ISSUE BRIEF

US POLICY

The Role of *Chevron* Deference in Federal Privacy Regulation

April 2024

Authors:
Ryan Campbell
Stacey Gray

FUTURE OF PRIVACY FORUM

Acknowledgments

The lead author Ryan Campbell is a 3L law student at UC Berkeley School of Law, and a Spring 2024 Law & Policy Intern at Future of Privacy Forum. Stacey Gray is a Senior Director for U.S. Policy at Future of Privacy Forum. Additional FPF policy staff who have contributed to this Issue Brief include Amie Stepanovich and Tatiana Rice. The views in this Issue Brief do not necessarily represent the views of FPF's supporters or Advisory Board. The team welcomes any feedback at info@fpf.org.

Executive Summary

Two cases currently pending before the Supreme Court, *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, consider whether or not to overturn a 40-year old precedent, *Chevron v. Natural Resources Defense Council*. The *Chevron* decision and its progeny, which established the legal doctrine of "*Chevron* deference," provide an analytical framework for courts to use when examining agency interpretations of ambiguous statutes. *Chevron* deference grants federal agencies flexibility to reasonably interpret statutes and to promulgate regulations addressing all aspects of society and industry. Proponents of *Chevron* highlight agency expertise, congressional inefficiency, and the value of allowing agencies to construe ambiguities in old laws to address contemporary challenges. Meanwhile, critics raise concerns of agency overreach, abdication of legislative and judicial duties to the executive branch, and the challenges of ensuring legal consistency as regulations change from administration to administration.

The cases at hand, which contemplate the narrowing or reversal of *Chevron*, have substantial implications for federal efforts to create and implement regulations for privacy, data security, and AI. Changes to the *Chevron* framework and judicial deference to agency rulemaking could make it more challenging for the Federal Trade Commission to address privacy and data security issues through its current Commercial Surveillance and Data Security Rulemaking, as well as other rules under the Children's Online Privacy Protection Act (COPPA) and the Gramm-Leach-Bliley Act (GLBA). Agency deference plays a key role in other agencies' regulatory efforts as well, such as the FCC's regulation of telecommunications privacy, attempts to protect reproductive privacy at the Department of Health and Human Services, and financial data privacy at the Consumer Financial Protection Bureau. At the same time, existing settlements and consent decrees are unlikely to be affected.

Finally, the doctrine of *Chevron* deference plays an important role in shaping the practical and political challenges for Congress as it seeks to draft laws related to emerging technology. If the scope of agency authority is uncertain or lessened, Congress may face greater challenges in drafting laws in ways that are more explicit as to the extent of authority it grants to expert agencies, while ensuring that laws are also sufficiently flexible to adapt to new technologies and business practices. The challenges of crafting specific-enough laws may also result in greater challenges at finding political consensus, as Congress has historically compromised on legislation by adopting more ambiguous text. Ultimately, while a change in the *Chevron* deference could prompt Congress to act and implement new laws, it could also result in further gridlock and inefficiency.

Table of Contents

1. Introduction

In January 2024, the Supreme Court heard oral arguments for two cases that have the potential to fundamentally change the federal regulatory landscape. In these cases, *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, the Court has been asked to address the future of a 40-year old precedent, *Chevron v. Natural Resources Defense Council*, which established a legal doctrine of deferring to administrative agencies in their interpretation of statutes. The doctrine of *Chevron* deference affords government agencies latitude to reasonably interpret ambiguous laws and issue regulations touching upon all corners of society, including healthcare, consumer protection, and telecommunications.

A Supreme Court decision overturning *Chevron* could have widespread impacts for data protection, among them the increased risk of legal challenges to past and present federal agency efforts to implement privacy, data security, and artificial intelligence regulations. Specifically, the Court's decision could have a significant impact on the FTC's ongoing Commercial Surveillance and Data Security rulemaking, which seeks to apply the FTC's "unfair or deceptive" authorities to privacy and security issues. And ultimately, as Congress scrambles to respond to the fast-paced rate of technological development, an invalidation or change to *Chevron* could undermine attempts to leverage administrative agency rulemaking as a more flexible alternative to prescriptive legislation and raise questions as to how the United States can effectively write laws governing data privacy and AI.

2. The *Chevron* Deference Doctrine and its Challengers in Loper Bright and Relentless

In the 1984 *Chevron* case, the U.S. Supreme Court held that when a statute granting agency authority is ambiguous, a court should defer to the agency's interpretation of that statute so long as the interpretation is reasonable. This means that when an agency issues regulations under a law that is ambiguous, a court should not interfere with the agency's reasonable interpretation of that law and the policies it develops according to that interpretation. Commonly referred to as "*Chevron* deference," this framework has been the well-established common law since 1984, cited in over 19,000 cases.

In the current two cases before the Supreme Court, *Loper Bright* and *Relentless*, at issue is a regulatory interpretation of a 1976 law that was promulgated through rulemaking by the National Marine Fisheries Service in 2020. The 1976 law requires fishermen to carry observers aboard their ships for the purposes of preventing overfishing, and the agency's subsequent regulations have interpreted the law's funding

provisions to require that fishermen bear the costs of hosting those observers. The lower courts denied challenges to the regulation, holding that under *Chevron* the agency's interpretation was reasonable in interpreting the 1976 statute to permit an industry-funded oversight system. The challengers have now appealed that holding, making what would traditionally be a routine application of *Chevron* now a fight over the *Chevron* framework itself.

Supporters of *Chevron* deference, including liberal-leaning Supreme Court Justices, emphasize the importance of agency expertise, and the need for letting regulators interpret ambiguous laws to fit society's new challenges. *Chevron* gives agencies leeway to apply their expertise and fill gaps Congress left in the texts of laws, forming regulations that can address emerging problems that may not have been contemplated at the time statutes were first enacted. In oral arguments for *Relentless*, Justice Ketanji Brown-Jackson raised her fear that "if we take away something like *Chevron*, the court will then suddenly become a policymaker," arguing that agencies are better suited to resolve complex technological or industry-specific issues. Justice Elena Kegan noted that "the basis of *Chevron*" is that "agencies know things that courts do not."

Meanwhile, critics of *Chevron* argue that it enables executive overreach and weakens government accountability, providing lawmaking authority to unelected agency staff. For these reasons, they argue that agency interpretations are politically driven and unstable between administrations. As a result, the Court's conservative Justices seemed amenable to arguments seeking to reverse *Chevron* during oral arguments. Justice Neil Gorsuch, a longstanding critic of *Chevron* and agency authority generally, raised issue with how the doctrine compels judges to "say, automatically, whatever the agency says wins," and that it is "a recipe for instability" that allows new administrations to "come in and undo the work of a prior one." Justice Kavanaugh also took issue with how agencies are subject to the whims of politics, and noted that *Chevron*'s flexible nature results "in shocks to the system every four or eight years when a new administration comes."

Another key question raised in oral arguments was the standard of review that should apply to various agency actions if *Chevron* were to be overturned. Beyond *Chevron*, a variety of legal standards exist by which courts in the United States are capable of assessing the legality of a law, regulation, or decision of a lower court. These include, for example, de novo review, reasonableness review, arbitrary-and-capricious review, review for abuse of discretion, and others. Courts also apply less deferential standards for assessing other forms of agency interpretations. These include, for example, *Auer* deference, in which a court defers to an agency's interpretation of its own ambiguous regulations so long as that interpretation is within the scope of the agency's expertise, demonstrates the agency's "fair and considered judgment" rather than its "convenient litigating position," and serves as "the agency's 'authoritative' or 'official position,'" as opposed to ad hoc statements, and *Skidmore* deference,

which requires a low level of "respect" for an agency's informal interpretations in opinion letters or guidelines.

As of this writing (April 2024), the Supreme Court has not yet issued a decision in *Loper Bright* or *Relentless*, and is expected to release a decision by June 2024. The Court maintains a 6-3 conservative majority, and in recent years, has issued decisions reflecting an increasingly anti-regulatory approach that is skeptical of federal agency authority. Most notably, the Court recently confirmed the "Major Questions Doctrine," which dictates that government agencies cannot issue regulations on major questions of "economic and political significance" absent clear, express authorization by Congress. Further, the Court is currently considering another case that could largely expand when plaintiffs can challenge a federal rule or regulation, which could help plaintiffs invalidate rules and regulations that have been in place for decades. In *Loper Bright* and *Relentless*, the Court could decide to uphold, strike down, narrow, or altogether modify or replace the *Chevron* doctrine. Regardless of how the Court rules, however, it is clear that the ruling may impact a wide range of regulatory activities related to privacy, data protection, consumer protection, and telecommunications.

3. Implications for Federal Regulations

Agencies across the federal government are currently busy seeking to address AI and privacy issues, from an inter-agency effort to prevent the use of discriminatory automated systems in the housing market and workplace to the FTC's pending rulemakings on Commercial Surveillance and Data Security and the Child Online Privacy Protection Act (COPPA). The doctrine of *Chevron* deference plays a central role in the extent of the statutory authority delegated to agencies, as well as the degree to which agencies can defend themselves against legal challenges to their regulatory initiatives.

The *Chevron* doctrine plays a significant role in federal efforts to implement privacy, data security, and AI regulations. The *Loper Bright* and *Relentless* cases, and the potential effect they may have on *Chevron*, could have far-ranging effects on federal activities related to data privacy. Specifically, certain privacy and AI-related regulations from federal agencies like the FTC, FCC, and others would be likely to be impacted by changes to doctrines of agency deference.

A. FTC's Commercial Surveillance and Data Security Rulemaking

In 2022, the Federal Trade Commission (FTC) began what is likely to be a substantial agency rulemaking on "Commercial Surveillance and Data Security." In doing so, the FTC relies on its powers under Section 5 of the FTC Act, which authorizes the FTC to address "unfair or deceptive acts or

practices," and Section 18, which empowers the FTC to prescribe rules that define specific unfair or deceptive practices within the purview of Section 5. The FTC has observed that Congress intentionally crafted Section 5 to be broad and vague, recognizing that attempts to define these terms would be "an endless task" as evolving business practices and technologies quickly rendered its definition out-of-date and circumventable. The FTC Act provides a broadly phrased three-part test for unfairness, stipulating that a practice must cause or be likely to cause an injury that is 1) substantial, 2) not outweighed by benefits to consumers or competition, and 3) that cannot be reasonably avoided by consumers. The text of the FTC Act does not provide any criteria for what constitutes "deceptive," though the agency has released a policy statement that explains something is deceptive when it is a material representation, omission, or practice that misleads or is likely to mislead a reasonable consumer.

Many of the key terms in the FTC Act, such as the three conditions for unfairness, "substantial," "countervailing benefits," and "reasonably avoidable," as well as the term "deceptive," could all potentially be considered ambiguous. As a result, the FTC's ability to reasonably interpret what they mean in relation to data privacy and security is likely owed deference under *Chevron*. As a result, *Chevron* deference would be likely to play a key role in defending and enforcing the Commercial Surveillance rules, and replacing this doctrine with a different approach, standard of review, or level of scrutiny would be likely to impact the process, including giving less short-term certainty to the agency's rulemaking and the extent to which it is given deference in any judicial review.

In particular, the extent to which *Chevron*, or another standard of agency deference, plays a role in Section 18 ("Magnuson-Moss") rulemaking may be a subject of debate. In contrast to most agency rulemaking, the FTC's rulemaking under Section 18 ("Magnuson-Moss") involves heightened procedural requirements such as public consultation and advance notice to Congress. While the FTC has issued rules under Magnuson-Moss procedures before, on issues ranging from regulation of the optometry/ophthalmology industry to the delivery of merchandise, the FTC's "unfair or deceptive" rulemaking activity has been largely underutilized. As a result, there is an ongoing question about whether Magnuson-Moss rulemaking, given its heightened procedural requirements, is entitled to standard *Chevron* deference, or another standard of review. In some cases, federal courts that have examined rules promulgated under Section 18 have invoked *Chevron*, though not discussed it at great length (*see, e.g.*, California State Bd. of Optometry v. F.T.C; American Financial Services v. F.T.C). At the same time, however, at least some academic commentators have argued that a rulemaking under Section 18 is not entitled to *Chevron*.

Finally, *Chevron* deference is not the only legal doctrine under which the FTC's authority to address data security and privacy issues through rulemaking is being contested. For instance, opponents of the

Commercial Surveillance rulemaking have emphasized that in accordance with *West Virginia v. EPA*, the regulation of data collection and security should qualify as a "major question" given its impact on the US economy. Under this doctrine, the FTC would not have authority to issue rules in at least some or all areas of data regulation or security absent a clear grant of authority by Congress.

B. Other Privacy-Related FTC Rulemaking

Beyond "unfair or deceptive acts or practices," the FTC also has statutory authority to promulgate several sector and issue-specific privacy regulations. This includes privacy for children under the Children's Online Privacy Protection Act (COPPA), the security of financial services information under the Gramm-Leach-Bliley Act (GLBA), and healthcare-related privacy via the Health insurance Portability and Accountability Act (HIPAA). The FTC has power to review and amend these regulations, and has done so to account for changes in industry practices and new innovations in technology. For example, the FTC finalized amendments to its GLBA "Safeguards Rule" in October 2023, which establishes new notification requirements for financial services institutions experiencing data breaches and other security events, and just announced substantial reforms to COPPA in its December 2023 notice of proposed rulemaking which seeks to address, among other things, dark patterns and the use of age estimation technology.

In contrast to rulemaking under Section 5 and Section 18, the FTC's statutory authority in each of these areas of law is both more recent, and often more specific. As a result, the agency's rulemaking authority has been used over many decades to adapt privacy protections to rapidly evolving society, technology, and business practices. *Chevron* deference plays a role in each of these areas of law as it allows the FTC to apply decades-old legislation like COPPA and GLBA to contemporary challenges.

C. FTC Enforcement and Existing Settlements

In recent decades, the primary mechanism the FTC has used to address data privacy and security issues has been enforcement, which typically is resolved by a settlement. Settlements often take the form of a consent order between a company and the FTC, which often establish a range of data protection requirements and commitments for a company that can last several decades. Many of the largest tech companies in the U.S. are currently under long-running FTC consent decrees.

In contrast to rulemaking, *Chevron* deference does not play a key role in FTC enforcement. This is because the Supreme Court has held that *Chevron* deference does not apply to agency actions which "lack the force of law," and lower courts have been reluctant to find that an FTC order or complaint is a form of " final agency action[] operating with the force and effect of law." In *Wyndham v. FTC*, for

instance, the Third Circuit found that because the FTC had not furnished a final "rule, adjudication, or document" to define cybersecurity requirements necessary to avoid Section 5 enforcement, there was nothing to defer to, and accordingly the court relied upon "ordinary judicial interpretation of a civil statute" to determine that Wyndham was not entitled to fair notice of the specific cybersecurity practices required by the FTC under Section 5 (but rather, entitled to fair notice of the general standard in all unfairness cases). Similarly, in LabMD, Inc. v. FTC, the Eleventh Circuit overturned an FTC settlement order for being overly vague and broad, while reiterating that the FTC had not issued a final action that was eligible for *Chevron* deference.

Although the outcome in *Loper Bright* and *Relentless* may not directly impact the FTC's enforcement powers, it's worth noting that the FTC's enforcement agenda has faced other legal obstacles and setbacks recently, amidst the Supreme Court's increasingly anti-regulatory approach. Last year, the Supreme Court dealt a blow to the FTC by ruling 9-0 that defendants in an FTC enforcement action may challenge the constitutionality of the agency's authority prior to the resolution of the enforcement action itself. In order to avoid further litigation that could decide the extent of its authority, the FTC chose to abandon its merger challenge that had led to the constitutional claim. In November 2023, Meta sued the FTC for unconstitutional exercise of authority after the agency sought to impose substantial revisions to a 2020 consent order with Meta. Alleging that Meta had violated its consent order, the FTC asserted its ability to "reopen" and "modify" the order, seeking to issue an all-out ban on the monetization of child data. Meta claims that the statutory ability to change consent orders is designed to let the FTC ease or rescind requirements imposed on companies, not to set more stringent ones, and that the FTC is using powers it was not constitutionally delegated to exercise. The outcome of this case may similarly shape the scope of the agency's authority in years to come.

D. FCC Authority over ISP Practices

Over many years, *Chevron* deference has played a critical role in defining the scope of the FCC's authority to classify broadband internet access service (BIAS) providers as a "telecommunications service" under Title II of the Communications Act of 1934, reflecting longstanding political debates over "net neutrality." A classification under Title II subjects entities to common carrier treatment under an expansive and complex regulatory regime, including regulations related to the privacy and security of sensitive consumer information, while classification under Title I provides for light-touch regulation of "information services."

Beginning in the Obama administration, the Federal Communications Commission (FCC) began asserting its longstanding authority to regulate certain data collection and security practices of telecommunications carriers and voice-over-internet-protocol (VoIP) providers to internet service

providers (ISPs) through the reclassification of BIAS providers to Title II. The ability for the agency to do so relied on the FCC's re-interpretation of its effectuating statute, the Communications Act. Based on this reclassification, in 2016 the FCC rolled out significant privacy regulations for ISPs. But in 2017, Congress in a rare move invoked its powers under the Congressional Review Act (CRA) to vacate the ISP privacy rules, and prohibited any future rules "substantially similar" to them. In the following administration, the FCC reclassified BIAS as an information service.

Federal courts, upon hearing various legal challenges to the FCC's reclassification efforts, have consistently deferred to the FCC's classification decisions under *Chevron*. The DC Circuit upheld the Obama-era rules in *USTA v. FCC*, and similarly upheld the Trump-era reversal in *Mozilla v. FCC*. Notably, in *USTA*, now-Justice Kavanaugh bemoaned the FCC's ability to classify BIAS as a telecommunications service under *Chevron*, and argued that it was a major rule which shouldn't even trigger *Chevron's* scope. Judge Kavanaugh argued that the net neutrality rule "fundamentally transforms the internet" and yields a "staggering" financial impact, chiding courts' deference to "the administrative state shoehorning major questions into long-extant statutory provisions without congressional authorization." Following *West Virginia v. EPA*, along with any changes to *Chevron*, the FCC's efforts are likely to face significant challenges under both a judicial review potentially lacking deference to the agency (*Chevron*), as well as under the Major Questions doctrine.

Although *Chevron* has played a key role in upholding FCC reclassification efforts, these same efforts have also given rise to much of the criticism of *Chevron*, insofar as it allows for instability between political administrations. In April 2024, the FCC again chose to reclassify broadband internet as a Title II telecommunications service. Aside from the issue of reclassification being a "major question," the outcome of *Loper Bright* and *Relentless* will be likely to affect these efforts insofar as *Chevron* has led federal courts to defer to these decisions in a consistent manner. Absent the doctrine, a different standard of review, whether de novo or another standard, could lead judges to reach different conclusions than the agency. This would have significant impact for ongoing and future reclassification efforts in the net neutrality debate.

E. Other Agency Efforts to Address Privacy and AI

There are myriad other rules and regulations currently under development that address privacy issues and emerging technologies like AI, with agencies relying on their existing statutory authority to do so. These regulations span across a variety of industries and sectors, and touch upon pressing and contemporary issues. All would be likely to be impacted by any change to a doctrine of agency deference, including:

- AI-enabled Robocalls. In February 2024, the FCC issued a declaratory ruling finding that AI-generated voices used for robocalls are illegal under the Telephone Consumer Protection Act. The TCPA restricts the use of unwanted calls made using an "artificial or prerecorded voice," and the FCC interpreted this phrase to include voices generated by AI.
- Automated Decision Making. In April 2023, four government agencies – the CFPB, DOJ, Equal Employment Opportunity Commission (EEOC), and FTC – issued a joint statement pledging to apply its existing legal authorities to issues of automated systems such as AI, emphasizing principles of fairness, equality, and justice. The statement brings attention to various guidance documents the agencies have put out regarding the applicability of AI to their current enforcement capabilities, and indicates a commitment to cracking down on harmful, discriminatory uses of AI. These guidance documents, given that they are not final rules, would likely be subject to a lesser form of deference (e.g., *Skidmore*), but their statement nonetheless signals that these agencies will continue to focus on AI regulation going forward, and that the potential for new rulemaking continues.
- Biometric Data. In 2021, Congress passed the Honoring the Abbas Family Legacy to Terminate (HALT) Drunk Driving Act as part of the Bipartisan Infrastructure Law, which requires the National Highway Traffic Safety Administration (NHTSA) to issue a rule requiring that "advanced drunk and impaired driving prevention technology" be integrated into new vehicles. The rule must be finalized by November 15, 2024. The advanced notice for proposed rulemaking called for consideration of biometric sensor technologies that can monitor information such as heart rate, sweat, or blood pressure. Prescribing that advanced technology be integrated into cars is undoubtedly one that requires substantive technical expertise, and may be subject to significant changes as more effective preventive technologies become available.
- Data Breaches. The FCC, in December 2023, adopted new data breach notification rules for telecommunications carriers and VoIP providers. The rule expands the definitions of both "breach" and "covered data" – now, a breach includes mere inadvertent access to covered data, and notification is required not only for a breach of CPNI, but for any "information that can be used to distinguish or trace an individual's identity either alone or when combined with other information that is linked or reasonably linkable to a specific individual."
- Financial Data Rights. The Consumer Financial Protection Bureau (CFPB) proposed a "Personal Financial Data Rights rule" in October, noting that Congress "explicitly recognized the importance of personal financial data rights" in the Consumer Financial Protection Act of 2010. The rule would grant consumers rights related to access, portability, and revocation of authorization, and also imposes new security requirements on financial institutions and card issuers.
- Reproductive Care. The Department of Health and Human Services (HHS) is currently undergoing a rulemaking that seeks to revise the HIPAA Privacy Rule to prohibit the use or

disclosure of personal health information for the purposes of investigating or bringing a proceeding against someone "seeking, obtaining, providing, or facilitating reproductive health care." This comes amidst the reversal of *Roe v. Wade* by the Supreme Court, and subsequent efforts by law enforcement and civil litigants to target recipients and providers of reproductive health services.

Challenges to the rules listed above, in the usual course of events, would likely involve a *Chevron* analysis (unless precluded by a major questions finding). So long as these rules interpret ambiguous statutory language and are reasonable interpretations of that language, the agency's rule would normally be given deference under the two-step *Chevron* framework.

4. Implications for Comprehensive Privacy Legislation and AI-related Legislation

Chevron deference, and more broadly, the authority of the FTC, plays an important political and practical role in crafting comprehensive consumer privacy legislation and AI-related legislation.

A. Practical Considerations for Congress

Absent *Chevron* or a similar doctrine of agency deference, it could be much more challenging for Congress to draft laws that responsibly and enduringly address privacy, data security, and AI. As a practical matter, laws regulating technology and business practices must be sufficiently flexible to adapt to changes over time and must give expert agencies clear authority and directions for how to regulate, as to avoid situations in which courts substitute their own interpretations for those of the agency. Take for example, the 1998 Children's Online Privacy Protection Act (COPPA). COPPA gives the FTC authority to regulate "unfair or deceptive acts or practices" related to "the collection, use, and/or disclosure of personal information from and about children on the Internet." Recognizing that technology and the public's needs would change over time, Congress mandated the FTC to review its regulations after five years, and permitted subsequent voluntary reviews as the FTC deemed necessary. This approach has allowed the boundaries of COPPA to respond to changes in technology, policy, and social norms for more than 20 years. Even today, when members of Congress are actively discussing legislative updates to COPPA, the original text remains effective at addressing many of the harms in its remit through ongoing rulemaking.

A change to the *Chevron* deference doctrine could disrupt Congress's ability to draft statutes in ambiguous terms that allow agencies to fill in the gaps. It may require Congress to write privacy statutes with better specificity, including express delegations of authority to the FTC and other federal agencies. While greater specificity may provide more clear instruction to agencies on the implementation of a statute, it could also increase the chances of laws becoming obsolete as new technologies and business practices arise.

During the oral arguments, the Supreme Court demonstrated it was cognizant of these possible consequences on efforts to regulate emerging technology. Several Justices brought up artificial intelligence during questioning, with Justice Kagan referring to AI as an area that demands the agency expertise and flexibility provided through *Chevron*. Justice Kagan opined that AI was likely to be "the next big piece of legislation on the horizon," and that Congress will by necessity grant agencies authority to adopt and modify regulations as the technology continues to evolve. She reckoned that "Congress knows that there are going to be gaps" in any AI statute "because Congress can hardly see a week in the future with respect to this subject, let alone a year or a decade," and quipped that the Court does not "even know what the questions are about AI, let alone the answers."

B. Political Considerations for Congress

The absence of *Chevron* or a similar doctrine of agency deference could also create challenges for achieving political consensus when drafting legislation that gives rulemaking authority to the FTC or another expert agency. Ideally, should Congress be expected to draft laws with better specificity, lawmakers may be motivated to act and pass laws that expressly address privacy issues and emerging technologies which have not been adequately addressed by existing law. On the other, and potentially more realistic hand, the need to draft laws with more explicit terms could yield gridlock and political disagreements that further disrupt efforts to regulate pressing privacy and AI issues.

When Congress struggles to agree on specific statutory provisions, it may compromise by selecting more general, ambiguous language that can placate the various perspectives involved. Agencies, subsequently, are tasked with interpreting these terms and applying them to contemporary technologies and issues. Depending on the outcome of the *Loper Bright* and *Relentless* cases, it may be more difficult to reach these sorts of compromises, as Congress may need to figure out how to delegate authority to agencies without it being declared an abdication of their legislative powers. As most recent proposals for a federal comprehensive privacy law involve either creating new expert government agencies or substantially expanding the powers of the FTC, this will be an urgent area of legal uncertainty to resolve.

5. What's Next

The decisions for *Loper* and *Relentless* are not expected until June. However, given the 6-3 ideological split between the conservative and liberal justices, it is possible if not likely that the Court could decide to restrict or overrule *Chevron*. If they choose to do so, it remains unclear as to what may replace *Chevron* as the prevailing analytical framework. Regardless, the decisions could have a substantial effect on the power of agencies to act absent Congressional guidance, and would surely impact federal efforts to enact regulations on privacy and AI.

1350 Eye Street NW Suite 350
Washington, DC 20005

info@fpf.org

FPF.org