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Context, Courts and Commissions: The 6th Circuit Got Net Neutrality Wrong

Jonathan Sallet*

In issuing a temporary stay of the Federal Communications Commission 2024 Net Neutrality order, the United States Court of Appeals for the Sixth Circuit has gone beyond recent teachings of the Supreme Court to erroneously block exercise of regulatory authority that Congress clearly intended the FCC to exercise.

From the Federal Reserve Board to the Federal Trade Commission and beyond, expert agencies have been created as a means for Congress to ensure that durable legislative principles keep up with the times.

The current Supreme Court seems not to share that view. Through its implementation of a major-questions doctrine (and its rejection of *Chevron* deference), it has endorsed a more skeptical view of regulatory expertise.

Importantly, application of the major-questions doctrine deprives an expert agency of regulatory authority (unlike this past Term's *Lopez Bright Enterprises,* which overruled *Chevron*, thus changing the standard for review of agency decisions, but not declaring the exercise of agency power to be invalid). In other words, it's a fair reading of the current Supreme Court precedent that if an expert agency tries to exercise major authority without clear congressional support, then a reviewing court need not – indeed cannot – review the agency's reasoning. In such circumstances, the regulatory agency lacks the power to act. Full stop.[1]

The Supreme Court's recent jurisprudence raises extremely important questions. Does the major-questions doctrine (alongside *Lopez Bright*) represent a shift of power from Congress to the courts? Does it undermine the use of expertise as a method of governmental decision-making? Are there, as two scholars have suggested, important implications for democratic rule?[2] These are important, continuing questions.

But nothing in the current Supreme Court approach justifies the 6th Circuit's invalidation of the Commission's application of common-carrier classification to residential broadband services. The court declared that "because the rule decides a question of vast economic and political power, it is a major question" that requires "clear congressional

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[1] *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1013, 1020-21, 26, 36 (2023).

[2] Deacon & Litman, *supra* n.1, at 1049 et seq.

authorization." *In re: MCP No. 185*, No. 24-7000, 2024 WL 3650468, at *3 (6th Cir. Aug. 1, 2024) (quotes cleaned up and internal quotations omitted). But, the court mistakenly concluded, "nowhere does Congress clearly grant the Commission the discretion to classify broadband providers as common carriers". *Id*.

The Supreme Court has explained that a critical component of application of the major-questions doctrine is the requirement that "the words of a statute must be read in their context and with a view to their place in the overall the statutory scheme" and that a particular focus is the "history and breadth of the authority that the agency has asserted". *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 700 (2022).

In fact, the context and history of the twinned terms "telecommunications service" and "information service" that underlie the Net Neutrality decision plainly demonstrate that Congress quite clearly understood and expected the Commission to carry forward the job of keeping federal regulation up-to-date with changing information technologies.

That's because Congress borrowed those two concepts from previous decisions of the Federal Communications Commission itself. In a series of three decisions running from the 1960s to 1988 (the "Computer Inquiries"), the FCC dealt with the convergence of telecommunications and computing. As the Supreme Court explained in its 2005 *Brand X* decision, "Congress passed the definitions in the Communications Act against the background of [the Commission's Computer Inquiries] regulatory history, and we may assume that the parallel terms 'telecommunications service' and 'information service' substantially incorporated [the] meaning of [basic and enhanced service from the Computer Inquiries]". *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 992-93 (2005).

This was scarcely a controversial view. Justice Scalia in dissent explained that the Computer Inquiries definitions "foreshadowed" those of the Telecommunications Act, which added "telecommunications service" and "information service" to the 1934 Communications Act. *Id.* at 1011 (Scalia, J., dissenting).

The Computer Inquiries were a landmark in the history of communications regulation, designed to ensure that the new information technologies that would become broadband were separated from the monopoly AT&T held over telecommunications services. The Commission used the terms "basic" and "enhanced" to define the boundary. Basic services offered "pure transmission capability" while enhanced services included computer processing applications that would alter the content of the communication. *Re Second Computer Inquiry*, 77 F.C.C.2d 384, 420 (1980). Two years later, the Commission definitions were substantially included in the AT&T breakup decree as "telecommunications services" and "information services". *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 178 n.198 (D.D.C. 1982), aff'd sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983). And in 1988, the Commission continued to chart the evolution of

technology, by determining, for example, that database services, like Dow Jones News, were "enhanced". *Brand X*, at 994.

This history of Commission action was expressly recognized by Congress in 1996. The Conference Report both recognized the genesis of "information service" and the Senate "inten[t] that the Commission would have continued flexibility to modify its definition and rules pertaining to enhanced services as technology changes," H.R. REP. No. 104-458, at 114-15 (1996) (Conf. Rep.).

Strikingly, the industry parties attacking the FCC action have taken the same position, telling the 6th Circuit that "[t]he 1996 Act is best understood as codifying a pre-existing regulatory dichotomy between two types of services," Opening Brief of Petitioners Ohio Telecom Association, et al. at 39, MCP No. 185 Open Internet Rule (FCC 24-52), No. 24-7000 (6th Cir. August 12, 2024) and explaining that: "The Commission first created the dichotomy in 1980, in its *Computer II* regulation that was subsequently adopted in the AT&T break-up order." Thus, the Petitioners say: "The 1996 Act brings this old soil with it." *Id.* at 41 (cleaned up and internal quotation omitted). Although the Petitioners use this history to debate the appropriate meaning of the statutory definitions, it really goes to Congress' understanding of the anticipated and continuing role of the Commission in policing the line between telecommunications and information services.[3]

Congress understood that its new law would need to survive great change. The first web browser and the commercialization of the Internet were still recent events when Congress in Section 706 expressly encouraged the deployment of advanced telecommunications capability like those over which consumers can reach the Internet. Section 706.

And change the technologies did: In 1996, the dominant form of home internet access was over dial-up copper telephone lines and the common speed was 56,000 bits per second (56k). That is so quaint that it has become a catch-phrase for the old days of of dial-up and VHS tapes in 1998. GENERATION 56K (Netflix 2021).

In 2015, the FCC upped the definition of broadband to reach 25 megabits per second (25 Mbps), and again to 100 Mbps in 2024. Today, speeds of 1 gigabit (a billion bits per second) are widely available. A file that would have taken around 3.5 days to download over 56k can today be downloaded in about 32 seconds.[4]

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[3] The petitioners rely on the political and economic significance of the application of Title II to argue that Congress could not have intended this exercise of regulatory authority, Opening Brief at 21-22, but Congress in 1996 clearly understood the social importance of the coming Internet, see legislative language at H.R. REP. No. 104-458, 38 (elementary schools); 86 (1996)("extraordinary advance in the availability of educational and informational resources for our citizens); 87 (defining the term "Internet"); political disputes since then shed no light on Congress' intent at that time; and, in any event, the history and context demonstrate convincingly that Congress knew exactly what the FCC had done and what it wanted the FCC to keep doing.

[4] Mike Murphy, *From dial-up to 5G: a complete guide to logging on to the internet*, QUARTZ (October 29, 2019), https://qz.com/1705375/a-complete-guide-to-the-evolution-of-the-internet.

In other words, Congress knew what it did not know—how the Internet would evolve—but it also knew that the FCC had established the core approach and the expertise to advance Congress's goals as dynamic innovation arrived. Despite a quarter-century of Net Neutrality debate and litigation, Congress has never overruled an FCC application of its statute.

The decision of Congress to enact legislation based on FCC decisions stands in obvious contrast to the Supreme Court decisions invalidating novel administrative decisions.

The Supreme Court has emphasized that it is skeptical of it is skeptical of entirely novel assertions of regulatory authority, applying the major-questions doctrine to agency powers that were "unprecedented", *Alabama Association of Realtors v. HHS,* 141 S. Ct. 2489 (2021)(per curiam*)*, "unheralded", *W. Virginia v. Env't Prot. Agency*, 597 U.S. at 724, "never previously claimed", Biden v, Nebraska, 143 S.Ct. 2355, 2372 (2023), or "never before adopted", Nat'l Fed'n of Indep. Bus. V. Dep't of Lab, 595 U.S. 109, 119 (2022)(per curiam).

By contrast, the FCC has adopted the current reading of "telecommunications service" before – and successfully. (I defended the 2015 decision and there are earlier ones too[5].)

Moreover, Congress has stood by without taking action while the FCC repeatedly re-assessed the best way to implement the purpose of those concepts—never weighing in either in favor of or against the Commission's views, a stunning contrast to the circumstances encountered when the Supreme Court used the major-questions doctrine in reviewing circumstances in which Congress "squarely rejected" legislative proposals, Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (XXXX); *see W. Virginia v. Env't Prot. Agency*, 597 U.S. at 724 (powers that were "consistently rejected").

The most important point is this: Here the adoption of policy and the existence of agency expertise came first. Congress knowingly adopted the FCC's distinction between the creation of content (information service) and the transmittal of content (telecommunications service) and expressed the intent that the Commission would continue to use its expert judgment to apply the relevant definitions.

The Supreme Court has told us that context and history are important. Here, that context and that history demonstrate that the major-questions doctrine does not apply and that the FCC has the requisite regulatory authority.

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[5] Narechania, Tejas N., On the New Administrative Law of Broadband Classification (May 28, 2024). UC Berkeley Public Law Research Paper , CPI TechREG Chronicle (May 2024), Available at SSRN: https://ssrn.com/abstract=4846370 (describing FCC's 1995 decision treating identified high-speed data transmissions as a "basic" service and its 1998 classification of DSL internet access as a "telecommunications service").