to the Internet today. Where the FCC is wrong is believing that only one interpretation leads to

969 (1992).

⁹⁰ See Kimberly Strawbridge Robinson, *For Stevens, Chevron Decision Defined How Supreme Court Changed*, BLOOMBERG L. (July 18, 2019, 4:56 AM), <https://news.bloomberglaw.com/us-law-week/for-stevens-chevron-decision-defined-how-supreme-court-changed> [<https://perma.cc/842D-EAWR>].

⁹¹ See Somin, *supra* note 9 (“When the meaning of federal law changes with the political winds and the partisan agendas of succeeding administrations, that undermines the rule of law and the stability that businesses, state and local governments, and ordinary citizens need to be able to organize their affairs. A new administration should not be able to make major changes in law simply by having its agency appointees reinterpret it.”).

⁹² See Yoo, *supra* note 47 (stating that current ISPs are use the same infrastructure as other ISPs, leaving the ISPs incapable of providing consumers improvement in service).

⁹³ See Restoring Internet Freedom, *supra* note 63, at 312.

⁹⁴ See *id.* at 318.

innovation or, for that matter, whether any interpretation unleashes the full capabilities of investors.

VI. *Chevron's* Enablers

[30] When the FCC published its most recent order, it did so justifiably saying that it had the “legal authority” to make its judgement.⁹⁵ There is hardly any disputing under the current precedent that regulatory agencies can make these changes.⁹⁶ Ironically, though, the FCC may have hurt itself in calling attention to a second pitfall of *Chevron's* precedent: the legal authority that the FCC claims to possess is the ability to read the law, gifted to them by the courts thus far and therefore reliant on the courts upholding that position.⁹⁷ Who is to say that the judiciary will not claim its role back? This tenuous position once again calls on courts to make the change.

[31] In order to examine this notion, it is perhaps best to return to Justice Thomas's statement in the majority opinion for *Brand X*. It is ultimately the agency's reading of a statute that wins out, even if it is inconsistent with a circuit court's precedent but so long as the reading of the statute is “unambiguous.”⁹⁸ This is a startling concession of judicial authority to a regulatory agency. The justification for upholding the constitutionality of *Chevron* is two-fold. First, regulators can use their discretion to interpret vague provisions of regulatory law to promote more economically efficient

⁹⁵ *See id.* at 404.

⁹⁶ *See id.*

⁹⁷ U.S. Telecomm. Ass'n v. FCC, 825 F.3d 674, 689.

⁹⁸ *See Nat'l Cable Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 982–83.

outcomes.⁹⁹ Second, a court “may discover that the best construction of the directive is that it vests decision making power in some other body...[thus] the court fulfills its judicial duty by accepting the determination of the other body.”¹⁰⁰ In other words, “the court. . .does not shirk its duty to construe the legal directive [as enabling a regulatory body].”¹⁰¹ These two justifications point to a potential reason why the *Chevron* doctrine persists.

[32] However, judges and legal scholars are not alone in maintaining a deference to *Chevron*.¹⁰² With net neutrality this problem is only exacerbated by proponents of either reading of the law. For example, the Center for Democracy and Technology (CDT), a vocal advocate of net neutrality, stated in response to *Mozilla* that it “still believes that agencies need to be able to interpret statutory language, and that their expertise should get deference from courts.”¹⁰³ The CDT further cited that *Chevron* “is an important aspect of how our legislative, administrative, and judicial branches interact”¹⁰⁴ This is a flawed approach. Oddly, the CDT, along with other net neutrality advocates, would perhaps be better served without this interaction at all. Instead, seeking to codify net neutrality in law would offer more permanence.

[33] Proponents of a competitive internet space such as the present composition of the FCC, are not blameless in this version of the story either,

⁹⁹ See DANIEL T. SHEDD & TODD GARVEY, CONG. RESEARCH SERV., R43203, *CHEVRON DEFERENCE: COURT TREATMENT OF AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTES* 4–6 (2013).

¹⁰⁰ Jason Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 956 (2018).

¹⁰¹ *Id.*

¹⁰² See Adams, *supra* note 10.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

though. When the deregulation-driven FCC issued its new order in 2017, it did so with the understanding that their new interpretation was the best reading to achieve its policy objectives.¹⁰⁵ The FCC and others, not unlike their policy opponents, endorse the delegated authority to determine the law.¹⁰⁶ It is not surprising to suspect the FCC would act out of self-interest to maintain its authority. However, left unchecked by courts, a new reading will surely win out with new personnel at the agency. In summary, whether it is in 2021, following the potential inauguration of a new president, or in the following years, this interpretative tightrope will invariably be walked again. No matter the length of time, businesses will fail to fully develop the longer *Chevron* operates as settled law. Once again, this is to the detriment of the populous. Should we face another instance where millions are forced online, we need the incentive-driven increases in bandwidth to account for both work and leisure.

VII. NEXT STEPS: ACCEPT ANOTHER OPPORTUNITY TO REVISIT *CHEVRON*

[34] Perhaps the biggest error committed in this whole narrative to date though was not the initial finding in *Chevron* nor was it truly the Supreme Court's decision to reaffirm the finding with respect to net neutrality in *Brand X*.¹⁰⁷ No, perhaps the most consequential failure was the Supreme Court's decision to not review the issue of *Chevron* at large when it denied petitions following *USTA v. FCC*.¹⁰⁸ Had the Court heard challenges in this case, it would have had the opportunity to reconsider *Chevron*, considering more than net neutrality. If gifted the chance to do so again, perhaps in

¹⁰⁵ See generally Restoring Internet Freedom, *supra* note 63 (finding that reclassification as an information service best comports with the text and structure of the Act, Commission precedent, and policy objective).

¹⁰⁶ See *id.* at 316.

¹⁰⁷ See Nat'l Cable Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983.

¹⁰⁸ See Howe, *supra* note 61.

Mozilla, the Court should not miss the opportunity. The inevitable challenges at lower courts show that we are in need of revised judgements.

[35] There already exists a framework to pursue this question in line with net neutrality. In his dissent in *Brand X*, Justice Antonin Scalia tried to perform his judicial function and interpret the statute to a degree.¹⁰⁹ His dissent said that “the Commission [had] chosen to achieve [a new regime of regulation]. . .through an implausible reading of the statute.”¹¹⁰ Justice Scalia comes to this conclusion in outlining what he believes is a “plausible” reading of the law stating that just because a company “offers” a bundled pack of services just means it does not supply them as “stand-alone” services.¹¹¹ Thus “after all is said and done. . .it remains perfectly clear that someone who sells cable-modem service is ‘offering’ telecommunications.”¹¹² The specifics of this particular case—what cable-modem services provide, for example—may seem antiquated if not ignorable as a result. The sentiment though, trying to uncover what components or offerings apply to each type of “service,” is a laudable mission for the court to take. The Supreme Court of today would be well served in trying to adopt this mode of thinking. This does not refer to adopting Justice Scalia’s exact conclusions as, even in the relatively short time since this decision, the Internet has changed dramatically.¹¹³ However, this should not scare the Court away from pursuing the question of what the Titles of the Communications Act cover.

[36] The Court could stay the course and simply wait until Congress speaks on this particular matter. This too is not an ideal path to take.

¹⁰⁹ See *Brand X*, 545 U.S. at 1006 (Scalia, J., dissenting).

¹¹⁰ *Id.*

¹¹¹ See *id.* at 1006–1010.

¹¹² *Id.* at 1013.

¹¹³ See *Mozilla Corp. v. FCC*, 940 F.3d at 90 (Millett, J., concurring).

Congress has had at least three distinct opportunities to end this debate in light of *Chevron*.¹¹⁴ The legislature could have clarified the laws intent in 2002, 2015, or most recently in 2017.¹¹⁵ It took none of these opportunities.¹¹⁶ The legislative cycle remains incomplete. Congress has passed a law, the President – or Presidents, in this case – have executed said law through regulatory agencies, but the judiciary remains silent as to the meaning of the given statute. This should not continue on. Congress has performed its duty - it is now time for the courts to do theirs.

[37] The current composition of the Supreme Court, although identical to the one that did not hear *USTA*, seems amenable to making this shift.¹¹⁷ However, there is one last item that is necessary to highlight. In then-Judge Gorsuch’s view, perhaps very little would practically change “in a world without *Chevron*.”¹¹⁸ A transition back to the world before this decision would be more rooted in principle as it would restore the proper constitutional arrangement and rule-of-law protections that the Constitution itself establishes.¹¹⁹ As discussed this is only partially correct. *Chevron* does have practical implications: of note, overturning *Chevron* would liberate interests from relying on a fickle administrative wing of the executive branch for limited intervals. In short, not only would overturning *Chevron* be a restoration of the judicial branch’s function, it would bring relief for all interests involved in the case for, or against, regulating ISPs. Overturning

¹¹⁴ See *id.* at 17–18.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See Michael McConnell, *Kavanaugh and the “Chevron Doctrine”*, HOOVER INST. (July 30, 2018), <https://www.hoover.org/research/kavanaugh-and-chevron-doctrine> [<https://perma.cc/PAF9-NXVJ>].

¹¹⁸ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

¹¹⁹ See *id.*

this precedent is not, then, a symbolic, self-interested gesture but one that would tremendously benefit all parties involved.

VIII. Conclusion

[38] In sum, the Supreme Court's precedents found in *Chevron* and *Brand X* ought to be reconsidered. This rationale stems not just from the idea that courts, generally, should seek to reclaim their authority; but rather, the existence of this precedent stifles technological innovation. Those who benefit from a neutral Internet, startups in particular, and others who benefit under more competitive circumstances such as internet service providers are not able to fully develop to their respective potentials because of the need to anticipate frequent policy changes.¹²⁰ Whether it is the recently-argued *Mozilla* case or another inevitable challenge to this precedent, the Supreme Court should not turn away an opportunity to rethink the decisions of old. Doing so will not only strengthen its own authority but, additionally, liberate stakeholders on either side of the neutrality from relying on the politically mercurial FCC. Moreover, stakeholders themselves must consider new roots for grounding their respective arguments. Neither can continue pressuring the FCC, rather than the courts, to make judgements. To be sure, abandoning the Court's interpretation to date will not be without a loss - we will be without the most "efficient outcomes," for example. However, ultimately working under Supreme Court-blessed definitions for the ambiguous portions the telecommunications laws will, most importantly, catalyze long-term investment and progress for either camp, both of which outweigh any momentary setbacks.

¹²⁰ See Somin, *supra* note 9.