

Settled No More: An Administrative Agency May  
Overturn Prior Judicial Interpretation of a Statute  
within its Jurisdiction so long as the Statutory  
Language is Ambiguous:

*National Cable & Telecommunications Association,  
et al. v. Brand X Internet Services, et al.*

ADMINISTRATIVE LAW – CHEVRON FRAMEWORK –  
TELECOMMUNICATIONS LAW — COMMUNICA-  
TIONS ACT

The Supreme Court of the United States held that (1) If a statute is ambiguous, and the implementing agency's construction is reasonable, *Chevron* requires federal courts to accept the agency's interpretation, even if the agency's interpretation differs from prior judicial construction of the statute; and (2) the FCC's classification of Cable Modem Service as an Information Service rather than Telecommunications Service under Title II of the Communications Act was lawful and therefore subject to deference by the courts.

*NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL., V.  
BRAND X INTERNET SERVICES, ET. AL.*, 125 S.Ct. 2688 (2005)

Title II of the Communications Act of 1934<sup>1</sup> requires all providers of “telecommunications service” to comply with strict common-carrier regulations.<sup>2</sup> In March 2002, the Federal Communications Commission (hereafter, “the FCC”) declared that cable modem service is not a “telecommunications service,” but rather an “information service” subject to far less regulation under the Com-

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1. Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (2000).

2. *National Cable & Telecommunications Association, et al. v. Brand X Internet Services et al.*, 125 S. Ct. 2688, 2695. *See* 47 U.S.C. § 153(44): “[A] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” 47 U.S.C. § 153(44) (2000).

munications Act.<sup>3</sup> This declaration came two years after a Ninth Circuit judicial construction found precisely the opposite; that cable modem service is a “telecommunications service” as defined within the statute.<sup>4</sup> In this case, the Court was asked to determine whose view should prevail.<sup>5</sup>

Consumers have traditionally accessed the Internet through “narrowband” connections between telephone wires and computer modems.<sup>6</sup> Because of the slower speed of narrowband service, high-speed “broadband” Internet service has become increasingly popular.<sup>7</sup> The two principal forms of broadband service are Digital Subscriber Line Service (hereinafter “DSL”) and cable modem service.<sup>8</sup> Cable companies offering broadband Internet service may act as an Internet service provider (hereinafter “ISP”) and provide high-speed Internet access directly to consumers, or they may lease their transmission lines to independent ISPs.<sup>9</sup>

Under the Communications Act, as amended in 1996, a company providing cable modem services may be classified as either a telecommunications carrier or as an information service

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3. *National Cable*, 125 S. Ct. at 2695. “The term ‘telecommunications service’ means 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.” 47 U.S.C. § 153(46) (2000). “The term “telecommunications” means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received” 47 U.S.C. § 153(43) (2000). “The term “information service” means 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. 47 U.S.C. § 153(20) (2000).

4. *National Cable*, 125 S. Ct. at 2698-99 (citing *AT&T Corp. v. Portland*, 216 F.3d 871, 877-880 (9th Cir. 2000)).

5. *Id.* at 2695.

6. *Id.* The court described “narrowband” as slower speed Internet dial-up connections. *Id.* at 2696.

7. *Id.* “Broadband” refers to services that transmit data between the Internet and the user's computer at much higher speeds than narrowband connections. *Id.*

8. *Id.* at 2698. DSL service provides high speed Internet access through local telephone lines that are owned by local telephone companies. *Id.* (citing *Worldcom, Inc. v. FCC*, 246 F.3d 690 (D.C. Cir. 2001)). Cable modem service delivers high speed access by connecting the user's computer to the Internet via a network of cable lines owned by the cable company. Other emerging forms of broadband service include land and satellite-based wireless connections. *Id.*

9. *National Cable*, 125 S. Ct. at 2696.

provider.<sup>10</sup> The critical difference is that telecommunications providers are subject to mandatory common-carrier regulations under Title II of the Act while information service providers are not.<sup>11</sup> The two classifications originated in the FCC's *Computer II* regime of the late 1970's, which defined telecommunications services by how they were perceived as being offered in the marketplace.<sup>12</sup> Specifically, the FCC distinguished between "basic" telephone service and "enhanced" computer-processing service (offered over telephone lines) by regulating the former and exempting the latter.<sup>13</sup> The terms "telecommunications service" and "information service" established by the 1996 Amendment to the Communications Act are analogous to the *Computer II* "basic service" and "enhanced service," respectively.<sup>14</sup>

The issue of regulatory classification of cable modem service was first addressed in *AT&T Corp. v. City of Portland*<sup>15</sup> by the

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10. *Id.* 47 U.S.C. § 153(44) provides, "[t]he term 'telecommunications carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in [§ 26] of this title) . . . ." 47 U.S.C. § 151.

11. *National Cable*, 125 S. Ct. at 2696. Under Title II, telecommunications carriers are required to comply with a number of provisions, including charging their customers reasonable, non-discriminatory rates; allowing other carriers to interconnect with their systems; and contributing to a federal "universal service" fund. 47 U.S.C. §§ 201-209, 251(a)(1), 254(d) (2000). Although these requirements do not apply to ISPs, the FCC can subject them to other regulations under its Title I interstate and foreign communications regulatory authority. 47 U.S.C. §§ 151-161 (2000).

12. *National Cable*, 125 S. Ct. at 2696. The *Computer II* regime consisted of a new set of rules promulgated in the late 1970's by the FCC for the purpose of regulating data-processing services over telephone lines. *Id.* (citing *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 417-423 (1980)).

13. *Id.* (quoting *In re Amendment of Section 64.702*, 77 F.C.C.2d at 428-32). Basic service is "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Id.* at 2697 (quoting *In re Amendment of Section 64.702*, 77 F.C.C.2d at 420). Pure or "transparent" transmission refers to the channeling of ordinary language from one point to another with no computer alteration of the message other than that necessary to convert the information into electronic form for transmission purposes. *Id.* Enhanced service involves "computer processing applications [ ] used to act on the content, code, protocol, and other aspects of the subscriber's information, . . . [as well as] protocol conversion." *National Cable*, 125 S. Ct. at 2697 (quoting *In re Amendment of Section 64.702*, 77 F.C.C.2d at 428). Basically, enhanced services are services that go beyond pure transmission, such as computer processing and data storage. *Id.* "Regulating" means subjection to the mandatory common carrier regulation under Title II. *Id.*

14. *Id.*

15. 216 F.3d 871 (9th Cir. 2000).

Court of Appeals for the Ninth Circuit.<sup>16</sup> The FCC had not yet spoken on the question, nor was it a party to the case.<sup>17</sup> Nevertheless, the court of appeals found it necessary to interpret the Communications Act and determined that cable modem service was a “telecommunications service” as defined by the Act.<sup>18</sup>

In March 2002, the FCC reached a different conclusion when it issued a declaratory ruling finding that “broadband Internet service provided by cable companies is an ‘information service’ but not a ‘telecommunications service’ under the Act, and therefore not subject to mandatory Title II common-carrier regulation.”<sup>19</sup> The FCC noted that its 1998 *Universal Service Report* to Congress classified “non-facilities based” ISPs solely as information service providers.<sup>20</sup> Even though cable companies own the transmission lines used to provide Internet access to their customers, the FCC found no language in the statute requiring different treatment from ISPs that do not.<sup>21</sup> Moreover, the FCC reasoned that, although Internet access is inherently integrated with the high-speed wire that provides it, consumers do not buy cable modems to use the wires but rather to access the Internet.<sup>22</sup> Finally, though mandatory Title II regulations would not be imposed upon cable

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16. *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120, 1127 (9th Cir. 2003).

17. *National Cable*, 125 S. Ct. at 2698.

18. *Brand X*, 345 F.3d at 1128. The question before the court in *Portland* was whether a local government could require a cable franchise to provide unaffiliated ISPs access to its cable modem. *Id.*

19. *National Cable*, 125 S. Ct. at 2697. The FCC had initiated a rule-making proceeding in September of 2000 to apply the 1996 classifications of “telecommunications service” and “information service” to cable companies that provided broadband Internet access directly to consumers. *Id.* See *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002).

20. *National Cable*, 125 S. Ct. at 2698 (citing *In re Inquiry Concerning High-Speed Access to the Internet*, 17 F.C.C.R. at 4823). See *In the Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11830 (1998). Non-facilities-based ISPs are companies that do not own the transmission lines that they use to provide Internet access to their customers. *National Cable*, 125 S. Ct. at 2697-98 (citing *In the Matter of Federal-State Joint Board*, 13 F.C.C.R. at 11533).

21. *National Cable*, 125 S. Ct. at 2698.

22. *Id.* The FCC was implying that unlike telephone service, which consumers purchase in order to be able to transmit information transparently across telephone lines, buyers of cable modem services are more interested in accessing and storing information from the Internet than they are in transmitting “pure” data. *Id.* Said another way, cable companies are not viewed as “offer[ing] telecommunications to the end user, but rather . . . merely use telecommunications to provide end users with cable modem service.” *Id.*

2006

Settled No More

companies, the FCC invited comment on whether, under its discretionary Title I authority, it should require cable companies to nonetheless share access to their transmission lines with other ISPs on common carrier terms.<sup>23</sup>

Numerous parties subsequently petitioned for judicial review, challenging the validity of the FCC's determinations.<sup>24</sup> The Court of Appeals for the Ninth Circuit, which by "judicial lottery" was selected to hear the cases, granted the petitions in part, and vacated the *Declaratory Ruling* in part.<sup>25</sup> Specifically, the court of appeals held that the FCC impermissibly concluded that cable modem service was not "telecommunications service" under the Communications Act, because the court of appeals had already decided the issue in *Portland*.<sup>26</sup> Therefore, the FCC's contrary subsequent interpretation was overridden by established judicial precedent.<sup>27</sup>

The Supreme Court granted certiorari<sup>28</sup> to determine whether the deferential framework established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>29</sup> applied to the FCC's in-

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23. *Id.* (citing *In re Inquiry Concerning High-Speed Access to the Internet*, 17 F.C.C.R. at 4839).

24. *Id.* at 2698. Respondents consisted of three different groups. *Id.* The first group, which included Brand X, Earthlink, the State of California, and the Consumer Federation of America claimed that cable modem service is both an information and a telecommunications service, and therefore should be subject to common carrier regulations. *Brand X*, 345 F.3d at 1127. The second group was a collection of organizations representing various cities and counties across the nation. *Id.* They also contended that cable modem service should be classified as both an information service and telecommunications service, thereby subjecting the cable companies to local regulation under the Communications Act. *Id.* The third Respondent is Verizon, who agreed with the FCC's determinations regarding cable modem service, but argued that DSL service is entitled to similar treatment. *Id.*

25. *Id.* at 2698.

26. *National Cable*, 125 S. Ct. at 2698.

27. *Id.* at 2699. Justice Thomas pointed out that the court of appeals focused its analysis solely on the *stare decisis* effect of *Portland*, and never considered the permissibility of the FCC's construction under the framework established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *National Cable*, 125 S. Ct. at 2698.

28. Certiorari is "[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to the delivery the record in the case for review. BLACK'S LAW DICTIONARY 220 (7th ed. 1999).

29. 467 U.S. 837 (1984).

terpretation of the term “telecommunications service,” and if so, whether the FCC’s conclusion was permissible.<sup>30</sup>

Justice Thomas wrote the majority opinion for a divided Court.<sup>31</sup> He first addressed the issue of whether the court of appeals erred by failing to apply *Chevron* when it reviewed the FCC’s Declaratory Judgment.<sup>32</sup>

The principles recognized in *Chevron* governed the Court’s review of trends in statutory construction by federal agencies.<sup>33</sup> Specifically, *Chevron* requires a federal court to adopt an administrative agency’s construction of an ambiguous statute within its jurisdiction so long as the agency’s construction is reasonable.<sup>34</sup> The rationale of this rule rests on the Court’s conclusions that (1) statutory ambiguities, or gaps, are congressional delegations of authority to the agency, and (2) due to their specific expertise, agencies are the best source for making difficult policy decisions involved in filling statutory gaps.<sup>35</sup> With regard to the FCC’s ruling, the Court acknowledged that Congress had expressly delegated authority to the FCC not only to enforce the Communications Act, but also to promulgate legal rules necessary to carry out this duty.<sup>36</sup> Thus, *Chevron* applied to the *Declaratory Ruling*,

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30. *National Cable*, 125 S. Ct. at 2699, 2702.

31. *Id.* at 2695. The majority opinion included Chief Justice Rehnquist and Justices O’Connor and Kennedy. *Id.* Justices Stevens and Breyer wrote concurring opinions. *Id.* at 2712.

32. *Id.* at 2699.

33. *Id.* at 2699.

34. *Id.* Under *Chevron*, the court must defer even if the agency’s reading differs from what the court believes is the best statutory interpretation. *Id.* (citing *Chevron*, 467 U.S. at 843-44).

35. *National Cable*, 125 S. Ct. at 2699 (citing *Chevron*, 467 U.S. at 865-66).

36. *Id.* (citing 47 U.S.C. § 201(b) (2000); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-378 (1999)). 47 U.S.C. § 201(b) states that, “The [FCC] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.” *Id.*

2006

Settled No More

even though the FCC's interpretations within that order differed from interpretations made in the past.<sup>37</sup>

Next, the majority addressed the court of appeal's failure to apply *Chevron* to the FCC order due to that court's prior findings in *Portland*.<sup>38</sup> Justice Thomas explained that "[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."<sup>39</sup> In other words, a court should refrain from applying *Chevron* only when prior judicial construction of the statutory language held it to be unambiguous.<sup>40</sup> If, on the other hand, prior decisions found the statute to be ambiguous or are simply silent on the issue, then the court should apply *Chevron* to the agency's determinations regardless of any contradiction with established precedent.<sup>41</sup> The Court claimed that this rule was consistent with the presumption in *Chevron* that Congress intended statutory ambiguities to be clarified, first and foremost, by the jurisdictional agency.<sup>42</sup>

Further, the Court found the contrary rule adopted by the court of appeals to be the product of misinterpretation of its prior

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37. *National Cable*, 125 S. Ct. at 2699-2700. The Respondents had claimed that *Chevron* should not apply because the FCC's *Declaratory Ruling* was inconsistent with its past policies. *Id.* Justice Thomas explained that "agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Id.* Rather, such inconsistency may establish a basis for finding the ruling to be arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 553, but only if the FCC failed to adequately explain its reasons for the change. *Id.* (citing *Barnhart v. Walton*, 535 U.S. 212, 226 (2002); *Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 742 (1996); *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991); *Motor Vehicle Mfrs. Assn. of United States v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 46-57, 103 (1983)).

38. *Id.* at 2700 (citing *Brand X*, 345 F.3d at 1127-32). The court of appeals believed that its construction of the Communications Act in *Portland* "foreclosed" the FCC's subsequent and contrary interpretation of the same subject. *Id.* (citing *Brand X*, 345 F.3d at 1127-32).

39. *Id.*

40. *Id.*

41. *Id.*

42. *National Cable*, 125 S. Ct. at 2700 (citing *Smiley*, 517 U.S. at 740-41). Justice Thomas states that "a contrary rule would produce anomalous results[,] [because *Chevron* instructs that] it is for agencies, not courts, to fill statutory gaps." *Id.*

decisions.<sup>43</sup> Those decisions merely held that prior judicial interpretation of a statute control an agency's construction *if* the precedent found the statute to be unambiguous.<sup>44</sup> With regard to the present action, the majority noted that nowhere in *Portland* did the court of appeals decide that the Communications Act "unambiguously required treating cable Internet providers as telecommunications carriers."<sup>45</sup> Therefore, the Court held, the court of appeals was bound to apply *Chevron* to the FCC's interpretation, and erred by refusing to do so.<sup>46</sup>

Justice Thomas next turned to the question of whether the FCC's interpretation of the definition of "telecommunications service" was a lawful construction of the Communications Act.<sup>47</sup> *Chevron* imposes a two-step test for determining whether an agency's interpretation of a statute is permissible.<sup>48</sup> First, the court must ask "whether the statute's plain terms directly address the precise question at issue."<sup>49</sup> Next, if the statute is found to be ambiguous on that question, the court must defer to the agency's reading, so long as the interpretation is "a reasonable policy choice for the agency to make."<sup>50</sup>

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43. *Id.* at 2701 (citing *Neal v. United States*, 516 U.S. 284 (1996), *Chapman v. United States*, 500 U.S. 453 (1991)). In *Neal*, the Court refused to defer to an interpretation made by the United States Sentencing Commission that conflicted with the Court's holding in *Chapman*. *Id.* at 2701 (citing *Neal*, 516 U.S. at 290-295). The court of appeals therefore viewed *Neal* as standing for the proposition that judicial interpretation of a statute overrules an agency's subsequent contrary interpretation. *Id.* (citing *Brand X*, 345 F.3d at 1131-32). The *National Cable* majority found otherwise, noting that *Chapman* held the statute under review to be ambiguous. *Id.* Thus, *Neal* is best understood as establishing "that a precedent holding a statute to be unambiguous forecloses a contrary agency interpretation." *Id.*

44. *Id.* (citing *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)).

45. *Id.* at 2701-02. Specifically, Justice Thomas pointed out that *Portland* "held only that the *best* reading of [the Communications Act] was that cable modem service was a 'telecommunications service,' not that it was the *only permissible* reading of the statute." *Id.* at 2701.

46. *Id.* at 2702.

47. *National Cable*, 125 S. Ct. at 2702.

48. *Id.*

49. *Id.* (citing *Chevron*, 467 U.S. at 843).

50. *Id.* (citing *Chevron*, 467 U.S. at 845).

The Court proceeded to analyze the FCC ruling under the first step of the *Chevron* test.<sup>51</sup> The parties challenging the ruling argued that cable companies who provide Internet access must, by necessity, “offer” the transmission service required to obtain and employ such access.<sup>52</sup> Therefore, they contended that cable modem service unambiguously met the statutory definition of telecommunications service, which is described as “the [offering] of telecommunications for a fee directly to the public.”<sup>53</sup> The majority disagreed, reasoning that “offering” can also be understood to mean a distinct, “stand alone” sale of a telecommunications service.<sup>54</sup> Borrowing from the FCC’s logic, the Court opined that, although cable companies must *use* telecommunications to offer Internet access to their customers, it does not necessarily follow that they therefore *offer* those telecommunications.<sup>55</sup> Justice Thomas recognized that such usage of the term contradicts both common convention<sup>56</sup> and the FCC’s traditional distinction between basic and enhanced services.<sup>57</sup>

Further, the Court averred that finding the offering of Internet service via telecommunications to also be an offering of telecommunications service would subject all ISPs to mandatory common carrier regulations, regardless of whether or not such entities

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51. *Id.* at 2704. Before beginning its analysis, the majority set forth its understanding of the FCC’s interpretation of the Communications Act. *Id.* The FCC’s first conclusion, that cable modem service is an “information service” as defined by the Act, was undisputed. *Id.* However, the FCC also determined that cable modem service was not a “telecommunications service” because from a customer’s point of view, cable modem service did not “offer” high-speed lines to the customer. *Id.* Rather, the FCC contended that the customer viewed transmission as merely a necessary component of the Internet access to be purchased. *Id.*

52. *National Cable*, 125 S. Ct. at 2704.

53. *Id.* See 47 U.S.C. § 153(46) (2000).

54. *National Cable*, 125 S. Ct. at 2704.

55. *Id.*

56. *Id.* The Court used the example of a car dealership here to illustrate its view. *Id.* Although a motor is necessary for a car to run, one does not think of a car dealership as “offering” motors. *Id.*

57. *Id.* According to the majority, the regulatory history of the FCC confirmed the ambiguity of the term “telecommunications service” within 47 U.S.C. § 153(46). *Id.* at 2705 (citing *In re Amendment of Section 64.702*, 77 F.C.C.2d at 420). When the FCC adopted the *Computer II* terms “basic” and “enhanced” services, the terms were defined according to how they were functionally perceived by the consumer. *Id.* (citing *In re Amendment of Section 64.702*, 77 F.C.C.2d at 420). Therefore, the FCC could have reasonably taken the same approach in its *Declaratory Ruling* when it construed the term “telecommunications service.” *Id.* (citing *In re Amendment of Section 64.702*, 77 F.C.C.2d at 420).

owned the transmission lines used to provide their services.<sup>58</sup> Justice Thomas opined that this result would completely contravene the FCC's established policy of not subjecting non-facilities based providers to common carrier regulations.<sup>59</sup> He insisted that the better approach was to view Congress' silence as a delegation to the FCC to determine the proper classification for ISPs that are facilities-based.<sup>60</sup>

Next, the Court analyzed the FCC ruling under the second step of the *Chevron* test.<sup>61</sup> The majority was not persuaded by claims that the FCC's position allows cable companies to avoid common carrier regulations by simply bundling information service with telecommunications.<sup>62</sup> Justice Thomas noted that the FCC's declaratory ruling did not state that all telecommunications bundled with information service were automatically exempt from Title II regulations.<sup>63</sup> Rather, the FCC merely concluded that Internet access service that relies upon telecommunications is not a telecommunications service.<sup>64</sup> Accordingly, the FCC's construction was a reasonable policy choice for it to make.<sup>65</sup>

In the final portion of the opinion, the majority rebutted Respondent MCI's assertion that the FCC's treatment of cable modem service was an arbitrary and capricious deviation from its treatment of DSL service, which was subject to common carrier

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58. *Id.* at 2707.

59. *National Cable*, 125 S. Ct. at 2707.

60. *Id.* at 2708.

61. *Id.*

62. *Id.*

63. *Id.* (citing *In re Inquiry Concerning High-Speed Access to the Internet*, 17 F.C.C.R. at 4823).

64. *National Cable*, 125 S. Ct. at 2708.

65. *Id.* at 2710. In reaching this conclusion, the Court also examined the FCC's understanding of cable modem service. *Id.* at 2709. The FCC had characterized cable modem service as a capability for acquiring, storing, utilizing and manipulating information from the World Wide Web. *Id.* Described in this manner, such service differs from the "pure transmission" qualities of basic telephone service (a regulated telecommunications service), which simply transmits unaltered information from point to point. *Id.* at 2709-10.

2006

## Settled No More

regulations.<sup>66</sup> Here, the Court reiterated its earlier position that the FCC was free to depart from a prior policy as long as it adequately explained its reasons for the change.<sup>67</sup> In its declaratory ruling, the FCC determined that, due to changed market conditions, the regulatory treatment of broadband services should be minimized in order to promote further investment and innovation.<sup>68</sup> Justice Thomas found nothing arbitrary in the FCC's rationale and concluded that the FCC had lawfully employed its expertise to resolve the difficult questions presented in this case.<sup>69</sup>

Justice Stevens, in a short concurring opinion, agreed with the majority's holding that a court's interpretation of an ambiguous statute does not bar subsequent contrary interpretation by an agency, but pointed out that such a rule is "not necessarily applicable to a decision by this Court that would presumably remove any pre-existing ambiguity."<sup>70</sup>

Justice Scalia wrote the dissenting opinion,<sup>71</sup> which he began by chastising the FCC for "once again attempting to concoct 'a whole new regime of regulation (or of free-market competition)' under the guise of statutory construction."<sup>72</sup>

The dissent argued that the FCC unlawfully exceeded its authority by ruling that cable-modem service providers did not offer telecommunication services as defined within the Communi-

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66. *Id.* at 2711. MCI's claim was based upon 5 U.S.C. § 706, which provides: To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutionality and statutory provisions, and determine the meaning and applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.  
5 U.S.C. § 706 (2000).

67. *National Cable*, 125 S. Ct. at 2711.

68. *Id.* (citing *In re Inquiry Concerning High-Speed Access to the Internet*, 17 F.C.C.R. at 4802).

69. *Id.* at 2712. The Court reversed the court of appeals' judgment and remanded the cases for further proceedings consistent with the Court's opinion. *Id.*

70. *Id.* (Stevens, J., concurring).

71. Justices Souter and Ginsburg joined the dissent as to Part I. *Id.* at 2713 (Scalia, J., dissenting).

72. *National Cable*, 125 S. Ct. at 2713 (Scalia, J., dissenting) (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 234 (1994)).

cations Act.<sup>73</sup> To Justice Scalia, the issue was not whether the term “offer” was ambiguous merely because “alternative dictionary definitions” existed.<sup>74</sup> Rather, the question was whether a consumer of cable-modem service would recognize the product as comprising two separate and distinct features, namely Internet access and the high-speed transmission providing such access, or whether the two components were so integrated that they could not be reasonably considered individually.<sup>75</sup> To illustrate the dissent’s claim that the components were two independent parts of a joint offering, Justice Scalia analogized the situation to that involved with ordering a pizza from a pizzeria.<sup>76</sup> When a customer calls a pizzeria and asks if they offer delivery, both parties reasonably understand that two separate offerings are implicated; the delivery of the pizza and the pizza itself.<sup>77</sup> Similarly, Justice Scalia contended that the high-speed transmission (i.e. telecommunications) component of cable-modem service retains such a distinct identity from the Internet access service that it must be understood as being a separate part of a package deal.<sup>78</sup>

Next, Justice Scalia refuted the majority’s concern that the dissent’s conclusions would result in the common-carrier regulation of all ISPs by pointing to the regulatory history of the FCC.<sup>79</sup> Under the *Computer II* regime, the FCC refrained from imposing Title II regulations upon non-facilities based “enhanced” services

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73. *Id.* (Scalia, J., dissenting) (citing *In re Inquiry Concerning High-Speed Access to the Internet*, 17 F.C.C.R. at 4799).

74. *Id.* at 2714 (Scalia, J., dissenting).

75. *Id.* (Scalia, J., dissenting).

76. *Id.* (Scalia, J., dissenting).

77. *National Cable*, 125 S. Ct. at 2714 (Scalia, J., dissenting). In an attempt to discredit this analogy, the majority retorted that pizza delivery is not required in order to buy a pizza, while a customer must buy the high-speed cable connection in order to access the ISP functions. *Id.* at 2705. In response, Justice Scalia pointed out that the cable company’s ISP functions can be used in the absence of cable connection by accessing them from an internet connection other than cable. *Id.* at 2715 (Scalia, J., dissenting).

78. *Id.* at 2714 (Scalia, J., dissenting). For support, Justice Scalia examined what other products cable-modem service substitutes for in the marketplace. With regard to the other broadband service, DSL, the physical transmission pathway to the Internet is sold (by requirement) separately from the Internet functionality. Justice Scalia viewed such treatment as indicative of the notion that customers shopping for broadband Internet service are seeking both functionality and transmission (i.e. both the pizza and the delivery). *Id.* at 2715 (Scalia, J., dissenting).

79. *Id.* at 2716 (Scalia, J., dissenting).

providers.<sup>80</sup> As such, the dissent saw no reason why the FCC could not treat non-facilities based ISPs similarly through the exercise of its statutory authority to forbear from imposing most common-carrier regulations.<sup>81</sup>

Finally, the dissent criticized the Court for continuing its “administrative law improvisation project” by concluding that an agency’s statutory construction may override a court’s earlier interpretation of the same question if the statute is ambiguous.<sup>82</sup> Justice Scalia’s primary concern was that the majority rule, which he labeled a reaction to a string of prior Court decisions that reduced the amount of cases that would qualify for *Chevron* deference, allows settled judicial precedent to be overturned by executive officers.<sup>83</sup> He attacked the rule as being unconstitutional and a source of confusion and chaos for the lower courts, and speculated that hundreds of prior statutory decisions are now subject to agency-reversal.<sup>84</sup> Under the tradition of *stare decisis*, Justice Scalia stated that a court’s interpretation of a statute not previously reviewed by an agency should become the predictable and established law.<sup>85</sup> Unfortunately, in the “wonderful new world” created by the majority, Justice Scalia sadly surmised that what seems to be settled is no longer so.<sup>86</sup>

Justice Breyer concurred with the majority’s opinion, but wrote separately to attack Justice Scalia’s dissent for wrongly character-

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80. *Id.* (Scalia, J., dissenting) (citing *In re Amendment of Section 64.702*, 77 F.C.C.2d at 428).

81. *Id.* (Scalia, J., dissenting).

82. *National Cable*, 125 S. Ct. at 2718 (Scalia, J., dissenting) (citing *Mead*, 533 U.S. at 218).

83. *Id.* at 2719 (Scalia, J., dissenting). In response to the dissent’s criticism that the majority’s rule allowed judicial decisions to be “subject to reversal by executive officers,” the majority noted that it is the agency, not the courts, that is the authoritative interpreter of statutes within its jurisdiction. *Id.* at 2701. Thus, judicial precedent is no more “reversed” by an agency in such circumstances than it is when a state court reaches a different interpretation of state law than that previously made by a federal court. *Id.*

84. *Id.* at 2720 (Scalia, J., dissenting). In *Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), the Court held that the final decisions of Article III courts cannot be reversed or ignored by executive officers. *Id.* at 110-11.

85. *Id.* at 2721 (Scalia, J., dissenting).

86. *Id.* (Scalia, J., dissenting). Justice Scalia claimed that a review of the *Chevron* framework was not even necessary here because the Court was not bound by the court of appeals’ precedent. *Id.* (Scalia, J., dissenting). Therefore, the Court could have reversed the lower decision without resorting to the making of “bad law.” *Id.* (Scalia, J., dissenting).

izing the Court's holding in *United States v. Mead*.<sup>87</sup> In his dissent, Justice Scalia portrayed *Mead* as providing the idea that a certain level of "formal process [by] the agency" was required before the agency's decision would be entitled deference under *Chevron*.<sup>88</sup> In response, Justice Breyer remarked that although such analysis characterized Justice Scalia's dissent in *Mead*, it did not represent the majority decision.<sup>89</sup> On the contrary, Justice Breyer claimed, *Mead* recognized that the proper prerequisite for *Chevron* deference was a finding that Congress expressly or implicitly delegated authority to an agency to "fill" statutory "gaps;" the existence of formal rulemaking was neither necessary nor sufficient to make such a finding.<sup>90</sup>

Since the early days of the republic, the courts have given great weight and deference to an administrative agency's construction of a statutory scheme within its jurisdiction.<sup>91</sup> In *Edwards' Lessee v. Darby*,<sup>92</sup> the Supreme Court was asked to invalidate a survey of land made by a North Carolina board of commissioners.<sup>93</sup> Under a 1782 state law enacted to grant parcels of land to soldiers of the Continental Army, the commissioners were authorized to locate various salt springs designated for public use and preserve six hundred forty acres of land surrounding such springs as public property.<sup>94</sup> After a survey of one particular spring showed that six hundred sixty-seven acres had been reserved, a private citizen claiming to own some of the reserved land sued to overturn the survey.<sup>95</sup> The citizen argued that the commissioners had exceeded

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87. *National Cable*, 125 S. Ct. at 2711 (Breyer, J., concurring) (citing *United States v. Mead*, 533 U.S. 218 (2001)).

88. *Id.* at 2719 (Scalia, J., dissenting).

89. *Id.* at 2712 (Breyer, J., concurring) (citing *Mead*, 533 U.S. at 245-46).

90. *Id.* (Breyer, J., concurring) (citing *Mead*, 533 U.S. at 226-227, 231, 237). Justice Breyer explained that such proceedings were not necessary because an agency may "arrive at" authoritative interpretations of a statute through other means, and they were not sufficient because Congress may not have intended to delegate such interpretative authority to the agency where the legal issue is unusually basic. *Id.* (Breyer, J., concurring).

91. *Chevron*, 467 U.S. at 844.

92. 25 U.S. 206 (1827).

93. *Id.* at 209.

94. *Id.* at 207-08.

95. *Id.* at 207.

2006

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their statutory authority by reserving more than six hundred forty acres.<sup>96</sup> The Court found the relevant statutory language to be ambiguous and upheld the commissioners' reservation of the land as warranted under the statute.<sup>97</sup> Recognizing a substantial deference to be accorded the commissioners' decisions, Justice Trimble explained: "[i]n the construction of a doubtful and ambiguous law, the cotemporaneous [sic] construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."<sup>98</sup>

This principle was reiterated by the Supreme Court nearly a century later in *Bates & Guild Co. v. Payne*,<sup>99</sup> when it said:

[w]here congress has committed to . . . a department certain responsibilities requiring the exercise of judgment and discretion, [its] action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless [the department] has exceeded [its] authority or this court should be of opinion that [its] action was clearly wrong.<sup>100</sup>

In *Payne*, the Court refused to disturb an order from the Postmaster General that denied second-class mail status to the plaintiff's publication, which would have resulted in lower rates.<sup>101</sup>

In *Chicago & Southern AirLines, Inc. v. Waterman S.S. Corp.*,<sup>102</sup> however, the Supreme Court rejected the notion that deference to administrative agencies sanctioned the reversal of judicial decisions.<sup>103</sup> The issue arose after the Civil Aeronautics Board denied Waterman Steamship Corporation's request to engage in overseas air transportation, but granted a similar request to Wa-

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96. *Id.* at 209.

97. *Darby*, 25 U.S. at 210-11.

98. *Id.* at 210.

99. *Bates & Guild Co. v. Payne*, 194 U.S. 106 (1904).

100. *Payne*, 194 U.S. at 108-09.

101. *Id.* at 107. The Court suggested that it may have reached another conclusion, but nonetheless held the Postmaster General's actions to be a reasonable exercise of his congressionally delegated discretion. *Id.* at 110.

102. 333 U.S. 103 (1948).

103. *Id.* at 113.

terman's rival, Chicago and Southern Air Lines.<sup>104</sup> The Civil Aeronautics Act<sup>105</sup> authorized judicial review of rulings by the Civil Aeronautics Board.<sup>106</sup> However, it was unclear whether the Act applied to orders of the board that were expressly approved by the President of the United States.<sup>107</sup> The court of appeals, attempting to avoid conflict with Executive foreign affairs power,<sup>108</sup> held that courts could review the orders, but that results of such review were subject to approval by the President.<sup>109</sup> The Supreme Court adamantly disagreed and reversed, declaring that "judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."<sup>110</sup>

The Court further defended its sovereign territory in *Barlow v. Collins*.<sup>111</sup> After the Secretary of Agriculture (hereafter the "Secretary") amended regulations associated with the Food and Agricultural Act,<sup>112</sup> multiple farmers sought a declaratory judgment

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104. *Id.* at 105.

105. 49 U.S.C. § 646 (1946).

106. *Waterman*, 333 U.S. at 105.

107. *Id.*

108. Under the United States Constitution,

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls. . . . [H]e shall receive Ambassadors and other public Ministers." U.S. CONST. art. II., § 2, cl. 2, 3. Although the Constitution is silent on the boundaries of the President's foreign affairs powers, many scholars, political leaders, Supreme Court justices and Presidents have maintained that the Constitution "contains implicit or hidden allocations of power that are corollary or incidental to" the express powers of the President, affording to him or her the flexibility to undertake actions that are necessary and proper towards carrying out those express powers.

Dana C. Makielski, *Foreign Policy: Can the President Act Alone? Gaps and Conflicts in the Constitutional Grants of Power*, 1 RICH. J. L. & PUB. INT. 1, 3 (1996).

109. *Waterman*, 333 U.S. at 112-13.

110. *Id.* at 113. Justice Scalia quoted this language in his dissent, in support of his argument that enforcement of an agency's interpretation of a statute that conflicts with prior judicial precedent is an unconstitutional reversal of an Article III court by another branch of government. *National Cable*, 125 S. Ct. at 2719 (Scalia, J., dissenting).

111. 397 U.S. 159 (1970).

112. 7 U.S.C. § 1444(d) (1965).

invalidating the Secretary's actions.<sup>113</sup> The quarrel centered on the meaning of the statutory phrase "making a crop."<sup>114</sup> Although the lower courts had deferred to the Secretary's judgment, the Supreme Court declined to follow.<sup>115</sup> Instead, Justice Douglas explained that "since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction."<sup>116</sup> Thus, the Court was free to disregard the Secretary's determinations and enforce its own interpretations as settled law.<sup>117</sup>

*Chevron*, decided in 1984, featured a dispute between the Environmental Protection Agency (hereafter, "the EPA") and several environmental associations over an EPA interpretation of the Clean Air Act Amendments of 1977.<sup>118</sup> The amendments required states that had failed to meet established national air quality standards to set up permit programs, which regulated "new or modified major stationary sources" of air pollution.<sup>119</sup> In 1981, the EPA promulgated regulations applicable to the permit requirement that allowed a state to utilize a plant-wide definition of the statutory term "stationary source."<sup>120</sup> This definition meant that an existing plant which operated multiple "pollution-emitting devices" could add or modify one piece of equipment without being subject to the permit requirements, provided the change did not increase the plant's total emissions.<sup>121</sup>

After the environmental organizations petitioned for review, the Court of Appeals for the District of Columbia vacated the EPA's

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113. *Barlow*, 397 U.S. at 161-62.

114. *Id.* at 166.

115. *Id.* at 163, 165-66.

116. *Id.* at 166.

117. *Id.*

118. *National Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718-719 (D.C. Cir. 1982). *See* 91 Stat. § 685 (2000).

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

120. *Id.* "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act. 42 U.S.C. § 7502(b)(6) (2000).

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

regulations.<sup>122</sup> Although the court found that the Clean Air Act<sup>123</sup> did not expressly define the type of “stationary source” to which the permit requirements should apply, it concluded that the EPA’s plant-wide definition was not aligned with the statute’s purpose to improve air quality.<sup>124</sup>

Upon review, the Supreme Court reversed, holding that the court of appeals had erred by construing its own definition of the term “stationary source” when Congress had not mandated that definition.<sup>125</sup> Justice Stevens cited numerous sources of authority and articulated a general rule, subsequently referred to as the “*Chevron* framework,” which the court of appeals should have applied.<sup>126</sup> Specifically, Justice Stevens announced that when a court reviews an administrative agency’s construction of a statute within its jurisdiction, the court must consider two questions.<sup>127</sup> First, the court must decide whether Congress has unambiguously expressed its intent as to the precise question at issue. If so, the court must apply that meaning.<sup>128</sup> However, if the statute is silent or ambiguous as to a precise question at issue, then the court cannot automatically apply its own interpretation, “as would be necessary in the absence of an administrative interpretation.”<sup>129</sup> Rather, the court must determine whether the agency’s findings

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122. *Id.* The parties that filed the petition were the National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc. *Id.* at 841. Chevron U.S.A. was one of several energy production companies that intervened to support the EPA’s position. *Gorsuch*, 685 F.2d at 719.

123. 42 U.S.C. § 7607 (2000).

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

125. *Id.* at 842. After applying the test established in its decision, the Court also concluded that the EPA’s construction of the term “stationary source” was permissible. *Id.*

126. *Id.* at 842-43. See *National Cable*, 125 S. Ct. at 2699.

127. *Chevron*, 467 U.S. at 842.

128. *Id.* at 843. Thus, if the agency’s conclusion differed with Congress’s intended meaning, the court must set aside the agency’s determination. *Id.*

129. *Id.* Notice that this language decidedly left open the precise issue resolved in *National Cable*. *Id.* Justice Stevens admitted that if the agency had not spoken on the specific question at issue, the court would be required to apply its own construction. *Id.* at 842. However, he did not contemplate the effect of such a construction, i.e. whether the court’s interpretation would become the settled law under *stare decisis*, or whether the court’s interpretation would simply act as a “temporary fill-in” until the agency finally ruled on the issue. *Id.* at 843.

are based upon a reasonable construction of the statute.<sup>130</sup> If so, the court must apply the agency's interpretation.<sup>131</sup>

The *Chevron* court's rationale for its new rule, which Justice Thomas borrowed to reach the majority's conclusions in *National Cable*, was two-fold.<sup>132</sup> First, the Court presumed that if Congress "explicitly left a gap for the agency to fill, [such action represented] an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."<sup>133</sup> Similarly, ambiguities were thought to be implicit legislative delegations.<sup>134</sup> Second, Justice Stevens recognized the Court's long history of deference to administrative decisions, and concluded that, due to an agency's superior understanding of the issues and policies surrounding the statute it administers, such deference would be justified.<sup>135</sup>

Although *Chevron* has been widely applied, distinguished, and qualified since its inception, three decisions over the last 15 years had a particularly important impact on the *National Cable* Court's understanding and ultimate expansion of *Chevron*'s framework.<sup>136</sup> Specifically, in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,<sup>137</sup> the Court sought to clarify the interplay between *Chevron* and *stare decisis* in a decision involving the Interstate Commerce Act.<sup>138</sup> The Act required common freight carriers to publish their rates with the Interstate Commerce Commission (hereinafter, "the ICC") and imposed three requirements: (1) carriers and shippers were prohibited from deviating from the published rates;<sup>139</sup> (2) the

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130. *Id.*

131. *Id.* at 844.

132. *Chevron*, 467 U.S. at 844. See *National Cable*, 125 S. Ct. at 2700. Justice Thomas seemed to find the following statements by the *Chevron* Court to be particularly persuasive: "Such legislative regulations are given controlling weight. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844.

133. *Chevron*, 467 U.S. at 844.

134. *Id.*

135. *Id.*

136. *National Cable*, 125 S. Ct. at 2700-01.

137. 497 U.S. 116 (1990).

138. *Id.* at 130-31. 49 U.S.C. § 10762 (2000).

139. 49 U.S.C. § 10761 (2000).

carrier's rates had to be nondiscriminatory;<sup>140</sup> and (3) the carrier's practice and rates had to be reasonable.<sup>141</sup>

At issue in *Maislin* was the ICC's *Negotiated Rates* policy, which allowed a shipper to elude a carrier's published rate by privately negotiating a lower rate with the carrier.<sup>142</sup> Under this policy, the ICC ruled that a carrier acted unreasonably when it attempted to enforce its published rate after the parties negotiated a lower rate.<sup>143</sup> Further, the ICC claimed that its determination was entitled to deference under *Chevron* because the Interstate Commerce Act did not specifically describe the types of practices that are considered unreasonable, and therefore it was free to "fill the gap."<sup>144</sup> The Court disagreed, noting that it had previously held that, by its terms, the Interstate Commerce Act prohibited as discriminatory "secret negotiations" and the charging of rates lower than the published rate.<sup>145</sup> In reversing the ICC's actions, Justice Brennan explained that "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."<sup>146</sup>

In 1996, the Court again addressed the application of *Chevron* in lieu of *stare decisis* when an administrative agency's interpretation of a statute departs from a court's prior construction.<sup>147</sup> In

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140. 49 U.S.C. § 10741 (2000).

141. *Maislin Industries*, 497 U.S. at 116. See also 49 U.S.C. § 10701 (2000). The provision in question stated: "A through route established by the rail carrier must be reasonable. Divisions of joint rates by rail carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable." 49 U.S.C. § 10701(a) (2000).

142. *Maislin Industries*, 497 U.S. at 116.

143. *Id.* at 130.

144. *Id.*

145. *Id.* (citing *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908)).

146. *Id.* at 131. The *National Cable* majority construed this statement to simply mean that a prior judicial interpretation of a statute trumps an agency's subsequent interpretation only if the court had found the statutory language to be unambiguous. *National Cable*, 125 S. Ct. at 2700. In dissent, Justice Scalia came to the opposite conclusion, opining that Justice Brennan's remarks reinforced the dominance of *stare decisis* over *Chevron* where the Court had already *clearly* defined the meaning of a statute's terms. *Id.* at 2719 (Scalia, J., dissenting). Specifically, Justice Scalia contended that the word "clear" in Justice Brennan's statement referred to the idea that the uncertainty surrounding the statutory language was cleared up by the Court's construction in a prior decision, not that the statutory language itself was unambiguous and clear. *Id.* (Scalia, J., dissenting).

147. *Neal v. United States*, 516 U.S. 284 (1996).

*Neal v. United States*, a convicted drug dealer was sentenced in accordance with the Supreme Court's prior interpretation of the relevant federal sentencing statute<sup>148</sup> in *Chapman v. United States*.<sup>149</sup> After the United States Sentencing Commission (hereafter, "the Sentencing Commission") revised its sentencing guidelines in a manner that conflicted with the *Chapman* approach, the convict sought to have his sentence reduced in accordance with the new rules.<sup>150</sup> The Court declined to defer to the Sentencing Commission's new guidelines, holding that the principle of *stare decisis* compelled it to adhere to its earlier construction in *Chapman*.<sup>151</sup> Justice Kennedy reasoned 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."<sup>152</sup>

In 2001, a third major post-*Chevron* decision arrived in *United States v. Mead Corp.*<sup>153</sup> In that case, the Court did not directly address the issue of the proper relationship between *Chevron* and *stare decisis*.<sup>154</sup> Rather, it set out to more specifically define the limits of *Chevron* deference owed to the various actions of admin-

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148. 21 U.S.C. § 841 (b)(1)(A)(v).

149. *Neal*, 516 U.S. at 288 (citing *Chapman v. United States*, 500 U.S. 453 (1991)).

150. *Id.* at 288-89.

151. *Id.* at 290.

152. *Id.* at 295. Justice Kennedy's rationale for this conclusion rested primarily on two points: (1) With regard to statutory construction, the reason that the courts attach great weight to *stare decisis* is that Congress can freely supersede the Court's interpretation of a statute; and (2) absent any such changes, or dispositive evidence of congressional intent, the judicial system requires the stability and predictability that is produced by the Court adhering to its prior statutory constructions. *Id.* at 295-96. In *National Cable*, Justice Scalia portrayed *Neal*'s "plain language" as being a clear and firm rejection of the idea that *Chevron* deference can compel the Court to revisit a prior judicial interpretation of a statute. *National Cable*, 125 S. Ct. at 2719 (Scalia, J., dissenting). However, the *National Cable* majority found support for its position in the precedent that the *Neal* Court cited in reaching its conclusion. *Id.* at 2701. Specifically, the *Chapman* decision, upon which *Neal* was based, had held that the federal sentencing statute at issue was unambiguous. *Chapman*, 500 U.S. at 462-63. Therefore, Justice Thomas read *Neal* as establishing "only that a precedent holding a statute to be unambiguous forecloses a contrary agency construction." *National Cable*, 125 S. Ct. at 2701. In such manner, *Neal* was held to conform with *Maislin*, and with the majority rule established in *National Cable*. *Id.*

153. 533 U.S. 218 (2001).

154. *Id.* at 221.

istrative agencies that implement statutes within their jurisdiction.<sup>155</sup>

The question before the Court was whether “ruling letters”<sup>156</sup> issued by the United States Custom Service (hereafter, the “Customs Service”) were entitled deference under *Chevron*.<sup>157</sup> Justice Souter announced that they were not, explaining that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>158</sup> The Court found that the Customs Service’s “ruling letters” did not qualify under this rule because the language of the relevant statute did not convey a congressional intention to delegate authority to the Customs Service to issue such rulings with the force of law.<sup>159</sup> Nor did the Customs Service engage in formal notice-and-comment rulemaking when issuing them.<sup>160</sup> Therefore, it was clear to the majority that the “ruling letters” were not binding on third parties who were not part of the transaction described therein, and they were not binding on the courts.<sup>161</sup>

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155. *Id.*

156. A “ruling letter,” formally known as a “tariff classification ruling,” represents the official position of the Customs Service with respect to the particular transaction [at issue] and is binding on all Customs Service personnel...In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances. Harmonized Tariff Schedule, 19 U.S.C. § 1202 (2000).

157. *Mead*, 533 U.S. at 221.

158. *Id.* at 226. Justice Souter further stated that “[d]elegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.” *Id.*

159. *Id.* at 232.

160. *Id.* at 233.

161. *Id.* In *National Cable*, Justice Scalia claimed that the *Mead* decision’s imposition of a formal rule-making requirement significantly limited the number of agency actions entitled to *Chevron* deference. *National Cable*, 125 S. Ct. at 2718-19 (Scalia, J., dissenting). As a result, the district courts were forced to interpret many statutory ambiguities that may have been resolved differently by administrative agencies better suited to the task. *Id.* at 2719 (Scalia, J., dissenting). Therefore, he suggested that the prospect of an “ossification of large portions of our statutory law” by courts with inadequate expertise motivated the *National Cable* majority to invent its new rule that allowed judicial decisions to be overturned by executive agencies. *Id.* (Scalia, J., dissenting).

The long line of Supreme Court cases that have reviewed the interpretations of an administrative agency have remained largely faithful to the guidance of Justice Trimble in *Darby*, that such determinations are “entitled to a very great respect.”<sup>162</sup> Indeed, the *Chevron* framework itself is a formal embodiment of this long-standing principle. However, nowhere before *National Cable* did the Court ever claim that this “great respect” outweighed the judiciary’s own firmly established principles and precedents. That an agency may overcome *stare decisis* and compel a court to accept its statutory interpretation over the prior judicial interpretation of the same is a dramatic extension of the *Chevron* doctrine. Yet, this is precisely the effect of the Court’s ruling in *National Cable*.

Justice Thomas’s support for such an idea rested in the rationale espoused in *Chevron*. Namely, he claimed that “*Chevron* established a ‘presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that 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>163</sup> In other words, if there was a statutory gap to fill, *Chevron* recognized the ultimate authority of the implementing agency to fill it.<sup>164</sup> Yet, a careful reading of *Chevron* reveals three points that undermine the idea of an agency’s ultimate authority in interpreting ambiguous statutes. First, the *Chevron* decision was made in the context of an agency’s construction of a statute that had not been previously interpreted by the courts.<sup>165</sup> If the Court meant for its newly established framework to apply when a prior court had already interpreted the statute, there was ample opportunity to explain as much. A good place to do so would have been when the opinion discussed the necessity of judicial construction of an ambiguous statute in the absence of an existing agency interpretation.<sup>166</sup> Justice Steven’s silence in *Chevron* on the effect of such action

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162. *Darby*, 25 U.S. at 210.

163. *National Cable*, 125 S. Ct. at 2700 (citing *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996)).

164. *Id.* Justice Thomas further contended that such authority could only be foreclosed by judicial decisions that found the statutory language ambiguous, because no gaps would exist. *Id.*

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

166. *Id.* at 843.

cannot be readily taken as abandonment of *stare decisis*. Rather, his silence seems to suggest the opposite.<sup>167</sup>

Next, *Chevron* clearly stated that the “[t]he judiciary is the final authority on issues of statutory construction.”<sup>168</sup> This language is, on its face, a plain repudiation of any ultimate agency authority concerning the interpretation of ambiguous statutes.

Finally, *Chevron’s* directive that the court review the agency’s interpretation in order to ensure its reasonableness further disputes the notion of the agency possessing “first and foremost” interpretative authority.<sup>169</sup> For, if the agency’s construction was to be equated with full congressional authority, the Court, as with any other legislation, would only be concerned with its constitutionality. That the Court also measures the reasonableness of the agency’s determination implies a superior interpretive authority remaining with the Judiciary.

The *National Cable* majority’s reliance on *Maislin* and *Neal* is also debatable. Although the precedent cited in both cases found the relevant statutory language unambiguous, neither decision can be cleanly read as upholding those precedents solely based on such findings. Taken alone, Justice Brennan’s comment in *Maislin* that “[o]nce we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*,” seems to lend some support to the *National Cable* majority’s position.<sup>170</sup> However, Justice Brennan’s remark was not made in a vacuum. Rather, this comment was part of his general argument that subsequent agency determinations are not given deference when the Supreme Court has already spoken on the issue.<sup>171</sup> Other than his use of the word “clear,” Justice Brennan did not qualify this argument by explaining that the precedent had to be unambiguous.<sup>172</sup> In fact, the authority that he relied upon simply stated, “this Court must accord to longstanding and well-

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167. The abandonment of *stare decisis* is such an important matter that Justice Stevens almost certainly would have discussed it if that were the intended effect of his words. *Id.* His silence is better taken as meaning that the “normal rules” of the judiciary still applied. *Id.*

168. *Id.*

169. *Id.* at 843.

170. *Maislin Industries*, 497 U.S. at 131.

171. *Id.*

172. *Id.*

entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes.”<sup>173</sup>

Justice Kennedy’s remarks in *Neal* are similarly unhelpful to the *National Cable* majority. As pointed out by Justice Thomas in *National Cable*, the prior judicial interpretation that the *Neal* court held as controlling (over the Federal Sentencing Commission’s subsequent interpretation) found the statute in question to be unambiguous.<sup>174</sup> But *Neal*’s support for Justice Thomas’s position does not extend beyond the existence of this circumstance. In *Neal*, Justice Kennedy made no special mention of *Chapman*’s conclusion that the statutory language was unambiguous. Instead, he merely recited the well-familiar phrase 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.”<sup>175</sup> Thus, precedential support for the *National Cable* ruling appears tenuous at best.

Justice Thomas also justified the *National Cable* majority’s holding by claiming that “a contrary rule would produce anomalous results.”<sup>176</sup> He challenged the wisdom of deciding whose interpretations should control by simply looking to the order in which they were issued, and repeated Justice Scalia’s concern in *Mead* about the “ossification of large portions of our statutory law” by the courts.<sup>177</sup> While significant, this concern must be weighed against the potential impact of the majority’s new rule. Tellingly, in *National Cable*, Justice Scalia was much more preoccupied with the prospect of agency reversal of judicial decisions than any “ossification” those decisions may or may not have created.

Indeed, the legal effect of the majority’s expansion of the *Chevron* doctrine cannot be understated. As Justice Scalia warned, many hundreds of established statutory interpretations are now subject to agency reversal.<sup>178</sup> The stability and predictability created by *stare decisis* has been weakened. A hue of uncertainty will

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173. *Id.* (citing *California v. FERC*, 495 U.S. 490 (1990)).

174. *National Cable*, 125 S. Ct. at 2701 (citing *Neal v. United States*, 516 U.S. 284 (1996), *Chapman v. United States*, 500 U.S. 453 (1991)).

175. *Neal*, 516 U.S. at 295.

176. *National Cable*, 125 S. Ct. at 2700.

177. *Id.*

178. *Id.* at 2720 (Scalia, J., dissenting).

creep its way through virtually every area of law that is regulated by an administrative agency. Whether related to transportation, securities regulation, energy, trade, the environment, occupational safety and health, or as here, telecommunications, both long-settled judicial interpretations and looming constructions may be equally vulnerable to displacement by an administrative agency's latest revelation. Adding to this uncertainty is the political character of most federal agencies. Each turnover in political office will bring the potential, and perhaps motivation, for the new administration to "make its mark." A substantial barrier preventing such practice has been lifted by the *National Cable* decision.

Of course, there are still limits to the degree of judicial deference to be given any agency's statutory interpretations – the statutory language cannot be unambiguous, the agency's conclusions must be reasonable, and *Mead* continues to suggest that some level of formality is required. Nevertheless, an enormous door has been opened. For, if there is one certainty produced by this decision, it is that many law firms, individuals, corporations, and others alike will intensify their efforts to find agencies that will reopen unfavorable judicial interpretations of regulatory statutes that govern their interests. Now that the opportunity to "re-interpret" the law is present, a great deal of lobbying is sure to follow.

*National Cable's* application of its new rule was also peculiar. The question presented to the Court was not whether the FCC unreasonably concluded that cable modem service is an "information service" as defined by the Communications Act. Rather, the question was whether the FCC unreasonably concluded that it was not a "telecommunications service" as well.<sup>179</sup>

The Communications Act defines telecommunication service 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."<sup>180</sup> For the *National Cable* majority, the issue turned on the meaning of the word "offer."<sup>181</sup> Justice Thomas opined that because "offer" can be understood as a "stand-alone" sale of telecommunications, cable companies do not necessarily offer transmission as part of their

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179. *Id.* at 2699, 2702.

180. 47 U.S.C. 153(46) (2000).

181. *National Cable*, 125 S. Ct. at 2704.

2006

## Settled No More

cable modem services product.<sup>182</sup> Rather, similar to any other ISP, the use of telecommunications was merely a prerequisite to delivering that product.<sup>183</sup> In other words, from the customer's point of view, the cable provider did not offer transmission; instead, transmission was simply a necessary component of the Internet access that the customer was purchasing.<sup>184</sup>

Such reasoning seems disconnected from the realities of the marketplace. When buying cable modem service, the customer is not merely buying Internet service. The customer is buying "high-speed" Internet service. That point is clearly articulated by the marketing efforts of various cable providers that sell cable modem service. Thus, it is unrealistic to assume that the consumer does not consider a cable provider to be selling "high-speed" transmission as part of its offering. Such an assumption is easily refuted simply by examining the price differential between e-products. For example, in Pennsylvania, a consumer may purchase pure Internet access from NetZero (an ISP) for \$9.95 per month.<sup>185</sup> However, the consumer must also then pay an additional charge for the telephone transmission service used to connect the user to the Internet. In contrast, a Pennsylvania consumer may buy cable modem service from Comcast (a cable provider) for \$42.95 per month.<sup>186</sup> The products vary widely in price because they are appreciably different. The average consumer almost certainly realizes that the cable modem service includes "high-speed" transmission, which is a much superior service to the telecommunications used in conjunction with NetZero's Internet access product. Therefore, the consumer also understands that the price for Comcast's Internet access product is much higher precisely because he or she would be buying that high-speed Internet transmission as part of the deal. As such, the cable modem service provider can hardly be described as not offering telecommunications.

Though the Court's conclusions about cable modem service are somewhat puzzling, the beneficiaries of its view are easy to discern. The decision is a major win for cable companies, in that cable modem service will not be subjected to common carrier regula-

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182. *Id.*

183. *Id.*

184. *Id.* at 2703-04.

185. NetZero, <http://www.netzero.com> (last visited Nov. 16, 2005).

186. Comcast, <http://www.comcast.com> (last visited Nov. 16, 2005).

tions under the Communications Act.<sup>187</sup> This means that the cable companies will not have to contend with nondiscriminatory pricing regulations, nor will they be required to share their transmission networks with competitors.<sup>188</sup> Many consumer advocacy groups fear that the decision will result in diminished competition, fewer programming options and increased costs for consumers.<sup>189</sup> However, the FCC and members of the fiber optic communications industry predict that the lower regulation will lead to increased investment and innovation in broadband technology.<sup>190</sup> The ultimate impact remains to be seen. But, as Justice Scalia reminds us, uncertainty is abundant in the brave new world created by *National Cable*.<sup>191</sup>

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187. However, the FCC can always subsequently decide to regulate the cable providers under its discretionary Title I authority. See *National Cable*, 125 S. Ct. at 2698.

188. See 47 U.S.C. §§ 201-209 (2000) and 47 U.S.C. § 251(a)(1) (2000).

189. Andrews Computer and Internet Litigation Reporter, *Supreme Court Decision Seen As Boon To Cable Companies*, 23 No. 3 ANCOMPILR 3 (2005).

190. Carl E. Kandutsch, *Supreme Court Rules for Cable in Brand X Case*, BROADBAND PROPERTIES (July 2005) available at <http://www.broadbandproperties.com/2005issues/feb05issues/feb2005.htm>.

191. *National Cable*, 125 S. Ct. at 2721 (Scalia, J., dissenting).