

FROM ARLINGTON TO TENNESSEE: THE BEGINNINGS OF A CHEVRON DEFERENCE FAREWELL TOUR?

INTRODUCTION

President Donald J. Trump and the Republican-controlled 115th Congress have made no secret of their desire to reign in the power of the regulatory state.¹ On the first day of the Trump administration, Reince Priebus, Assistant to the President and Chief of Staff, issued a memorandum propounding a robust regulatory freeze for all administrative agencies.² And, the 115th Congress has followed suit.³ While albeit in less flashy form than the President's tweets and ceremonial signings of executive orders, two proposed statutes, the "Regulations from the Executive in Need of Scrutiny Act of 2017," or REINS Act, and the "Regulatory Accountability Act of 2017" were the first actions by the new Administration to fundamentally curtail the power and scope of administrative agencies.⁴ Writing for *The Atlantic*, Peter M. Shane asserts that these two laws complicate an already complex rulemaking process to

1. See Andrew Soergel, *Trump Talks Scrapping Government Regulations*, U.S. NEWS & WORLD REPORT (Jan. 23, 2017, 11:42 AM), <http://www.usnews.com/news/articles/2017-01-23/donald-trump-we-can-peel-back-government-regulations-by-75-percent-maybe-more>; David Jackson & Gregory Korte, *Trump Begins with Action on Obamacare, Regulation Freeze, and Confirmations*, USA TODAY (Jan. 20, 2017, 12:44 pm), <https://www.usatoday.com/story/news/politics/2017/01/20/donald-trump-first-day-barack-obama-white-house/96829932/>; Peter M. Shane, *The Quiet GOP Campaign Against Government Regulation*, THE ATLANTIC (Jan. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/01/gop-complicates-regulation/514436/>.

2. See Cass R. Sunstein, *The Fine Print in Trump's Regulation Memo*, BLOOMBERG VIEW (Jan. 25, 2017, 4:30 AM), <https://www.bloomberg.com/view/articles/2017-01-25/the-fine-print-in-trump-s-regulation-memo>.

3. See *Regulations from the Executive in Need of Scrutiny Act of 2017*, H.R. 26, 115th Cong. (2017).

4. See Shane, *supra* note 1.

the point of “virtually shut[ting] this process down.”⁵ This, all under the guise of regulatory “reform.”⁶

In addition to the executive and legislative branches’ direct assaults, the change in the composition of the Supreme Court following the death of Justice Antonin Scalia poses another fundamental challenge to the authority and power of the administrative state. Assumedly, the replacement of a “conservative” Justice by another conservative would not upend a constitutional majority regarding a controversial aspect of administrative law. But, attempts to pigeonhole Supreme Court Justices with predictive labels of “conservative” or “liberal” can be more misleading than helpful.⁷ This is certainly true of the late Justice Scalia. While the conservative label often presumes an anti-regulatory position, Scalia was an ardent proponent of affording deference to the ability of administrative agencies to interpret law.⁸ This deference is referred to as *Chevron* deference⁹ from the Supreme Court’s decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁰ In *Chevron*, the Court upheld the Environmental Protection Agency’s statutory interpretation of a Clean Air Act provision.¹¹ In large part, Scalia’s pro-*Chevron* conservative judicial orientation stemmed from his long-standing preference to leave power with the executive agencies to interpret statutory ambiguities, rather than with unelected judges.¹² Based on the Trump Administration’s anti-regulatory agency pronouncements and actions during its first year, it comes as no surprise that the newest member to the Supreme Court, Justice Neil Gorsuch, a presidential nominee, does not share Justice Scalia’s pro-*Chevron* proclivities.¹³ As such, the direction

5. *See id.*

6. *See id.*

7. *See* Harvey A. Silverglate, *Passing Judgment: The Scramble to Pigeonhole Supreme Court Nominee John Roberts Misses the Point*, THE BOS. PHX. (Sept. 2, 2005), <http://www.harveysilverglate.com/archive/#BP> (scroll down to “The Boston Phoneix”; then scroll down to the article “Passing Judgment”).

8. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 387 (1999).

9. *See Arlington*, 569 U.S. at 296.

10. *See generally Chevron, U.S.A., Inc. v. Nat’l Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

11. *See id.* at 837 (affording deference to the EPA’s construction of “stationary source” in relation to environmental permitting as permissible because it was a reasonable interpretation of the Clean Air Act Amendments of 1977).

12. *See Arlington*, 569 U.S. at 296; *AT&T Corp.*, 525 U.S. at 386-87 (1999).

13. *See* Jonathan H. Adler, *Gorsuch’s Judicial Philosophy Is Like Scalia’s – with One Big Difference*, THE WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/opinions/gorsuchs-judicial-philosophy-is-like-scalias-with-one-big-difference/2017/02/01/44370cf8-e881-11e6-bf6f-301b6b443624_story.html?utm_term=.aba85ab9959e.

of the Court is likely to sway in favor of further limiting administrative agency's power.

This comment focuses on the resurgence of a federalism-based judicial narrative that undercuts the power and authority of the administrative state. Specifically, the comment traces recent judicial attempts to challenge the *Chevron* deference afforded to the Federal Communications Commission ("FCC"), the independent administrative agency tasked with primary authority for laws, regulations, and innovation related to interstate and international communications.¹⁴ Namely, the comment contrasts two recent decisions: the Supreme Court's 2013 *Arlington v. FCC* opinion¹⁵ with that of the Sixth Circuit's *Tennessee v. FCC* decision in 2016.¹⁶ The Sixth Circuit's federalism-based *Tennessee* decision challenges not only the Court's holding in *Arlington* that upheld the FCC's *Chevron* deference, but, more significantly, *Tennessee* challenges the power and scope of the post-New Deal administrative state. It accomplishes this by positing a fundamental remaking of the *Chevron* framework.¹⁷

This judicial challenge is not based on a new legal theory. It has been percolating in judicial dissents such as the one in *Arlington*.¹⁸ In *Tennessee*, the court accomplishes this challenge to *Chevron* deference by inserting the clear statement rule, a federalism-based canon of statutory construction,¹⁹ into its *Chevron* analysis. This federalism-based refashioning of the *Chevron* framework substantially limits an agency's ability to exercise its regulatory power, imposing what has been referred to as a "clarity tax"²⁰ that effectively denies *Chevron* deference within the context of potential federal preemption of state law.

At the end of the day, this paper suggests that the Sixth Circuit's federalism-based refashioning of *Chevron* is a consequential judicial act, especially in light of President Trump's decision to fill the Supreme Court vacancy after Justice Scalia's death with Justice Neil Gorsuch. The Sixth Circuit's decision foreshadows the ascendance of a long dormant desire in an agglomeration of dissenting judicial opinions to place limits on the regulatory power and scope of administrative agencies. Given the anti-

14. See *About the FCC*, FEDERAL COMMUNICATIONS COMMISSION, <https://www.fcc.gov/about/overview> (last visited Oct. 4, 2017).

15. See generally *Arlington*, 569 U.S. 290.

16. See generally *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016).

17. See Samuel L. Feder et al., *City of Arlington v. FCC: The Death of Chevron Step Zero?*, 66 FED. COMM. L.J. 47, 48-49 (2013).

18. See *Arlington*, 569 U.S. at 312-28.

19. See John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010).

20. See *id.*

regulatory zeal ushered in by President Trump's ascendancy to the White House and Justice Gorsuch's Supreme Court confirmation,²¹ this dual case study of *Arlington* and *Tennessee* aims to provide insight into one of the ways in which the landscape of the post-New Deal administrative state is almost certain to fundamentally change for years to come, from within the highest courts in the land.

Part I provides an overview of the persuasive power of federalism-based arguments and dissenting opinions to influence and, more significantly, change substantive areas of law. In particular, it explains how *Chevron* deference works and elucidates how it fits within these federalism-based dissenting opinions as a prime substantive target to curtail. Part II examines the Supreme Court's majority and dissenting opinions' underlying federalism-based arguments in *Arlington*. This five-to-four decision narrowly upheld the FCC's *Chevron* deference. Specifically, it contrasts Justice Scalia's defense of *Chevron* deference in his majority opinion with Chief Justice Roberts' dissent. Particular attention is paid to the dissenting opinion's federalism-based concerns about what it perceived as the threat posed by the growth and power of the regulatory state. Part III focuses on the Sixth Circuit's federalism-based denial of *Chevron* deference to the FCC in *Tennessee*. After providing background for the specific issues at stake, this Part explains the fundamental change the Sixth Circuit made to the *Chevron* analysis, undercutting the power and scope of the FCC. Part IV evaluates the state of *Chevron* deference post-*Tennessee* by placing the Sixth Circuit's decision within the current anti-regulatory political context. In essence, this Part suggests that the Sixth Circuit's decision concerning *Chevron* deference elucidates the rise of a potent federalism-based legal narrative that champions state sovereignty against what has been derisively characterized by critics since the New Deal era as a unconstitutional overreach by the federal government and its administrative apparatus.

I. THE ASCENDANCE AND PERSUASIVE SIGNIFICANCE OF FEDERALISM-BASED LEGAL NARRATIVES

This Part provides an overview of the persuasive power of federalism-based judicial narratives to affect substantive areas of law, specifically *Chevron* deference as a cross-cutting issue. It provides a context for grasping the potential significance of the Sixth Circuit's federalism-based

21. Peter J. Henning, *Gorsuch Nomination Puts Spotlight on Agency Powers*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/business/dealbook/gorsuch-nomination-puts-spotlight-on-agency-powers.html>.

decision that overturned the FCC's traditionally-held *Chevron* deference. This Part also explains how *Chevron* fits within a broader federalism-based judicial rallying cry against the administrative state's authority and power.

A. *Federalism Is and Has Always Been Hot*

The future of the Supreme Court was front and center during the 2016 election, dominated by the potential of both reversal of particular decisions and a more fundamental ideological judicial shift.²² Nevertheless, based on a recent study by Professors Lee Epstein, Andrew D. Martin, and Kevin Quinn, President Trump's selection of a conservative justice to replace the late Justice Scalia will likely keep Justice Anthony Kennedy, for now, as the "median Justice" on the Court.²³ As a result, the study suggests that for many hot-button issues, like same-sex marriage and gay rights, a dramatic change in the law is not expected.²⁴ While garnering comparatively less media attention, however, Professors Frank B. Cross and Emerson H. Tiller, in their empirical assessment of Supreme Court jurisprudence, describe federalism as the "hot" topic to watch when it comes to potential judicial upheaval.²⁵ In fact, the future of the Supreme Court was front and center at the recent 2016 Federalist Society Convention, where both current Supreme Court Justices Samuel Alito and Clarence Thomas addressed attendees gathered under the theme of "The Jurisprudence and Legacy of Justice Antonin Scalia."²⁶ During his keynote speech, Justice Alito identified the

22. See generally Lee Epstein, Andrew D. Martin & Kevin Quinn, *Possible Presidents and Their Possible Justices*, WASH. U. IN ST. LOUIS 4 (Sept. 15, 2016), <http://epstein.wustl.edu/research/PossibleNominees.pdf> (examining the potential for an ideological Supreme Court shift based on the potential judicial picks of then presidential candidates Hillary R. Clinton and Donald J. Trump).

23. See *id.* at 4. In contrast, if Secretary Hillary Clinton had selected Justice Scalia's replacement, the median justice would likely have been Justice Stephen Breyer, a marked liberal move in the Court along a left-right spectrum. See *id.*

24. See *id.*

25. Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 741 (2000).

26. See Jennifer Harper, *The Heavyweights: Clarence Thomas, Samuel Alito, Ted Cruz Head for Federalist Society Convention*, THE WASH. TIMES (Nov. 16, 2016), <http://www.washingtontimes.com/news/2016/nov/16/clarence-thomas-samuel-alito-to-attend-federals-so/>. While neither Justices Alito nor Thomas mentioned then President-elect Trump specifically, conference attendees included a number of conservative judges named by then President-elect as possible replacements for Justice Scalia. Justice Alito addressed "constitutional fault lines" for the federal courts and coined "WWSD," a play on "WWJD" ("What would Jesus do?"), as a tribute to Justice Scalia and his guiding jurisprudential principles. See Tribune News Services, *Clarence Thomas: Honor Scalia By Reigning in Government*, THE CHI. TRIB. (Nov. 17, 2016, 9:50 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-alito-supreme-court-tryouts-20161117-story.html>.

erosion of federalism, specifically the expansion of both federal agencies and commerce clause expansive interpretations, as the most significant of threats to the stability of the republic.²⁷

The centrality of federalism-based decisions is nothing new. These decisions have figured among the most significant instances of Supreme Court reversals of its own precedents.²⁸ And, political debates about federalism, broadly defined as establishing a balance between states' rights and the legitimate reach of the National Government, have occupied a prominent place since the United States' founding.²⁹ In the same vein, Justice Scalia, writing for the majority in *Printz v. United States*, acknowledged that the United States has historically, since the debates between Alexander Hamilton and James Madison, exhibited a "split personality on matters of federalism."³⁰ This sentiment was echoed by Justice Kennedy's concurring opinion in *United States v. Lopez*, where he identified the Judiciary's role as tenuous in preserving federalism, specifically in maintaining the balance as intended by the Framers between the federal and state governments.³¹ Moreover, as Justice Kennedy explains, given that federalism was the "unique contribution of the Framers to political science and political theory," there is an irony with the

27. Debra Cassens Weiss, *Alito Warns of 'Constitutional Fault Lines' in Federalist Society Speech*, ABA JOURNAL, (Nov. 17, 2016, 3:47 PM), http://www.abajournal.com/news/article/alito_warns_of_constitutional_fault_lines_in_federalist_society_speech.

28. Cross & Tiller, *supra* note 25, at 744 n.10. Cross and Tiller identify three types of federalism: political, institutional, and honest. The latter they identify with "state's rights federalism." *Id.* at 743. But, even an "honest" adherence to states' rights "may simply reflect a strategic ideological decision." *Id.* at 749.

29. *Younger v. Harris*, 401 U.S. 37, 44 (1971). Justice Hugo Black defined federalism as a "system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

30. *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997). Justice Scalia explains that while Alexander Hamilton and James Madison may have come to agree on many issues discussed in *The Federalist Papers*, the scope of federal authority was not one such area. Specifically, Hamilton advocated for a far more expansionist view of centralized federal authority than Madison. This would engender, according to Justice Scalia, "the subsequent struggle to fix the meaning of the Constitution by early congressional practice." *Id.*

31. *United States v. Lopez*, 514 U.S. 549, 575-77 (1995) (Kennedy, J., concurring) (citing Henry J. Friendly, *Federalism: A Forward*, 86 YALE, L.J. 1019, 1019-34 (1977)). Two years later, writing for the majority in *Printz*, Justice Scalia cited Justice Kennedy's *Lopez* concurrence when contesting Justice Stephen Breyer's comparative analysis that Scalia interpreted as attempting to draw flawed similarities with what he believed was the "unique" federalist system of the United States with that of other countries, including the European Union. *See Printz*, 521 U.S. at 920-21 n.11. Quite blatantly, Justice Scalia asserts, "The fact is that our federalism is not Europe's." *Id.*

Judiciary's degree of "uncertainty respecting the existence, and the content, of standards" applied to federalism.³² It is this uncertainty and tenuousness of federalism-based judicial reasoning that places issues of federal versus state and local rights front and center of many important constitutional questions of our time.³³

B. The Power of Federalism-based Arguments to Reach Substantive Issues of Law via Judicial Signaling

Since federalism has occupied such a central role in many of the great debates in our nation's history, one would expect to find it raised in a significant number of Supreme Court dissenting opinions. Indeed, Professors Vanessa Baird and Tonja Jacobi have found that federalism appears, not unsurprisingly, in a significant number of dissenting opinions across many substantive areas.³⁴ They identify federalism as a significant "cross cutting" issue capable of splitting an existing majority on a substantive policy area.³⁵ Given that dissenting opinions arguably indicate the presence of legal indeterminacy or, at least, the existence of divergent judicial vantage points about a particular dispute,³⁶ the invocation of federalism to affect judicial change is unsurprising.

Federalism not only frequently appears in dissenting opinions as a cross-cutting issue, but Professors Baird and Jacobi advance a theory of judicial signaling where federalism-based dissents function to frame future litigation for subsequent majority coalitions and litigators.³⁷ The general theory of dissents as influential judicial signals of sorts is not new.³⁸ What

32. *Lopez*, 514 U.S. at 575.

33. See GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 78 (10th ed. 1980) (questioning whether federalism today "increases liberty, encourages diversity . . . [o]r is . . . a legalistic obstruction, a harmful brake on governmental responses to pressing social issues").

34. See Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 186 (2009).

35. See *id.*

36. See Jeffrey A. Lefstin, *The Measure of the Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit*, 58 HASTINGS L.J. 1025, 1032 (2007).

37. See Baird & Jacobi, *supra* note 34, at 186, 202.

38. See PERCIVAL E. JACKSON, DISSENT IN THE SUPREME COURT: A CHRONOLOGY 17 (1969) (quoting Justice Charles E. Hughes' remarks that a dissent is an "appeal to the brooding spirit of the law . . . when a later decision may possibly correct the error . . . the dissenting judge believes the court to have been betrayed"); MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT 25 (2015) (quoting Chief Justice Stone's assertion that while dissents may not change the votes of judges on a particular case, their influence lies in "shaping and sometimes altering the course of the law"); Lani Guinier, *The Supreme Court, 2007 Term: Foreward: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 14 (2008) (arguing that oral dissents "spark a deliberative

is novel about their research is their focus on the specific influence of federalism-based dissents as their unit of analysis.³⁹ Their theory of judicial signaling posits that federalism has a particularly “manipulative power” and that judges use federalism-based arguments successfully as “an alternative means of deciding cases . . . and as a means of achieving the reverse outcome in a case decided on the basis of the substantive issue of law.”⁴⁰ In this way, federalism is one way in which a judge’s level of abstraction of a legal issue can influence determinatively an adjudicatory outcome.⁴¹ Their research confirms that federalism, when invoked by the dissent, moves policy in favor of the position advanced by the dissenting coalition, regardless of whether the dissent is categorized as liberal or conservative.⁴²

C. *Federalism-based Arguments Against the Growth of the Administrative State and Chevron Deference*

The authority and power of administrative agencies stands as one of the long-standing targets for proponents of state and local sovereignty. Critics of administrative agencies’ rise have included dissenting Supreme Court Justices, who have historically described their usurpation of state sovereignty and power as an unchecked fourth branch of government.⁴³ This view is part of a broader perspective that the federal government’s expansion fundamentally threatens the constitutional federal system itself.⁴⁴ Some of these criticisms stem from opposition to a perceived

process” about the meaning of constitutional law and culture); Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 466 (2008) (explaining that perpetual dissents “can be justified as a method to signal to legislators, lawyers, and prospective litigants that the time has come for a precedent to be overruled, or that a legal principle has been stretched to its limit”).

39. See Baird & Jacobi, *supra* note 34, at 213. Professors Baird and Jacobi analyze the impact of federalism-based dissents in the Supreme Court between 1953 and 1985. *Id.* Specifically, they considered dissenting opinions that mentioned federalism when the issue was not raised by the majority. These dissents, as their unit of analysis, are what they label as “federalism dissents.” *Id.* at 202.

40. See *id.* at 236.

41. See *id.*; see also Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1084 (1981).

42. See Baird & Jacobi, *supra* note 34, at 235.

43. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, R., dissenting). In his dissenting opinion, Justice Jackson states, “The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.” *Id.*

44. See Clarence Thomas, *Keynote Address at The Federalist Society’s 2016 National Lawyers Convention*, THE FEDERALIST SOCIETY (Nov. 18, 2016), <https://www.youtube.com/watch?v=qkrxhvwLmsA&feature=youtu.be>.

aggrandizement of executive power from President Franklin D. Roosevelt's New Deal initiatives.⁴⁵ Indeed, this expansion has been derisively described as spawning an unprecedented "alphabet soup" of administrative agencies.⁴⁶ And, some critics have gone so far as to allege the unconstitutionality of the post-New Deal administrative state itself.⁴⁷ Despite a treasure trove of dissenting opinions and academic papers lamenting the state of affairs for critics of this "fourth branch of government," the features of the modern administrative state have gained wide-ranging acceptance.⁴⁸ This is not to say that federalism-based challenges are not gaining steam within the current political and judicial climate.

Now, challenges to the growth of the administrative state have turned increasingly to the intersection of federalism and statutory construction.⁴⁹ And, here, *Chevron* deference plays a significant role.⁵⁰ As Chief Justice Roberts stated in his *Arlington* dissent, *Chevron* deference is "a powerful weapon in an agency's regulatory arsenal."⁵¹ The deference afforded via *Chevron* aggrandizes the power of administrative agencies because, in many cases, it gives their statutory interpretation "the full force and effect of law."⁵² As such, *Chevron* deference insulates administrative agencies from full-scale attack because of the broad authority it grants to their interpretations of statutory provisions.⁵³

Assistant Attorney General John C. Cruden and Trial Attorney Matthew R. Oakes, both with the U.S. Department of Justice's Environment and Natural Resources Division, describe *Chevron* deference as a doctrinal "umbrella of legal theories that apply to judicial deference to administrative

45. See Andrew S. Oldham, *Sherman's March (In)To the Sea*, 74 TENN. L. REV. 319, 369 (2007).

46. See *id.* Moreover, the Supreme Court in *Chrysler Corp. v. Brown* characterized as "clear broth" the immediate post-New Deal proliferation of agencies in comparison to the more current state of administrative affairs that include Compliance Review Reports (CRIs), Complaint Investigation Reports (CIRs) and Affirmative Action Programs (AAPs). See *Chrysler Corp. v. Brown*, 441 U.S. 281, 286 n.4 (1979).

47. See Gary Lawson, *Symposium: Changing Images of the State: The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994). Professor Gary Lawson describes the legal validation of the post-New Deal administrative state as "nothing less than a bloodless constitutional revolution." *Id.*

48. See *id.* at 1232.

49. Scott A. Keller, *How Courts Can Protect State Autonomy From Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 47-48 (2008).

50. *Id.* at 53. Professor Scott Keller identifies *Chevron* deference as one of the exacerbating issues that will ensure the "hard" questions of federalism arise within administrative law. *Id.*

51. *Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, J., dissenting).

52. *Id.*

53. Keller, *supra* note 49, at 53.

interpretations of law.”⁵⁴ They describe the nascence of *Chevron* deference as a byproduct of the proliferation of environmental statutes that tasked administrative agencies with making decisions requiring “expertise borne of regulatory specialization.”⁵⁵ Within this context, Judge Harold Levanthal, an influential jurist in administrative law,⁵⁶ described the changing role of the courts within this new regulatory context as one of agency supervision rather than administration of environmental laws.⁵⁷ Thus, a court would defer to agency expert judgment on technical issues, while at the same time reviewing agency actions as a “generalist who can penetrate the scientific explanation underlying a decision just enough to test its soundness.”⁵⁸ Judge Levanthal describes the soundness of this nascent deference based on the pragmatic reality that judges, simply put, do not have scientific aides.⁵⁹ Thus, as Cruden and Oakes explain, administrative law, within this context, “attempts to develop rules that strike the right balance between the judicial, executive, and legislative branches.”⁶⁰

In 1984, the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* established a two-step analytical framework for judicial review of an administrative agency’s statutory construction.⁶¹ Given the highly technical laws passed by Congress related to areas from financial regulation to drug safety, the *Chevron* deference framework allows agencies to fill in the legal gaps by interpreting the law based on its expertise.⁶² *Chevron*’s two steps have been referred to by courts and legal scholars as “Step One” and “Step Two.”⁶³ At Step One, the *Chevron* Court identified that “the question [of] whether Congress has directly spoken to the precise [statutory] question at issue” must be

54. John C. Cruden & Matthew R. Oakes, *The Enduring Nature of the Chevron Doctrine*, 40 HARV. ENVTL. L. REV. 189, 190 (2016).

55. *Id.* at 193.

56. *See id.*

57. *See* Harold Levanthal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 510 (1974).

58. *Id.* at 517-18.

59. Cruden & Oakes, *supra* note 54, at 194 (quoting Judge Harold Levanthal in *Int’l Harvester Co. v. Ruckelhaus*, 478 F.2d 615, 641 (D.C. Cir. 1973)).

60. Cruden & Oakes, *supra* note 54, at 194. The authors describe this balance as one where “an elected legislature creates laws implemented by the executive branch headed by an elected president who appoints the heads of administrative agencies . . . [and] the courts . . . ensur[e] that an administrative agency does not overstep the authority granted by Congress.” *Id.*

61. *See* *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

62. *See* Steven D. Solomon, *Should Agencies Decide Law? Doctrine May Be Tested at Gorsuch Hearing*, N.Y. TIMES (Mar. 14, 2017), <https://www.nytimes.com/2017/03/14/business/dealbook/neil-gorsuch-chevron-deference.html>.

63. *See, e.g.*, *City of Arlington v. FCC*, 668 F.3d 229, 247-49 (5th Cir. 2012).

addressed.⁶⁴ At this stage, if Congress has spoken directly and clearly to the statutory issue, then Congress' intent must take effect.⁶⁵ If, however, Congress' intent regarding the question at issue is ambiguous, then, at Step Two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁶⁶ Regardless of whether Congress leaves an explicit or implicit statutory gap, a reasonable administrative interpretation trumps a court's statutory construction.⁶⁷

The next two parts chart two major challenges to *Chevron* deference, one aimed at what has been referred to as *Chevron's* implicit jurisdictional Step Zero⁶⁸ and another that requires the integration of a more stringent Step One analysis.⁶⁹ Both challenges are grounded on federalism-based principles.⁷⁰ Part II explains the Step Zero assault on *Chevron* deference, ultimately rejected by Justice Scalia's majority opinion in *Arlington* but that was interwoven throughout oral arguments before the Court and in Justice Roberts' dissent.⁷¹ While the Step Zero challenge to the FCC was ultimately unsuccessful, what remained was a stock of dissenting judicial rhetoric by Chief Justice Roberts that broadly railed against the all-too-familiar unchecked power of administrative agencies.⁷² Conversely, Part III explains the challenge to administrative statutory authority at Step One that ultimately proved successful in the Sixth Circuit's *Tennessee v. FCC* decision. Significantly, this decision followed Justice Roberts' vociferous dissent to *Chevron* deference in *Arlington*. The next two parts' examinations of these judicial opinions highlight their importance to future contestations against administrative agency authority.

64. *Chevron*, 467 U.S. at 842.

65. *See id.* at 842-43.

66. *Id.* at 843.

67. *See id.* at 843-44.

68. *See* Transcript of Oral Argument at 4-5, *City of Arlington v. FCC*, 569 U.S. 290 (2013) (Nos. 11-1545, 11-1547), 2013 WL 170666. Justice Scalia begins his majority opinion in *Arlington* by describing this jurisdictional challenge to *Chevron*, referred to during oral arguments as a "Step Zero" challenge: "We consider whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron*." *Arlington*, 569 U.S. at 293.

69. Paul D. Clement, *Administrative Law and Regulation Panel Discussion*, THE FEDERALIST SOCIETY'S 2016 NATIONAL LAWYERS CONVENTION (Mar. 4, 2016), <http://fedsoc.7up.stage.enga.ge/commentary/videos/keynote-address-by-paul-clement-event-audio-video>.

70. *Arlington*, 569 U.S. at 305.

71. *See generally* Transcript of Oral Argument, *supra* note 68, at 4-5 (showing a robust discussion between petitioners' attorney Thomas C. Goldstein and Supreme Court Justices over the framing of the jurisdictional issue in *Arlington* on *Chevron* Step Zero grounds).

72. *See Arlington*, 569 U.S. at 313-15 (Roberts, J., dissenting).

II. THE FCC'S *CHEVRON* DEFERENCE SURVIVES A FEDERALISM-BASED STEP ZERO CHALLENGE: *ARLINGTON V. FCC*

Arlington and *Tennessee* are two cases that highlight the ongoing tension between the power of administrative agencies and federalism-based state and local sovereignty arguments. Both also demonstrate the power of federalism-based judicial arguments. These decisions placed the power of the administrative state front and center, specifically the scope of the FCC's *Chevron* deference. In *Arlington*, Chief Justice Roberts' dissent signaled the dissenting bloc's antipathy towards the majority's affirmation of *Chevron* deference, a deference he states poses a tyrannical danger "by the growing power of the administrative state [that] cannot be dismissed."⁷³

A. *Setting the Stage for an Interpretive Battle: A Statute That Grants General Authority with Limitations*

To begin with, *Arlington* is an example of a narrowly decided Supreme Court case that rejected attempts to embrace a federalism-based challenge to the FCC's interpretation of the Telecommunications Act of 1996.⁷⁴ Principally, Justice Scalia, in a five-four decision, relied on the *Chevron* deference afforded to the FCC as an administrative agency with legitimate authority to interpret the Act's provisions.⁷⁵ The specific statutory text at issue was Section 332(c)(7),⁷⁶ entitled "Preservation of Local Zoning Authority."⁷⁷ In her declaratory ruling to clarify its provisions, Chief Circuit Judge Priscilla Owen, writing for the majority, described Section 332(c)(7) as an attempt by Congress to reconcile competing local, state, and federal interests.⁷⁸

The construction of this statute sets the stage for the federalism-based battle between the FCC and the City of Arlington.⁷⁹ The first part of the statute provides state or local governments with "general authority" regarding the "placement, construction, and modification of personal wireless service facilities."⁸⁰ By the same token, the same statutory section

73. *Id.* at 315.

74. *See id.* at 293-94.

75. *Id.* at 296.

76. Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 FCC Rcd. 13994, 13995 (2009), 2009 WL 3868811.

77. 47 U.S.C. § 332(c)(7).

78. *City of Arlington v. FCC*, 668 F.3d 229, 234 (5th Cir. 2012).

79. *See* 47 U.S.C. § 332(c)(7).

80. 47 U.S.C. § 332(c)(7)(A).

also provides for limitations to this general state or local authority.⁸¹ One specific limitation is that a state or local government “shall act on any request for authorization . . . within a reasonable period of time after the request is duly filed.”⁸² The next two sections explore in more detail the tension that emerged between the FCC’s interpretation of this statutory limitation and the City of Arlington’s assertion of the primacy of its statutorily derived “general authority.”

B. Arlington v. FCC: A Sixth Circuit Decision Over a Simple Matter of Statutory Interpretation?

This case’s legal question, at first glance, appears rather innocuous, just one of many that pepper the dockets of administrative agencies’ adjudication. In brief, the case turned on whether the FCC had the authority to define the phrase “within a reasonable period of time.”⁸³ More specifically, the case focused on whether the FCC could determine the timeframe for state and local zoning authorities to respond to requests by wireless operators to build wireless towers or attach equipment to pre-existing structures.⁸⁴ In a declaratory ruling, FCC Chairman Julius Genachowski defined the ambiguous phrase that referenced the time authorities had to respond before a “failure to act” presumption was triggered.⁸⁵ According to Genachowski, a “reasonable period of time” for a state or local authority to review siting applications was to be understood as either 90 days for collocation applications or 150 days for all others.⁸⁶ The Commission explained that defining this timeframe was necessary to prevent delays in zoning at the local and state levels that effectively thwarted the goals of the Communication Act’s public interest goals⁸⁷ to ensure wireless services for consumers.⁸⁸

81. 47 U.S.C. § 332(c)(7)(B).

82. 47 U.S.C. § 332(c)(7)(B)(ii).

83. *See id.* The statutory section reads: “A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.” *Id.* (emphasis added).

84. *See Declaratory Ruling, supra* note 76, at 13994.

85. *See id.* at 13995.

86. *See id.*

87. *See id.* at 13997. The Commission explains that wireless services are “central to the economic, civic, and social lives of over 270 million Americans.” *Id.* at 13995.

88. *See id.* Chairman Genachowski states that providing broadband services for mobile devices requires “obtaining State and local governmental approvals for constructing towers or attaching transmitting equipment to pre-existing structures.” *Id.*

Following the FCC's declaratory judgment, the City of Arlington, along with the City of San Antonio, sought a review by the Fifth Circuit Court of Appeals of the ruling.⁸⁹ On the one hand, the cities claimed the FCC lacked regulatory authority to adopt the 90-day and 150-day time frames that defined "within a reasonable amount of time."⁹⁰ On the other hand, the FCC contended that its authority to interpret the Act's statutory language was found within its general regulatory authority to make such rules "as may be necessary to carry out the Communication Act's provisions."⁹¹ Ultimately, the court recognized the FCC's authority to interpret the statutory language and upheld the declaratory judgment regarding the timeframes for state and local authorities to act.⁹²

In the final analysis, the Fifth Circuit afforded the FCC substantial deference to its statutory interpretation of "reasonable period of time" by applying *Chevron* deference.⁹³ The court applied the *Chevron* two-step standard of review to the FCC's statutory interpretation.⁹⁴ Accordingly, the court held that the FCC's interpretation was subject to disturbance only if the agency's interpretation constituted an "impermissible construction" of the statute.⁹⁵ As part of the first step in its *Chevron* analysis, the court determined that the phrase "a reasonable amount of time" was ambiguous on its face.⁹⁶ As such, this phrase left "room for agency guidance" on how much time state and local governments had to act before a "failure to act" presumption was triggered.⁹⁷ Ultimately, the statutory ambiguity, coupled with agency *Chevron* deference, enabled the FCC's interpretation to stand. *Chevron* deference worked seamlessly.

89. See *City of Arlington v. FCC*, 668 F.3d 229, 233 (5th Cir. 2012).

90. See *id.* at 253.

91. *Id.* at 247.

92. See *id.* at 255.

93. See *id.*

94. See *id.* at 247. The court describes this two-step process. The first inquiry is whether Congress unambiguously expressed its intent regarding the question at issue. If so, then Congress' intent must be given effect. See *id.* If "the statute is silent or ambiguous with respect to" Congress' intent, then an agency's construction is taken under consideration by a court to assess whether the interpretation is permissible. *Id.* And, "[a]s long as the agency's construction of an ambiguous statute is permissible, it must be upheld." *Id.* (citing *Am. Airlines v. Dallas*, 202 F.3d 788, 796 (5th Cir. 2000)).

95. See *Arlington*, 668 F.3d at 255.

96. See *id.*

97. See *id.*

C. The Supreme Court Upholds Chevron Deference While the Dissent Sends Out Judicial Signals Against Agency Power

On appeal at the Supreme Court, the City of Arlington unsuccessfully asserted the FCC was not entitled to receive *Chevron* deference because the statutory provision at issue regarded a threshold jurisdictional issue about the scope of the agency's interpretive power rather than a matter of plain statutory construction.⁹⁸ In other words, the City argued that agency deference should not apply in a threshold jurisdictional inquiry.⁹⁹ In its reply brief for writ of certiorari, the City argued that the Court should proceed incrementally upon review of the Fifth Circuit's holding by considering a "precondition" to the traditional *Chevron* framework.¹⁰⁰ This preliminary inquiry would determine "whether Congress intended to give the agency interpretative authority over the provision at issue."¹⁰¹ This threshold jurisdictional inquiry has been referred to as "*Chevron* Step Zero."¹⁰² In particular, the City of Arlington contended that the general authority provision in § 332(c)(7)¹⁰³ explicitly barred the FCC from asserting its authoritative interpretive agency in the first instance.¹⁰⁴ As such, the FCC failed at *Chevron* Step Zero, a failure that should have prevented an advancement to the first step of the traditional *Chevron* analysis. To address this issue, the Supreme Court certified for consideration the question of whether the FCC had the authority to determine the limits of its own jurisdiction.¹⁰⁵

While the Supreme Court ultimately affirmed the Fifth Circuit's decision upholding the FCC's declaratory judgment, Professors Samuel L. Feder, Matthew E. Price, and Andrew C. Noll suggest that the significance of the case may lie more in the dynamic dialogue between Justice Scalia's majority opinion, Justice Roberts' dissent, and Justice Steven's

98. See Reply Brief for Petitioners at 1-2, *City of Arlington v. FCC*, 668 F.3d 229 (2013) (Nos. 11-1545, 11-1547), 2013 WL 75387.

99. See *id.* at 1.

100. See *id.* at 2.

101. Feder et al., *supra* note 17, at 62.

102. See Reply Brief for Petitioners, *supra* note 98, at 2. See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 912-13 (2001) (asserting that a court has a role in determining whether Congress, in the first instance, clearly intended for the agency to be the "primary interpreter" of its own jurisdiction prior to proceeding with step one in the traditional *Chevron* framework); Feder et al., *supra* note 17, at 48-49 (identifying "*Chevron* Step Zero" as a "separate judicial determination" by courts that Congress meant to delegate authority to the agency "to interpret the particular statutory provision at issue").

103. See 47 U.S.C. § 332(c)(7)(A).

104. See Reply Brief for Petitioners, *supra* note 98, at 1-2.

105. See *City of Arlington v. FCC*, 569 U.S. 290, 295 (2013).

concurrence.¹⁰⁶ Namely, a significant aspect of the case is the federalism-based judicial signaling concerning issues of state and local sovereignty and federal administrative power that emerged from the Court's reasoning.¹⁰⁷ The majority bloc, composed of Justices Scalia, Thomas, Ginsburg, Sotomayor, and Kagan, rejected the distinction between "jurisdictional" and "nonjurisdictional" questions, describing them as interpretive mirages.¹⁰⁸ Similarly, the dissenting bloc, including Chief Justice Roberts and Justices Alito and Kennedy, did not defend the distinction.¹⁰⁹ Rather, like Justice Breyer's concurrence, the dissenting justices would have upheld that a preliminary judicial determination regarding Congress' intent to delegate authority is needed before applying *Chevron* deference.¹¹⁰ According to their view, a court must first ask whether Congress "intended to delegate interpretive authority to the agency concerning the particular provision at issue."¹¹¹

Apart from that concern, what occupies the first part of Chief Justice Roberts' dissent is an attack on the alleged unfettered growth of agency power.¹¹² In fact, Chief Justice Roberts cited Federalist No. 47's warning against "the very definition of tyranny" posed by the accumulation of powers in any one branch of government.¹¹³ Chief Justice Roberts suggested that this danger is present in the administrative state as a "central feature of modern American government."¹¹⁴ Specifically, the Chief Justice argues that modern administrative agencies exercise legislative power through the promulgation of regulations, executive power by policing compliance, and judicial power through both its adjudication of actions involving violation of rules and by their imposition of sanctions.¹¹⁵ Indeed, the dissent went on to describe the current state of administrative agencies as one not envisioned by the Framers.¹¹⁶

Justice Scalia acknowledged the Chief Justice's "discomfort with the growth of agency" but contested the assertion that the FCC was exerting

106. See Feder et al., *supra* note 17, at 48.

107. See *id.* at 48-49.

108. See *id.* at 57.

109. See *id.* at 59.

110. See *id.*

111. See *id.*

112. See *City of Arlington v. FCC*, 569 U.S. 290, 312-14 (2013) (Roberts, J., dissenting).

113. See *id.*

114. *Id.*

115. See *id.*

116. See *id.* (quoting Justice Souter's dissent in *Alden v. Maine*, 527 U.S. 706, 807 (1999) that the "administrative state with its reams of regulations would leave [the Framers] rubbing their eyes").

authority beyond the executive power in this case.¹¹⁷ While both Justice Scalia and Chief Justice Roberts sent judicial signals regarding their discomfort about the growth of the administrative state, their disagreement is one based more on strategy and their different understandings of the role the judiciary should play in stemming its growth.¹¹⁸ Justice Scalia states his discomfort at the idea of aggrandizing the role of “unelected (and even less politically unaccountable) federal judges” at the expense of “unelected federal bureaucrats.”¹¹⁹ In particular, Justice Scalia, true to form, seeks to avoid placing judges in the role of “haruspex, sifting the entrails of vast statutory schemes to divine whether a particular agency interpretation qualifies as ‘jurisdictional.’”¹²⁰ At the very least, according to Justice Scalia, administrative agencies are at least beholden to the more accountable elected executive branch.

Thus, despite Justice Scalia’s decision upholding *Chevron* deference, both his opinion and Chief Justice Roberts’ dissenting opinion sent out unmistakable judicial signals from the highest court in the land about a fundamental distaste with the administrative state apparatus. In essence, there was no disagreement between the majority, dissenting, and concurring blocs concerning the main certified issue as stated by Justice Scalia:¹²¹ “whether an agency’s interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron*.”¹²² Instead, what concerned the dissenting bloc was a preliminary inquiry into Congress’ intent to delegate interpretative authority. As the next part of this comment will discuss, this concern resurfaced in *Tennessee* just three years after *Arlington*.

III. *CHEVRON* DEFERENCE FALLS: *TENNESSEE* OVERTURNS THE FCC’S PREEMPTION OF STATE LAW

The Sixth Circuit’s decision in *Tennessee v. FCC* is an example where an attempt to grant the FCC *Chevron* deference failed based on a federalism-based framing of the issues at stake. Unlike in *Arlington*, here the court inserted its challenge to *Chevron*, not at a Step Zero, but rather at Step One of the traditional *Chevron* inquiry.¹²³ Instead of granting the FCC

117. *See id.* at 304 n.4.

118. *See id.* at 304.

119. *Id.*

120. *Id.* at 301.

121. Feder et al., *supra* note 17, at 48.

122. *City of Arlington v. FCC*, 596 U.S. 290, 293-94 (2013).

123. *See City of Arlington v. FCC*, 668 F.3d 229, 247 (5th Cir. 2012).

Chevron deference to preempt state law based on the agency's interpretation of statutory provisions of the Telecommunication Act of 1996, the court's majority denied deference because of what it asserted was the agency's intermeddling into core state functions.¹²⁴ In essence, the Sixth Circuit held that a "clear statement" from Congress was required for the FCC to have preemptive regulatory authority over Tennessee and North Carolina state laws.¹²⁵ Without Congress' "clear statement" the FCC's regulatory authority failed at *Chevron* Step One, the step at which the *Chevron* Court determined that the inquiry is whether Congress unambiguously expressed its intent in a statutory provision at issue.¹²⁶ In the end, it is this refashioning of the *Chevron* framework that undercut the FCC's authority and poses a future threat to that of the administrative agency apparatus.

A. *Setting the Stage for Another Interpretive Battle: A Statute That Grants Preemption of State Law?*

The statutory section at issue is entitled "Advanced Telecommunications Incentives."¹²⁷ In this section, Congress provides the FCC "with regulatory jurisdiction over telecommunications services [to] encourage the deployment on a reasonable and timely basis [] advanced telecommunications capability to all Americans."¹²⁸ The statutory section goes on to list several ways the Commission can go about achieving this goal: "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to investment."¹²⁹

This Part examines the conflict between the FCC's interpretation of this statute with that of North Carolina and Tennessee. On the one hand, the FCC asserted that its regulatory jurisdiction allowed for preemption of state laws to "promote competition" and utilize "other regulating methods that remove barriers to investment."¹³⁰ On the other hand, the states asserted that the FCC's preemption amounted to a fundamental intrusion into their sovereignty to organize their municipalities, a core state

124. See *Tennessee v. FCC*, 832 F.3d 597, 611 (6th Cir. 2016).

125. *Id.* at 610.

126. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

127. 47 U.S.C. § 1302.

128. 47 U.S.C. § 1302(a).

129. *Id.*

130. Respondent Brief for the FCC at 27, 31, *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016) (Nos. 15-3291, 15-3555), 2015 WL 6854343.

function.¹³¹ This Part first provides some background regarding the facts of this case and then describes the Sixth Court’s fundamental refashioning of the *Chevron* framework at Step One when confronted with an issue of federal preemption of state law.

B. A Success Tale of Two High-Tech Cities: Chattanooga and Wilson

The city of Chattanooga, Tennessee’s fourth largest,¹³² has been hailed a high-tech success story.¹³³ The city was named one of seven global finalists for the Intelligent Community Forum’s “2011 Intelligent Community of the Year” award.¹³⁴ In fact, the Intelligent Community Forum recognized Chattanooga for having “one of the smartest smart-grid systems in the world.”¹³⁵ Not insignificant, the city was recognized for leveling the high-tech playing field by providing “nearly every resident, rich or poor [] with the world’s most advanced broadband network.”¹³⁶ This placed Chattanooga, located in the southeastern part of the state and with a 2010 population of only 167,674,¹³⁷ in the company of past winners, including Singapore (1999), New York City (2001), Seoul (2002), Taipei (2006), Stockholm (2009), and Montreal (2016).¹³⁸ Several studies, along with Chattanooga’s Chamber of Commerce, credit the broadband access provided by the Electric Power Board of Chattanooga (“EPB”) with dynamic job growth and the city’s robust entrepreneurial culture.¹³⁹

Like Chattanooga, the city of Wilson provides the residents of Wilson County with “optical fiber” broadband connectivity, in addition to the

131. See Petitioner Reply Brief for North Carolina at 4, *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016) (No. 15-3555), 2015 WL 7574402.

132. See *About Chattanooga*, CHATTANOOGA.GOV, <http://www.chattanooga.gov/about-chattanooga> (last visited Oct. 15, 2017).

133. See BENTO J. LOBO, THE U. TENN. CHATTANOOGA, THE REALIZED VALUE OF FIBER INFRASTRUCTURE IN HAMILTON COUNTY, TENNESSEE 6-7 (June 18, 2015), <http://ftpcontent2.worldnow.com/wrcb/pdf/091515EPBFiberStudy.pdf>.

134. See *The Top 7 Intelligent Communities of the Year*, THE INTELLIGENT COMMUNITY FORUM, <http://www.intelligentcommunity.org/top7> (last visited Oct. 15, 2017).

135. *Chattanooga, Tennessee*, THE INTELLIGENT COMMUNITY FORUM, http://www.intelligentcommunity.org/chattanooga_tennessee (last visited Oct. 15, 2017).

136. *The Top 7*, *supra* note 134.

137. U.S. Census Bureau, *Chattanooga city, Tennessee*, AMERICAN FACT FINDER (2010), https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmk.

138. *The Top 7*, *supra* note 134.

139. *In re Wilson*, 30 FCC Rcd 2408, 2417 (2015). Specifically, Amazon and Volkswagen have been lured to the area by Chattanooga’s “all-fiber network.” *Id.* In addition, Chattanooga, dubbed the “Gig City,” has received global recognition for its thriving high-tech economic engine. LOBO, *supra* note 133, at 7. And, its public libraries and schools are at the forefront of delivering high-speed and innovative services. See *id.* at 46-47.

electric services it provides to five other counties in Eastern North Carolina.¹⁴⁰ This high-speed connectivity encouraged tech-savvy entrepreneurs and start-ups to flock to Wilson, located just outside Raleigh.¹⁴¹ As an example, a 2014 *New York Times* article reported on the decision by the co-owners of Exodus FX, a special effects company that worked on the feature films *The Black Swan* and *Captain America*, to locate there.¹⁴² Instead of paying \$1,500 to \$3,000 for a dedicated fiber connection in Hollywood, they found that they could pay just \$150 a month in Wilson.¹⁴³ For Wilson, a town that has suffered significant job losses in manufacturing and tobacco, fiber offers a robust economic solution.¹⁴⁴ Businesses and entrepreneurs have flocked to cities like Wilson to better position themselves as more globally competitive with optical fiber that offers “upload and download speeds about 100 times faster than what is typically offered in the United States.”¹⁴⁵

Remarkably, despite serving as high-tech models for 21st century economic innovation, the EPB of Chattanooga and the City of Wilson have been prevented from providing their cutting-edge broadband services to neighboring communities in need.¹⁴⁶ On the one hand, in Tennessee, state law imposes a “flat limitation” that prevents any municipal electric provider from delivering broadband services outside of its electric service area.¹⁴⁷ On the other hand, in Wilson’s case, North Carolina has imposed “sector-specific regulatory limitations” on municipal providers that seek to provide broadband connectivity.¹⁴⁸ The FCC has called these North Carolina statutory provisions “a series of costly hoops” for municipal providers.¹⁴⁹ In essence, the FCC has held that these provisions “effectively raise the cost of market entry so high as to effectively block entry and protect the private providers that advocated for such legislation from competition.”¹⁵⁰ As a

140. *In re Wilson*, 30 FCC Rcd at 2423.

141. See Kate Murphy, *For the Tech-Savvy with a Need for Speed, a Limited Choice of Towns with Fiber*, N.Y. TIMES (Apr. 2, 2014), https://www.nytimes.com/2014/04/03/technology/personaltech/for-the-tech-savvy-with-a-need-for-speed-a-limited-choice-of-towns-with-fiber.html?_r=0.

142. *See id.*

143. *Id.*

144. *See id.*

145. *Id.* In addition, Wilson provides free Wi-Fi connectivity throughout its downtown area, and its schools and libraries offer advanced telecommunications capabilities. See *In re Wilson*, 30 FCC Rcd at 2424-25.

146. *In re Wilson*, 30 FCC Rcd at 2413-14.

147. *See id.* at 2410.

148. *See id.* at 2413.

149. *Id.* at 2410.

150. *Id.* at 2410-11.

result, both Chattanooga and Wilson remain thriving twenty-first century oases within a digital desert.¹⁵¹

In 2014, in response to “regular requests” by outlying neighboring areas, both the EPB of Chattanooga and the City of Wilson petitioned the FCC to preempt Tennessee and North Carolina state law.¹⁵² Consequently, the FCC granted their petitions in 2015, preempting state law.¹⁵³ Nevertheless, on appeal in 2016, the Sixth Circuit, in *Tennessee v. FCC*, overturned the agency’s preemptive decision.¹⁵⁴ In doing so, the Sixth Circuit undercut the deference historically accorded to the FCC that had been upheld in *Arlington*.¹⁵⁵ Specifically, in *Arlington*, the Court had affirmed the FCC’s authority to interpret provisions of the Telecommunications Act by according the agency *Chevron* deference.¹⁵⁶ In the end, the Sixth Circuit undercut the FCC’s *Chevron* deference by overturning the agency’s preemptive decision based on a judicial interpretation of the Telecommunications Act.¹⁵⁷

C. Federalism-based Framing Triumphs in Tennessee v. FCC with a More Robust Chevron Step One

The case of *Tennessee v. FCC* is the epitome of one that petitioners successfully recast into federalism-based form. The Sixth Circuit’s decision against the FCC was consequential. The FCC’s order regarding the preemption of North Carolina and Tennessee law turned, in part, on two basic issues: (1) the FCC’s interpretation of the state statutes as barriers to broadband investment and competition and (2) the agency’s *Chevron* deference in asserting this understanding.¹⁵⁸ *Chevron* emerged as a central aspect in the FCC’s case under the proposed standard of review.¹⁵⁹ The FCC framed the issue for the court as one in which *Chevron* deference is owed to the agency’s interpretation of “the scope of Section 706, a statute

151. Respondent Brief, *supra* note 130, at 13.

152. *See id.*

153. *See In re Wilson*, 30 FCC Rcd at 2409.

154. *See Tennessee v. FCC*, 832 F.3d 597, 600 (6th Cir. 2016).

155. *See generally* City of Arlington v. FCC, 569 U.S. 290 (2013).

156. *Id.* at 307. Justice Antonin Scalia described *Chevron* deference’s canonical formulation in *Arlington*: when a statute at issue is ambiguous, an administrative agency, rather than the courts, possess discretion to resolve the ambiguity by providing a reasonable interpretation. *See id.* at 296.

157. *See generally Tennessee*, 832 F.3d at 600.

158. *See generally In re Wilson*, 30 FCC Rcd. at 2445-63 (explaining that Tennessee’s § 7-52-601 and North Carolina’s H.B. 129 are both barriers to broadband investment and competition).

159. *See* Respondent Brief, *supra* note 130, at 24-26.

that the agency administers.”¹⁶⁰ Significantly, the FCC cited *Arlington* as support for its deference.¹⁶¹ The agency described its regulatory power under Section 706 to preempt state law based on its general authority to maintain control of the communications industry as part of a comprehensive regulatory apparatus.¹⁶² And, the FCC interpreted the encouragement of broadband as part of its central mandate.¹⁶³ In essence, the agency asserted that its authority to “regulate interstate communications generally and to promote broadband deployment and competition specifically” is what provided the agency with its regulatory preemption power.¹⁶⁴ As such, the FCC required no additional “clear statement” from Congress to preempt state law.¹⁶⁵

Conversely, North Carolina Attorney General Roy Cooper argued that the FCC had erroneously preempted state law.¹⁶⁶ The state contended that the plain language of Section 706 did not unambiguously provide the FCC with preemptive authority when viewed with other statutory provisions of the Act.¹⁶⁷ Furthermore, to bolster North Carolina’s claims, Cooper argued that the FCC’s interpretation cut to the core of the states’ “sovereign right to create and control the authority of its political subdivisions.”¹⁶⁸ This argument reframed the issue as cutting to the core of the states’ functions rather than the FCC’s. Cooper argued that without Congress’ granting of clear preemptive authority in Section 706, North Carolina’s state law was a matter “solely for the General Assembly, as the democratically elected arm of the people of this state.”¹⁶⁹

In the end, Sixth Circuit Judge John M. Rogers, writing for the majority, agreed with North Carolina’s federalism-based reframing,¹⁷⁰ arguably applying a more robust *Chevron* Step One analysis. Thus, the FCC’s argument, citing *Arlington*’s majority opinion did not win the day. In particular, the opinion states that “[t]he FCC order essentially serves to

160. *See id.* at 24-25.

161. *See id.* at 24-26. Respondents cite to *Arlington*’s citation of *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830, n.7 (1984): “[N]o ‘exception exists to the normal [deferential] standard of review’ for ‘jurisdictional or legal question[s] concerning the coverage’ of an Act.” *See Arlington*, 569 U.S. at 301.

162. *See* Respondent Brief, *supra* note 130, at 27.

163. *See id.*

164. *Id.* at 32.

165. *See id.* at 32.

166. *See* Petitioner Reply Brief, *supra* note 131, at 1.

167. *See id.* at 3.

168. *Id.* at 4-5.

169. *See id.* at 1.

170. *Tennessee v. FCC*, 832 F.3d 597, 600 (6th Cir. 2016).

re-allocate decision-making power between the states and their municipalities.”¹⁷¹ The court agreed with Cooper that the traditional *Chevron* two-step framework required the incorporation of the clear statement rule when matters of state sovereignty were involved.¹⁷²

According to the Sixth Circuit’s majority opinion, the clear statement rule requires that “if Congress has the power to allocate state decision making, it must be very clear that it is doing so.”¹⁷³ In other words, a “clear directive from Congress” is required when there is “any attempt by the federal government to interpose itself into [a] state-subdivision relationship.”¹⁷⁴ To support its position, the court cites *Nixon v. Mo. Mun. League*.¹⁷⁵ In *Nixon*, the Supreme Court held that a clear statement from Congress was needed in order to preempt a Missouri law that prevented municipalities “from entering the telecommunications market altogether.”¹⁷⁶

In its brief to the Sixth Circuit, the FCC had differentiated the bases for the Court’s *Nixon* analysis from the facts at issue in *Tennessee*.¹⁷⁷ First, at issue in *Nixon* was a “state-law flat ban on municipal telecommunications.”¹⁷⁸ The FCC explained one of *Nixon*’s holdings: “whether municipalities may provide telecommunications goes to ‘State’s arrangements for conducting their own governments,’” which implicates the clear statement rule.¹⁷⁹ However, in *Tennessee*, the states had already “permitted a political subdivision to enter the market”¹⁸⁰ in an area “where there [had] been a history of significant federal presence.”¹⁸¹ Nevertheless, the Sixth Circuit’s decision ultimately relied on a *Nixon*-based application of the clear statement rule. Second, while in *Nixon* the Supreme Court upheld an FCC order that the agency itself lacked the authority to preempt Missouri law,¹⁸² the Sixth Circuit overturned an FCC order that permitted preemption in *Tennessee*.¹⁸³ Thus, in *Nixon*, the Supreme Court did not overturn the agency’s authority but rather affirmed its decision about its own purview. Conversely, the Sixth Circuit’s decision was based on an

171. *Id.*

172. *See id.* at 610-11.

173. *Id.* at 610.

174. *Id.*

175. *See id.* at 610-12 (citing *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004)).

176. *See id.* at 610 (citing *Nixon v. Mun. League*, 541 U.S. 125, 129 (2004)).

177. *See* Respondent Brief, *supra* note 130, at 41-47.

178. *Id.* at 45.

179. *Id.* at 46 (citing *Nixon*, 541 U.S. at 140).

180. *Id.* at 46.

181. *Id.* at 43.

182. *Id.* at 45; *see generally Nixon*, 541 U.S. 125.

183. *See generally Tennessee v. FCC*, 832 F.3d 597, 600 (6th Cir. 2016).

administrative posture that ultimately led to an undercutting of the agency's authority.

This *Tennessee* decision is important because, as John F. Manning explained in his article entitled "Clear Statement Rules and the Constitution," by inserting the clear statement rule into the *Chevron* framework, the court effectively imposed a "clarity tax on Congress."¹⁸⁴ This "clarity tax" works to insist "that Congress legislate exceptionally clearly when it wishes to achieve a statutory outcome that threatens to intrude upon some judicially identified constitutional value – such as federalism."¹⁸⁵ Consequently, without a "clear statement" by Congress, an administrative agency's interpretation that trammels upon a purported state interest is afforded no deference. According to the State of North Carolina in its reply brief, this more robust version of Step One prevents the alleged conflation of *Chevron* Steps One and Two, a conflation that supposedly led to conclusions where administrative deference was almost assuredly granted.¹⁸⁶ Here, since the court found that the statutory provision of the Telecommunications Act fell short of providing such a clear statement of preemption at the *Chevron* Step One stage, the court reversed the FCC's preemptive order.¹⁸⁷ In the end, whereas in *Arlington* the Court affirmed *Chevron* deference against a challenge at Step Zero, in *Tennessee* the Sixth Circuit undercut *Chevron's* scope at Step One.

IV. THE STATE OF *CHEVRON* TODAY AS FORESHADOWED BY *ARLINGTON* AND *TENNESSEE*

The Sixth Circuit's *Tennessee* decision has been hailed by some as a "bold attempt" to prevent the agency from exceeding its "lawful bounds."¹⁸⁸ In particular, the critical role that the clear statement rule played in trumping the FCC's attempted preemption has been recognized.¹⁸⁹ Whether the Sixth Court's ruling is backed by future circuit rulings or a fundamental decision by the Supreme Court remains to be seen. What is clear is that questions about the role and importance of *Chevron* deference in

184. See John F. Manning, Essay, *Clear Statement Rules and the Constitution*, COLUMBIA L. REV. 101, 101 (2010).

185. See *id.*

186. See Petitioner Reply Brief, *supra* note 131, at 9-11.

187. See *Tennessee*, 832 F.3d at 600.

188. See Randolph May & Seth Cooper, *Sixth Circuit Ruling Stops FCC's Unlawful Municipal Broadband Preemption*, THE FEDERALIST SOC'Y FOR LAW AND PUB. POL'Y STUD. (Aug. 12, 2017), <https://fedsoc.org/commentary/blog-posts/sixth-circuit-ruling-stops-fcc-s-unlawful-municipal-broadband-preemption>.

189. See *id.*

administrative and constitutional law will remain at issue for years to come.¹⁹⁰ In fact, the future of *Chevron* deference was front and center at the Senate confirmation hearings of Supreme Court nominee Neil Gorsuch to replace the vacancy left by the late Justice Scalia.¹⁹¹

A. *A Waning Influence of Chevron Deference?*

While *Chevron* continues to stand guard at the “borders of the administrative state,”¹⁹² *Arlington* and *Tennessee* offer views of the ways in which its borders may increasingly shrink. The future of administrative law, and that of *Chevron* deference in particular, was a topic of keynote addresses and panel discussions at The Federalist Society’s 2016 conference in honor of the late Justice Scalia.¹⁹³ Justice Thomas’ address at the annual dinner, in a general sense, echoed Chief Justice Roberts’ impassioned warning about the administrative state’s expansion in *Arlington*.¹⁹⁴ Chiefly, Justice Thomas addressed the dangers of a ravenous federal government gone wild, threatening to devour the reserved power of the states.¹⁹⁵ And, as part of a panel discussion entitled “Administrative Law and Regulation: The Evolution of Justice Scalia’s Views on Administrative Law,” Professor Lisa Heinzerling and former U.S. Solicitor General Paul D. Clement discussed whether the final cases prior to Justice Scalia’s death reflect a waning influence of *Chevron* deference.¹⁹⁶

The debate between Heinzerling and Clement identified the critical role that *Chevron* plays in discussions about the direction of administrative

190. See Philip Hamburger, *Gorsuch’s Collision Course with the Administrative State*, N.Y. TIMES (Mar. 20, 2017), https://www.nytimes.com/2017/03/20/opinion/gorsuchs-collision-course-with-the-administrative-state.html?_r=0; Mark Sherman, *AP Explains: The Doctrine Sure to Come in Gorsuch Hearings*, ASSOCIATED PRESS (Mar. 17, 2017), <http://bigstory.ap.org/article/09506499439149fdb84817bec22109a5/ap-explains-doctrine-sure-emerge-gorsuch-hearings>.

191. See Hamburger, *supra* note 190; Sherman, *supra* note 190.

192. Leading Case, *Clean Water Act—Jurisdictional Determination—Finality—United States Army Corps of Engineers v. Hawkes Co.*, 130 HARV. L. REV. 447, 447 (2016).

193. THE FEDERALIST SOCIETY, 2016 NATIONAL LAWYERS CONVENTION SCHEDULE: THE JURISPRUDENCE AND LEGACY OF JUSTICE SCALIA (2016), <http://www.fedsoc.org/events/page/2016-national-lawyers-convention-schedule>.

194. See The Federalist Society, *Keynote Address by Justice Clarence Thomas*, YOUTUBE (Nov. 18, 2016), <https://www.youtube.com/watch?v=qkrxhvwLmsA&feature=youtu.be>.

195. See *id.* Significantly, Justice Thomas echoed the importance of Scalia’s “most important question”: “Who will decide?” *Id.* He goes on to list the possible answers: the Congress, the President, the Courts, and the People. See *id.* These answers reflect his core concerns about the separation of powers and federalism.

196. See generally The Federalist Society, *The Evolution of Justice Scalia’s Views on Administrative Law*, THE FEDERALIST SOCIETY (Nov. 24, 2016), <https://fedsoc.org/commentary/videos/the-evolution-of-justice-scalia-s-views-on-administrative-law-event-audio-video>.

law.¹⁹⁷ On the one hand, Heinzerling asserted that *Chevron* deference remained a dominant mode of statutory interpretation.¹⁹⁸ This, despite two rulings following *Arlington* where the Court, with Justice Scalia in the majority, did not apply *Chevron* deference to the Environmental Protection Agency's interpretive authority.¹⁹⁹ On the other hand, Clement suggested that *Chevron's* stature has diminished.²⁰⁰ Clement argued that while Justice Scalia may have embraced *Chevron* deference, his embrace came increasingly with a caveat.²⁰¹ Specifically, Clement interprets Justice Scalia's later decisions as harboring a growing displeasure with the number of cases bypassing "Step One" and moving to "Step Two."²⁰² Paul Clement explains that most statutes, according to Justice Scalia, would remain at Step One, thus failing to receive *Chevron* deference because the statutes were not ambiguous:

How many statutes actually get you to Step Two? And, I think the answer to that question very much depends on who's interpreting the statute and who's asking that question. And, if the person asking that question and answering that question is Justice Scalia, there's an awful lot of cases that are going to be decided at Step One both because of his view of textualism and his respect for the canons of construction.²⁰³

Clement goes on to add, "I do think that perhaps part of his frustration with *Chevron* over time may be that he didn't get to have the exclusive right to interpret all the statutes and determine whether we're at Step One and Step Two."²⁰⁴ So, while both Heinzerling and Clement agree that the *Chevron* two-step analysis plays a role in administrative legal analysis, the former asserts its importance whereas the latter renders its end product, administrative agency deference, a potentially rarer outcome.

B. A Path Forward to Challenge the FCC and the Administrative Apparatus?

The Sixth Circuit packaged its challenge to *Chevron's* power by putting forth a federalism-based analysis that relied on a framing of the issue at stake as one between the FCC and the core sovereignty between the states of Tennessee and North Carolina and their municipalities. Hence,

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.*

203. *Id.*

204. *Id.*

Tennessee, following some of the federalism-based concerns echoed in *Arlington's* dissent, charts a way forward for a newly formed skeptical Court to strike at the heart of *Chevron's* deferential weight. Of great significance for the future of *Chevron* deference is Justice Gorsuch's unique skepticism of "certain core doctrines of administrative law and the deference they provide to the agencies – particularly on questions of how to read their operative statutes."²⁰⁵

In 2008, Scott A. Keller's piece entitled "How Courts Can Protect State Autonomy From Federal Administrative Encroachment" recommended this kind of approach to protect state sovereignty.²⁰⁶ Specifically, Keller argued for an expansion of "federalism-based clear-statement canons of statutory construction" as primary "procedural limits to protect federalism."²⁰⁷ Keller warned against the inadequacy of "Chevron Step Zero" as a protection of state sovereignty.²⁰⁸ Rather than utilizing clear statement canons as mere illegitimate bootstrapping arguments of last resort,²⁰⁹ Keller suggested that with the insertion of the clear statement canon at Step One, "cases decided on shaky Chevron Step Zero grounds could be decided under a firmer clear-statement canon."²¹⁰

CONCLUSION

The outcome of a case can rest as much on the successful framing of a legal issue as on the raw potential of its facts. And, as we have seen, the arrangement of a case's facts to fit within the classic narrative of federal power versus state sovereignty can compel judicial outcomes.²¹¹ While parties already successfully invoke "familiar tropes of bitter contest between state and federal authority" when opposing alleged overreach by federal regulations,²¹² federalism-based framing will likely hold an even greater sway in a Supreme Court molded by President Trump. Whether embraced by judges in a penumbral sense or as a first principle, previous

205. Eric Citron, *The Roots and Limits of Gorsuch's Views on Chevron Deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM), <http://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/>. "In the now-relatively well-known case of *Gutierrez-Brizuela v. Lynch* [834 F.3d 1142 (10th Cir. 2016)], Gorsuch wrote both the majority decision for the U.S. Court of Appeals for the 10th Circuit and his own concurrence, using the latter as an opportunity to argue against what is known in the law as "Chevron deference." *Id.*

206. *See* Keller, *supra* note 49, at 50-51.

207. *Id.*

208. *See id.* at 70-73.

209. *See id.* at 73.

210. *Id.* at 78.

211. *See* Baird & Jacobi, *supra* note 34, at 187-88.

212. *See* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 3-4 (2011).

federalism-based opinions within the administrative law arena, from both majority and minority judicial blocs, provide a “quote miner’s treasure trove” for future opinions that nod towards, if not fully embrace, these pervasive foundational principles.²¹³ As such, a “penumbral federalism” emerges as a pragmatic, plausible, and malleable, albeit “watered down,” version of federalism to the judicial mind seeking “to keep federalism alive as a formal matter” if not in ideologically absolutist form.²¹⁴

Debates about the future of the administrative state will remain front and center under a Trump presidency. Despite the Court’s *Arlington* decision authored by Justice Scalia rejecting a *Chevron* Step Zero challenge to the FCC’s authority, the potential for robust applications of *Chevron* Step One inquiries modeled after the Sixth Circuit’s in *Tennessee* is increasingly on the judicial horizon. As such, the Sixth Circuit’s more laden *Chevron* analytical framework could ultimately serve as a substantial tool in a future arsenal against what has been referred to as our fourth branch of government.

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213. See Edward Cantu, *The Roberts Court and Penumbral Federalism*, 64 CATH. U.L. REV. 271, 284-85.

214. See *id.* at 287-88.

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