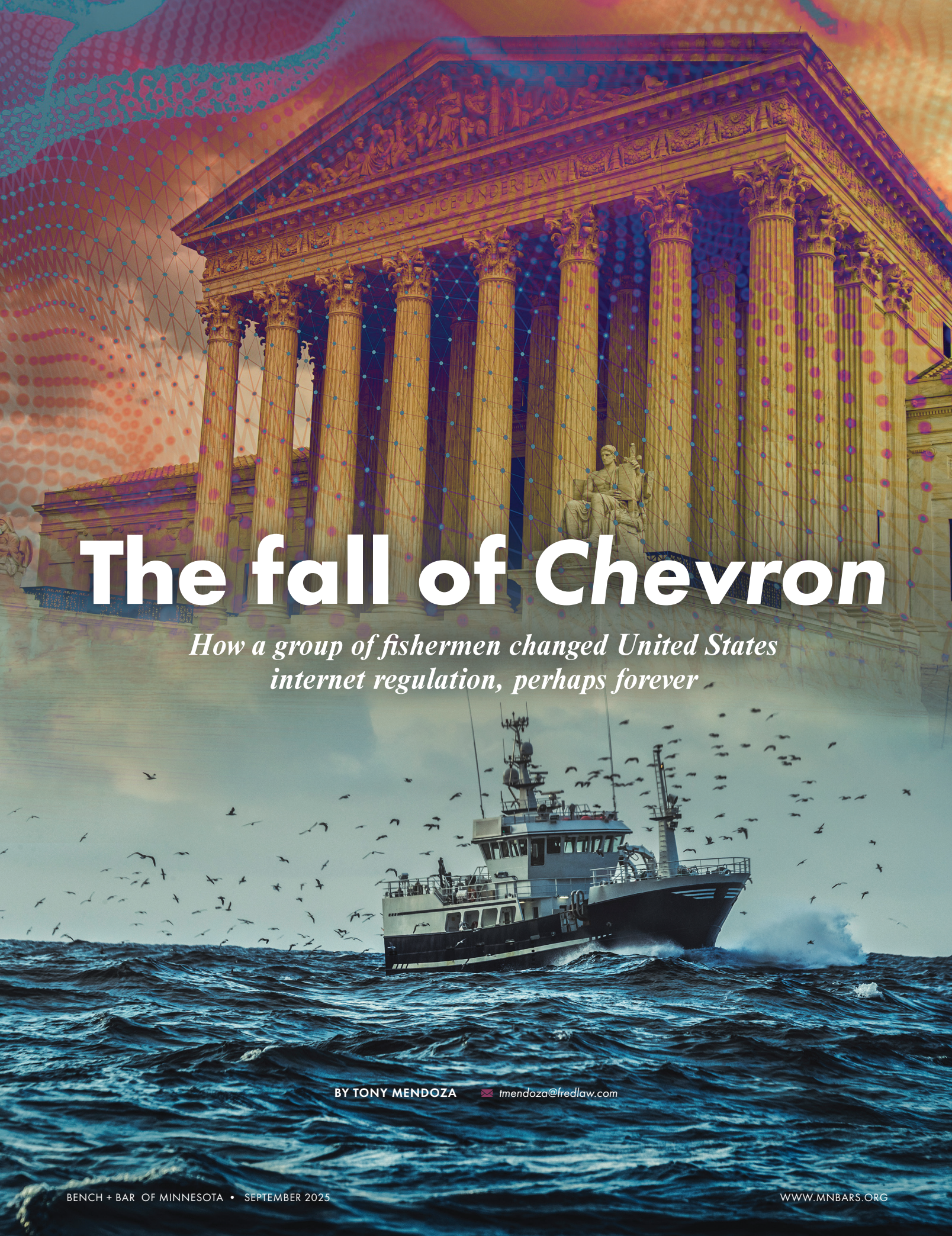




The fall of Chevron

How a group of fishermen changed United States internet regulation, perhaps forever

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In 2020, two groups of Atlantic herring fishermen were faced with the prospect of having to pay \$710 per day for the cost of federal government monitors whose job was to ride along on fishing vessels and collect data necessary to protect against overfishing. The fisherman didn't object to the monitor *per se*. In fact they saw benefit in the work the monitors were doing. But they did object to having to foot the cost of the monitors and didn't believe the National Marine Fisheries Service (NMFS) had the authority to impose such a charge under federal law.

Conservative organizations had been angling for years to find a case that could serve as a vehicle to overturn *Chevron v. Natural Resources Defense Council*,¹ a decision that had become a cornerstone of federal administrative law but which conservative groups now believed had contributed to the unfettered growth of the "administrative state." *Chevron* required federal courts to use a two-step analysis to interpret statutes administered by federal agencies. If, in reviewing a statute, congressional intent was clear, that was the end of the court's analysis. If Congressional intent was unclear, however, courts were required to defer to an expert agency's interpretation of the law, if it was based on a "permissible reading" of the statute. Defenders of *Chevron* argued that it was appropriate for executive branch agencies to make these decisions because they are experts in the field and part of a political branch.

The fishermen, litigating in two separate cases, lost in district court, with both district courts applying *Chevron* deference to the agency's interpretation of the law. Reviewing circuit courts of appeal affirmed, and the fishermen appealed the adverse decisions to SCOTUS. Writing for a 6-3 majority in *Loper Bright Enterprises v. Raimondo*, Chief Justice Roberts reviewed the history of *Chevron*, making several notable points.² He began by reviewing the Article III powers of the judiciary under the Constitution to adjudicate "cases and controversies" and *Marbury v. Madison*'s declaration that "it is emphatically the province and duty of the judicial department to say what the law is."³

Justice Roberts then went on to explain how the New Deal had greatly expanded the "administrative process." He spent considerable time detailing the history of courts' deference to administrative agencies on issues of fact, but not questions of law. Citing *Skidmore v. Swift & Co.*,⁴ Justice Roberts explained that the informed expertise of an administrative agency could provide important *guidance* to legal determinations to be made by a court, but noted that when Congress enacted the Administrative Procedures Act (APA) in 1946, it codified the distinction that courts owed deference to administrative agencies regarding factual determinations but not legal determinations. Among other arguments of the government rebutted by Justice Roberts, he took issue with the assertion that *Chevron* deference leads to more uniform construction of federal laws. In addition, Justice Roberts took umbrage at the notion that judicial interpretation

of ambiguous statutory provisions amounts to policymaking. Resolution of statutory ambiguities "involves legal interpretation" and, citing the Federalist Papers, he wrote that judges are to "construe the law with 'clear heads... and honest hearts' and not with an eye toward policy preferences." In short, Justice Roberts concluded that the "justifying presumption" of *Chevron*—that the judicial branch owed deference to administrative agencies on issues of law—was a fiction. The Court overruled *Chevron* and remanded the parties back to the circuit courts.

The world's longest running game of ping-pong

Meanwhile, oceans away from the concerns of the Atlantic herring fisherman, the Federal Communications Commission (FCC) was in the backstroke of a volley in a long-running game of regulatory ping pong over a fundamental question that would decide the future of internet regulation in the United States. The FCC was about to answer, for the fourth time in a quarter-century, this seemingly simple question: What is the internet?

The debate had roots that went even further back in time to a series of FCC decisions in the 1960s and 1970s popularly known as "the computer inquiries." It was during that time that the FCC began to grapple with the emergence of computing equipment, computer processing, and the convergence of those new technologies with regulated telephone services. Should computing equipment be regulated in the way phone service was at the time? Phone service was mostly being provided by the AT&T Bell monopoly and was heavily regulated under a dual federal-state regulatory regime enacted under the Communications Act of 1934. The FCC, not wanting to quash the nascent computer industry, made a critical regulatory distinction between "enhanced services" (data processing services) and "basic services," the transmission (telephone) component underlying enhanced services, which were regulated as common carrier services. The FCC determined that "enhanced services" would *not* be regulated as common carrier services, though telephone (basic) services would continue to be.

In 1996, Congress enacted what stands today as the last major act of Congress governing the telecommunications industry—the Telecommunications Act of 1996. In the 1996 Act, Congress codified the computer inquiries distinction between basic and enhanced services. "Telecommunications services" equated to "basic services" (the transmission component) and "information services" to "enhanced services" (the data processing component). Telecommunications services would remain subject to common carrier regulation under Title II of the Act, which features a dual federal-state regulatory regime governing market entry and exit, merger-and-acquisition approvals, rate regulation, service quality regulation, interconnection requirements, universal service subsidy programs, and more. "Information services" would be subject to lighter regulation under Title I of the Act, which provided for none of these things.

In retrospect, perhaps the timing of the 1996 Act was premature—it was enacted just as the internet was beginning down its path to ubiquity. Historical context is important here; 1996 was the same year that two Stanford classmates began working on a research project called “Backrub” that would later become Google. By 1998 the FCC, with a Democratic majority appointed by President Bill Clinton, began the ping pong game with its first serve across the net when it issued its Advanced Services order.⁵ The FCC ruled that digital subscriber line (DSL) internet services, an early internet service technology provided by traditional telephone companies, was a “telecommunications service.” The FCC ruled that DSL was a transmission service that should be subject to Title II common carrier regulation.

Soon, cable came along and began offering its own version of internet service through cable modems. In 2002, under a Republican-led FCC appointed by President George W. Bush, the FCC ruled that cable modem service was a Title I information service (and therefore to be lightly regulated), and not a Title II telecommunications service. The FCC reasoned that cable modem service was a “single, integrated service that enables the subscriber to utilize Internet access service” with a telecommunications component inseparable from data processing elements of the service.

Brand X Internet Services v. FCC

Around the same time the FCC began grappling with the question of how to categorize internet services, the question had started popping up in other contexts. In 1998, the city of Portland, Oregon categorized AT&T’s cable modem internet services in yet a third regulatory category as “cable services” to be regulated under Title VI of the Act, a categorization that would have allowed local governments to collect cable video franchise fees on internet revenue for right-of-way use. But the 9th Circuit Court of Appeals overruled a federal district court upholding the city’s classification.⁶ The 9th Circuit held that AT&T’s services were Title II telecommunications services.

By judicial lottery, the 9th Circuit was also selected to hear the appeal of the FCC’s 2002 Cable Modem Order. Applying *stare decisis* to its earlier *City of Portland* decision, the 9th Circuit vacated the FCC’s Cable Modem Declaratory Ruling and held that cable modem internet service was a Title II telecommunications service.⁷ Numerous parties appealed this decision to SCOTUS.

Writing for a 6-3 majority, Justice Thomas held that instead of applying *stare decisis*, the 9th Circuit should have employed *Chevron* deference to the FCC’s Cable Modem Declaratory Ruling. The Court held that under *Chevron*, the FCC was owed deference regarding its determination that the “high-speed wire” used in cable modem service

is always used in connection with information processing, and therefore the transmission component of the service is inseparable from its information processing-abilities (such as the world wide web). Thus, the Court held that cable modem service was a Title I information service. Having prevailed on its Cable Modem Order, the FCC went on to also reclassify DSL and wireless internet services as information services.

The net neutrality debate

Coined in 2003 by Columbia professor Tim Wu, the term “net neutrality” was initially promoted as a common carrier nondiscrimination principle (in which capacity it would presumably be subject to more extensive Title II regulation). Arguments in favor of net neutrality largely came from a coalition of interests that included emerging tech/digital content giants like Google, Amazon, Microsoft, Yahoo, Netflix, and Reddit, just to name a few. These stakeholders were concerned that owners of internet networks would become gatekeepers of the internet who could dictate how and on what terms content was delivered over those networks.

In 2005, the FCC took its first stab at creating net neutrality principles by issuing its Internet Policy Statement, which included four “openness” principles:

1. Consumers are entitled to access the lawful internet content of their choice.
2. Consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement.
3. Consumers are entitled to connect their choice of legal devices that do not harm the network.
4. Consumers are entitled to competition among network providers, application and service providers, and content providers.⁸

Comcast objected to the Internet Policy Statement and sued the FCC. In 2010, the D.C. Circuit Court of Appeals struck down the FCC’s Internet Policy Statement, holding FCC did not show that it possessed “ancillary” regulatory authority to enforce Internet Policy Statement rules against Comcast.⁹ The concept of “ancillary authority” means that an agency’s regulatory authority, if not expressly granted by Congress, can be exercised only if it can be reasonably tied to the effective performance of other statutorily mandated responsibilities. With internet service classified as a Title I information service, the FCC could point to no such nexus.

Under President Obama, the FCC undertook a more formal rulemaking process to craft net neutrality rules. In 2010, the FCC issued its Open Internet Order.¹⁰ The FCC attempted to fortify its argument that it had ancillary authority under Title I to regulate the internet and promulgated the first iteration of what are now known as the net neutrality

“bright line rules,” which prohibit internet service providers (ISPs) from blocking or discriminating with respect to content transmitted over internet networks. The Open Internet Order also included a transparency rule requiring accurate disclosure by ISPs of information about network management practices, performance, and commercial terms and conditions.

ISPs again challenged the FCC’s authority to promulgate neutrality rules, and on appeal the D.C. Circuit again largely agreed. With the exception of the transparency rules, the court held that under Title I, the FCC had no authority to promulgate what amounted to common carrier regulations on ISPs.

Having failed in its effort to enact net neutrality rules under Title I, the Obama FCC served the ping pong ball over the net again in 2015. The FCC reclassified internet service as a Title II “telecommunications service,” holding that any “information services” offered in conjunction with broadband connectivity (e.g. email and online storage) were sufficiently independent of internet service so as to not transform it into an information service. The FCC reissued its bright line rules under the FCC’s Title II powers.

With the 2016 election of President Donald Trump, the FCC immediately began a proceeding to reverse the second Obama FCC net neutrality order. The net neutrality debate grew louder, reaching a fever pitch in 2017 when late night talk show host John Oliver urged watchers of *Last Week Tonight* to file comments with the FCC in support of net neutrality rules. So many comments were filed that it crashed the FCC’s public comment system. Undeterred by the intensity of popular opinion in support of net neutrality rules, the FCC, in its Restoring Internet Freedom (RIF) order, reverted to classifying broadband internet service as a Title I information service, and repealed the bright line rules (but not the transparency rule).¹¹ And in what has turned out to be an overreach that backfired, the FCC preempted “any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.” Proponents of net neutrality appealed the RIF Order again to the D.C. Circuit Court of Appeals.

In *Mozilla v. FCC*, the D.C. Circuit, applying *Chevron* deference, largely upheld the RIF Order with an important exception.¹² The court reversed the FCC’s preemption of state and local regulation of internet services. The court reasoned that by classifying internet service as a Title I information service, the FCC, in addition to stripping itself of common carrier regulatory authority, also stripped itself of the authority to preempt state and local regulation under Title II. In the Title I context, the

court found Congressional intent was clear: Title I conferred no preemptive power to the FCC. Therefore, with respect to the state and local preemption issue, the court never reached the second part of the *Chevron* test—whether to defer to the FCC construction of an ambiguous law—because in the court’s view there was no ambiguity.

During President Biden’s term, the FCC, as you might now be able to guess, reclassified internet service yet again, ruling it to be a telecommunications service, and reinstated the net neutrality bright line rules. However, it did not promulgate its Safeguarding and Securing the Open Internet (SSOI) order until late in President Biden’s term.¹³ The Biden FCC issued its SSOI order on May 7, 2024. *Loper Bright* was argued on January 17, 2024, and decided on June 28, 2024. Through judicial lottery, the appeal of the FCC’s SSOI Order was assigned to the 6th Circuit Court of Appeals. By the time it was argued, *Loper Bright* was the law of the land.

Thanks to fishermen who were probably somewhere out on the Atlantic Ocean catching herring, the 6th Circuit was no longer bound by *Chevron* and the court was free to apply its own reading of the 1996 Act. The court ruled that internet service is an information service, and that the FCC lacked the statutory authority to impose net neutrality policies under Title II of the Telecom Act of 1996.¹⁴ Until Congress amends the 1996 Act—which, despite observing 25 years of regulatory ping pong, Congress has never summoned the political will to do—the internet will remain a lightly regulated Title I information service for years to come.

Loper Bright’s impact on internet regulation

With the regulatory classification question finally settled by the 6th Circuit, barring Congressional action, the internet regulatory framework now has two primary characteristics. First, as a Title I service, it will be subject to little if any federal regulation. The transparency rule survived, but that’s all that remains of 25 years of administrative proceedings. Second, under the *Mozilla* decision, arguments for the existence of an express federal preemption of state governmental internet regulation under the federal Communications Act are increasingly untenable.

As a result, it is not surprising that we have already seen several states enacting new statutes that regulate internet service. Even before *Mozilla* was decided, the state of California adopted the California Internet Consumer Protection and Net Neutrality Act, which largely mirrors the federal net neutrality rules.¹⁵ Those rules were upheld in a preemption challenge by the 9th Circuit.¹⁶ Last year, Minnesota enacted its own net neutrality law, which also largely models the vacated FCC rules.¹⁷ Colorado, Oregon, and Washington have also passed similar new neutrality laws.

In addition to state net neutrality laws, states are also enacting or considering other internet regulations. In 2021, the State of New York enacted the Affordable Broadband Act, the first state law to regulate broadband rates.¹⁸ A federal preemption challenge to the New York law was rejected by the 2nd Circuit Court of Appeals and *certiorari* was denied by SCOTUS.¹⁹ Other state legislatures have introduced similar bills in Vermont, California, Minnesota, and Massachusetts.

Epilogue

At its heart, the debate over *Chevron* was a struggle over constitutional separation of powers. Justice Kagan's dissenting opinion in *Loper Bright* effectively argues that *Chevron* deference was necessary and appropriate for resolving interstitial, often technical or scientific questions that Congress, either intentionally or unintentionally, failed to answer when it legislated. On the other hand, as the 25-year tug of war over the regulatory classification of internet services shows, these interstitial questions could end up becoming decades-long political ping pong games. The net neutrality saga may have been in the back of Justice Roberts's mind when, in his *Loper Bright* opinion, he rebutted the argument that *Chevron* resulted in more uniform construction of federal law. The tug of war over the legal classification of the internet in many ways was an example in support of his argument that *Chevron* did not in fact result in more uniform construction of law.

In addition, some questions in which courts exercised *Chevron* deference were not necessarily of a scientific or technical nature. The Atlantic herring fishermen's objections to the regulatory creep of an NMFS regulation to require them to pay for the cost of ride-along observers didn't seem to fall into the category of technical or scientific.

Unfortunately, as with many issues of the day, the majority and dissenting opinions in *Loper Bright* engage in polemical arguments to advance their point of view. Justice Roberts's majority opinion, as Justice Kagan's dissent notes, offers no middle ground for deferring to an agency's technical or scientific expertise. Nor does Justice Kagan's acerbic dissent acknowledge that *Chevron* had been used too often as a crutch for lazy administrative jurisprudence, or as an enabler of regulatory creep that amounted to executive branch regulatory agencies legislating where Congress wouldn't—without the same political accountability.

The rapid consolidation of executive authority in the opening days of the second Trump Administration offer an early retrospective on *Loper Bright*. On February 18, 2025, the White House published Executive Order 14215 ("Ensuring Accountability for All Agencies"), which contains the following excerpt (emphasis added):

Sec. 7. Rules of Conduct Guiding Federal Employees' Interpretation of the Law. The President and the Attorney General, subject to the President's supervision and control, shall provide authoritative interpretations of law for the executive branch. The President and the Attorney General's opinions on questions of law are controlling on all employees in the conduct of their official duties. *No employee of the executive branch acting in their official capacity may advance an interpretation of the law as the position of the United States that contravenes the President or the Attorney General's opinion on a matter of law, including but not limited to the issuance of regulations, guidance, and positions advanced in litigation, unless authorized to do so by the President or in writing by the Attorney General.*²⁰

EO 14215 appears to require executive branch employees, including all federal agency employees, to advance only interpretations of law that are consistent with the president's interpretation of the law. What are federal employees to do if the president's interpretation of law is directly contrary to a decision of the judiciary? What will the judiciary do if the president's interpretation of law is directly contrary to a decision of the judiciary? If it is "emphatically the province and duty of the judicial department to say what the law is," will the Roberts Court uphold that principle in the face of a president who claims *he* is the final word about what the law is? ▲

NOTES

¹ 467 U.S. 837 (1984).

² 603 U.S. 369 (2024).

³ 1 Cranch 137, 177.

⁴ 323 U.S. 134 (1944).

⁵ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011 (1998).

⁶ *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

⁷ *Brand X Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

⁸ *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005).

⁹ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

¹⁰ *In re Preserving the Open Internet*, 25 FCC Rcd 17905 (2010).

¹¹ *In re Restoring Internet Freedom*, 33 FCC Rcd 311 (2018).

¹² 940 F.3d 1 (D.C. Cir. 2019).

¹³ *In re Safeguarding and Securing the Open Internet*, 39 FCC Rcd 4975 (2024).

¹⁴ *In re MCP 185*, 124 F.4th 993 (6th Cir. 2025).

¹⁵ Cal. Civil Code §3100 et seq.

¹⁶ *ACA Connects v. Bonta*, 24 F.4th 1233 (9th Cir. 2022).

¹⁷ Minn. Stat. §325F.6945.

¹⁸ N.Y. Gen. Bus. §3999-ZZZZ.

¹⁹ *New York State Telecommunications Ass'n v. James*, 101 F.4th 135 (2d Cir. 2024), cert den. 145 S. Ct. 984 (2024).

²⁰ 90 FR 10447.



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