

A Decisive Battle For Net Neutrality Looms Ahead

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December 7, 2017, 11:29 AM EST

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The history of net neutrality has become a study in administrative U-turns, which now promise to test the limits of judicial deference to agency decision making. The Pai commission's proposed new statutory and regulatory approach to broadband internet access service overrules the Wheeler commission's more aggressive Title II approach, which itself reversed the Powell commission's Title I "light regulatory touch."



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At the same time, the underpinnings of judicial deference to an agency's interpretation of its organic statutes and agency positions regarding the meaning of its own rules is under judicial and academic attack. With Justice Neil Gorsuch replacing the late Justice Scalia, there is once again a majority on the Supreme Court of the United States that favors reexamination of judicial deference to agency construction of statutes and/or regulations.

Enter the likely reversal (again!) of statutory construction, factual findings and policy approach to the internet embodied in the Pai commission's proposed net neutrality order ("Pai order").^[1] If adopted at the Federal Communications Commission's ("FCC" or "commission") Dec. 14, 2017, open meeting, the Pai order would constitute the fourth shift in the statutory definition and regulatory approach to internet content and delivery technologies.

The unique, politically charged and tortured regulatory history of net neutrality, combined with the gathering storm clouds over Chevron^[2] and Auer,^[3] could create a seminal moment in administrative law. Appeal of the Pai order to the D.C. Circuit is a foregone conclusion. The national importance of the underlying issue, the participation of the solicitor general and the intense debate over the proper scope of judicial review of agency action give the case all the earmarks of a blockbuster on the Supreme Court's calendar for October Term 2018.

One irony should not be lost. Chevron itself was a product of the mid-1980s. The movement toward Chevron deference was first championed by then Judge Antonin Scalia and Circuit Judges Robert Bork and Ken Starr on the D.C. Circuit. They sought to check what they viewed as judicial intrusion into policy

decisions, thereby encroaching upon the executive branch's constitutional authority to "take Care that the Laws be faithfully executed." [4] A byproduct of this doctrinal goal was to give the Reagan administration more leeway to pull back from some aspects of the Carter administration's regulatory state. That both the birth and death of Chevron could occur in an environment of Republican deregulatory zeal would no doubt give the late Justice Scalia and the late Judge Bork a hearty laugh.

Net Neutrality in a Nutshell

The rationale behind net neutrality-type regulation traces back to the FCC's Computer II regulations of the 1970s and 1980s. [5] The idea was that content and data services (then known as "enhanced services") should be separated and protected from abuse of monopoly power by the major transmission systems provided by the Baby Bells and GTE and denominated "basic services." GTE and the Baby Bells were prohibited from entering the "enhanced services" market, and the "enhanced services" providers were given some price and access rights to "basic services." The goal was to avoid potential abuse of the last-mile monopoly controlled by large telcos to stifle competition and innovation in the data services market.

The net neutrality debate began in earnest in 2007, with complaints from BitTorrent and Skype that Comcast was "throttling" their content by targeting those services for reduced bandwidth and other limitations on delivery speed and quality. [6] Because BitTorrent was a file-sharing service used largely to "swap" movies and television programs, this raised a concern that Comcast was using control over the network to disadvantage a competitor to its cable content. Similarly, Skype offered two-way, worldwide telephone and audiovisual communication that was a competitor to the telephone part of the bundle offered by the large cable and telephone providers.

The Martin commission cited Comcast for violation of a set of "principles" that the FCC had adopted in 2005 to promote open networks and to forbid practices like "throttling" to disadvantage competitors' content. The D.C. Circuit reversed the FCC's ruling, holding that the FCC lacked express or ancillary jurisdiction to enforce the guidelines against Comcast. [7]

By the time Michael Powell was seated as the 24th chairman of the FCC in 2001, it was clear that at least some concerns expressed in Computer II and the Comcast enforcement proceeding arguably had been overtaken by more competition in the data transmission markets. In addition, the idea that DSL remained a Title II common carrier service solely because it was offered by telcos was hard to square with principles of competitive neutrality across different transmission technologies.

The Powell commission took the D.C. Circuit's Comcast decision to heart and acted by notice and comment rulemaking. It declared that "information services," the new statutory term for "enhanced services," were an inseparable combination of internet content, DNS [8] conversion services and transmission. [9] This entire package was to be regulated with a "light touch" as a Title I information service. The telcos would no longer be shackled with common carrier-type regulation, which the Powell commission viewed as a white elephant. In *Brand X*, [10] the Supreme Court upheld the Powell commission's Title I treatment of what today is called BIAS. [11] As discussed below, Justice Clarence Thomas's opinion for the Supreme Court in *Brand X* may be the high water mark for judicial deference to agency interpretation of statutes.

Enter the Obama administration and the Wheeler commission. Concerned that the Powell commission's "light regulatory touch" was too light, the Wheeler commission began proceedings to strengthen the limits on BIAS providers' ability to selectively favor or disfavor internet content. The concern was that

BIAS providers would discriminate in favor of their own content or that content from the largest providers would be given speed and caching advantages, known as “paid prioritization.” The newest and most innovative content creators (now termed “edge providers”) would suffer because they simply did not have the financial resources to compete in a world of “paid prioritization.” Chairman Wheeler summed up his approach thusly: “These enforceable, bright-line rules assure the rights of Internet users to go where they want, when they want, and the rights of innovators to introduce new products without asking anyone’s permission.”[12]

The Wheeler commission reversed the Title I designation and reclassified BIAS as a Title II “telecommunications service.” Any discrimination in the speed or method of delivery of one content provider over another was forbidden. In *USTA v. FCC*,[13] the D.C. Circuit dutifully applied *Brand X* and upheld the reinterpretation of definitional sections of the Communications Act and the reclassification of the transmission component of internet services as a separate “conduit function”; in principle, the same as voice telephony.

The first pages of the final chapter of the net neutrality odyssey may be penned by the proposed Pai order. Rejecting the legal interpretations and policy goals of the Wheeler commission, the Pai order would reverse Title II treatment of BIAS providers and eliminate price and access controls. In essence, the Pai order, if adopted next month, would go back to a version of the Powell commission’s “light regulatory touch.” One key component of the reversal was Chairman Ajit Pai’s agreement with the Powell commission’s finding (rightly or wrongly) that new competition among cable, telecom, mobile and other forms of internet access services had reduced the need for government regulation.[14]

The Constitutional Underpinning (and Undoing?) of Chevron Deference

As noted above, judicial deference to agency action has been the polestar of administrative law for more than 30 years. This was not always so. In the 1970s and early 1980s, federal courts applied the *Overton Park*[15] “hard look” doctrine, which provided for a “searching and careful” review of every aspect of informal agency decision making, including both factual findings and legal conclusions.

The “hard look” doctrine was put to rest by Justice John Paul Stevens’s opinion for the Supreme Court in *Chevron*. [16] In the decision below in *Chevron*, the D.C. Circuit, in an opinion by then Judge Ruth Bader Ginsburg, relied upon previous judicial interpretations of the statutory phrase “stationary source” in the Environmental Protection Act.[17] The lower court struck down the U.S. Environmental Protection Agency’s (“EPA”) decision to bundle individual units within a covered plant under what was known as the “bubble concept.”[18] The Supreme Court found that the D.C. Circuit’s “basic legal error ... was to adopt a static judicial definition of the term ‘stationary source,’” in particular where Congress had not spoken to the issue.[19]

Rather, ruled the Supreme Court, the judicial role should be limited to determining whether the EPA administrator’s interpretation was a “reasonable one” with “considerable weight ... accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”[20] This familiar two-pronged inquiry of (i) has Congress spoken to the specific statutory issue at hand?, and if not, (ii) is the agency’s interpretation a reasonable one? has defined the scope of judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. since *Chevron*. In *Auer*, this doctrine of judicial deference was extended to give “controlling” weight to an agency’s interpretation of its own previously promulgated regulations.[21]

In some ways, *Auer* was a bridge too far for judicial deference. Making the agency a judge in its own

cause by giving its post hoc and often litigation-driven reading of its regulations “controlling weight” seems to be in tension with several important constitutional principles.

First, Auer deference is in tension with both the separation of powers and the Article III delegation of the “Judicial power” to the federal courts. Second, Auer deference is a constitutional non sequitur. Chevron deference rests on the presumption that statutory ambiguity equals a delegation of “gap filling” authority to the agency. But there is no sound constitutional foundation for a “double delegation,” i.e., first, when the agency promulgates the rule, and second, when it seeks to enforce the rule. Third, the Auer doctrine presents serious due process issues. It incentivizes a federal agency to promulgate vague and sweeping regulations and to only hone down to the specifics after it has accused a private party of a regulatory violation. For these reasons, four sitting justices have expressed a desire to reexamine and possibly overrule Auer.[22]

Then judge and now Justice Gorsuch has gone even further. Specially concurring in his own majority opinion upholding an Immigration and Naturalization Service interpretation of its statutory scheme, then-Judge Gorsuch wrote: “Chevron and Brand X permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”[23]

Final Observations and a Prediction

The stage is now set for a classic battle over market conditions, regulatory philosophies and what statutory mandate there is (or is not) for FCC regulation in the rapidly changing market for creation and delivery of digital content. Add the possible reexamination of Chevron and the case has all the makings of a blockbuster that comes along only once a generation. The result will not be limited to telecommunications; it will have a profound effect on every federally regulated industry.

In upholding the Powell commission’s reclassification of internet access services as an integrated Title I offering, Justice Thomas stated that if the statute was ambiguous as to the proper classification, then “[t]hat silence suggests . . . that the Commission has the discretion to fill the consequent statutory gap.”[24] This powerful statement of judicial deference to the FCC’s authority to interpret the Communications Act could justify almost any classification or reclassification of BIAS providers.

Is it plausible that Congress silently delegated “gap filling” authority to the FCC to completely change the statutory classification and regulatory treatment of the internet depending on politics and market philosophy? Why write the statutory definitions at all? This raises a second important constitutional principle — the nondelegation doctrine. At some point, and net neutrality may be it, the task is simply too big, too important and too freighted with political outlook for Congress to “punt” it to an administrative agency. Thus, a net neutrality appeal could also implicate principles that go to the core of the theory of the administrative state itself.

But Justice Thomas has more recently expressed serious constitutional concerns, at least with regard to judicial deference to agencies’ interpretations of their own rules. Some of Justice Thomas’s concerns about Auer deference apply with equal force to Chevron. these criticisms would logically lead to reexamination by Justice Thomas’s not only of Auer but of Chevron as well Justice Thomas has argued recently that judicial deference has gone so far as to become an abdication of the judicial power conferred by Article III.[25] Justice Gorsuch’s views on this issue are clear, and Justice Ginsburg is the only dissenter in Brand X still on the Supreme Court.[26]

This leads to my prediction. Given the confluence of the net neutrality debate and the desire to reexamine the roots of judicial deference to agencies' interpretation of statutes and regulations, I predict that the Supreme Court will overturn Brand X, either before or at the time of its review of Pai order. A majority of the Supreme Court will hold that it is "emphatically the province and duty of the judicial department to say what the law is," [27] without any assistance from the executive branch. Thus, the difficult question of statutory interpretation that separated Justices Scalia and Ginsburg from Justice Thomas in Brand X itself will finally be joined: Do the relevant statutory definitions and FCC regulatory history require a particular statutory classification of BIAS providers as opposed to the internet content that BIAS providers deliver to their subscribers?

With the importance of the internet to the United States' economy and to retaining its status as a world leader in digital content, application development and transmission technologies, this could be one of the most important business cases to come before the court in this century.

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[1] In the Matter of Restoring Internet Freedom, 32 FCC Rcd. 4434 (rel. May 23, 2017).

[2] Chevron, USA Inc. v. National Resources Defense Council Inc., 467 U.S. 837 (1984).

[3] Auer v. Robbins, 519 U.S. 452 (1997).

[4] U.S. Const. art. II, § 3.

[5] In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 417-23 (1980).

[6] See Comcast Corp. v. F.C.C., 600 F.3d 642, 644-45 (D.C. Cir. 2010).

[7] Id. at 652-61.

[8] DNS or Domain Name System is the internet's system for converting alphabetic names into numeric IP addresses. The Powell Commission ruled that internet access services were "information services" in part because DNS conversion, in the Powell Commission's view, involved a "change in the form or content of the information as sent or received." 47 U.S.C. § 153(50). This change in content sent by the user was explicitly excluded from the definition of telecommunications in § 153(50).

[9] In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14986, 14988 (2005).

[10] National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005).

[11] Broadband internet access service ("BIAS") providers, previously referred to as internet service providers or "ISPs."

[12] *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 6000 (2015) (statement of Chairman Tom Wheeler).

[13] *United States Telecom Association v. FCC*, 825 F.3d 674, 696-97 (D.C. Cir. 2016).

[14] *Pai Order* at 4471.

[15] *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

[16] *Chevron*, 467 U.S. 837.

[17] *Nat. Res. Def. Council Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982), *rev'd*, *Chevron*, 467 U.S. 837 (1984). One cannot help but note the remarkable coincidence that Anne Gorsuch, Justice Gorsuch's mother, was the EPA administrator who approved the rules under review culminating in the Supreme Court's *Chevron* decision.

[18] *Chevron*, 467 U.S. at 837.

[19] *Id.* at 842.

[20] *Id.* at 844, 845.

[21] *Auer*, 519 U.S. at 461.

[22] See *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring) ("[T]here is some interest in reconsidering those cases"); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."); *id.* at 1211-13 (Scalia, J., concurring); *id.* at 1213 (Thomas, J., concurring); *Tr. of Oral Arg. at 3:25-4:1, Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195 (2011) (No. 09-329), 2010 WL 4974685, at *3-4 (Justice Kagan wondering "whether *Auer* continues to remain good law").

[23] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

[24] *Brand X*, 545 U.S. at 997.

[25] *Perez*, 135 S. Ct. at 1217-20 (Thomas, J. concurring).

[26] *Brand X*, 545 U.S. at 1005 (Justice Ginsburg joining Part I of Justice Scalia's dissent).

[27] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).