

A Supreme Choice Between the Blue Pill and the Red Pill: *Brand X Internet Services v. FCC*

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I. OVERVIEW

The United States Supreme Court’s decision in *National Cable & Telecommunications Ass’n v. Brand X Internet Services* settled “a battle

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for the soul of the internet.”¹ In 2002, the Federal Communications Commission (FCC) declined to classify cable modem service as a telecommunications service. Telephone companies subsequently decried the consequences of not subjecting cable modem service to common carrier regulations under Title II of the Communications Act of 1934 (Communications Act) as amended. On review, the United States Court of Appeals for the Ninth Circuit recognized the established doctrinal command to defer to a government agency’s expert judgment in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Nonetheless, the Ninth Circuit felt compelled to apply its own jurisdictional precedent instead. Thus, this case involved not just a question of statutory construction, but also a ruling regarding the interaction between two significant legal principles: the *Chevron* doctrine and stare decisis. On appeal, the Supreme Court held that the Ninth Circuit erred in its application of stare decisis over *Chevron* and the FCC’s definition of cable modem service was a lawful one.

This Comment will attempt to peel back the layers of this case by first discussing the technology at issue. The case history will then be explored, starting with the legislative history of 1996, proceeding with a notice of inquiry released in 2000, continuing with a declaratory ruling issued during 2002, and concluding with the decision of the Ninth Circuit in 2003. Next, the questions presented for certiorari and the arguments presented for reversal will be discussed. Finally, the Supreme Court’s decision will be analyzed.

II. THE TECHNOLOGY AT ISSUE: TELEPHONE LINES VERSUS CABLE LINES AS A HOUSEHOLD CONNECTION TO THE INTERNET

In a 2002 report, the United States Department of Commerce posited that more than fifty percent of households in the United States were connected to the Internet.² The report also estimated that more than seventy-five percent of those which were connected used a telephone line for “dial-up” access.³ Dial-up access requires that an individual’s computer dial the number of an Internet Service Provider (ISP), which then connects the user to the Internet so that they can browse Web sites,

1. Jeff Chester, Executive Dir., Ctr. for Digital Democracy, Statement on Today’s Decision of the Supreme Court To Review the “Brand X” Open Access Case (Dec. 3, 2004), available at <http://www.democraticmedia.org/news/BrandXSC.html>.

2. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1123 (9th Cir. 2003).

3. *Id.*

send electronic mail, etc.⁴ Dial-up access transfers data at a rate of up to 56 kilobits per second (kbps).⁵

A growing percentage of the population is using broadband services. Broadband services are mostly of two types: digital subscriber lines (DSL) and cable lines.⁶ DSL allows an ISP to transmit its broadband service directly to the individual by utilizing telephone lines and equipment located at the telephone company.⁷ Alternatively, cable lines utilize the coaxial cable that is commonly used for cable television service.⁸ However, while the cable companies similarly transmit their broadband service directly to the individual, they do so through their own cable system and without the need for a middleman.⁹ Thus, cable companies control the so-called “headend” or origination point for signals in the cable system.¹⁰ Broadband service transmits data at a rate of up to 10 megabits per second (mbps)—or 1000 times faster than dial-up access.¹¹

In 2002, approximately seventy-five percent of households in the United States were capable of accessing broadband services.¹² This figure has undoubtedly grown since that time.

III. CASE HISTORY FROM LEGISLATION THROUGH REGULATORY INTERPRETATION AND JUDICIAL REVIEW

A. *Legislation: The Telecommunications Act of 1996*

On February 8, 1996, President Clinton signed The Telecommunications Act of 1996 (Telecommunications Act).¹³ The Telecommunications Act, which amended the Communications Act, promoted the “deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”¹⁴

4. *Id.* at 1123-24.

5. *Id.* at 1124.

6. *See id.* It should also be noted that there are two other types available, satellite and fixed wireless, although the deployment of each is currently limited. *See id.* at 1125.

7. *See id.* at 1124.

8. *See id.*

9. *See id.*

10. *Id.* at 1124-25.

11. *Id.* at 1124.

12. *In re Inquiry Concerning High-Speed Internet Access to the Internet over Cable and Other Facilities (Declaratory Ruling)*, 17 F.C.C.R. 4798, 4803 (2002).

13. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 (2000)).

14. H.R. REP. NO. 104-458, at 113 (1996).

“Cable service” is defined as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”¹⁵

“Telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”¹⁶

“Information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”¹⁷

B. Regulatory Interpretation, Part 1: The FCC’s Notice of Inquiry

On September 28, 2000, the FCC released a notice of inquiry, *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities (Notice of Inquiry)*.¹⁸ The inquiry’s stated purpose was “to determine what regulatory treatment, if any, should be accorded to cable modem service and the cable modem platform used in providing this service.”¹⁹

First and foremost, the FCC asked for comments regarding the classification of cable modem service and the cable modem platform.²⁰ While posing the question, it acknowledged that there might be a number of different regulatory approaches, including treating cable modem service as: (1) a cable service subject to Title VI, (2) a telecommunications service subject to Title II, (3) an information service subject to Title I, or (4) a hybrid service subject to multiple provisions.²¹

The FCC also invited comments as to whether open access to the cable modem platform was a desirable policy goal.²² If so, it asked for

15. 47 U.S.C. § 522(6).

16. *Id.* § 153(46).

17. *Id.* § 153(20).

18. *In re Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities (Notice of Inquiry)*, 15 F.C.C.R. 19,287, 19,287 (2000).

19. *Id.*

20. *See id.* at 19,293-98.

21. *See* 47 U.S.C. §§ 151, 201, 521; *Notice of Inquiry*, 15 F.C.C.R. at 19,293.

22. *Notice of Inquiry*, 15 F.C.C.R. at 19,300-01.

opinions as to the most appropriate means of achieving that objective.²³ Moreover, the agency acknowledged that cable, wireless, and satellite operators do not provide access to multiple ISPs.²⁴ Therefore, it specifically asked for guidance as to whether a uniform framework should apply to all providers of high-speed services.²⁵

C. Regulatory Interpretation, Part 2: The FCC's Declaratory Ruling

There were over 250 subsequent filings by a variety of different commentators.²⁶ After deliberation, on March 15, 2002, the FCC issued its declaratory ruling, *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities (Declaratory Ruling)*.²⁷ Three overarching principles guided the agency's decision: (1) to encourage the ubiquitous availability of broadband, (2) to remove regulatory uncertainty that in itself may discourage investment and innovation, and (3) to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures.²⁸

Accordingly, the FCC concluded that cable modem service is an information service, not a cable service, and there is not a separate offering of telecommunications service.²⁹ The FCC's analysis relied upon the distinction drawn in three FCC decisions that the use of computer processing applications to act on content, code, protocol, or other aspects of the subscriber's information "enhances" the transmission or movement of information such that it constitutes an information service.³⁰ Nevertheless, the *Declaratory Ruling* also put forth the FCC's arguments against proposed alternative definitions.

To those who contended that cable modem service should be defined as a telecommunications service, the FCC responded that cable modem service does not provide capabilities "within communications,"

23. *Id.* at 19,301.

24. *Id.* at 19,304.

25. *Id.* at 19,304-06.

26. *In re Inquiry Concerning High-Speed Internet Access to the Internet over Cable & Other Facilities (Declaratory Ruling)*, 17 F.C.C.R. 4798, 4801 (2002).

27. *Id.* at 4798.

28. *See id.* at 4801-02.

29. *Id.* at 4802. The "interstate" part of the definition is derived from the FCC's jurisdictional authority and the finding that although such traffic is both interstate and intrastate in nature, it is properly classified as interstate. *See id.* at 4832.

30. *See id.* at 4820; *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, 104 F.C.C.2d 958 (1996); *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384 (1980); *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 7 F.C.C.2d 11 (1966).

but rather “via telecommunications.”³¹ Consequently, the telecommunications component is not separable from, but is rather integral to, other capabilities.³² The FCC did observe the prior ruling in *AT&T Corp. v. City of Portland*,³³ however, it disagreed that it compelled a finding that a separate telecommunications service is offered because of the existence of a telecommunications component.³⁴ The agency noted that the court did not have the benefit of briefing by the parties or the FCC concerning both this particular issue and recent legal developments.³⁴ Consequently, the *Declaratory Ruling* reiterated the difference between “telecommunications” and “telecommunications service,” and it unequivocally stated that the mere existence of a telecommunications component does not constitute the offering of a telecommunications service.³⁵ Therefore, cable modem service could not be considered a telecommunications service.

To those who contended that cable modem service should be defined as a cable service, the FCC responded that commentators misapplied the definition’s “one-way transmission to subscribers” and “other programming services” terms in light of their original legislative formulation during 1984.³⁶ Using this corrective lens, the FCC maintained that “one-way transmission to subscribers” was written to reflect the traditional view of cable as primarily a mass medium of communication and also to mark the boundary by which future transactional services would not be regulated as a cable service.³⁷ “Other programming services,” meanwhile, was written to reference nonvideo information and not to subscriber specific information.³⁸ The agency did observe that the definition of “cable service” specifically contemplates subscriber interaction.³⁹ However, original legislative intent was again utilized to demonstrate that subscriber interaction was meant to be limited to simple menu-selection or searches of pre-sorted information.⁴⁰ Other highly interactive services, such as offering the capacity to engage in transactions or off-premises data processing, were not meant to

31. *Declaratory Ruling*, 17 F.C.C.R. at 4823.

32. *See id.*

33. *Id.* at 4831-32.

34. *See id.* at 4832.

35. *Id.*

36. *Id.* at 4833-35.

37. *Id.* at 4833; H.R. REP. NO. 98-934, at 22, 27, 41 (1984), as reprinted in 1984 U.S.C.C.A.N. 4655, 4659, 4664, 4678.

38. *Declaratory Ruling*, 17 F.C.C.R. at 4835; H.R. REP. NO. 98-934, at 41-42, as reprinted in 1984 U.S.C.C.A.N. 4678-79.

39. *See Declaratory Ruling*, 17 F.C.C.R. at 4835.

40. *See id.*; H.R. REP. NO. 98-934, at 43, as reprinted in 1984 U.S.C.C.A.N. 4679-80.

constitute cable service.⁴¹ Therefore, cable modem service could not be considered a cable service.

To those who contended that cable modem service should be defined as advanced telecommunications ability, the FCC responded that such a definition would be a remedy without any teeth.⁴² It admitted that cable modem service fits within Section 706 of the Telecommunications Act because it meets the sole requirement of affording a user the ability to send and receive information at speeds higher than 200 kbps.⁴³ However, Section 706 does not impose particular obligations on providers of such capability.⁴⁴ Thus, while cable modem service could be considered advanced telecommunications ability, this was not an appropriate definition.

D. Judicial Review, Part 1: The Issue Before the Court

Petitions for review were filed in the United States Courts of Appeal for the Third, Ninth, and D.C. Circuits.⁴⁵ On April 1, 2002, the Judicial Panel on Multidistrict Litigation consolidated and transferred all seven petitions for review.⁴⁶ For reasons that will become more apparent later, although there were several alternative forums, the venue of the Ninth Circuit was chosen by judicial lottery according to 28 U.S.C. § 2112(a)(3).⁴⁷

Nevertheless, three different views were advanced. First, Brand X, EarthLink, the State of California, and the Consumer Federation of America argued that the FCC should have defined cable modem service as both an information service and a telecommunications service.⁴⁸ A second group of petitioners, including the National League of Cities, the National Association of Telecommunications Officers and Advisors, the

41. See *Declaratory Ruling*, 17 F.C.C.R. at 4835-36.

42. See *id.* at 4839.

43. *Id.*

44. *Id.*

45. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1127 (9th Cir. 2003); see *Petition for Writ of Certiorari, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. (NCTA)*, 125 S. Ct. 2688 (2004) (No. 04-281) [hereinafter *FCC Petition for a Writ of Certiorari*]; *Petition for Writ of Certiorari, NCTA*, 125 S. Ct. 2688 (2004) (No. 04-277) [hereinafter *NCTA Petition for Writ of Certiorari*]; *Brief for Verizon Tel. Cos., NCTA*, 125 S. Ct. 2688 (2004) (Nos. 04-277, 04-281); *Brief for Respondents Brand X Internet Servs. & Ctr. for Digital Democracy, NCTA*, 125 S. Ct. 2688 (2004) (Nos. 04-277, 04-281); *Brief for States & Consumer Groups Supporting Respondents, NCTA*, 125 S. Ct. 2688 (2004) (Nos. 04-277, 04-281); *Brief for Respondent Earthlink, Inc., NCTA*, 125 S. Ct. 2688 (2004) (Nos. 04-277, 04-281); *Reply Brief for Petitioners, NCTA*, 125 S. Ct. 2688 (2004) (Nos. 04-277, 04-281).

46. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1227 (9th Cir. 2003).

47. *Id.*; see 28 U.S.C. § 2112(a)(3) (2000).

48. *Brand X*, 345 F.3d at 1227.

United States Conference of Mayors, the National Association of Counties, the Texas Coalition of Cities for Utility Issues, and five Pennsylvania townships argued that the FCC should have defined cable modem service as both an information service and a cable service.⁴⁹ Finally, Verizon argued by itself that the FCC was correct to define cable modem service as an information service, but that DSL service should therefore also be classified as an information service.⁵⁰

In reaching its decision, the Ninth Circuit looked to the Supreme Court's *Chevron* opinion, which set forth the formula for judicial review of a federal agency's interpretive powers.⁵¹ According to *Chevron*:

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁵²

Applying this framework, the Ninth Circuit framed the appropriate inquiry as whether the FCC's interpretation in this case was based on a permissible construction of the statute.⁵³ The argument in favor of affirmation was presumptively strong. However, the Ninth Circuit subsequently considered the proverbial fly in the ointment: its own precedent.

E. Judicial Review, Part 2: The Ninth Circuit's Prior Precedent

In 2000, the aforementioned *AT&T* case was decided by a three-judge panel of the Ninth Circuit.⁵⁴ The suit was filed in regards to the merger of the nation's largest long-distance carrier, AT&T, and one of the nation's largest cable television operators, Telecommunications, Inc.⁵⁵ At that time, Telecommunications, Inc. had franchise agreements with the City of Portland and Multnomah County to provide cable broadband

49. *Id.*

50. *Id.*

51. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

52. *Id.*

53. *Brand X*, 345 F.3d at 1127.

54. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 871 (9th Cir. 2000).

55. *See id.* at 874.

service.⁵⁶ So, as a condition of the merger, the City of Portland and Multnomah County sought to condition AT&T's acquisition of their franchises upon a provision of open access to AT&T's "@Home" cable broadband network.⁵⁷ AT&T refused and filed suit against the local franchise authorities for a declaratory ruling that the City of Portland and Multnomah County lacked the power to impose such a condition.⁵⁸ In response, the City of Portland argued that cable modem service is a cable service governed by the franchises.⁵⁹ Hence, the Ninth Circuit resolved to determine the statutory definition of "cable service."

Without much discussion, the Ninth Circuit concluded that cable modem service is not cable service because Internet access is not one-way and general, but rather interactive and individual.⁶⁰ Consequently, it found that a cable operator may provide cable modem service without a cable service franchise.⁶¹ This ruling helped delineate "cable service," but it still left the exact definition of "cable modem service" unresolved.⁶² Nevertheless, the Ninth Circuit continued its analysis and determined:

Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.⁶³

Therefore, almost two years prior to the FCC's Declaratory Ruling, the Ninth Circuit defined "cable modem service" as both an information service and a telecommunications service.⁶⁴

F Judicial Review, Part 3: Mesa Verde, Neal, and the Ninth Circuit's Ultimate Decision

The Ninth Circuit believed that its decision in *Brand X* was not determined by *Chevron*, but rather by stare decisis.⁶⁵ In *Brand X*, the

56. *Id.*

57. *See id.* at 875.

58. *Id.* at 875-76.

59. *See id.* at 876.

60. *See id.*

61. *Id.* at 877.

62. *See id.*

63. *Id.* at 878.

64. *See id.*

Ninth Circuit considered the possible applicability of the exception that was carved out in *Mesa Verde Construction Co. v. Northern California District Council of Laborers*.⁶⁶ In *Mesa Verde*, the Ninth Circuit held that precedent can be abrogated by subsequent agency interpretation, provided that the interpretation is reasonable and the precedent constituted deferential review of agency decision-making.⁶⁷ However, because this case involved precedent that did not review agency decision-making, the Ninth Circuit concluded that it fell outside the scope of the exception.⁶⁸ Furthermore, the Ninth Circuit looked to the Supreme Court's opinion in *Neal v. United States* for support of stare decisis.⁶⁹ In *Neal*, the Court ruled that "[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law."⁷⁰ Notably, the Brand X court came to its conclusions without any consideration of whether the FCC's interpretation was reasonable.⁷¹ It simply issued a per curiam opinion disposing of the case according to the principle of stare decisis.⁷² In sum, the Ninth Circuit saw no reason to apply a different rule to circuit courts.⁷³

Circuit Judges O'Scannlain and Thomas both wrote concurring opinions.⁷⁴ Judge Thomas, the author of the *AT&T* opinion, wrote to underscore his view that *AT&T* was correctly decided because cable modem service does indeed contain a telecommunications service component.⁷⁵ Meanwhile, Judge O'Scannlain observed that "adherence to *stare decisis* . . . produces a result 'strikingly inconsistent with *Chevron's* underlying principles."⁷⁶ O'Scannlain explained that there are three possible outcomes in this case: (1) reversal by the Supreme Court, (2) action by Congress, and (3) nonacquiescence by the FCC.⁷⁷ O'Scannlain even noted that Supreme Court Justice Antonin Scalia prophesized this positively bizarre scenario in his dissenting opinion in

65. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1130 (9th Cir. 2003).

66. See *id.* at 1130-31; *Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir. 1988).

67. *Brand X*, 345 F.3d at 1130 (citing *Mesa Verde*, 861 F.2d at 1136).

68. See *id.* at 1131.

69. *Id.* at 1131-32; see *Neal v. United States*, 516 U.S. 284 (1996).

70. *Brand X*, 345 F.3d at 1131-32 (quoting *Neal*, 516 U.S. at 294-95).

71. See *id.* at 1132.

72. *Id.*

73. See *id.*

74. *Id.* at 1132-40.

75. See *id.* at 1135.

76. *Id.* at 1132 n.4 (quoting Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 192 (2002)).

77. *Id.* at 1133.

United States v. Mead.⁷⁸ Nevertheless, O’Scannlain felt compelled to concur.⁷⁹

IV. THE QUESTIONS PRESENTED TO THE SUPREME COURT

The FCC,⁸⁰ as well as the National Cable & Telecommunications Association (NCTA),⁸¹ filed petitions for a writ of certiorari with the Supreme Court. The FCC argued that the Ninth Circuit incorrectly overrode its expertise “with respect to a communications policy issue of immediate and compelling national importance.”⁸² It defined the question presented as follows:

Whether the court of appeals erred in holding that the Federal Communications Commission had impermissibly concluded that cable modem service is an “information service,” without a separately regulated telecommunications service component, under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*⁸³

Meanwhile, the NCTA contended that “the FCC’s was a reasonable interpretation of statutory language” and, “subject only to deferential review, national communications policy [should] be made by the FCC.”⁸⁴ It defined the question presented as follows:

Whether, under the framework set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the FCC was entitled to decide that, for purposes of regulation under the Communications Act, cable operators offering so-called “cable modem service” (high-speed Internet access over cable television systems) provide only an “information service” and not a “telecommunications service.”⁸⁵

It should be noted that the United States Courts of Appeal for the Fourth, Eighth, and Federal Circuits had previously joined the Ninth Circuit in its determination.⁸⁶ However, the United States Courts of Appeal for the

78. *See id.* at 1134 (citing *United States v. Mead*, 533 U.S. 218, 246 (2001)).

79. *See id.*

80. FCC Petition for Writ of Certiorari, *supra* note 45, at 1.

81. NCTA Petition for Writ of Certiorari, *supra* note 45, at 1.

82. FCC Petition for Writ of Certiorari, *supra* note 45, at 15.

83. *Id.* at 1.

84. NCTA Petition for a Writ of Certiorari, *supra* note 45, at 20-21.

85. *Id.* at (i) (citation omitted).

86. *See Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1376 (Fed. Cir. 2000) (“[W]e conclude that the Court of Federal Claims erred in holding that, on the facts of this case, an Executive agency regulation could effectively construe a statute in a manner different from a prior definitive court ruling.”); *Indus. TurnAround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997) (“We are precluded from adopting [the agency’s interpretation] as the law of the Circuit because it stands in conflict with . . . a prior panel opinion of this court.”); *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519, 523 (8th Cir. 1991) (“*Chevron* does not stand for the proposition that

Second, Third, Eleventh, and D.C. Circuits had ruled in the opposite manner.⁸⁷ On December 3, 2004, the Supreme Court granted certiorari to settle this conflict.⁸⁸

V. THE ARGUMENTS PRESENTED TO THE SUPREME COURT FOR REVERSAL

A. *The Ninth Circuit Misinterpreted Chevron*

The bottom line is that *Chevron* represents more than just a formula for appellate court application. It also embodies a principle of laissez-faire jurisprudence necessitated by the federal regulatory structure. The Ninth Circuit's rigid conclusion did not seem to address the latter principle while taking into account much of the former formula.

In its brief, the FCC argued that the Ninth Circuit's decision incorrectly abrogated agency authority over matters which are specifically under its purview.⁸⁹ Clearly, the philosophy of *Chevron* is that deference applies "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."⁹⁰ This principled scheme calls for the agency to have primary authority.⁹¹ If the agency has not yet exercised that primary

administrative agencies may reject, with impunity, the controlling precedent of a superior judicial body?").

87. See *Satellite Broad. & Comms. Ass'n of Am. v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994) ("[T]his circuit is not precluded from revisiting our initial interpretation of the regulatory scheme in [a prior decision]."); *Schisler v. Sullivan*, 3 F.3d 563, 568 (2d Cir. 1993) ("New regulations at variance with prior judicial precedents are upheld unless 'they exceeded the Secretary's authority [or] are arbitrary and capricious.'") (quoting *Heckler v. Campbell*, 461 U.S. 458, 466-68 (1983)); *United States v. Joshua*, 976 F.2d 844, 855 (3d Cir. 1992) ("Where a prior panel of this court has interpreted an ambiguous statute in one way, and the responsible administrative agency later resolves the ambiguity another way, this court is not bound to close its eyes to the new source of enlightenment."); *Chem. Waste Mgmt., Inc. v. U.S. EPA*, 873 F.2d 1477, 1482 n.3 (D.C. Cir. 1989) ("Our discussion rejecting the presumption set forth in [a previous decision's] dictum has been separately circulated to and approved by the entire court, and thus constitutes the law of this circuit.").

88. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 654 (2004).

89. See *id.*; Brief for the Federal Petitioners at 17-18, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) (Nos. 04-277, 04-281) ("[T]he Ninth Circuit's approach . . . would subject a single agency decision to differing standards of review, thereby producing unseemly races to the courthouse, unnecessary conflicts in the circuits, and unfortunate situations in which (absent this Court's review) the meaning of federal statutes would be dispositively determined for the entire Nation by lone three-judge panels.").

90. *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

91. See *id.*

authority, a court should not step in and render its own opinion.⁹² To the contrary, the FCC suggested that the proper result is for the agency to still utilize its own expertise and resources to resolve the conflict.⁹³

As recently as three years ago, the Supreme Court found in *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.* that “the subject matter here is technical, complex and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent.”⁹⁴ In the majority opinion, Justice Anthony Kennedy wrote that “[t]he agency’s decision, therefore, to assert jurisdiction over these attachments is reasonable and entitled to our deference.”⁹⁵ Yet, in *Brand X*, the Ninth Circuit concluded that *stare decisis* trumps the deferential treatment of *Chevron* by reason of a distinction between types of precedent.⁹⁶ Therefore, the FCC argued that this was “inconsistent with *Chevron*’s recognition that Congress has delegated to the agency—not the courts of appeals—the primary authority to resolve statutory ambiguities.”⁹⁷ The agency also noted that “*Chevron* does not contain any exception . . . for cases in which courts have attempted to resolve the ambiguity without agency guidance, and any such exception would conflict with the rationale that underlies the *Chevron* doctrine.”⁹⁸

Furthermore, the FCC agreed with the NCTA’s contention that there were “pressing reasons for limiting *Neal*.”⁹⁹ According to the FCC, the Ninth Circuit misinterpreted *Neal* as a so-called “*Chevron* Step Two” case (involving a silent or ambiguous statute) when in fact it was a so-called “*Chevron* Step One” case (involving a clear and unambiguous statute).¹⁰⁰ Consequently, both the FCC and the NCTA posited that *Neal* should not have even applied to *Brand X*.¹⁰¹ Deference could have then correctly been accorded to the FCC’s subsequently reasonable interpretation.

92. See Brief for the Federal Petitioners, *supra* note 89, at 32 (“As this Court held in *Chevron* . . . [s]uch policy arguments are more properly addressed to legislators or administrators, not to judges who are not experts in the field.” (internal quotations omitted)).

93. See *id.*

94. 534 U.S. 327, 339 (2002).

95. *Id.* at 342.

96. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003).

97. Brief for the Federal Petitioners, *supra* note 89, at 17.

98. *Id.* at 39.

99. NCTA Petition for a Writ of Certiorari, *supra* note 45, at 24.

100. FCC Petition for a Writ of Certiorari, *supra* note 45, at 22-23.

101. See *id.*; NCTA Petition for Writ of Certiorari, *supra* note 45, at 24.

B. The Ninth Circuit's Distinction Between Types of Precedent Is Nonsensical

In adhering to the precedent of *AT&T* and in failing to give deferential review to *Chevron*, the Ninth Circuit distinguished between precedent which reviewed agency decision-making and that which did not review agency decision-making.¹⁰² Granted, the *Mesa Verde* exception makes sense for its line of cases which involve judicial review of agency decision-making. However, in its brief, the FCC noted:

Before the agency has acted, the legal question before the court of appeals is simply how best to resolve the statutory ambiguity. After the agency has interpreted the statute, however, the legal question before the court of appeals is whether the agency, to which Congress has delegated the authority to construe the statute, has adopted a permissible view.¹⁰³

The Ninth Circuit's distinction, which placed an emphasis on the very agency decision-making that was foreclosed under different circumstances, is arguably paradoxical. It would have made more sense and been simpler for the Ninth Circuit to have distinguished the case differently.¹⁰⁴ In any event, the Ninth Circuit's distinction is simply confusing.

C. The Ninth Circuit's Ruling Has Perverse Consequences

Under the Declaratory Ruling, cable modem service providers are not subject to regulation as common carriers under Title II or as cable service providers under Title VI, but as information service providers under the far less stringent provisions of Title I.¹⁰⁵ Alternatively, under the Ninth Circuit's opinion in *Brand X*, cable modem service providers stood to be classified as common carriers and subject to corresponding regulation.¹⁰⁶ Of greater concern, however, is that there would have been an incentive to litigate each new interpretive issue as it arose, so as to erect a prophylactic barrier from further review by the very agency charged to make such interpretations.¹⁰⁷

102. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1131 (9th Cir. 2003).

103. Brief for the Federal Petitioners, *supra* note 89, at 44.

104. See James Grimmelmann, *What's at Stake in Brand X?*, LAWMEME, Dec. 16, 2005, <http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=1663> ("As soon as you see that either [*AT&T* or *Mesa Verde*] is ambiguous, though, you immediately realize that the *Brand X* court picked the wrong resolution of the ambiguity.")

105. See *Brand X*, 345 F.3d at 1126.

106. See *id.*

107. See *Satellite Broad. & Commc'ns Ass'n of Am. v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994) ("[This] result illogically . . . would create a rush to the courthouse among parties wishing

Shameless forum shopping could have ensued. In such a bizarre construct, a court's statutory interpretation in any matter of first impression would be binding precedent for that circuit. The FCC's only option would have been to either interpret prior to litigation or otherwise participate in such litigation so as to influence the outcome.

The FCC claimed that this would have raised perverse consequences for its decision-making process.¹⁰⁸ But under the rule of the Ninth Circuit, it would not be clear which decisions govern and when they take effect. Further, the FCC submitted that it would have been entirely possible for a different rule of law to apply to different circuits.¹⁰⁹ Essentially, the Ninth Circuit's illogical construction raised questions more than it provided answers.

VI. THE SUPREME COURT'S DECISION

The Supreme Court concluded that the Ninth Circuit should have applied the *Chevron* doctrine rather than stare decisis.¹¹⁰ In an opinion written by Justice Thomas and joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, and Breyer, the Court pointed out that even agency inconsistency is not a basis for declining to analyze under *Chevron* "since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."¹¹¹ Consequently, the Court unequivocally stated: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."¹¹² According to the Court, the Ninth Circuit read *Neal* mistakenly.¹¹³ The Ninth Circuit then confused the *best* statutory interpretation with the *only*

to litigate a statute's meaning before an agency has exercised its broad knowledge respecting the matters subjected to agency regulations." (internal quotations omitted)).

108. Brief for the Federal Petitioners, *supra* note 89, at 40.

109. *See id.* at 43 ("[A] no-deference rule like the one adopted in the Ninth Circuit 'illogically would wed [a circuit] to [its precedent] while all other circuits and the Supreme Court would be bound under *Chevron* to defer' to an agency's reasonable construction.") (quoting *Satellite Broad. & Commc'n Ass'n of Am. v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994)); NCTA Petition for Writ of Certiorari, *supra* note 45, at 2 (stating that the Ninth Circuit's approach "promotes circuit splits . . . and unnecessarily generates appeals to this Court").

110. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005).

111. *Id.* at 2699-2700 (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 742 (1996)).

112. *Id.* at 2700.

113. *See id.* at 2701.

impermissible statutory interpretation.¹¹⁴ While the Ninth Circuit may have believed its earlier interpretation in *AT&T* was the best interpretation, the Ninth Circuit did not hold in that case that the statute unambiguously required such a construction.¹¹⁵ Thus, *Chevron*, and not *stare decisis*, applied to the case at bar.¹¹⁶

The Court also ruled that the FCC's definition of cable modem service was a lawful construction of the Communications Act under *Chevron*.¹¹⁷ At *Chevron*'s first step, the statute does not reflect an unambiguous intent of Congress.¹¹⁸ Despite the respondents' argument that the Communications Act's definition of telecommunications service can have but a single meaning, the Court believed that the definition could also reasonably be read to mean a stand-alone offering of telecommunications.¹¹⁹ Furthermore, the FCC's own distinction between basic and enhanced service further supports the conclusion that the Communications Act is ambiguous.¹²⁰

At *Chevron*'s second step, the FCC's construction constituted a "reasonable policy choice."¹²¹ All information service offerings are not being exempted from common carrier regulations under Title II of the Communications Act.¹²² Likewise, the respondents' argument that cable modem service provides a transparent transmission is mistaken because "[w]hen an end user accesses a third-party's Web site . . . he is equally using the information service provided by the cable company that offers him Internet access as when he accesses the company's own Web site, its e-mail service, or his personal Web page."¹²³

In conclusion, the Court observed that "[t]he [FCC] is in a far better position to address these questions than we are."¹²⁴ Therefore, it reversed and remanded the judgment of the Ninth Circuit.¹²⁵

Justice Scalia wrote a dissenting opinion, in which Justices Souter and Ginsburg joined, that characterized the FCC's statutory interpretation as implausible.¹²⁶ Justice Scalia was quite concerned by "how an

114. *See id.*

115. *See id.* at 2701-02.

116. *Id.* at 2699.

117. *Id.* at 2702.

118. *See id.* at 2704.

119. *Id.*

120. *Id.* at 2706.

121. *Id.* at 2708.

122. *Id.* at 2709.

123. *Id.*

124. *Id.* at 2712.

125. *Id.*

126. *See id.* at 2713 (Scalia, J., dissenting).

experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions.¹²⁷ In sum, Justice Scalia thought it perfectly clear that cable modem service offers telecommunications.¹²⁸

VII. CONCLUSION

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court faced a choice between stare decisis (the blue pill) and *Chevron* (the red pill) based upon a deeply flawed decision of the Ninth Circuit. If it had chosen the blue pill and a rigid adherence to stare decisis, the unfortunate consequence would have been an abrogation of power specifically granted to the FCC, and the undesirable effects would have included the promotion of forum shopping and conflicting rules of law. The correct choice was to overturn the decision of the Ninth Circuit and to restore the full effect of the *Chevron* doctrine. In this case, the Court wisely chose the red pill.

127. *Id.* at 2718 (Scalia, J., dissenting).

128. *See id.*