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## HOW *CHEVRON* STEP ONE LIMITS PERMISSIBLE AGENCY INTERPRETATIONS: *BRAND X* AND THE FCC'S BROADBAND RECLASSIFICATION

### I. INTRODUCTION

How are *Chevron* step one and step two related? Intuitively, the range of a statute's judicially described ambiguity at step one should limit the interpretations available to an agency at step two to some extent;<sup>1</sup> ambiguity alone does not suggest unfettered authority.<sup>2</sup> But *Chevron* itself and voluminous academic commentary show that an agency may exercise wide-ranging policy judgment to fill statutory gaps.<sup>3</sup> Using the example of the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>4</sup> this Note argues that, in some circumstances, a judicial holding at *Chevron* step one can and should limit an agency's policy discretion at step two. Specifically, the nature of the statutory ambiguity should bear on the range of permissible agency interpretations at step two. This conclusion is most immediately relevant to the Federal Communications Commission's (FCC) present effort to reregulate cable modem and DSL broadband service. In order to reassert regulatory authority over these services, the FCC must revise the interpretation of the Telecommunications Act of 1996<sup>5</sup> ("the 1996 Act") that the Supreme Court upheld in *Brand X*.

Part I of this Note describes the history of FCC internet regulation. Part II shows that the *Brand X* Court identified ambiguity in the 1996 Act with respect to the consumer's view of a service's functional integration. Part III argues that doctrinal and policy reasons support re-

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<sup>1</sup> Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) (describing *Chevron* as ensuring that the agency's conclusion falls within a judicially described "range of indeterminacy").

<sup>2</sup> Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (rejecting FDA authority to regulate tobacco); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–26 (1994) (rejecting FCC authority to eliminate telephone rate regulation pursuant to authority to "modify" rate-filing requirements).

<sup>3</sup> See, e.g., David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 694 (1997) ("Yet, in most [cases in which the Court has considered revised agency statutory interpretations,] the Court deferred to the agency's interpretation, no matter what standard for deference it set forth."); see also *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 621–23 (1996).

<sup>4</sup> 545 U.S. 967 (2005).

<sup>5</sup> Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

quiring the FCC to classify services according to the consumer perception rubric. Part IV concludes by identifying the broader implications of this limitation for future *Chevron* step two cases and for the nature of congressionally delegated authority.

## II. FCC INTERNET REGULATION

Congress created the FCC in the Communications Act of 1934 to encourage “a rapid, efficient, Nationwide, and world-wide wire and radio communication service.”<sup>6</sup> Today, the FCC regulates a range of communications industries, including radio and television broadcasting, cable television, and wireless and wireline telephone, though it has no explicit authority to regulate internet services commensurate with its vast regulatory power over these other industries.<sup>7</sup> The statutory definitions at issue in *Brand X* are traceable to FCC regulatory efforts in the late 1970s and early 1980s to maintain telephone service regulations but keep new services provided over the copper telephone network free from regulation.<sup>8</sup> The so-called *Computer II* proceeding<sup>9</sup> distinguished between regulated “basic services,” which included traditional voice communications, and unregulated “enhanced services,” which included data-processing functions that “provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.”<sup>10</sup> Following these decisions, the FCC did not regulate “enhanced services” even where they relied on “basic services.”<sup>11</sup> The two represented separate regulatory categories.

Congress codified this distinction in the 1996 Act, the first comprehensive revision of the Communications Act of 1934.<sup>12</sup> Like *Computer*

<sup>6</sup> Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–615b (2006)).

<sup>7</sup> See Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 537–38 (2010) [hereinafter Werbach, *Off the Hook*] (“The dominant perspectives in contemporary communications and cyberlaw scholarship support a limited role for the FCC, either because the FCC cannot be trusted to regulate wisely, or because the Commission’s legal authority over the Internet is narrow. Commentators have been content with the notion that Internet-based services are somehow subject to ‘ancillary jurisdiction’ under the vague and procedural Title I of the Communications Act.” (footnote omitted)). This is not to understate the FCC’s role in the development of the internet through its regulation of physical networks and their relationship to end-user devices. See Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV. 1, 12 (2005) [hereinafter Werbach, *Computer Commission*].

<sup>8</sup> *Brand X*, 545 U.S. at 976–77.

<sup>9</sup> See *In re Amendment of Section 64.702 of the Comm’n’s Rules & Regulations* (Second Computer Inquiry), 77 F.C.C.2d 384 (1980).

<sup>10</sup> 47 C.F.R. § 64.702(a) (2010); see also Werbach, *Computer Commission*, *supra* note 7, at 23–24.

<sup>11</sup> Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 130 (2003).

<sup>12</sup> Kevin Werbach, *Higher Standards Regulation in the Network Age*, 23 HARV. J.L. & TECH. 179, 192 (2009).

II, the 1996 Act defines mutually exclusive categories of regulated services. “Telecommunications service” reflects the “basic services” of the *Computer II* age.<sup>13</sup> The 1996 Act defines “telecommunications” as “the transmission . . . of information of the user’s choosing, without change in the form or content of the information as sent and received.”<sup>14</sup> The 1996 Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public.”<sup>15</sup> In general, telecommunications services are subject to the full panoply of FCC regulations under the authority of Title II of the Communications Act, including common carriage,<sup>16</sup> rate regulation,<sup>17</sup> and the requirement that network owners allow competitors to “interconnect” with their networks.<sup>18</sup> These regulations reflect the fact that in the *Computer II* era, and even at the time Congress passed the 1996 Act, “the telephone network [was] the primary, if not exclusive, means through which information service providers [could] gain access to their customers.”<sup>19</sup> Because only one “last-mile” network existed at those times, the FCC required the network owner — the incumbent telephone company — to open its network to companies offering various services.<sup>20</sup> Wireline telephone is the prime example of a Title II telecommunications service.

Information services, on the other hand, remained relatively unregulated. The 1996 Act defines “information service[s]” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”<sup>21</sup> These services are not subject to Title II regu-

<sup>13</sup> See *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 211–12 (3d Cir. 2007); Olivier Sylvain, *Internet Governance and Democracy*, 62 FED. COMM. L.J. 205, 237–38 (2010).

<sup>14</sup> 47 U.S.C. § 153(43) (2006).

<sup>15</sup> *Id.* § 153(46). The FCC has explained that “[a]lthough the transmission of information to and from [computer processors] may constitute ‘telecommunications,’ that transmission is not necessarily a separate ‘telecommunications service.’” *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities (Cable Declaratory Ruling)*, 17 FCC Rcd. 4798, 4823 (2002).

<sup>16</sup> 47 U.S.C. § 201; see *id.* § 153(10) (defining “common carrier”); *U.S. Telecom Ass’n v. FCC*, 295 F.3d 1326, 1328–29 (D.C. Cir. 2002) (describing “common carrier”).

<sup>17</sup> See 47 U.S.C. § 201; see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (upholding the FCC’s authority to establish pricing rules under section 201).

<sup>18</sup> 47 U.S.C. § 251(a) (with respect to common carriers); *id.* § 251(c)(2)–(3) (with respect to incumbent local exchange carriers).

<sup>19</sup> *Cable Declaratory Ruling*, 17 FCC Rcd. at 4825 (emphasis omitted).

<sup>20</sup> *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 212–13 (3d Cir. 2007); see also *Cable Declaratory Ruling*, 17 FCC Rcd. at 4825 (“Indeed, for more than twenty years, *Computer II* obligations have been applied exclusively to traditional wireline services and facilities.”).

<sup>21</sup> 47 U.S.C. § 153(20).

lation; rather, the FCC may only regulate information services pursuant to its limited, “ancillary” authority under Title I.<sup>22</sup>

*A. The Internet: “Telecommunications Service”  
or “Information Service”?*

Following the 1996 Act, the FCC began proceedings to determine the appropriate statutory categorization of cable modem broadband and DSL broadband internet services. Cable companies offer cable modem broadband service directly to consumers via the coaxial cable or fiber-optic networks that those companies own.<sup>23</sup> After an eighteen-month rulemaking, the FCC concluded that these services were rightly classified as information services and not telecommunications services.<sup>24</sup> Consequently, they fell under Title I rather than Title II regulations. The resulting *Cable Declaratory Ruling* freed providers of cable broadband service from mandatory interconnection, common carrier regulation, and any future FCC efforts to mandate “net neutrality” requirements pursuant to Title II authority alone.<sup>25</sup> In making this regulatory classification, the FCC focused on the “function that is made available” rather than “the particular types of facilities used.”<sup>26</sup> The FCC concluded that, “taken together,” the range of internet services available via cable modem service, including email, newsgroups, and the domain name system (DNS), comprised an information service.<sup>27</sup>

The *Cable Declaratory Ruling* drew from the reasoning in the FCC’s 1998 *Universal Service Report*.<sup>28</sup> That report noted that since *Computer II*, the FCC had always treated so-called “non-facilities based” providers of “communications and computing components” as providers of enhanced services.<sup>29</sup> Unlike cable companies, these non-facilities-based providers did not own physical network infrastructure; rather, they served customers over other carriers’ networks.<sup>30</sup> The functional view the FCC adopted rendered this distinction meaningless. The FCC explained that “[t]his functional approach is consistent

<sup>22</sup> *Id.* §§ 151–61; see *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005); *Comcast Corp. v. FCC*, 600 F.3d 642, 646–47 (D.C. Cir. 2010) (discussing the FCC’s Title I “ancillary” authority).

<sup>23</sup> See *Brand X*, 545 U.S. at 977–78.

<sup>24</sup> *Cable Declaratory Ruling*, 17 FCC Rcd. at 4821–22.

<sup>25</sup> *Brand X*, 545 U.S. at 977–78. In *Comcast*, the FCC attempted to impose net neutrality regulations via its Title I “ancillary” authority. The D.C. Circuit rejected this effort. See *Comcast Corp.*, 600 F.3d at 649.

<sup>26</sup> *Cable Declaratory Ruling*, 17 FCC Rcd. at 4821.

<sup>27</sup> *Id.* at 4822.

<sup>28</sup> In the Matter of Fed.-State Joint Bd. on Universal Serv. (*Universal Service Report*), 13 FCC Rcd. 11,501 (1998).

<sup>29</sup> *Id.* at 11530.

<sup>30</sup> See *Brand X*, 545 U.S. at 978.

with Congress's direction that the classification of a provider should not depend on the type of facilities used. . . . Its classification depends rather on the nature of the service being offered to customers."<sup>31</sup> As a result, the appropriate interpretation of the service a consumer was "offer[ed]" turned on the consumer's own perception of that service.<sup>32</sup> The policy rationale for this shift assumed that the cable broadband market was sufficiently competitive and vibrant to warrant deregulation.<sup>33</sup> This market-based view echoed the FCC's deregulatory attitude toward enhanced services in the *Computer II* era.<sup>34</sup> The Supreme Court affirmed the FCC's authority to deregulate cable broadband service in *Brand X*, which applied the *Chevron* doctrine to the FCC's interpretation of the 1996 Act's service definitions.<sup>35</sup>

<sup>31</sup> *Universal Service Report*, 13 FCC Rcd. at 11,530.

<sup>32</sup> *Cable Declaratory Ruling*, 17 FCC Rcd. at 4821-22; see *Brand X*, 545 U.S. at 976.

<sup>33</sup> *Cable Declaratory Ruling*, 17 FCC Rcd. at 4802 ("We recognize that residential high-speed access to the Internet is evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite. By promoting development and deployment of multiple platforms, we promote competition in the provision of broadband capabilities . . .").

<sup>34</sup> See Farrell & Weiser, *supra* note 11, at 129-30.

<sup>35</sup> *Brand X*, 545 U.S. at 982. At the time of the *Cable Declaratory Ruling*, the DSL broadband service offered by telecommunications rather than cable companies was still subject to the common carrier requirements of Title II. *Brand X*, 545 U.S. at 1000. Shortly after the Supreme Court upheld the FCC's *Cable Declaratory Ruling* in *Brand X*, the FCC moved to make regulation of DSL, as well as other broadband platforms, consistent with that of cable broadband. See In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 17 FCC Rcd. 3019 (2002). The other broadband platforms that the FCC deregulated included satellite, fixed wireless, mobile wireless, and broadband-over-powerlines (BPL) services. Sylvain, *supra* note 13, at 240. The resulting order concluded, consistent with the *Universal Service Report* and the *Cable Declaratory Ruling*, that DSL internet service, like cable modem broadband, is an "information service." See In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities (*Wireline Broadband Order*), 20 FCC Rcd. 14,853, 14,862 (2005). As a result, facilities-based DSL broadband providers would no longer be subject to the Title II regulations that had forced them to share transmission facilities and offer service as common carriers. *Id.* at 14875-76 ("[A]ll wireline broadband Internet access service providers are no longer subject to the *Computer II* requirement to separate out the underlying transmission from wireline broadband Internet access service and offer it on a common carrier basis."). To justify this policy, the FCC again pointed to the strong market for broadband service and the rapid platform convergence across communications services. *Id.* at 14875 ("A wide variety of IP-based services can be provided regardless of the nature of the broadband platform used to connect the consumer and the ISP."). The legacy copper telephone network was no longer the primary means of accessing the internet. *Cable Declaratory Ruling*, 17 FCC Rcd. at 4825. This convergence underscored the Commission's functional approach; like the *Cable Declaratory Ruling*, the *Wireline Broadband Order* relied on the consumer's view of the service being offered to justify its regulatory classification. *Wireline Broadband Order*, 20 FCC Rcd. at 14,863-64. Consumer perception thus gave the FCC reason to classify DSL broadband as an information service regardless of whether the network owner or one of its competitors offered the service. *Id.* at 14,864 ("From the end user's perspective, an information service is being offered regardless of whether a wireline broadband Internet access service provider self-provides the transmission component or provides the service over transmission facilities that it does not own."). The Third Circuit upheld this FCC order in *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 215 (3d Cir. 2007).

*B. Net Neutrality*

As the *Brand X* case made its way through the lower courts, a new internet policy issue developed in the academic community. Law Professor Tim Wu first coined the term “network neutrality” in 2003 to describe a “network anti-discrimination regime” securing “users the right to use non-harmful network attachments or applications, and give innovators the corresponding freedom to supply them.”<sup>36</sup> Essentially, such a principle would prohibit an internet service provider (ISP) from privileging the transmission of its favored content to the detriment of its disfavored content. The academic debate<sup>37</sup> soon spread to the political sphere. Less than two months after the Supreme Court decided *Brand X*, the FCC issued a broadband policy statement adopting net neutrality principles.<sup>38</sup> The next year, the debate in the House of Representatives on the Communications Opportunity, Promotion, and Enhancement Act of 2006<sup>39</sup> focused on the soundness of net neutrality policy, virtually to the exclusion of the cable television franchising policy questions that bill was designed to address. The House ultimately defeated net neutrality amendments both in committee<sup>40</sup> and during floor consideration.<sup>41</sup> The Senate Commerce Committee also held hearings on net neutrality in consideration of its companion bill.<sup>42</sup>

ISPs had long opposed net neutrality legislation as “a solution without a problem.”<sup>43</sup> But in 2007, two episodes of ISP traffic discrimination gave net neutrality advocates tangible evidence of the net neutrality imperative. In August, AT&T muted a Pearl Jam concert webcast just as lead singer Eddie Vedder sang lyrics critical of Presi-

<sup>36</sup> Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 143 (2003) (The proposed antidiscrimination principle would “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.”).

<sup>37</sup> See generally Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529 (2009).

<sup>38</sup> FED. COMM’NS COMM’N, FCC 05-151, POLICY STATEMENT (Aug. 5, 2005) (adopting principles protecting consumers’ rights to “access the lawful Internet content of their choice,” “to run applications and use services of their choice,” “to connect their choice of legal devices that do not harm the network,” and to “competition among network providers, application and service providers, and content providers”).

<sup>39</sup> H.R. 5252, 109th Cong. (2006).

<sup>40</sup> H.R. REP. NO. 109-470, at 17 (2006).

<sup>41</sup> 152 CONG. REC. H3583 (daily ed. June 8, 2006).

<sup>42</sup> *Communications Reform Bill Hearing II: Hearing on S. 2686 Before the S. Comm. on Commerce, Sci., & Transp.*, 109th Cong. (2006).

<sup>43</sup> Grant Gross, AT&T Says It Didn’t Censor Pearl Jam, IDG News (Aug. 9, 2007, 4:00 PM), [http://www.pcworld.com/article/135767/atandt\\_says\\_it\\_didnt\\_censor\\_pearl\\_jam.html](http://www.pcworld.com/article/135767/atandt_says_it_didnt_censor_pearl_jam.html) (internal quotation mark omitted).

dent Bush.<sup>44</sup> Two months later, the Associated Press reported that Comcast, the largest American cable TV provider and its second-largest ISP, had slowed the transmission of “peer-to-peer” BitTorrent file transfers.<sup>45</sup> The latter incident sparked FCC complaints against Comcast by public interest groups, which claimed that Comcast’s actions “violat[ed] the FCC’s Internet Policy Statement.”<sup>46</sup> Comcast defended its practices as essential to managing its limited network bandwidth and challenged the ensuing FCC order, which asserted jurisdiction over ISP network management under Title I of the Communications Act and ordered Comcast to disclose its network management practices.<sup>47</sup> In *Comcast Corp. v. FCC*,<sup>48</sup> the D.C. Circuit held that the FCC lacked authority to use a policy statement to subject ISPs to nondiscriminatory traffic management requirements.<sup>49</sup> In earlier cases, the Supreme Court had construed FCC authority under Title I of the Communications Act to extend to FCC actions “reasonably ancillary to the effective performance of the Commission’s various responsibilities.”<sup>50</sup> But the D.C. Circuit rejected a broad construction of ancillary authority in *Comcast*.<sup>51</sup>

One month after the D.C. Circuit issued its opinion, FCC Chairman Julius Genachowski announced his intention to reclassify broadband internet services as “telecommunications service[s].”<sup>52</sup> Notably, Chairman Genachowski sought public comment on a “third way” that would allow the FCC to regulate “consumer protection policies” pursuant to Title II authority but leave “Internet content and applications” unregulated under Title I.<sup>53</sup> Reclassification thus appears to serve the interest of implementing net neutrality requirements without subjecting ISPs to the full range of Title II regulations.<sup>54</sup> The conse-

<sup>44</sup> *Id.* AT&T claimed that a contractor’s mistake was to blame for the editing. *Id.*

<sup>45</sup> See Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOCIATED PRESS, Oct. 19, 2007, available at <http://www.msnbc.msn.com/id/21376597/>.

<sup>46</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (alteration in original).

<sup>47</sup> *Id.* at 645–66. The D.C. Circuit rejected the FCC’s claim that *Brand X* had affirmed the reach of the FCC’s Title I jurisdiction. The *Brand X* Court’s dictum that the FCC “remains free to impose special regulatory duties on [cable internet providers] under its Title I ancillary jurisdiction,” *id.* at 649 (alteration in original) (quoting Nat’l Cable & Telecomms. Ass’n v. *Brand X* Internet Servs., 545 U.S. 967, 996 (2005)) (internal quotation mark omitted), did not abrogate the Court’s earlier definitions of FCC ancillary jurisdiction. *Id.* at 649–50.

<sup>48</sup> 600 F.3d 642.

<sup>49</sup> *Id.* at 652–55.

<sup>50</sup> See *Am. Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

<sup>51</sup> *Comcast Corp.*, 600 F.3d at 655–61.

<sup>52</sup> Press Release, Fed. Commc’ns Comm’n, FCC to Seek Best Legal Framework for Broadband Internet Access (June 17, 2010) [hereinafter *Reclassification Press Release*], available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db0617/DOC-298861A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0617/DOC-298861A1.pdf).

<sup>53</sup> *Id.*

<sup>54</sup> See Ryan Singel, *FCC Prepares to Re-Regulate Broadband*, WIRED (May 5, 2010, 5:52 PM), <http://www.wired.com/epicenter/2010/05/fcc-reclassify-broadband/>.

quence of such a move would be a full reversal of the FCC's laissez-faire stance toward internet service and the beginning of a new era of substantial government regulation of the broadband market.

### III. *CHEVRON* DEFERENCE AND *BRAND X*

The *Chevron* doctrine prescribes broad judicial deference to agency constructions of ambiguous statutes. Under *Chevron*, an agency may use wide-ranging policy judgments to resolve judicially defined statutory ambiguities. In *Brand X*, the Supreme Court applied *Chevron* and found that the 1996 Act was ambiguous because consumers may or may not perceive an ISP to “offer” a “telecommunications service.” A close reading of the opinion suggests that the consumer perception rubric explains the Court’s step one holding.

#### A. *Chevron Deference*

The *Chevron* doctrine governs judicial review of the FCC’s regulatory classifications of telecommunications services and information services.<sup>55</sup> At *Chevron* step one, a court employs “traditional tools of statutory construction”<sup>56</sup> to determine whether “Congress has directly spoken to the precise question at issue.”<sup>57</sup> If Congress has done so, then the inquiry ends and Congress’s prescription prevails.<sup>58</sup> If, however, the statute is “silent or ambiguous with respect to the specific issue,” then the court asks at *Chevron* step two “whether the agency’s answer is based on a permissible construction of the statute.”<sup>59</sup> The theory of *Chevron* deference relies at least in part<sup>60</sup> on the notion that agencies use policy judgments to resolve textual ambiguities or gaps in statutes.<sup>61</sup> As Professor John Manning has explained, “[I]t is now a

<sup>55</sup> Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (“We first consider whether we should apply *Chevron*’s framework to the Commission’s interpretation of the term ‘telecommunications service.’ We conclude that we should.”); see also Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327, 333–39 (2002) (holding that the FCC’s interpretation of the Communications Act is subject to *Chevron* deference).

<sup>56</sup> *Chevron* U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

<sup>57</sup> *Id.* at 842.

<sup>58</sup> *Id.* at 842–43.

<sup>59</sup> *Id.*

<sup>60</sup> The opinion in *Chevron* described several possible justifications for judicial deference to agency statutory constructions. See Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2043–48 (2010).

<sup>61</sup> *Chevron*, 467 U.S. at 843 (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” (citation omitted)); see also Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (“If the statute is ambiguous on the point, we defer at step two to the agency’s interpretation so long as the construction is ‘a reasonable policy choice for the agency to make.’” (quoting *Chevron*, 467 U.S. at 845)).



fixed point of constitutional law that Congress can assign administrators substantial responsibility for specifying the particulars of open-ended federal statutes.”<sup>62</sup> Consequently, the judicial inquiry at *Chevron* step two is whether the agency has acted within the range of congressionally circumscribed authority.<sup>63</sup>

The *Chevron* step two standard is generally one of reasonableness.<sup>64</sup> As such, step two would seem to set no particular limits on the means an agency uses to resolve statutory ambiguities, so long as the agency does not ignore congressionally prescribed criteria.<sup>65</sup> Nor would a change in an agency’s prior interpretation, as the FCC is now contemplating, require any more substantial an explanation than the initial interpretation.<sup>66</sup>

The Court in *Brand X* adhered to the well-described *Chevron* approach. Examining the term “telecommunications service” as defined in the 1996 Act, the Court applied *Chevron* and concluded at step one that the meaning of what an ISP “offer[s]” was ambiguous.<sup>67</sup> Moving to step two, the Court held that the FCC’s interpretation of the relevant definition was “a reasonable policy choice for the [Commission] to make.”<sup>68</sup> Because the FCC concluded that ISPs offer internet access to their customers and do not offer “a transparent ability (from the end

<sup>62</sup> Manning, *supra* note 3, at 621.

<sup>63</sup> *Id.* at 623 (“[T]he judicial task is limited to deciding whether the agency’s specification of meaning is within the *range* of choice that an open-ended term . . . implies.”); *see id.* at 625 (“*Chevron* embraces the assumption that if a silent or ambiguous statute leaves an interpreter room to choose among reasonable alternative understandings, the interpretive choice entails the exercise of substantial policymaking discretion.” (citation omitted)); *see also* Strauss, *supra* note 1, at 1121 (characterizing *Chevron* as ensuring that the agency’s conclusion falls within a judicially described “range of indeterminacy”).

<sup>64</sup> *See* Kenneth A. Bamberger & Peter L. Strauss, *Chevron’s Two Steps*, 95 VA. L. REV. 611, 621 (2009) (“Courts and commentators have converged on an emerging consensus that the ‘arbitrary, capricious, and abuse of discretion’ standard set forth in [the Administrative Procedure Act’s (APA)] Section 706(2)(A) supplies the metric for judicial oversight at *Chevron*’s second step.”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (This inquiry evaluates whether the interpretation is “reasonable in light of the underlying law.”).

<sup>65</sup> *See* *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . .”). *But cf.* Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990) (arguing that agencies should use legislative history to inform their interpretation of statutes).

<sup>66</sup> *See* *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (Under the APA, an agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better . . .”). *Chevron* itself examined the EPA’s departure from its previous interpretation of “source.” *Chevron*, 467 U.S. at 856–58.

<sup>67</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005). The precise nature of the ambiguity in *Brand X* is somewhat cryptic.

<sup>68</sup> *Id.* at 997 (citation omitted).

user's perspective) to transmit information," the Court found that the FCC could reasonably classify cable modem broadband service as an information service.<sup>69</sup>

*B. Consumer Perceptions and Step One Ambiguity*

The Court found ambiguity in the 1996 Act's definition of "telecommunications service" deriving from both the meaning of the word "offer" and the legislative history of the 1996 Act.<sup>70</sup> To the Court, the question of whether cable broadband service "offer[ed]" telecommunications turned on the particulars of that service. That question, in turn, relied on the consumer's perception of that service. A close reading of the opinion shows that the consumer perception rubric underlay the Court's finding of ambiguity in both the text and context of the statute.

1. *Sources of Ambiguity.* — The textual ambiguity at issue concerned the word "offer" as used in the definition of "telecommunications service" in the 1996 Act.<sup>71</sup> The Court found that "the term 'offer' can sometimes refer to a single, finished product and sometimes to the 'individual components in a package being offered.'"<sup>72</sup> As a result, the ambiguity turned not on "the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance."<sup>73</sup> In other words, the question was "whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering."<sup>74</sup>

The Court also found that the legislative history of the 1996 Act rendered the statute ambiguous. The Court noted, "Congress passed the definitions in the Communications Act against the background of

<sup>69</sup> *Id.* at 1000.

<sup>70</sup> *Id.* at 989 ("Instead, 'offering' can reasonably be read to mean a 'stand-alone' offering of telecommunications, *i.e.*, an offered service that . . . transmits messages unadulterated by computer processing. That conclusion follows not only from the ordinary meaning of the word 'offering,' but also from the regulatory history of the Communications Act.").

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 991–92.

<sup>73</sup> *Id.* at 991.

<sup>74</sup> *Id.* at 990. This conclusion looks suspiciously like a *Chevron* step two holding. Notably, the Court used the reasonableness of the FCC's statutory construction to support its finding of ambiguity in the statute. *Cf.* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009) ("If an agency's construction of the statute is 'contrary to clear congressional intent' . . . then the agency's construction is a fortiori not 'based on a permissible construction of the statute.' Step One is therefore nothing more than a special case of Step Two, which implies that all Step One opinions could be written in the language of Step Two." (alteration in original) (citations omitted)).

[the *Computer II*] regulatory history . . . .”<sup>75</sup> The Court thus assumed that the “basic” and “enhanced” services of the *Computer II* era paralleled the definitions of “telecommunications service” and “information service” in the 1996 Act.<sup>76</sup> Like the text of the 1996 Act, the ambiguity in the legislative history reflected the identity of the service being regulated. Historically, the FCC had classified products according to whether the components of that product were functionally integrated.<sup>77</sup>

The daylight between the *Brand X* majority and dissent underscores the Court’s focus on the character of the service to resolve the step one analysis.<sup>78</sup> Justice Scalia disagreed with the Court’s finding of ambiguity, but not due to the dictionary definition of the word “offer.” To Justice Scalia, as for the Court, this definition was not the relevant question.<sup>79</sup> Rather, the issue was whether “the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being an offer.”<sup>80</sup> The dissent concluded it did. Justice Scalia found that the statute was clear because “[t]here are instances in which it is ridiculous to deny that one part of a joint offering is being offered merely because it is not offered on a ‘stand-alone’ basis,” such as how cable modem service was provided.<sup>81</sup> The majority and dissent diverged at *Chevron* step one due to opposing views of what was being offered. In this sense, both the majority and dissent shifted the ambiguity question from a textual inquiry to an exploration of the service subject to FCC classification. To all of the Justices, the statute was ambiguous in the sense that a service could either offer or not offer telecommunications.

2. *The Consumer Perception Rubric.* — The ambiguity in the 1996 Act’s definitions turned on the identity of what an ISP “offer[s].”<sup>82</sup> But the Court did not divine the identity of what ISPs offer in a vac-

<sup>75</sup> *Brand X*, 545 U.S. at 992; see also *id.* at 976 (“These two statutory classifications originated in the late 1970’s, as the Commission developed rules to regulate data-processing services offered over telephone wires.”).

<sup>76</sup> *Id.* at 992.

<sup>77</sup> *Id.* at 993 (“It was therefore consistent with the statute’s terms for the Commission to assume that the parallel term ‘telecommunications service’ in 47 U.S.C. § 153(46) likewise describes a ‘pure’ or ‘transparent’ communications path not necessarily separately present, from the end user’s perspective, in an integrated information-service offering.”). Additionally, the FCC classified cable modem broadband based on its apparent functional integration. In the *Cable Declaratory Ruling*, it concluded that “[a]s provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.” 17 FCC Rcd. 4798, 4823 (2002).

<sup>78</sup> Justices Souter and Ginsburg joined Part I of Justice Scalia’s dissent.

<sup>79</sup> *Brand X*, 545 U.S. at 1006 (Scalia, J., dissenting) (“It seems to me, however, that the analytic problem pertains not really to the meaning of ‘offer,’ but to the identity of what is offered.”).

<sup>80</sup> *Id.* at 1008.

<sup>81</sup> *Id.* at 1007.

<sup>82</sup> *Id.* at 989 (majority opinion).

uum. According to both the text and the legislative history of the 1996 Act, the question of a service's functional integration turned on whether the product's components appeared to be functionally integrated from the viewpoint of the consumer.<sup>83</sup>

As a matter of "ordinary meaning"<sup>84</sup> and "common usage," the Court concluded that "what a company 'offers' to a consumer [is] what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product."<sup>85</sup> To illustrate this point, the Court explained that "a car dealership 'offers' cars, but does not 'offer' the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis."<sup>86</sup>

Turning to the legislative history, the Court made a similar finding about the nature of the statute's ambiguity. The FCC had distinguished between the "basic" and "enhanced" services "based on how the consumer interacts with the provided information."<sup>87</sup> Because the 1996 Act's definitions "substantially incorporated the[] meaning" of the *Computer II* definitions, the statute adopted the same rubric.<sup>88</sup> Consequently, the Court derived support for its conclusion regarding the statute's ambiguity from the FCC's own approach to the statute.<sup>89</sup> At *Chevron* step one, the Court thus read the consumer perception rubric into the 1996 Act's statutory definitions.<sup>90</sup>

#### IV. WHAT *BRAND X* SAYS ABOUT *CHEVRON* STEP TWO

The example of *Brand X* and the 1996 Act shows how Congress can implicitly cabin an agency's permissible interpretations of ambiguous statutes. More specifically, it suggests that a judicial finding of ambiguity at *Chevron* step one may not support a blanket delegation of policymaking authority in all cases, and further, that in some cases,

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<sup>83</sup> *Id.* at 992.

<sup>84</sup> *Id.* at 989.

<sup>85</sup> *Id.* at 990.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 993 ("It was therefore consistent with the statute's terms for the Commission to assume that the parallel term 'telecommunications service' in 47 U.S.C. § 153(46) likewise describes a 'pure' or 'transparent' communications path not necessarily separately present, from the end user's perspective, in an integrated information-service offering."); see *Universal Service Report*, 13 FCC Rcd. 11,501, 11,530 (1998).

<sup>88</sup> *Brand X*, 545 U.S. at 992.

<sup>89</sup> See, e.g., *id.* at 993 ("First, in the *Computer II Order* that established the terms 'basic' and 'enhanced' services, the Commission defined those terms functionally, based on how the consumer interacts with the provided information, just as the Commission did in the order below.")

<sup>90</sup> In *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007), the Third Circuit made similar findings in holding that the FCC's classification of DSL broadband service as an "information service" and not as a "telecommunications service" was not a reasonable interpretation of the Communications Act. *Id.* at 215. Notably, the Court did not read all of the FCC's *Computer II*-era regulatory decisions into the 1996 Act's definitions.

the nature of a statute's ambiguity may limit "permissible" agency action pursuant to the statute.<sup>91</sup>

The standard view of *Chevron* suggests that the FCC's reclassification of cable broadband services would be reasonable. Because *Brand X* held that the statute is ambiguous,<sup>92</sup> and there are effectively only two possible classifications, either classification is permissible under the statute.<sup>93</sup> This understanding is consistent with the prevailing view of *Chevron* that statutory ambiguity reflects a congressional grant of broad agency policymaking discretion.<sup>94</sup>

But a close reading of *Brand X* supports the notion that *Chevron* step one can limit agency constructions at step two — at least for particular types of ambiguities and where the agency's policymaking discretion would otherwise be vast.<sup>95</sup> Though unconventional, this view is consistent with theories of *Chevron* step two that recognize the influence of the Administrative Procedure Act's "arbitrary [or] capricious" standard without suggesting an equivalence between that standard and *Chevron* step two.<sup>96</sup> Deriving limits on agency authority from the nature of a statute's ambiguity is consistent with judicial practice and scholarship emphasizing an agency's means of elaborating a permissible construction at *Chevron* step two.<sup>97</sup> This approach, Professors Kenneth Bamberger and Peter Strauss argue, is perfectly consonant with the APA.<sup>98</sup> Indeed, the permissibility of an agency inter-

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<sup>91</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (concluding that if the statute is silent or ambiguous, then the "question for the court is whether the agency's answer is based on a permissible construction of the statute").

<sup>92</sup> *Brand X*, 545 U.S. at 989.

<sup>93</sup> See *Wireline Broadband Order*, 20 FCC Rcd. 14,853, 14,862 n.32 (2005) ("Although the Commission has not been entirely consistent on this point, we agree for the wireline broadband Internet access described in this Order with the past Commission pronouncements that the categories of 'information service' and 'telecommunications service' are mutually exclusive."). Though the FCC could conclude that cable modem broadband service is a "cable service" under Title VI of the Communications Act, 47 U.S.C. § 522(6) (2006), this interpretation would prevent like regulation of cable versus DSL broadband service. Moreover, the FCC has dismissed this possibility, *Cable Declaratory Ruling*, 17 FCC Rcd. 4798, 4836–37 (2002), and the *Brand X* Court did not consider it. As a result, the implicit choice is between "telecommunications service" or "information service."

<sup>94</sup> See *Chevron*, 467 U.S. at 843; Manning, *supra* note 3, at 621.

<sup>95</sup> Cf. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996) (noting that *Chevron* deference rests on the presumption that Congress "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

<sup>96</sup> See, e.g., Stephenson & Vermeule, *supra* note 74, at 599 (suggesting that *Chevron* step two and the APA standard are redundant).

<sup>97</sup> Bamberger & Strauss, *supra* note 64, at 623–24 ("In other words, Step Two analysis considers whether agencies have permissibly exercised the interpretive authority delegated to them by reasonably employing appropriate methods for elaborating statutory meaning.")

<sup>98</sup> *Id.* at 624; see 5 U.S.C. § 706(2)(C) (2009) ("in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

pretation ought to reflect the nature of the statute's ambiguity because resolving the ambiguity necessarily involves "the appropriate scope of agency discretion in light of the governing statute's meaning."<sup>99</sup>

### A. *The Evidence from Brand X*

In its step one inquiry, the *Brand X* Court concluded that whether a service is "offer[ed]" hinges on whether the consumer perceives the service as functionally integrated. But must an FCC classification rely on the consumer's perception of a service to be "permissible,"<sup>100</sup> or must the classification merely be consistent with the consumer's perception? For policy and doctrinal reasons, the first possibility is more convincing.<sup>101</sup> This view suggests that *Brand X*'s ratification of FCC authority to classify a service under the 1996 Act is nonetheless subject to the FCC's determination of how consumers perceive that service.

The nature of the 1996 Act's textual ambiguity suggests that the FCC must rely on the consumer perception rubric to permissibly interpret the definition of "telecommunications service." Like all *Chevron* step one holdings, the *Brand X* holding of ambiguity at step one describes a range of permissible interpretations that the agency, using its policy expertise, may lawfully select.<sup>102</sup> Though the word "offers" in the 1996 Act is ambiguous, the interpretive ambiguity derived from the variable consumer perception of what services were offered.<sup>103</sup>

Accordingly, the range of FCC interpretive authority deriving from the statute's ambiguity should be described as follows: examining a particular service, the FCC may conclude that consumers perceive the service as functionally integrated, and therefore, that the service does not "offer[] telecommunications"; or the FCC may conclude that consumers do not perceive the service as functionally integrated, and therefore, that the service "offer[s] telecommunications."<sup>104</sup> Under this

<sup>99</sup> Bamberger & Strauss, *supra* note 64, at 624.

<sup>100</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>101</sup> The most obvious source for the answer would be the *Brand X* Court's step two analysis. However, because *Brand X* found that the FCC's interpretation was permissible and the FCC relied on consumer perception to decide the appropriate classification for cable modem broadband, that part of the opinion says little about whether that reliance was merely sufficient or necessary to satisfy the Court at *Chevron* step two. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 997–1000 (2005); see also *id.* at 988 ("Instead, whether that service also includes a telecommunications 'offering' turn[ed] on the nature of the functions the *end user* is offered." (quoting *Cable Declaratory Ruling*, 17 FCC Rcd. 4798, 4823 (2002)) (internal quotation marks omitted)).

<sup>102</sup> See *Chevron*, 467 U.S. at 844–45, 864–66; Stephenson & Vermeule, *supra* note 74, at 603.

<sup>103</sup> *Brand X*, 545 U.S. at 990.

<sup>104</sup> 47 U.S.C. § 153(46) (2006); see *Wireline Broadband Order*, 20 FCC Rcd. 14,853, 14,862 n.32 (2005) (finding that the "categories of 'information service' and 'telecommunications service'" for wireline broadband internet access are "mutually exclusive").

theory, the FCC would have authority to regulate services only so long as it interprets the word “offer” in light of the consumer perception rubric that *Brand X* found dispositive in determining the statutory definition of “telecommunications service.” At *Chevron* step two, the *Brand X* Court found the FCC’s construction reasonable because “[t]he service that Internet access providers offer to members of the public is Internet access,’ not a transparent ability (from the end user’s perspective) to transmit information.”<sup>105</sup>

In short, the ambiguous aspect of the statute was the nature of the consumer’s perception, not the ultimate question of how a service should be classified. The FCC may use its policy expertise to determine the consumer’s perception of the service, but it cannot invoke policy expertise to adopt a classification at odds with consumer perception.<sup>106</sup> In terms of delegation, Congress left only the question of consumer perception for the FCC to decide and made the larger, more important question of what services should be regulated as telecommunications services subject to this inquiry. Notably, the nature of this ambiguity differs from that in *Chevron* itself. There, the term “stationary source” was ambiguous;<sup>107</sup> as a result, the Environmental Protection Agency could use its policy judgment to resolve the competing interests at the heart of how broadly “stationary source” should be defined.<sup>108</sup> In contrast, the regulatory category — “telecommunications service” — is not the ambiguous aspect of the 1996 Act. Rather, the statute’s ambiguity reflects the uncertain outcome of the FCC’s inquiry. Thus, the FCC possesses delegated authority to exercise policymaking discretion only to decide whether an entity “offer[s] telecommunications,” not whether any given service ought to be regulated in one way or another.<sup>109</sup>

This is not to say that the FCC cannot consider other factors in deciding how to regulate a given service. Rather, it merely suggests that these other factors must bear not on the wisdom of classification qua classification, but on the question of how consumers view the service. For example, market consolidation alone may be an impermissible reason for regulating a particular service; but to the extent market changes have caused consumers to view the components of that service as no longer functionally integrated, then the FCC’s regulation would

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<sup>105</sup> *Brand X*, 545 U.S. at 1000 (citation omitted).

<sup>106</sup> See *id.* at 1008 (Scalia, J., dissenting) (“[T]he telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on [sic] offer — especially when seen from the perspective of the consumer or the end user, which the Court purports to find determinative.” (citation omitted)); cf. *id.*; *Chevron*, 467 U.S. at 843.

<sup>107</sup> *Chevron*, 467 U.S. at 859–61.

<sup>108</sup> *Id.* at 865.

<sup>109</sup> *Brand X*, 545 U.S. at 996 (“The definition hinges solely on whether the entity ‘offer[s] telecommunications for a fee directly to the public’ . . .”).

fall within the authority granted by the 1996 Act. For example, consolidation of the broadband market into a phone and cable duopoly and ISPs' well-publicized, selective content throttling may show consumers that ISPs "offer[]"<sup>110</sup> a transmission or access component of broadband service distinct from internet content such as BitTorrent file transfers or a Pearl Jam concert webcast.<sup>111</sup>

Were an FCC classification merely consistent with — and not reliant on — the consumer perception rubric, then it would not be certain that the FCC made its regulatory decision pursuant to this criterion.<sup>112</sup> Rather, the FCC would simply revise its regulatory classifications based on its policy judgment about which services should be regulated and which should not.<sup>113</sup>

The Third Circuit's decision in *Time Warner Telecom, Inc. v. FCC*<sup>114</sup> supports this view. Relying on *Brand X*, the *Time Warner Telecom* court held that the FCC's classification of DSL broadband was not arbitrary and capricious in violation of the APA<sup>115</sup> because "the record adequately supports the FCC's conclusion that from the perspective of the end-user, wireline broadband service and cable modem service are functionally similar and, therefore, that they should be subject to the same regulatory classification under the Communications Act."<sup>116</sup> The Third Circuit quoted at length from the *Brand X* opinion's language on consumer perception.<sup>117</sup> The court went so far as to cite numerous telecommunications companies' comments on the FCC record supporting the notion that the consumer is agnostic to the specific platform over which a company offers broadband service.<sup>118</sup> Notably, the *Time Warner Telecom* court rejected the argument that the FCC's deregulation of DSL broadband required a full market analysis; rather, the FCC's predictive judgment about likely market developments was "reasonable and consistent with the approach

<sup>110</sup> 47 U.S.C. § 153(46) (2006).

<sup>111</sup> Cf. *Brand X*, 545 U.S. at 988 ("Seen from the consumer's point of view, the Commission concluded, cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access . . .").

<sup>112</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . .").

<sup>113</sup> *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 234 (1994) ("But our estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the federal Communications Act of 1934."); Bamberger & Strauss, *supra* note 64, at 623–24 ("In other words, Step Two analysis considers whether agencies have permissibly exercised the interpretive authority delegated to them by reasonably employing appropriate methods for elaborating statutory meaning.")

<sup>114</sup> 507 F.3d 205 (3d Cir. 2007).

<sup>115</sup> 5 U.S.C. §§ 500–89 (2006).

<sup>116</sup> *Time Warner Telecom*, 507 F.3d at 217.

<sup>117</sup> See, e.g., *id.* at 216–17 & 216 n.10.

<sup>118</sup> *Id.* at 217–18.



upheld by the Supreme Court in *Brand X*.<sup>119</sup> The court's approach in this case lends support to the notion that the consumer's perspective is itself the ambiguous aspect of the 1996 Act subject to FCC interpretation, and that classification according to this rubric is the approach the statute requires.

### B. Scope of Agency Authority

This approach to *Chevron* is especially compelling where, as here, the agency's discretion would otherwise be vast. Two points — one specific to *Brand X* and one drawing on the Supreme Court's constructions of agency regulatory authority — support this view.

First, requiring the FCC to classify services based on consumer perception limits the FCC's policymaking discretion consistent with its practice under the *Computer II* rules. During the *Computer II* era, the FCC distinguished its “basic” and “enhanced” service classifications “functionally, based on how the consumer interacts with the provided information.”<sup>120</sup> Before the 1996 Act, the FCC did not merely consider the consumer perspective in its service classifications; rather, the classifications “turn[ed] on the nature of the functions that the end user [was] offered.”<sup>121</sup> As the *Brand X* Court explained, the 1996 Act definitions “substantially incorporated” those the FCC adopted in the early 1980s.<sup>122</sup> Indeed, the FCC reached the same conclusion after the passage of the 1996 Act<sup>123</sup> and applied the consumer perception rubric as the dispositive factor in its *Cable Declaratory Ruling*<sup>124</sup> and the post-*Brand X Wireline Broadband Order*.<sup>125</sup> To the extent Congress — by incorporating the *Computer II* definitions — intended to preserve or limit the FCC's means of classifying services, the 1996 Act should be interpreted not to give the FCC unbounded discretion to regulate services but rather to hold the FCC to the pre-1996 approach using the consumer perception rubric. Notably, this point suggests that where an ambiguous statute merely codifies earlier agency practice, step one ambiguity should not imply agency authority broader than that earlier practice.

Second, limiting FCC discretion to classify services also avoids conferring upon the FCC regulatory authority of a breadth that, as a general matter, Congress is unlikely to have intended. This argument

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<sup>119</sup> *Id.* at 222.

<sup>120</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 993 (2005).

<sup>121</sup> *Cable Declaratory Ruling*, 17 FCC Rcd. 4798, 4822 (2002).

<sup>122</sup> *Brand X*, 545 U.S. at 993.

<sup>123</sup> *Id.* at 992–93.

<sup>124</sup> *Cable Declaratory Ruling*, 17 FCC Rcd. at 4822 (“[W]e conclude that the classification of cable modem service turns on the nature of the functions that the end user is offered.”).

<sup>125</sup> *Wireline Broadband Order*, 20 FCC Rcd. 14,853, 14,864 (2005).

draws by analogy on the Supreme Court's "major questions" cases, in which the Court declined to find statutory ambiguity at *Chevron* step one where such ambiguity would have committed vast policymaking discretion to an agency.<sup>126</sup> Admittedly, unlike these cases, the *Brand X* Court found the underlying statute ambiguous. Nonetheless, the magnitude of the policy question of broadband regulation gives similar cause to doubt that the *Brand X* step one holding gives the FCC unfettered discretion to regulate broadband services.

Several Supreme Court precedents caution against construing a statute to confer vast agency authority absent an explicit congressional mandate. The Court's decision in *MCI Telecommunications Corp. v. AT&T*<sup>127</sup> was textually grounded; Justice Scalia's majority opinion explained that the FCC's authority under section 203 of the Communications Act to "modify" telephone company rate-filing requirements did not grant the FCC authority to eliminate rate regulation for telephone companies.<sup>128</sup> But the Court's rationale reflected the significance of the policy change the FCC claimed statutory authority to implement.<sup>129</sup> "It is highly unlikely," the Court explained, "that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion — and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."<sup>130</sup> The Court resolved a later case, *FDA v. Brown & Williamson Tobacco Corp.*,<sup>131</sup> on similar grounds. There, the Court held that the FDA's attempt to regulate tobacco products exceeded its statutory authority despite the FDA's broad statutory mandate to restrict the "sale, distribution, or use" of unsafe drugs.<sup>132</sup> Drawing a parallel to *MCI*, the Court explained, "As in *MCI*, we are confident that Congress could not have

<sup>126</sup> Sunstein, *supra* note 64, at 237.

<sup>127</sup> 512 U.S. 218 (1994).

<sup>128</sup> *Id.* at 227–29.

<sup>129</sup> Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 495 ("It is not merely the largeness of the change being effected, but also that accepting it will entail accepting that an agency can be empowered to change its mandate."); *see also* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (Or Why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593, 600 (2008) ("But the Court did not merely decide that elimination of some requirement was too dramatic to constitute a 'modification.' Instead, the opinion focused on the rate-filing requirement in particular, concluding that tariff filing was 'the essential characteristic of a rate-regulated industry' and that elimination of that single requirement was tantamount to total deregulation.").

<sup>130</sup> *MCI*, 512 U.S. at 231.

<sup>131</sup> 529 U.S. 120 (2000).

<sup>132</sup> *Id.* at 129.

intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>133</sup>

True, the Court in both *MCI* and *Brown & Williamson* found that Congress had not delegated the agency-asserted authority, and in *Brand X* the Court held the opposite. But this observation is all the more reason to conclude that the ambiguity in the 1996 Act’s definitions are tied to real limits on the FCC’s authority to reclassify services. The reclassification of broadband internet service as a “telecommunications service” would be the most significant change in consumer internet regulation since *Brand X* and perhaps since the passage of the 1996 Act.<sup>134</sup> Reclassification may subject a virtually unregulated broadband industry to the range of regulatory authorities under Title II of the Communications Act. Like the deregulation at issue in *MCI*, this reading of *Brand X* would leave to the FCC “the determination of whether an industry will be entirely, or even substantially” regulated “through such a subtle device” as the ambiguity of the word “offers.”<sup>135</sup> Given this parallel, which reading of the 1996 Act is more likely: that Congress left the question of the broadband industry’s regulation entirely to FCC discretion, or that it subjected the FCC’s regulatory power to a criterion that, although ambiguous, checked the FCC’s authority?

The FCC’s net neutrality bent adds some support to this view of *Brand X*. The nature of the authority the FCC claimed in *Brand X* was more limited than that which it claims now. The FCC’s reclassification proceeding is an explicit effort to address the FCC’s lack of authority to impose net neutrality mandates under Title I.<sup>136</sup> Indeed, the “third way” proposal that Chairman Julius Genachowski has floated would eschew many explicit Title II authorities in favor of the FCC’s apparent authority to regulate ISPs’ traffic-management practices.<sup>137</sup> But net neutrality appears nowhere in Title II, and the policy issue of nondiscriminatory treatment of internet traffic was not an is-

<sup>133</sup> *Id.* at 160; see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (“A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”).

<sup>134</sup> *Cf. Comcast Corp. v. FCC*, 600 F.3d 642, 649 (D.C. Cir. 2010) (“[I]f Title II applied to cable Internet, then . . . cable companies would have to unbundle the components of their Internet services, thus allowing Brand X and other independent Internet service providers (ISPs) to use the telecommunications component of those bundles to offer competing Internet service over cable company wires.”).

<sup>135</sup> *Cf. MCI*, 512 U.S. at 231.

<sup>136</sup> Reclassification Press Release, *supra* note 52, at 1 (“A recent decision of the U.S. Court of Appeals for the D.C. Circuit cast doubt on prior understandings about the FCC’s ability to ensure fair competition and provide consumers with basic protections when they use today’s broadband Internet services.”); see *Comcast Corp.*, 600 F.3d at 644.

<sup>137</sup> Reclassification Press Release, *supra* note 52, at 1.

sue in congressional debates over the 1996 Act because the policy issue would not exist for seven years.<sup>138</sup> Furthermore, to the extent Congress has spoken to the net neutrality question, it has rejected the policy; three consecutive Congresses have failed to pass net neutrality bills.<sup>139</sup> Does *Brand X* mean that the FCC has authority to reclassify broadband services as “telecommunications service[s]” explicitly and solely to impose net neutrality mandates? Construing the 1996 Act to require the FCC to classify services according to the consumer perception rubric prevents the FCC from bootstrapping the ambiguity *Brand X* found at *Chevron* step one to authorize vast regulatory power.

<sup>138</sup> Wu, *supra* note 36, at 143.

<sup>139</sup> See, e.g., Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong. (2009); Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong. (2008); Network Neutrality Act of 2006, H.R. 5273, 109th Cong. (2006); cf. *MCI*, 512 U.S. at 233 (rejecting idea that subsequent acts of Congress had changed the statute at issue because “[w]e have here not a consistent history of legislation to which one or the other, interpretation of the Act is essential”).