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Demise of Chevron Deference Promotes Regulatory Certainty

by

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Gain in long-term legal stability outweighs any short-term disruption

The Supreme Court's jettisoning of the Chevron deference doctrine this past June in Loper Bright Enterprises v. Raimondo has prompted as much commentary as the adoption of the Chevron decision did when it was adopted 40 years ago.

Unfortunately, much of it is misguided. This is especially true with respect to the oft-repeated claim that Chevron's demise promotes instability in the regulatory regimes throughout the vast administrative state. Chevron's burial does just the opposite. It helps ensure more stable legal rules. This, in turn, facilitates investment and innovation, even apart from the salutary effect of curbing the overly broad bureaucratic discretion that Chevron empowered.

Under Chevron, courts were required to defer to federal agencies' reasonable interpretations of statutory provisions governing the agencies' authority if the provisions were deemed ambiguous. Deference was required even if a court had already determined that an agency's interpretation

was not the best reading of the statute. In other words, an agency's view of the bounds of its regulatory authority trumped a court's interpretation.

Here, I want to focus on recent comments where Sen. Amy Klobuchar bemoaned the demise of Chevron's deference. She argued that Chevon's elimination is detrimental "because a lot of how we move forward with our economy is if we have consistent rules in place, right?" She said that if you know what the rules are, then you can invest. But "if people don't know what the rules are going to be or if they're going to change, it makes it a lot harder."

Ms. Klobuchar, Minnesota Democrat, is right that stability in the law is important for businesses so they can intelligently plan investments and judiciously execute other business decisions.

But Ms. Klobuchar and others who take the same line should know better, especially those — such as Ms. Klobuchar, who serves on the Senate Commerce Committee — who are familiar with communications law and policy. They have witnessed firsthand how reliance on the Chevron doctrine has promoted instability in the legal regime governing broadband internet providers under the guise of "net neutrality." The back-and-forth "switcheroos" between the imposition of heavy-handed public utility regulations and a light-touch regulatory regime is a prime example.

For the past decade, each time the Federal Communications Commission has been controlled by Democrats, the commission has adopted stringent utility regulations for broadband providers; each time the Republicans regained control, the FCC reinstituted a deregulatory regime. The commission's most recent effort under President Biden to reimpose utility regulation has now been stayed by an appellate court. But regardless of what ultimately happens in the litigation, it's certain that when fully constituted, the FCC under President-elect Donald Trump will vote to revert to light-touch regulation.

Here's the key point: Each time the FCC has switched from one set of legal rules to the other, the agency invoked Chevron deference to support the switch. And each time the courts affirmed the FCC's newly changed interpretation of the same ambiguous statutory position, it relied on Chevron deference.

In his Loper Bright concurrence, Justice Neil Gorsuch explicitly highlighted Chevron's fault in enabling the FCC's back-and-forth pendulum swings regarding the regulation of broadband providers: "Each time, the government claimed its new rule was just as 'reasonable' as the last. Rather than promoting reliance by fixing the meaning of the law, Chevron deference engenders constant uncertainty and convulsive change even when the statute at issue itself remains unchanged."

Few credible observers argue that this instability in the legal regime governing broadband providers has promoted investment or innovation or has otherwise been conducive to business planning. It hasn't. And the same instability has occurred across the administrative state wherever regulatory regimes have been subject to back-and-forth switcheroos created by a change in administration and sustained by the application of Chevron deference.

It may be true that in the short term, overruling Chevron will cause some unpredictable disruption, including for businesses trying to discern the regulations to which they are subject, as agencies and courts adjust to the agencies' loss of overly broad interpretative discretion. The gain in long-term legal stability, however, outweighs any short-term disruption.

The principal reason the Chevron doctrine was eliminated in Loper Bright Enterprises is that Chevron is inconsistent with the Administrative Procedure Act's requirement that courts, not agencies, must decide "all relevant questions of law" arising on review of agency actions. The Constitution's separation of powers reinforces the APA's dictate that, as Chief Justice John Marshall declared in Marbury v. Madison, "it is emphatically the province and duty of the judicial department to say what the law is."

The elimination of the Chevron doctrine is correct as a matter of law — and that is what's most important. But the fact that the doctrine's death limits bureaucratic overreach while promoting legal stability for the administrative state's multitude of regulatory regimes cannot be gainsaid.

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