

WEST VIRGINIA V. EPA, A NEW MAJOR QUESTIONS DOCTRINE OR MAINTAINING THE STATUS QUO? AN APPLICATION TO NET NEUTRALITY

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INTRODUCTION

In *West Virginia v. Environmental Protection Agency (West Virginia)*, the Supreme Court rejected an expansive reading of section 7411 of the Clean Air Act.¹ Expressly invoking the “major questions doctrine” for the first time in a majority opinion, the Court concluded that section 7411 does not allow the EPA to require generation shifting to reduce greenhouse emissions.² Specifically, the Court held that the U.S. Environmental Protection Agency (EPA) exceeded its authority under section 111(d) of the Clean Air Act (CAA) in its 2015 emission guidelines for existing fossil fuel-fired power plants, which were based in part on “generation shifting,” or shifting electricity generation from higher-emitting sources to lower-emitting ones.³ Not only did the Court’s decision create an immediate impact on environmental policy in the United States, but perhaps more critically, it altered the administrative law landscape. It has always been a generally accepted principle in the field of administrative law that Congress may not delegate its legislative authority to an administrative agency located in the executive branch.⁴ While the general proposition of “non-delegation” has been understood and accepted, the contours of this rule have been far less clear.⁵ *West Virginia* encapsulated the longstanding and

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1. 597 U.S. 697 (2022).

2. KATE R. BOWERS, CONG. RSCH. SERV., LSB10791, SUPREME COURT ADDRESSES MAJOR QUESTIONS DOCTRINE AND EPA’S REGULATION OF GREENHOUSE GAS EMISSIONS (2022) [hereinafter *Supreme Court Addresses Major Questions Doctrine*].

3. *Id.*

4. See Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1403 (2000) (“For almost two centuries, the Supreme Court has understood [the Vesting Clause] to limit the extent to which, or the conditions under which, Congress may delegate its lawmaking powers to executive or administrative officials.”).

5. See Joseph Postell, *The Nondelegation Doctrine After Gundy*, N.Y.U. J.L. & LIBERTY 280, 282 (2020) (“Even defenders of a robust nondelegation doctrine, to this point, have been unable to offer a clear line of distinction.”).

fundamental constitutional principle that agencies only have that regulatory authority Congress delegated to them.⁶ The Court detailed when a case presents a major question and outlined several different factors contributing to its analysis.⁷ The case was decided on a 6-3 basis, with Justice Gorsuch authoring a concurring opinion and Justice Kagan authoring a dissenting opinion.⁸ In the majority opinion, Chief Justice Roberts outlined several factors to be considered when deciding whether a particular action by an agency should be deemed a major question.⁹ Justice Gorsuch added some additional considerations courts should consider in a major questions analysis.¹⁰

While in the case handed down over the summer the EPA, in the context of the CAA, was the subject of the dispute, there is nothing in the opinion indicating that the Court would not consider major questions challenges to statutes empowering other agencies. One such agency that has been the subject of delegation challenges is the Federal Communications Commission (FCC). Specifically, the adoption of the major questions doctrine might create legal complications in the field of broadband competition. *Chevron* deference, a deference standard more favorable to agency discretion, has played a key role in three major court decisions regarding net neutrality.¹¹ During the George W. Bush administration, the Republican-led FCC classified cable broadband as an information service, an order the Supreme Court upheld based on *Chevron*.¹² More than a decade later, during Barack Obama's administration, the Democratic-led FCC reclassified broadband as a telecommunications service, making it subject to more regulatory authority from the FCC and enabling the commission to impose net neutrality protections on broadband providers such as Comcast, Charter Communications, Verizon, and AT&T.¹³ The U.S. Court of Appeals for the D.C. Circuit similarly upheld that decision under *Chevron* deference.¹⁴ During Donald Trump's administration, broadband was reclassified yet again as an information service, and the net neutrality rules were repealed.¹⁵ The D.C. Circuit Court of Appeals, in its 2019 decision upholding the order, wrote, "Our review is governed by the familiar *Chevron* framework in which we defer to an agency's construction of an ambiguous provision in a

6. See *Supreme Court Addresses Major Questions Doctrine*, supra note 2.

7. 'Major Questions'? Supreme Court Decision in Climate Change Case Sends Ripples Across the Regulatory Landscape, AKIN GUMP STRAUSS HAUER & FELD LLP (July 16, 2022), <https://www.akingump.com/a/web/2gi1BEr3hN4EMFVD3CXA8L/46C8jy/major-questions-of-supreme-court-decision.pdf> [hereinafter '*Major Questions*'?].

8. See *West Virginia v. EPA*, 597 U.S. 697 (2022).

9. *Id.* at 720–32.

10. *Id.* at 736–53 (Gorsuch, J., concurring).

11. CHRIS D. LINEBAUGH, CONG. RSCH. SERV., R46973, NET NEUTRALITY LAW: AN OVERVIEW (2022) [hereinafter *Net Neutrality Law*].

12. See *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.* 545 U.S. 967 (2005).

13. *In the Matter of Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) [hereinafter *2015 Open Internet Order*].

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

15. *In re Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018).

statute that it administers if that construction is reasonable.”¹⁶ President Joe Biden has encouraged the current FCC to restore net neutrality protections.¹⁷

It is my position that concerns about agencies’ ability to promulgate rules *en masse* in light of *West Virginia* are misplaced. The majority opinion centers its analysis not on the political and economic effects of the EPA’s rules, but the statutory authority from which it derives such rulemaking power. Translating this to the net neutrality context, I will argue that given the extensive delegation that the Telecommunications Act gives the FCC and the vast amount of precedent supporting such delegation, it is extremely unlikely that the Court will use *West Virginia* to limit the FCC’s authority in matters of internet regulation.

In Part I of this Note, I will trace the development of the major questions doctrine, ending with an analysis of the framework the majority opinion puts forward in *West Virginia*. In Part II, I will examine the relevant statute, FCC rules, and precedent discussing the authority of the FCC to craft net neutrality rules. In Part III, I will analyze the authority delegated to the FCC by the Telecommunications Act of 1996 under the new framework provided by the Court.

I. DEVELOPMENT OF THE MAJOR QUESTIONS DOCTRINE

A. *Chevron and Agency Deference*

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., decided by the Supreme Court in 1984, was a landmark case in the field of administrative law.¹⁸ The Court in *Chevron* was required to interpret the meaning of the term “stationary source” within the Clean Air Act.¹⁹ The EPA, empowered by the CAA enacted a regulation that permitted states “to adopt a plantwide definition of the term ‘stationary source.’”²⁰ Under this definition, a facility could install or modify specific pollution-generating units at a plant without triggering onerous permit conditions, as long as the modification did not increase plantwide emissions.²¹ The question presented was whether the EPA’s decision to group all pollution-generating units within a single “bubble” could be considered a reasonable construction of the statutory term “stationary source.”²² Writing for a unanimous Court, Justice John Paul Stevens found that EPA’s

16. *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

17. *Biden Seeks Return of Net Neutrality, Greater Competition Among ISPs in Executive Order*, CNET (July 9, 2021), <https://www.cnet.com/home/internet/biden-seeks-return-of-net-neutrality-greater-competition-among-isps-in-executive-order/> (“In his fifty-second executive order since taking office, Biden calls for increased regulation and accountability of major corporations to improve competition in a number of industries The list includes internet providers, as broadband remains a key point of focus in the president’s domestic agenda.”).

18. 467 U.S. 837. As a detailed analysis of *Chevron* is unnecessary to a resolution of the question presented in this Note, the discussion of the case will be somewhat brief.

19. *Id.* at 840; 42 U.S.C. § 7502.

20. 467 U.S. at 840.

21. *See id.* at 856.

22. *Id.* at 840.

regulation was reasonable, overturning the D.C. Circuit's determination that the agency's creation of the bubble concept conflicted with the Clean Air Act's purpose to improve air quality.²³

In reaching its conclusion, the Court established the bedrock two-step test to be used when interpreting a statute delegating authority to an agency. Under the first part of the test, courts are to analyze the statutory language to determine whether Congress has directly spoken on the question at issue.²⁴ If the court finds that the text is unambiguous, the court's inquiry ends, and the agency may not interpret the statute in any other manner.²⁵ However, if there is genuine ambiguity in the text or if Congress failed to speak to the issue at hand, courts are to decide whether the agency's interpretation is "based on a permissible construction of the statute."²⁶ If the agency's reading of the statute is "reasonable," the agency's interpretation governs.²⁷

In *Chevron*, the Court famously held that if a statute is ambiguous, courts should defer to the agency's interpretation, so long as that interpretation is "reasonable."²⁸ The Court explained that an agency is empowered to "fill any gap" or resolve statutory ambiguities left by Congress because Congress's grant of rulemaking authority to the agency creates the presumption that the agency may "make all policy choices within its sphere of delegated authority."²⁹ This rationale relies on the Court's presumptions that agencies possess both greater political accountability and technical expertise than the courts, and thus are in the best position to administer "technical and complex" regulatory programs, in which discretionary but complex policy choices are inherent.³⁰ Thus, Congress's delegation to agencies not only stems from the notion that expert agencies are better than judges at construing statutory ambiguities, but also because "a reasonable legislator in the modern administrative state would rather give law-interpreting power to agencies than the courts."³¹

While *Chevron* established a deferential standard for courts to follow, there have been several instances in which courts have refused to apply *Chevron* at all. This threshold inquiry, coined *Chevron* Step Zero, defines the scope of

23. *Id.* at 840.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 844.

29. Melanie E. Walker, Comment, Congressional Intent and Deference to Agency Interpretations of Regulations, 66 U. CHI. L. REV. 1341, 1346 (1999).

30. *Chevron*, 467 U.S. at 863.

31. *Id.* at 844, 865–66. See also Patricia M. Wald, Comment, *The "New Administrative Law"—With the Same Old Judges In It?*, 1991 DUKE L.J. 647, 657–59 (1991) ("[A]sking judges to familiarize themselves enough with the policies and operations of the dozens of agencies that appear in hundreds of cases a year, and whose functions vary from labor to shipping to nuclear energy to gas regulation . . . is asking a great deal.").

Chevron's implied delegation of interpretive power from Congress.³² The critical inquiry is whether Congress has delegated authority to the agency to speak with the force of law.³³ This analysis often turns on the formality of the administrative procedures used in rendering a statutory interpretation.³⁴ Furthermore, when an agency interprets legal requirements that apply broadly across agencies, it is not operating pursuant to delegated interpretive authority to resolve ambiguities or relying on its particular expertise in implementing a statute, and the agency's interpretation is not afforded deference by a reviewing court.³⁵

In addition to the procedural situations in which the Supreme Court has limited *Chevron*'s domain, the Court, in the last few decades, has sought to place a substantive criterion on whether to apply *Chevron* deference. This effort has manifested in the "major questions doctrine," which is an effort to limit *Chevron*'s reach, or "blunt its force," by depriving agencies of *Chevron* deference in a certain set of cases.³⁶

B. Development of the "Major Questions" Doctrine

The Supreme Court first invoked the major questions doctrine in the 1993 case *MCI Telecommunications Corp. v. American Telephone & Telegraph Co. (MCI)*.³⁷ The Communications Act of 1934 requires common carriers to file tariffs with the FCC, which then charges customers pursuant to the tariff rates. The Act also authorizes the Commission to "modify" this requirement "in its discretion and for good cause shown."³⁸ Using this statutory authority, the FCC issued a series of reports and orders in the 1980s that removed non-dominant long-distance carriers from the filing requirement.³⁹

The Court sought to determine whether the FCC could permissibly interpret "modify" to allow an entire group of carriers to be exempt from filing tariffs at all.⁴⁰ Although it cited to *Chevron* in its opinion, the Court declared that "the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement."⁴¹ In reviewing the FCC regulation, the Court found that "rate filings are . . . the essential characteristic of a rate-regulated industry" and that

32. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

33. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 192 (2006).

34. *Id.* at 214 (citing *Christensen v. Harris County*, 529 U.S. 576 (2000)).

35. See *Rapoport v. U.S. Dept. of Treasury*, 59 F.3d 212 (D.C. Cir. 1995).

36. Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021).

37. 512 U.S. 218 (1994).

38. *Id.* at 224 (citing 47 U.S.C. § 203(b)(2)).

39. See *id.* at 221–22.

40. *Id.* at 220 ("These cases present the question whether the Commission's decision to make tariff filing optional for all nondominant long-distance carriers is a valid exercise of its modification authority.").

41. *Id.* at 229.

the filing requirement “was Congress’s chosen means of preventing unreasonableness and discrimination in charges.”⁴² On this determination, the Court concluded that it was “highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion” and “even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”⁴³ The Court held that the FCC’s regulation amounted to a “fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist.”⁴⁴ The Court rejected the FCC’s interpretation of the statute and accordingly, its ability to detariff a segment of common carriers.⁴⁵

Six years later, the Court again invoked the major questions in *FDA v. Brown & Williamson Tobacco Corp. (Brown & Williamson)*.⁴⁶ In *Brown & Williamson*, the Food and Drug Administration (FDA) interpreted its governing statute to allow it to exercise authority over tobacco products.⁴⁷ The relevant provision defining “drug[s]” as “articles (other than food) intended to affect the structure or any function of the body” seemed to support the FDA’s view or, at worst, to be ambiguous.⁴⁸

However, the Court expressly limited *Chevron*’s reach, stating that “whether Congress has directly spoken to the precise question at issue,” was impacted by the “nature of the question presented.”⁴⁹ The Court pointed out that *Chevron* deference is rooted in the principle that Congress implicitly delegated the agency authority to “fill in the statutory gaps.”⁵⁰ But, “[i]n extraordinary cases,” it explained, the Court would not assume that “Congress has intended such an implicit delegation.”⁵¹ The Court then found that the case involved such extraordinary circumstances, first reasoning that the FDA’s regulatory ability would extend to “a significant portion of the American

42. *Id.* at 230, 231. (“There is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.” (quoting *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440 (1907))). *Id.* at 231. Rate filings had “always been considered essential to preventing price discrimination and stabilizing rates.” (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990)). *Id.* at 230.

43. *Id.* at 231.

44. *Id.* at 231–32.

45. *Id.* at 228.

46. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

47. *See id.* at 125.

48. *Id.* at 126 (quoting 21 U.S.C. § 321(g)(1)(C)).

49. *Id.* at 159.

50. *Id.* (citing *Chevron*, 467 U.S. 837, 844 (1984)).

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

economy.”⁵² In support of this proposition, the Court noted how the relevant federal statute stated that “the marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.”⁵³ The Court was “confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁵⁴ It therefore concluded that Congress had “directly spoken to the question at issue and precluded the FDA from regulating tobacco products.”⁵⁵

Taken together, these two cases stand for the general proposition that courts will not lightly take a statutory grant of rulemaking power as a grant of authority to resolve major questions. It does not necessarily preclude a given substantive outcome but directs courts to make an independent decision about whether agencies can produce certain substantive outcomes.

In the years following *MCI* and *Brown & Williamson*, the major questions doctrine was applied differently than it had been in the two foundational cases. Rather than applying the major questions analysis strictly at Step One as it had been in the two original cases, the Court began to apply it at different phases of the ambiguity analysis.⁵⁶ Two representative cases of the inconsistent application of the doctrine are *Utility Air Regulatory Group v. EPA (UARG)*⁵⁷ and *King v. Burwell*,⁵⁸ from 2014 and 2015, respectively.

One of several questions presented in *UARG* was whether the EPA’s promulgation of greenhouse gas emission standards for new motor vehicles compelled the agency to regulate certain stationary sources of greenhouse gas emissions, such as power plants, industrial facilities, and even apartment buildings.⁵⁹ First, the Court rejected the EPA’s argument that the plain language of the Clean Air Act demonstrated that a source not otherwise regulated because of its emissions must be subject to permitting requirements solely due to its emitting potential.⁶⁰

After rejecting the EPA’s plain language argument, the Court progressed to Step Two to determine whether the EPA’s interpretation that the CAA could be construed to regulate these sources was nonetheless reasonable.⁶¹ Despite recognizing that *Chevron*’s deferential framework permitted EPA to “operate ‘within the bounds of reasonable interpretation,’” the majority rejected EPA’s

52. *Id.*

53. *Id.* at 137 (quoting 7 U.S.C. § 1311(a) (1994)).

54. *Id.* at 160.

55. *Id.* at 160–61.

56. See Kevin O. Leske, *Major Questions About the “Major Questions” Doctrine*, 5 MICH. J. ENV’T. & ADMIN. L. 479, 488 (2016).

57. 134 S. Ct. 2427 (2014).

58. 135 S. Ct. 2480 (2015).

59. See Kevin O. Leske, *A Step by Step Look at UARG v. EPA: A New Layer of Greenhouse Gas Regulation*, 4 EARTH JURIS. & ENV’T JUST. J. 3 (2014).

60. *UARG*, 134 S. Ct. at 2438–39.

61. *Id.* at 2442.

construction of the CAA.⁶² Rather than relying strictly on the language of the statute, the Court invoked the major questions doctrine to support its argument. The Court highlighted that EPA had “repeatedly acknowledged that applying the [CAA] permitting requirements to greenhouse gases would be inconsistent with . . . the Act’s structure and design.”⁶³ Furthermore, the EPA’s interpretation would lead to an incredible rise in permit applications, billions of dollars in administrative costs, and “decade-long delays” that would cause “construction projects to grind to a halt nationwide.”⁶⁴ The Court cited the EPA’s own admission that including smaller sources would result in a “complicated, resource-intensive, time-consuming, and sometimes contentious process.”⁶⁵ The Court cited both *Brown & Williamson* and *MCI* for the proposition that in circumstances where an agency’s interpretation impacts “a significant portion of the American economy,” courts should be wary to endorse such an interpretation without clear direction by Congress.⁶⁶ Rather than considering the gravity of the question presented at Step One as it had previously done, the Court wrapped up its major questions analysis into a determination of reasonability at Step Two.

At issue in *King* was a provision of the Patient Protection and Affordable Care Act (ACA) concerning tax credits available to individuals.⁶⁷ The specific question presented to the Court was “whether the Act’s tax credits are available in States that have a Federal Exchange rather than a State Exchange.”⁶⁸ Although the ACA states that tax credits “shall be allowed” for any “applicable taxpayer,” it also provides that the tax credit amount depends in part on the taxpayer’s enrollment in a health insurance plan through “an Exchange established by the State under section 1311 of the [ACA].”⁶⁹

The Court, rather than applying the doctrine at Step One or Step Two, applied it at Step Zero. It first acknowledged that the Court “often” applies the *Chevron* two-step framework, which “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”⁷⁰ But, the Court quoted its opinion in *Brown & Williamson*, explaining that “[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit

62. *Id.* at 2431 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)).

63. *Id.* at 2442.

64. *Id.* at 2442–43 (citing, e.g., Tailoring Rule, 75 Fed. Reg. 31,514, 31,557 (June 3, 2010)).

65. *Id.* at 2443 (quoting Tailoring Rule, 74 Fed. Reg. 55,292, 55,304, 55,321–22 (proposed Oct. 27, 2009)).

66. *Id.* at 2444 (quoting *Food & Drug Admin. v. Brown & Williamson*, 529 U.S. 120, 159–60) (citing *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994); *Indus. Union Dept., AFL–CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (plurality opinion)).

67. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015).

68. *Id.* at 2487.

69. *Id.* (quoting 26 U.S.C. § 36B(a)–(c) (2012)).

70. *Id.* at 2488 (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

delegation.”⁷¹ As the issues at stake in *King* were, according to the Court, of such “extraordinary” significance, the Court found that Congress had not empowered either the HHS or the IRS to receive *Chevron* deference for their interpretations of the ACA.⁷² As evidenced by these two cases, the Court, even within the last decade, has not applied the major questions doctrine at a consistent point within the *Chevron* analysis, nor has it developed and communicated a precise inquiry for determining whether a specific statutory ambiguity qualifies as a major question.

C. *West Virginia v. EPA*

In the summer of 2022, the Court handed down an important decision that clarified the major questions doctrine and put forward a series of factors by which courts are to determine whether a certain issue qualifies as a major question. In *West Virginia v. EPA*, at issue was section 111 of the Clean Air Act. As part of the CAA’s overall scheme to limit the emission of pollutants from stationary sources, section 111(d) directs the EPA to establish emission guidelines for states to set “standards of performance” for existing stationary sources in source categories that the EPA has found cause or contribute significantly to “air pollution which may reasonably be anticipated to endanger public health or welfare.”⁷³ The EPA sets emission standards under section 111(d) based on the emissions reductions achievable through “application” of the best system of emission reduction (BSER).⁷⁴ Pursuant to this authority, in 2015, the EPA promulgated the 2015 Clean Power Plan (CPP).⁷⁵ In the CPP, EPA determined that the BSER should be a combination of three “building blocks”: (1) improving the heat rate (i.e., efficiency of energy generation) at coal-fired units; (2) shifting generation to lower-emitting natural gas units; and (3) shifting generation from fossil fuel units to renewable energy generation.⁷⁶ The EPA reasoned that the best “system” was one that applied to the “overall source category.”⁷⁷ However, in 2019, the EPA reversed course, adopting a stricter interpretation of its authority under the ACE Rule.⁷⁸ The EPA asserted that the “only permissible reading” of section 111 limited the agency to identifying source-specific measures as the BSER—that is, control measures that could be applied at a specific source to reduce emissions from that source—and prohibited the agency from selecting as the BSER measures

71. *Id.* at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at 159).

72. *Id.* at 2489.

73. 42 U.S.C. §§ 7411(a)–(b).

74. *Id.*

75. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661 (Oct. 23, 2015)

76. *Id.*

77. *Id.*

78. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (July 8, 2019).

that apply to the source category as a whole or to entities entirely outside the regulated source category; this effectively repealed the CPP.⁷⁹

West Virginia provided an opportunity for the Court to describe the major questions doctrine in more detail than in previous cases. The majority explained that, in general, courts interpret statutory language “in [its] context and with a view to [its] place in the overall statutory scheme.”⁸⁰ In cases where there is something extraordinary about the “history and the breadth of the authority” an agency asserts or the “economic and political significance” of that assertion, courts should “hesitate before concluding that Congress’ meant to confer such authority.”⁸¹ The majority explained that, because Congress rarely provides an extraordinary grant of regulatory authority through language that is modest, vague, subtle, or ambiguous, an agency “must be able to point to ‘clear congressional authorization’” for its action in order to demonstrate that Congress “in fact meant to confer the power the agency has asserted” in such cases.⁸²

In other words, application of the “major questions doctrine” is a two-step inquiry: (i) does the case trigger the “major questions doctrine,” and, if so, (ii) can the agency point to “clear congressional authorization” to regulate in the proposed manner? As to the first inquiry, the opinion sets forth several (apparently non-exhaustive) considerations to help decide whether a case implicates the “major questions doctrine”: whether the agency discovered in a “long-extant statute an unheralded power” that significantly expands or even “transform[s]” its regulatory authority; whether the agency’s claimed authority derives from an “ancillary,” “gap-filler,” or otherwise “rarely used” provision of the statute; and whether the agency adopted a regulatory program that Congress had “conspicuously and repeatedly declined to enact itself.”⁸³

The majority held that these principles applied to the EPA’s assertion of authority in the CPP. It described section 111(d) as a “previously little-used backwater” and underscored that prior limits under section 111 had been based on source-specific pollution control technology.⁸⁴ According to the majority, the CPP fundamentally revised the statute. Because the EPA’s generation shifting-based approach implicates coal-fired plants’ share of national electricity generation, the Court cautioned that EPA could extend its authority under section 111(d) to force coal plants to cease generating power altogether.⁸⁵ The Court concluded that it was unlikely Congress would task the EPA with “balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy,” such as deciding the optimal mix of energy sources nationwide over time and identifying an acceptable level

79. *Id.*

80. *West Virginia v. EPA*, 597 U.S. 697, 721 (2022).

81. *Id.* (citation omitted).

82. *Id.*

83. *Id.* at 724.

84. *Id.* at 730.

85. *Id.* at 728.

of energy price increases.⁸⁶ In support of this conclusion, the Court pointed to factors including the description of the EPA's expertise in a funding request and the fact that Congress considered and rejected legislation to create an emissions trading program or enact a carbon tax.⁸⁷

Beyond the Court's specific holding in *West Virginia*, its reliance on the major questions doctrine could have broader implications. In particular, the decision suggests that the Court will closely review agency actions that address novel problems, rely on statutory provisions that are infrequently used (or use those provisions in a way that deviates from past practice), or could have significant economic or political repercussions. Furthermore, as will be discussed in Part III of this note, both the majority and concurring opinions present interesting questions as to the future of the doctrine itself and its application in a variety of potential challenges.

II. AN OVERVIEW OF NET NEUTRALITY LAW

A. Statutory Framework

The FCC has relied on its legal authority under the Communications Act and the Telecommunications Act of 1996 (the Act) to formulate its regulatory policy towards net neutrality.⁸⁸ Titles I and III of the Act define categories of services that determine whether a service provider may be classified as a common carrier or an information service provider.⁸⁹ Title II contains the substantive requirements applicable to common carriers.⁹⁰ Along with these three titles, section 706 of the Telecommunications Act figures prominently in the FCC's net neutrality actions.

Title I of the Communications Act defines two terms critical to the FCC's net neutrality actions: "telecommunications service" and "information service."⁹¹ "Telecommunications service," is defined as the "offering of telecommunications for a fee directly to the public . . ."⁹² "Telecommunications," is defined as "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."⁹³ "Information service" is defined as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . ."⁹⁴ The Act exempts "any such capability for the management, control, or operation of a

86. *Id.* at 729.

87. *Id.* at 731–32.

88. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

89. *See* 47 U.S.C. §§ 153, 332(c).

90. *See id.* §§ 201–231.

91. *Id.* § 153(24), (53).

92. *Id.* § 153(53).

93. *Id.* § 153(50).

94. *Id.* § 153(24).

telecommunications system or the management of a telecommunications service” (referred to as the “telecommunications management exception”).⁹⁵

Title II is fundamental in that it demonstrates the importance of the distinction between classification as an information service and a telecommunications service, as a service defined as the latter would be subject to stricter common carrier requirements. This provision sets out the requirements applicable to entities that are classified as common carriers per Titles I and III. In particular, sections 201 and 202 require carriers to: (1) provide communication service upon “reasonable request;”⁹⁶ (2) charge “just and reasonable” rates;⁹⁷ and (3) engage in “any unjust or unreasonable discrimination.”⁹⁸ Title II also requires carriers to file their rates with the FCC, restricting the ability of carriers to depart from these filed rates.⁹⁹ It further requires carriers to obtain authorization from the Commission before taking certain actions, such as discontinuing or reducing service.¹⁰⁰

Section 706 of the Telecommunications Act is a critical statutory provision underlying the FCC’s net neutrality actions.¹⁰¹ Section 706 directs the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”¹⁰² It defines advanced telecommunications capability as “high-speed, switched, broadband telecommunications capability” that enables users to “originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”¹⁰³ It specifies that, in doing so, the Commission shall, in a manner consistent with the public interest, use “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure”¹⁰⁴ It further requires that the FCC conduct regular studies on the availability of advanced telecommunications capability.¹⁰⁵ When the Commission finds that advanced telecommunications capability is not being deployed to all Americans in a “reasonable and timely fashion,” it must take “immediate action” to accelerate deployment by “removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹⁰⁶ If a service is defined as a telecommunications service, it is subject to timely and involved regulation by the FCC.

95. *Id.*

96. *Id.* § 201(a).

97. *Id.* § 201(b).

98. *Id.* § 202(a).

99. *See* MCI WorldCom, Inc. v. FCC, 209 F.3d 760, 762 (D.C. Cir. 2000).

100. 47 U.S.C. § 214; 47 C.F.R. § 63.

101. 47 U.S.C. § 1302

102. *Id.* § 1302(a).

103. *Id.* § 1302(d)(1).

104. *Id.* § 1302(a).

105. *Id.* § 1302(b).

106. *Id.*

B. FCC Classifications and Subsequent Litigation

On July 9, 2021, President Biden called on the FCC to consider adopting “net neutrality” rules.¹⁰⁷ Net neutrality is the concept that internet service providers should neither control how consumers use their networks nor discriminate among the content providers that use their networks.¹⁰⁸ This is hardly the first time the FCC has considered the net neutrality issue. For more than a decade, net neutrality has been a perennially challenging issue for the Commission. The difficulty springs in part from the fact that the FCC’s ability to adopt net neutrality rules is tied to the legal classification it gives to broadband internet access service (BIAS) under the Act.¹⁰⁹

To better understand the current net neutrality landscape, it is important to understand the first time the FCC was tasked with classifying broadband. The first broadband classification decision dealt with Digital Subscriber Line (DSL) service.¹¹⁰ DSL service uses packet-switching technology to deliver high-speed internet over telephone lines.¹¹¹ In a 1998 order, the FCC concluded that DSL has both telecommunications and information service components.¹¹² The aspect of DSL service that uses phone lines to transmit the data is a telecommunications service, the FCC explained, because it involves the pure transmission of information “without change in the form or content of the information as sent and received”¹¹³ By contrast, the FCC recognized a separate information service component of DSL service, in which DSL providers perform additional functions that enable the users to access the internet.¹¹⁴ Accordingly, telephone carriers providing DSL services were to be regulated as Title II telecommunications carriers unless they created a separate affiliate to provide only the internet access service component of DSL.¹¹⁵

However, by 2002, cable broadband had become the most widely used form of broadband service, and phone companies had scaled back their DSL deployment plans. Up to that point, the FCC had not clarified cable broadband’s regulatory treatment.¹¹⁶ The FCC explained that, in addressing this question, it was guided by policy goals of encouraging the widespread availability of broadband and maintaining a “vibrant and competitive free market” for internet

107. Exec. Order No. 14,036, Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 9, 2021).

108. See *Net Neutrality Law*, *supra* note 11.

109. 47 U.S.C. §§ 151–646.

110. *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24012 (1998) [hereinafter *DSL Order*].

111. *Id.* at 24027.

112. *Id.* at 24030–31.

113. *Id.* at 24030.

114. *Id.*

115. *Id.* at 24030, 24052.

116. *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities Internet Over Cable Declaratory Ruling*, 17 FCC Rcd. 4798, 4802 (2002) [hereinafter *Cable Broadband Order*].

services by avoiding unnecessary regulatory costs.¹¹⁷ Rather than treating the transmission and internet access components as separate stand-alone offerings, the Commission concluded that they formed a “single, integrated information service.”¹¹⁸ Cable broadband providers, the FCC concluded, were offering not only the ability to transmit and receive data over the internet, but also information service functions offered by the internet service providers.¹¹⁹ For instance, the FCC observed, providers typically gave users the ability to set up their own email address or web page and participate in newsgroups.¹²⁰ The FCC concluded that these features were not separable from the pure transmission component, and comprised a single, integrated offering that is properly classified as an information service rather than a Title II telecommunications service.¹²¹

The Supreme Court subsequently upheld this classification of cable broadband in *Brand X* after applying *Chevron*.¹²² In the course of its analysis, the Court concluded that the term “offering” in the telecommunications service definition is ambiguous and that it is reasonable for the FCC to interpret it as only referring to the finished product offered by a provider, rather than the discrete parts of the product.¹²³ The relevant question became whether the transmission components and the information service components were “sufficiently integrated” such that it was “reasonable to describe the two as a single, integrated offering.”¹²⁴ The Court held that the Commission’s affirmative answer was reasonable.¹²⁵ The Court explained that BIAS providers’ use of DNS services and caching supported the FCC’s classification,¹²⁶ even though users could access third-party websites rather than a provider’s own web page or email service.¹²⁷

Over a decade later, in 2015, the FCC, in an effort to increase innovation in the broadband sphere, reclassified BIAS as a telecommunications service subject to Title II.¹²⁸ This reclassification allowed the FCC to impose net neutrality rules on BIAS providers without running afoul of the Communications Act.¹²⁹ With these new classifications, the 2015 Open Internet Order proceeded to impose three “bright-line” rules¹³⁰ that banned BIAS providers from: (1) “blocking” lawful content, applications, services, or non-

117. *Id.* at 4840.

118. *Id.* at 4824.

119. *Id.* at 4822.

120. *Id.* at 4821–22.

121. *Id.* at 4823–32.

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

123. *Id.* at 989–99.

124. *Id.* at 990.

125. *Id.*

126. *Id.*

127. *Id.*

128. *2015 Open Internet Order*, *supra* note 13, at 5601.

129. *Id.* at 5733–34. *See generally* *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

130. *2015 Open Internet Order*, *supra* note 13, at 5646–47.

harmful devices; (2) “throttling” (i.e., impairing or degrading) lawful internet traffic on the basis of content, applications, services, or non-harmful devices; and (3) engaging in “paid prioritization,” defined as favoring some internet traffic over others, in exchange for consideration.¹³¹ This 2015 Open Internet Order also retained the three basic disclosure categories established in the 2010 Order: network management practices, performance, and commercial terms,¹³² and specified additional information that BIAS providers must disclose regarding these categories, including pricing details, fees, data caps, packet loss, and network practices applied to traffic associated with a particular user or user group.¹³³

This classification was once again challenged as contrary to the language of the Act the following year. In *USTA v. FCC*, the D.C. Circuit upheld the Open Internet Order in its entirety.¹³⁴ Following precedent established in *Brand X*, the court held that the Commission reasonably concluded that BIAS providers were “offering” a standalone transmission service.¹³⁵ The court credited extensive evidence in the record that consumers perceived the transmission service as separate from any information services like email and cloud storage.¹³⁶

However, following a change in presidential administration, the FCC again changed course a few years later. Under its new leadership, the Commission issued a declaratory ruling, report, and order titled “Restoring Internet Freedom” (RIF Order), which it adopted in December 2017 and released in January 2018.¹³⁷ The RIF Order once again classified fixed BIAS as an information service.¹³⁸ The Order also reversed course on the 2015 Open Internet Order’s bright-line rules and General Conduct Rule, eliminating them in their entirety.¹³⁹ While the RIF Order retained a transparency rule, it removed many of the 2015 Order’s additional disclosure obligations.¹⁴⁰

In the subsequent challenge to this classification, *Mozilla Corp. v. FCC*, the D.C. Circuit upheld the bulk of the Order.¹⁴¹ Applying the *Chevron* framework as well as *Brand X*, the court held the Commission’s reclassification of fixed BIAS as an information service was reasonable in light of the FCC’s reliance on DNS and caching.¹⁴² The D.C. Circuit reasoned that the Supreme Court’s decision in *Brand X* supported this approach because it had upheld the

131. *Id.* at 5647–58.

132. *Id.* at 5672.

133. *Id.* at 5672–77.

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

135. *Id.* at 704–05.

136. *Id.*

137. *In the Matter of Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018) [hereinafter *RIF Order*].

138. *Id.*

139. *Id.* at 312–13, 450–69.

140. *Id.* at 435–50.

141. *Mozilla Corp. v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019).

142. *Id.* at 20.

Commission's classification as information services in light of the integrated nature of these services.¹⁴³

Evidently, courts have been willing to give the FCC extensive leeway in determining the proper amount of regulation on broadband carriers by allowing the agency to classify the carriers however it chooses. Before *West Virginia*, the FCC's authority to classify broadband one way or the other was never in doubt. However, with the Court's recent clarification of the role of the major questions doctrine in questions of agency deference, the key question is what level of authorization the FCC must have before crafting rules regulating the internet.

III. CAN THE FCC MAKE NET NEUTRALITY RULES UNDER *WEST VIRGINIA*?

The most noteworthy part of the *West Virginia* majority opinion is Section III.B., which addresses when the major questions doctrine is triggered. "[T]his is a major questions case," the Court explained, because the EPA "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'"¹⁴⁴ After the Court set up this two-pronged framework in an introductory paragraph, it divided the rest of Section III.B. into two distinct segments that tracked these two reasons why the Clean Power Plan was an extraordinary case: The Court first addressed why the Clean Power Plan was unprecedented; it next addressed why the Clean Power Plan represented a transformative expansion of the EPA's authority.¹⁴⁵ In this section of the Note, I will apply Justice Roberts's two-part threshold analysis to net neutrality. Ultimately, I argue that an analysis of the relevant statutory authority and precedent demonstrates that net neutrality rules neither stem from a rarely used portion of the statute nor represent an unheralded transformation.

A. *Will Net Neutrality Rulemaking Stem from a Rarely Used Statutory Provision?*

From its origins, the Telecommunications Act is intended to grant the FCC "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio,"¹⁴⁶ and which is, for this purpose, given sufficiently "broad authority."¹⁴⁷ In elaborating on the extent of Title I jurisdiction, for instance, the Supreme Court first held that Title I consists of a jurisdictional grant in itself; instead of requiring the FCC to find substantive jurisdiction in other areas of the Act, the Court specifically stated that "[n]othing in the language of section 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and

143. *Id.* at 20–22.

144. *West Virginia v. EPA*, 597 U.S. 697, 724 (2022).

145. *See generally id.*

146. S. REP. NO. 73–781, at 1 (1934).

147. *United States v. Sw. Cable Co.*, 392 U.S. 157, 168 (1968).

forms of communication that are specifically described by the Act's other provisions."¹⁴⁸

Many other clauses of Titles I and II likewise confirm this understanding. Section 154(i) states that the FCC "may perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions;"¹⁴⁹ section 201 specifies that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act];"¹⁵⁰ and section 303(r) again authorizes the FCC to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]"¹⁵¹

Although the FCC uses section 154(i)'s "necessary and proper" provision and Title I generally for authority not specifically granted in other titles, some originally argued that section 154(i) "is not a grant of legislative authority to the FCC, but rather a grant of housekeeping authority empowering the agency only to set rules of internal procedure."¹⁵² While the section is included in the Act's administrative provisions, the Supreme Court has, on multiple occasions, expressly authorized broad Title I ancillary jurisdiction over new forms of communication, and the FCC may apply this analysis to broadband internet as well.

For example, when dealing with the advent of new technologies such as cable television in the 1960s, the Supreme Court flatly rejected the argument that section 154(i) "does not independently confer regulatory authority upon the Commission, but instead merely prescribes the forms of communication to which the Act's other provisions may separately be made applicable."¹⁵³ Rather, the Court routinely defers to the FCC to extend its jurisdiction over major forms of communication not contemplated by Congress in 1934, regulating communications not specifically described by the Act's other provisions under this direct grant of "ancillary jurisdiction" under Title I.¹⁵⁴ In other words, as will be discussed *infra*, with regard to emerging information-services like broadband internet that require Title I jurisdiction, the FCC only needs to rely on provisions outside of the Title I grant of authority "for the

148. *Id.* at 172; *see also* *United States v. Midwest Video Co.*, 406 U.S. 649, 669 n.28 (1972) (holding that other provisions of the Act need not themselves grant the FCC "power for their implementation" because Title I already does so).

149. 47 U.S.C. § 154(i).

150. *Id.* § 201.

151. *Id.* § 303(r).

152. James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 22–23 (2003) (citing Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 517–19 (2002)) (emphasis omitted).

153. *Sw. Cable Co.*, 392 U.S. at 172 (1968).

154. *See Midwest Video Co.*, 406 U.S. at 660 (1972) ("We also held that [section 152(a)] is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act's other provisions governing common carriers and broadcasters apply.").

policies they state and not for any regulatory power they might confer,” because the provisions of Title I themselves provide that regulatory authority.¹⁵⁵

Ultimately, it is this understanding of the “ancillary to” language, as originally interpreted from section 152(a) by the Court, that has consistently grounded its prior grants and restrictions on ancillary jurisdiction.¹⁵⁶ For instance, “ancillary to” was not held by the Supreme Court to simply mean “‘necessary to’ the furtherance of [the FCC’s] other regulatory authority . . . over common carriers or broadcasters” alone.¹⁵⁷ Rather, Title I directly accords the FCC authority over “communication by wire or radio,”¹⁵⁸ with the express conditions that such authority remains both ancillary to, and constrained by, explicit, substantive congressional grants or intentions.¹⁵⁹ Even in *Midwest II*, where the Supreme Court found the FCC’s regulations to exceed the bounds of any such congressional intent, the Court fully reaffirmed that the “various responsibilities” upon which the FCC must base its Title I jurisdiction must be derived from and delimited by “congressional guidance.”¹⁶⁰

In a line of cases dealing with expanding cable television technologies in the late 1960s and early 1970s, the Supreme Court resoundingly interpreted the Telecommunications Act to grant the FCC the authority to regulate cable based on the idea that such regulation was “reasonably ancillary” to the Commission’s statutory authority over broadcast television.¹⁶¹ The first such decision was *United States v. Southwestern Cable Co.*, a 1968 case that addressed the issue of whether the FCC could create and enforce rules prohibiting a cable company from importing the “distant signals” of a broadcast company and re-transmitting them through its cable system.¹⁶²

In finding the Commission’s assertion of jurisdiction appropriate, the Court held that cable television was within section 152(a)’s broad application to “all interstate and foreign communication by wire or radio”¹⁶³ and that the “legislative history indicates that the Commission was given ‘regulatory power over all forms of electrical communication. . . .’”¹⁶⁴ The Court stressed that

155. *Id.* at 669 n.28. With regard to information services, the Supreme Court has confirmed the FCC’s Title I authority over a host of other services not specifically mentioned in the Act, including satellite services, microwave systems, dark fiber, and cable television. Andrew Gioia, *FCC Jurisdiction over ISPS in Protocol-Specific Bandwidth Throttling*, 15 MICH. TELECOMM. & TECH. L. REV. 517 (2009).

156. *See Sw. Cable Co.*, 392 U.S. at 178 (“the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission’s various responsibilities”).

157. *See Speta*, *supra* note 152, at 24–25.

158. 47 U.S.C. § 152(a).

159. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707–08 (1979) (*Midwest II*).

160. *Id.* at 708.

161. *See Susan P. Crawford*, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 FORDHAM L. REV. 695, 730 (2005).

162. *United States v. Sw. Cable Co.*, 392 U.S. 157, 160–61 (1968).

163. *Id.* at 172.

164. *Id.*

Congress specifically granted this broad authority to the FCC so that it could appropriately handle new technologies as they were developed and expanded:

Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished “to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission” . . . that it conferred upon the Commission a “unified jurisdiction” . . . and “broad authority.” Thus, “[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.”¹⁶⁵

Recognizing that Congress, in 1934, acted in a field that was demonstrably “both new and dynamic,” and that Congress therefore gave the Commission “a comprehensive mandate” with “expansive powers,”¹⁶⁶ the Court acknowledged that it is the FCC’s role to administer wire and radio communications as they develop; otherwise, absent congressional intent to the contrary, it would be prohibiting “administrative action imperative for the achievement of [the] agency’s ultimate purposes.”¹⁶⁷ Here, there was an implicit recognition that the FCC and not Congress would be in the best position to classify new technologies as it saw fit.¹⁶⁸

Title I ancillary jurisdiction was further defined and expanded four years later in *United States v. Midwest Video Corp.*, where the Supreme Court affirmed both the FCC’s jurisdiction over cable television and its order that certain cable systems had to originate some of their own programming.¹⁶⁹ The Court concluded that the use of jurisdiction under Title I is only appropriate when “the Commission has reasonably concluded that regulatory authority . . . is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities.”¹⁷⁰ In applying this “regulatory goals” test to the FCC’s regulation, the Court found a sufficient goal upon which to base ancillary jurisdiction, as its application to cable systems would “further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public’s choice of programs and types of services”¹⁷¹ Ultimately, the Court concluded that its “duty is at an end when [it] find[s] that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress.”¹⁷²

165. *Id.* at 172–73 (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)).

166. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943).

167. *Sw. Cable Co.*, 392 U.S. at 177–78.

168. *See Nat’l Broad. Co.*, 319 U.S. at 218–19.

169. *United States v. Midwest Video Co.*, 406 U.S. 649, 649 (1972).

170. *Id.* at 661 (internal quotations omitted).

171. *Id.* at 667–68.

172. *Id.* at 674 (quoting *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 224 (1943)).

While the Supreme Court was adjudicating these cable cases, the Federal Circuit was considering the extent of FCC jurisdiction over the computer industry. That court ruled that the FCC could use Title I ancillary jurisdiction to regulate the information-service sectors of companies like AT&T:

Instead of regulating enhanced services under Title II, the Commission used its ancillary jurisdiction to impose upon AT&T a structural regulation scheme that requires AT&T to offer enhanced services only through a separate subsidiary. The Commission found that this separation requirement will effectively protect the public interest by limiting the power of AT&T to gain an unfair advantage in the marketplace by cross-subsidizing its competitive services by its monopoly ones. We believe this to be a sufficient basis to support the Commission's decision not to regulate enhanced services under Title II.¹⁷³

In *Brand X*, the Court reached the same conclusion, stating that the FCC has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction, and indicated that policies in this “‘technical and complex’ area should be set by the Commission”¹⁷⁴ Expanding the authority of the FCC, the Court effectively gave the Commission complete discretion over what rules should be mandated with respect to “information-services” (including the internet), even if those rules are the same as those applied to common carriers.¹⁷⁵

B. Is Internet Regulation a Transformative, Unheralded Power?

Evidently, the FCC can and has exercised its authority over several decades to regulate a number of new technologies not contemplated by Congress. The next question, then, is whether crafting net neutrality represents a transformative, unheralded departure from statutory delegation under the Act. As outlined above, while possessing jurisdiction directly under the provisions of Title I, the FCC can assert that authority merely by acting in a manner “‘reasonably ancillary to the effective performance of the Commission’s various responsibilities”¹⁷⁶ Perhaps the most significant is the national Internet Policy enshrined in section 230(b).¹⁷⁷

The Policy Statement enacted as section 230 of the Telecommunications Act (and as part of the Communications Decency Act) lays out congressional findings and policies regarding the internet. After subsection (a) outlines the benefits, history, goals, and technicalities of the internet, the policies found in subsection (b) include, in relevant part:

173. *Comput. & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 211 (D.C. Cir. 1982).

174. Crawford, *supra* note 161, at 737 n.211 (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.* 545 U.S. 967, 992 (2005)).

175. Gioia, *supra* note 155, at 532 (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.* 545 U.S. 967, 992 (2005)).

176. *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968).

177. 47 U.S.C. § 230(b).

1. to promote the continued development of the [i]nternet and other interactive computer services and other interactive media;
2. to preserve the vibrant and competitive free market that presently exists for the [i]nternet and other interactive computer services, unfettered by Federal or State regulation;
3. to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the [i]nternet and other interactive computer services¹⁷⁸

Section 230(b)(2) instructs the Commission to ensure that competition across all [i]nternet features exists. To ensure true competition in video-on-demand over broadband internet, the FCC must regulate and prevent companies from unfairly exploiting their monopolistic advantage.¹⁷⁹ Though the provision includes the phrase “unfettered by Federal or State regulation,” an interpretation that would remove all FCC jurisdiction would entirely contradict the initial goal of “preserv[ing] the vibrant and competitive free market.”¹⁸⁰

Additionally, section 230(b)(2) should be read in the context of section 230(a)’s other findings, noting that the internet has flourished for the “benefit of all Americans, with a minimum of government regulation.”¹⁸¹ Nowhere does Congress refer to the benefit of broadband access providers or to no regulation.¹⁸² Instead, a minimum level of government involvement would be necessary to create the free, open marketplace that section 230(b)(2) promotes.

Second, section 230(b)(1) seeks to “promote the continued development of the internet and other interactive computer services and other interactive media,”¹⁸³ and likewise must be read in the context of section 230’s congressional findings and goals. For instance, Congress has sought to continue the competitive marketplace of and within broadband internet;¹⁸⁴ it has determined that the internet offers “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”¹⁸⁵ Further, Congress has increasingly found that “Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.”¹⁸⁶ In this context, the failure to exercise ancillary jurisdiction would fully prevent the continued enjoyment and development of interactive media in providing various services as well as

178. *Id.*

179. *Comput. & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 211 (D.C. Cir. 1982) (allowing the FCC to regulate internet services if it finds that the market is either not sufficiently competitive or that no other consumer safeguards exist).

180. 47 U.S.C. § 230(b)(2).

181. *Id.* § 230(a)(4)

182. Gioia, *supra* note 155, at 536.

183. 47 U.S.C. § 230(b)(1).

184. *Id.* § 230(b)(3).

185. *Id.* § 230(a)(3).

186. *Id.* § 230(a)(5).

the types of forums the internet offers. Such diversity has long been a goal of Congress and the FCC,¹⁸⁷ and without this basis, consumer access to several services offered by various content providers could be blocked.

Finally, Congress announced a federal policy in section 230(b)(3) to encourage the development of internet-based technologies that maximize users' control over the information they receive. Title I is necessary to prevent Comcast and other broadband internet providers from blocking or degrading particular applications used to provide particular content, policies that do not maximize user control.¹⁸⁸

Some might argue that because section 230 was passed as part of the Communications Decency Act ("CDA") (or Title V of the 1996 Telecommunications Act), a law whose primary purposes were to regulate indecency and obscenity on the internet and to provide immunity for operators of internet services regarding the potentially defamatory or obscene speech of their users, that net neutrality rules are something entirely outside of the scope of the section. However, this argument is misplaced for a few reasons.

First, nowhere does section 230, or any provision of the Telecommunications Act, restrict the Act's internet policies to the domain of "[i]nternet publisher liability" or specifically prevent the FCC from implementing nondiscrimination policies. The statute plainly outlines a series of general findings and furthers them with five specific goals, only two of which specifically relate to obscenity or the other stated purposes of the CDA.¹⁸⁹ It does not follow that simply because Congress' internet policies happened to be included in a section entitled "Protection for Private Blocking and Screening of Offensive Material"¹⁹⁰ that such broad, sweeping policies were entirely limited to providing ancillary jurisdiction for the FCC's narrow responsibility of protecting content providers from defamation liability.

Second, the Court has consistently held that Congress did not intend to freeze the Act in time and prevent the FCC from expanding its regulatory goals to other appropriate technologies through Title I.¹⁹¹ Instead, by allowing the FCC to regulate new technologies like cable television and information-services through its ancillary authority, the Supreme Court acknowledged the broad principles of FCC-deference and the extension of existing statutory goals and language to new areas and contexts in the Act.¹⁹² In this context, it would not make sense to find that Congress somehow restricted its internet policy goals in section 230 to one specific circumstance-ISP publisher liability, while at the

187. See generally *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (reaffirming the FCC's goal of diversity in finding a "diversity index" used by the Commission to weigh cross-ownership of radio, television and newspapers employed several "irrational assumptions and inconsistencies").

188. Gioia, *supra* note 155, at 537.

189. See generally 47 U.S.C. § 230(b) (3)-(4).

190. See generally *id.* § 230.

191. See *infra* Part III.A.

192. See *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

same time leaving its other policy goals and statutory grants of authority open to new applications through Title I. More specifically, if Congress allowed the FCC to regulate cable television under the umbrella of broadcast television goals, then it seems unreasonable that Congress would prohibit the FCC from regulating protocol discrimination over broadband internet while allowing it to regulate the types of defamation claims actionable against content providers over that same broadband internet.

Finally, section 230's specific goals of improving competition and developing applications and services are acutely applicable in the internet publisher context and the bandwidth throttling context. By removing the virtually endless litigation that would ensue if content providers were open to defamation suits based on the content their users provide, section 230 appropriately encourages the growth of the internet and competition among such providers.¹⁹³ Likewise, by eliminating the types of anticompetitive behavior that Comcast sought to introduce with its protocol throttling, jurisdiction based on section 230 would similarly ensure that the internet remains both a hotbed for development and a competitive environment by removing barriers to entry and success.¹⁹⁴

Overall, the internet policies enacted by Congress in section 230 and their approval and reinforcement in the FCC's Internet Policy Statement provide the requisite "regulatory goals," congressional intent, and statutory basis upon which to base Title I ancillary jurisdiction. Congress clearly intended, as evident in its findings and policymaking, to foster the open, competitive exchange and free market that the internet continues to offer.¹⁹⁵ Section 230 outlines specific policies upon which ancillary jurisdiction over an internet service developing a protocol can reasonably be based, and in this context, the FCC can act if it seeks to fully promote those policies of competition and development over broadband internet.

One could argue that the FCC's use of section 230 will enable it to regulate any aspect of the internet that it wishes. But the limited policies outlined in the provision, when read in light of the Supreme Court's "regulatory goals" test for ancillary jurisdiction, will appropriately restrict any FCC regulation of broadband internet to those specific goals outlined in section 230. The medium is not open for unfettered regulation simply because the provision's subject matter includes the internet, and such an interpretation of the FCC's Comcast Report is similarly misguided. In this instance, the Commission may regulate Comcast's network throttling because such regulation is ancillary to the congressional policies of ensuring a competitive market, promoting the continued development of the internet, and allowing users to control the information they receive with the applications they choose.¹⁹⁶

Finally, of equal importance to the analysis is what the majority in *West Virginia* refused to adopt as its test for deciding whether an agency action fell

193. Gioia, *supra* note 155, at 540.

194. *Id.*

195. *Id.*

196. *Id.*

under the major questions umbrella. Most notably, the brief for the state petitioners adopted the EPA’s framing, which, as noted, was borrowed from one of then-Judge Kavanaugh’s opinions while on the D.C. Circuit. The state petitioners argued that “[e]very factor for deciding whether a question is ‘major’” favors finding that the Clean Power Plan triggers the major questions doctrine.¹⁹⁷ Pointing to Judge Kavanaugh’s opinion, the state petitioners further explained that these factors were “cost, overall economic impact, number of affected persons, and degree of public and political attention.”¹⁹⁸

Justice Gorsuch also favored a multi-factor approach in his concurring opinion. He argued that there were exclusive categories of “triggers” that provide “signs the Court has found significant in the past,” including (1) “when an agency claims the power to resolve a matter of great ‘political significance,’”¹⁹⁹ “or end an ‘earnest and profound debate across the country,’”²⁰⁰ and (2) “when [an agency] seeks to regulate ‘a significant portion of the American economy,’”²⁰¹ “or require ‘billions of dollars in spending’ by private persons or entities.”²⁰² He also contended there were yet more “suggestive factors,” such as whether the economic sector at issue was “among the largest in the U.S. economy.”²⁰³

The Justices in the majority were, therefore, aware that a multi-factor test of economic and political significance was a possible framework for applying the major questions. However, the Court did not adopt a multi-factor test. Moreover, the Court did not apply several of the factors that others, including the EPA (in promulgating the ACE Rule) and Justice Gorsuch (in his concurring opinion), argued demonstrated the economic and political significance of the Clean Power Plan. Justice Gorsuch’s concurring opinion thus does not restate the majority opinion with helpful clarifying analysis; it changes the majority opinion’s approach into something completely different. A rejection of such an approach rejects a major questions doctrine rooted in principles of non-delegation in favor of one rooted in principles of statutory interpretation.

A second rejected test was a rule requiring a clear statement from Congress. In the D.C. Circuit, Judge Walker contended that no one defending the CPP could “make a serious and sustained argument that [section] 111 . . . satisfies the major-rules doctrine’s clear-statement [sic]

197. Brief of West Virginia, et al., at 20, *West Virginia v. EPA*, 597 U.S. 697 (2022) No. 20-1530 (quoting *U.S. Telecom Ass’n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from denial of rehearing en banc)).

198. *Id.*

199. *West Virginia v. EPA*, 597 U.S. 697, 743 (2022) (Gorsuch, J., concurring) (quoting *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661, 665 (2022)).

200. *Id.* (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)).

201. *Id.* at 744 (quoting *Utility Air*).

202. *Id.*

203. Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENVTL. L. & POL’Y REV. 47 (2022) (quoting *West Virginia v. EPA*, 597 U.S. 697, 745 (2022) (Gorsuch, J., concurring)).

requirement.”²⁰⁴ But the majority opinion in *West Virginia* never uses the phrase “clear statement” in its legal analysis. It instead uses the phrase “clear congressional authorization,” quoting that precise framing at least three times.²⁰⁵ The majority says that, if “Congress could reasonably be understood to have granted” the authority, the court can, and should, uphold it.²⁰⁶ In contrast, under a clear statement rule, the court could depart from the most natural reading of a statute to require explicit and unquestioned delegation; it appears that several justices in the majority, namely Chief Justice Roberts and Justices Thomas, Kavanaugh, and Barrett, were not prepared to endorse such a proposition in *West Virginia*.²⁰⁷

Therefore, it should be emphasized that the Court rejected both a nefarious economic and political significance test and a requirement of a clear statement of delegation. Instead, the majority endorses a test simply requiring clear congressional authorization, which according to Justice Roberts, is achieved if the agency’s source of authority does not invoke a rarely used portion of the governing statute or substantially transform the agency’s authority.

CONCLUSION

The major questions doctrine may end up being a significant development in administrative law as agencies test the bounds of their authorities moving forward. Common carrier regulation of broadband networks will clearly raise many of the issues that give rise to major question cases, and while any future case will largely depend on the facts of the specific regulations in question, any regulation that subjects broadband to Title II classification will undoubtedly face lengthy litigation. Ultimately, however, *West Virginia v. EPA* in reality did little to disturb the contours of the major questions doctrine. In fact, the case may serve as an enabler of vast agency rulemaking power, as the opinion explicitly rejected a non-delegation-centered economic and political significance threshold test in favor of a clear congressional authorization test. The FCC’s plenary power, with its enabling statute and decades of precedent, will likely remain undisturbed in its authority to regulate the internet.

204. *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 999 (D.C. Cir. 2021) (Walker, J., concurring in part).

205. *West Virginia v. EPA*, 597 U.S. 697, 723, 724, 731 (2022).

206. *Id.* at 724. *See King v. Burwell*, 576 U.S. 473, 474 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

207. Only Justice Alito joined Justice Gorsuch’s concurring opinion.