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A Comment on "Sticky Regulations" and the Net Neutrality Saga

by

Randolph May *

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In his forthcoming *Hastings Law Journal* article, [Sticky Regulations and Net Neutrality: Restoring Internet Freedom](#), Aaron Nielson argues, correctly I think, that "[s]tickiness allows regulated parties to invest with greater confidence that they will be able to recoup their investment over the long run – which enhanced investment in turn better allows agencies to pursue long-term policies." Stickiness here refers to "sticky regulations," that is, "regulations backed by a credible agency commitment that the policy will not be changed too soon."

As a backdrop for his thoughtful piece on regulatory stickiness, it should not be at all surprising that Professor Nielson focuses on the "zigzagging" saga of Net Neutrality regulation at the Federal Communications Commission. I've been writing extensively about the pros and cons of net neutrality regulation (mostly the cons!) for more than fifteen years, so I admire Professor Nielson's crisp review of net neutrality regulatory history at the FCC and in the courts.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

Before saying another word, I should point out that the strikethrough of ~~Net Neutrality~~ in the title of Professor Nielson's article is his, not mine. And, I might add, a very clever way of imprinting his point.

Here I'll just digress briefly to say that, while I like Professor Nielson's use of the "zigzagging" imagery to describe the FCC's back-and-forth net neutrality policy, my allusion to Bobby Vee's bouncing "rubber ball" to invoke net neutrality policy still appeals to me too – maybe because I'm of a certain age. In any event, you can find my most recent "rubber ball" essay, "The Ongoing Saga of Chevron and Net Neutrality," in [The Regulatory Review](#), which addresses "the long saga of back-and-forth regulatory treatment of internet access regulation, popularly known as net neutrality."

But now back to my main purpose – commending Aaron Nielson's forthcoming "Sticky Regulations" article to all those interested in regulatory policy and administrative law. For as he emphasizes, his essay is really not about Internet policy, but rather about whether we ought, generally, to value stability in regulatory policy, and if so, how we might think about achieving it. Or, as Professor Nielson asks, do we want a regulatory system "in which major policies zigzag from administration to administration?"

In thinking about ways to achieve greater "stickiness" in regulatory policy, Mr. Nielson offers various ideas for consideration, including (1) curtailing the Supreme Court's [Brand X](#) precedent, which requires courts to defer even to agency statutory interpretations that are inconsistent with prior judicial decisions – the net neutrality saga is grounded in *Brand X*; (2) revisit the Supreme Court's [Fox Television Stations](#) precedent, which gives agencies broad leeway to reverse existing policies; (3) increase the "ossification" associated with the rulemaking process to make it more difficult for agencies to adopt regulations reversing course, at least quickly; (4) somehow further enhance the [Brown & Williamson](#) "major questions" doctrine that removes major policy issues of great "economic and political" significance from the realm of [Chevron](#) deference.

Here I've only summarily listed Professor Nielson's tentative ideas, which are, of course, more fully set forth in his article. To his credit, he candidly acknowledges their potential limitations and drawbacks, even acknowledging, in conclusion: "One answer may be nothing—the costs of foregone flexibility may not justify the benefits of enhanced stability."

A final point: The growing sentiment – among scholars and, perhaps more to the point, among Supreme Court justices – to reconsider [Chevron](#) deference, or at least to rethink whether the deference doctrine should somehow be curtailed, is inextricably related to any consideration of the "stickiness" of regulations. Put simply, at least in macro terms, less *Chevron* deference generally means more stickiness because agencies would have less discretion to reverse course by changing statutory interpretations.

On this score, I appreciate that Professor Nielson cites (at note 104) my two articles published in the *Administrative Law Review* arguing that the statutory interpretations of so-called independent regulatory agencies, consistent with fundamental separation of powers principles, should receive less deference than those of executive branch agencies: [Defining Deference Down: Independent Agencies and Chevron Deference](#) and [Defining Deference Down, Again:](#)

[Independence Agencies, Chevron Deference and Fox](#). Please see these articles for a full explanation of my argument.

The relevance of my articles to Professor Nielson's stickiness concern, especially as it relates to the Federal Communications Commission's long-running Net Neutrality saga, should be obvious: Were the agency to receive less deference for its statutory interpretations, the likelihood of ongoing zigzagging with regard to Internet policy with each change in administration would be reduced.

For my part, I make no bones about my support for the FCC's current light-handed Internet regulatory policy adopted in December 2017 in the agency's [Restoring Internet Freedom Order](#). I'd like for Congress, finally, to enact a law that would resolve the long-running controversy, preferably by embodying the current light-handed approach, before yet more "zigs" or "zags." I'll give Aaron Nielson the last words to explain why this is so:

To the extent that a legal scheme can quickly change, rational actors in the private sector are less willing to make long-term investments in reliance on that scheme, at least at the margins. Uncertainty is a problem for regulated parties.

That's a stickiness proposition for which there should be widespread agreement.

* Randolph May is Founder and President of the [Free State Foundation](#). He is a former Chair of the ABA Section of Administrative Law & Regulatory Practice, a former Public Member and now Senior Fellow at the Administrative Conference of the United States, and a Fellow at the National Academy of Public Administration. *A Comment on "Sticky Regulations" and the Net Neutrality Saga* was published in the *Yale Journal on Regulation: Notice & Comment Blog* on March 23, 2020.