

5-15-2014

## City of Arlington v. FCC: Jurisdictional or Nonjurisdictional, Where to Draw the Line?

Whitney Ruijuan Hao

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### Recommended Citation

Whitney Ruijuan Hao, *City of Arlington v. FCC: Jurisdictional or Nonjurisdictional, Where to Draw the Line?*, 34 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1 (2014)

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# ***City of Arlington v. FCC: Jurisdictional or Nonjurisdictional, Where to Draw the Line?***

**By Whitney Ruijuan Hao**

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## I.            INTRODUCTION

The United States Supreme Court’s 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> has been considered one of the most important cases of modern administrative law.<sup>2</sup> This seminal case marked the birth of the well-recognized *Chevron* deference standard, which determines how far an agency can go in interpreting the law.

Before the Supreme Court took up the issue in *City of Arlington v. FCC*,<sup>3</sup> however, there was a longstanding dispute regarding whether courts should apply *Chevron* deference when reviewing an agency’s interpretation of their own so-called “jurisdiction.”<sup>4</sup> In other words, may administrative agencies receive *Chevron* deference when interpreting the scope of their own regulatory authority?

This note analyzes the Supreme Court’s decision in *City of Arlington* and discusses its impact upon the field of administrative law. Part II outlines the history of *Chevron* deference and the principles of administrative law at work in this case. Part III details the facts, the background of the Communications Act of 1934—Section 332(c)(7) in particular—and the procedural history of the case. Part IV presents and discusses the Court’s majority, concurring, and dissenting opinions. Part V discusses the impact of the *City of Arlington* decision on modern administrative law, and Part VI concludes the note.

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<sup>1</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

<sup>2</sup> See Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN L.J. AM. U. 187 (1992); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (1989) (“Chevron has proven a highly important decision—perhaps the most important in the field of administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC*.”). *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

<sup>3</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

<sup>4</sup> See *City of Arlington v. FCC*, 668 F.3d 229, 248 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

## II. HISTORY AND BACKGROUND

A. *The Law's Development Prior to Chevron*

Courts have long been called upon to determine when and how much deference should be given to an administrative agency's interpretation of legislation that it is charged with administering.<sup>5</sup> Prior to its decision in *Chevron*, the Supreme Court applied diverse deference standards to agency interpretations of regulations and had failed to articulate a systematic doctrine.<sup>6</sup> As noted by George Washington University Law Professor Richard Pierce, the pre-*Chevron* judicial review of agency interpretations of statutes<sup>7</sup> that the agency implemented could be "characterized by pervasive inconsistency and unpredictability."<sup>8</sup>

*NLRB v. Hearst Publications*<sup>9</sup> represented one of the Supreme Court's first attempts at establishing guidelines for deference to agency interpretations. In this case, publishers of four Los Angeles daily newspapers refused to bargain collectively with a union representing newsboys who distributed their papers on the streets of that city.<sup>10</sup> The principal question that confronted the Court was whether the newsboys were "employees" because Congress did not explicitly define the term.<sup>11</sup> Reversing the Ninth Circuit, a five-justice majority of the Court upheld the National Labor Relations

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<sup>5</sup> As early as 1810, in *United States v. Vowell*, the Supreme Court wrote, "If the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions." *United States v. Vowell*, 9 U.S. 368, 372 (1810).

<sup>6</sup> See Russell L. Weaver & Thomas A. Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-Chevron Assessment*, 22 MEM. ST. U.L. REV. 411, 413 (1992); see also Scalia, *supra* note 2, at 516 ("An ambiguity in a statute committed to agency interpretation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. . . . As I read the history of developments in this field, the pre-*Chevron* decisions sought to choose between (1) and (2) on a statute-by-statute basis.").

<sup>7</sup> This review differs in substance from the standard of review courts apply for legislative pronouncements.

<sup>8</sup> RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 87 (Foundation Press 2008).

<sup>9</sup> *NLRB v. Hearst Publ'ns*, 322 U.S. 111 (1944).

<sup>10</sup> *Id.* at 113.

<sup>11</sup> *Id.* at 120.

Board's (NLRB) interpretation of the term and instructed reviewing courts to defer to an agency's construction of a statute that is administered by the agency if it had "a reasonable basis in law."<sup>12</sup>

A few months earlier, however, a six-justice majority of the Supreme Court, in the same term, decided *Davies Warehouse Co. v. Bowles* and reached an opposite conclusion regarding deference.<sup>13</sup> In *Davies*, the Court chose to ignore the agency's interpretation of a statutory term—"public utility"—which Congress had failed to define.<sup>14</sup> Even though the scope of the term was ambiguous and the agency's interpretation was sensible, the Court decided to follow its own "reasonable view" instead of deferring to the agency interpretation.<sup>15</sup>

Later in the same year, the Supreme Court decided *Skidmore v. Swift & Co.*,<sup>16</sup> which brought further confusion to the Court's jurisprudence on the deference issue. In *Skidmore*, the plaintiffs, who were firemen, elevator operators, or relief firemen, orally agreed that, in addition to their regular eight-hour duties, they would stay overnight three and a half to four nights each week to answer fire alarms.<sup>17</sup> During their time of employment, there were no fires and few alarms.<sup>18</sup> Under the labor administrator's interpretations of the Fair Labor Standards Act (FLSA), the plaintiffs were not entitled to recover overtime compensation for sleeping overnight on the premises of the company,<sup>19</sup> and thus the plaintiffs sued.<sup>20</sup>

Reversing the Fifth Circuit, the *Skidmore* Court held that the interpretations and opinions of the labor administrator were "entitled to respect," but were "not controlling upon the courts."<sup>21</sup> Writing for the majority of the Court, Justice Jackson stated, "The weight [accorded to an administrative] judgment in a particular case will

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<sup>12</sup> *Id.* at 131.

<sup>13</sup> *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944).

<sup>14</sup> *Id.* at 156.

<sup>15</sup> *Id.* at 151–52, 156. Besides *Davies*, there were other cases where the Court applied inconsistent standards regarding deference to agencies' interpretations. *See, e.g., Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947) (holding that the NLRB's adjudicative opinions addressing whether company forepersons could be classified as "employees" were not entitled to deference).

<sup>16</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>17</sup> *Id.* at 135.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 136.

<sup>20</sup> *Id.* at 135–36.

<sup>21</sup> *Id.* at 140.

depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>22</sup> One commentator noted that *Skidmore* established a principle of “cautious deference” to agency interpretations.<sup>23</sup>

Therefore, prior to *Chevron*, the Supreme Court’s inconsistencies on the issue of agency interpretation weaved “a pattern of wavering between strong and weak deference” that would continue for over four decades.<sup>24</sup> The lack of clarity in the Court rulings imposed many adverse effects on the parties who litigated the matter. In the words of Justice Scalia, the pre-*Chevron* Court’s “statute-by-statute evaluation” approach created “a font of uncertainty and litigation.”<sup>25</sup>

### B. *The Establishment of Chevron Deference*

In June 1984, the Supreme Court decided *Chevron* and issued what many feel was the single most definitive instruction regarding deference to administrative agencies’ interpretations of statutes.<sup>26</sup> In *Chevron*, an environmental advocacy group challenged an Environment Protection Agency (EPA) interpretation of the term “stationary source” as used in the Clean Air Act (CAA) Amendments of 1977.<sup>27</sup> The principal issue was whether the EPA’s ruling, which allowed “[s]tates to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single ‘bubble,’” was a reasonable interpretation of the statutory term “stationary source.”<sup>28</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> Jamie A. Yavelberg, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. Aramco*, 42 DUKE L.J. 166, 166 (1992).

<sup>24</sup> Naaman A. Fiola, *Christensen v. Harris County: Pumping Chevron for All It’s Worth—Defining the Limits of Chevron Deference*, 21 J. NAT’L ASS’N ADMIN. L. JUDGES 151, 154 (2001); see also John G. Osborn, *Legal Philosophy and Judicial Review of Agency Statutory Interpretation*, 36 HARV. J. ON LEGIS. 115, 116 (1999).

<sup>25</sup> Scalia, *supra* note 2, at 516.

<sup>26</sup> See sources cited *supra* note 2; see also sources cited *infra* note 41.

<sup>27</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 839–40 (1984).

<sup>28</sup> *Id.* at 840.

Through the amended CAA, Congress imposed certain requirements on states that had not satisfied the national air quality standards established by the EPA in accordance with earlier legislation.<sup>29</sup> Those “nonattainment” states<sup>30</sup> were required to establish a permit program regulating “new or modified major stationary sources” of air pollution.<sup>31</sup> Both prior to and following the amendments, however, the CAA failed to define the term “stationary source” for purposes of measuring pollutants.<sup>32</sup>

The regulations the EPA promulgated in October 1981 allowed a state to adopt a plant-wide definition of the term “stationary source” instead of classifying each of its pollution-emitting devices as individual stationary sources.<sup>33</sup> This interpretation, which became known as the “bubble” theory, allowed states to increase pollution in one area of their facility so long as there was an equivalent decrease in another area.<sup>34</sup>

Taking into consideration that Congress did not define “stationary source,” and this particular issue was not addressed in the legislative history, the Supreme Court ruled in favor of the EPA’s interpretation of the term and upheld its policy.<sup>35</sup> In arriving at such a conclusion, the Court adopted a two-prong test to determine whether a reviewing court should defer to an agency’s construction of a statute.<sup>36</sup> The two questions that reviewing courts need to consider are:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own

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<sup>29</sup> *Id.* at 837.

<sup>30</sup> “Nonattainment” states were those states that had not achieved the national air quality standards established by the EPA. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 841.

<sup>33</sup> *Id.* at 837.

<sup>34</sup> *Id.* at 837, 840.

<sup>35</sup> *Id.* at 859–66.

<sup>36</sup> *Id.* at 842–43.

construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>37</sup>

By identifying a two-step analysis, the Supreme Court established a new standard for reviewing how far an agency can go in interpreting the law.<sup>38</sup> *Chevron* initiated a rather clear and unified rule in determining the agency's interpreting authority when the statute under its administration is unclear or ambiguous. Reviewing courts must presume that Congress has granted the agency authority to fill in the gaps as long as the agency's interpretation is not "arbitrary, capricious, or manifestly contrary to the statute."<sup>39</sup> In other words, the agency's interpretation does not have to be the best choice out there; instead it just needs to meet a low threshold of "reasonableness" under the circumstances.

The impact of *Chevron* deference on the field of administrative law is well-recognized and long-lasting. One commentator noted:

Since its publication, *Chevron* has been the controlling case in the area of judicial deference to administrative interpretations and rules. The decision has become the basis for any evaluation of the allocation of authority among administrative agencies, the federal courts, and state courts. *Chevron* essentially proclaimed that when the plain words of a statute are ambiguous, it is the sole province of the administrative agency responsible for overseeing the implementation of that statute to determine precisely what the law says.<sup>40</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> The Supreme Court's ruling in *Chevron*, 467 U.S. 837 (1984), marked the birth of the well-known *Chevron* deference.

<sup>39</sup> *Id.* at 844.

<sup>40</sup> A. Michael Nolan, *State Agency-Based v. Central Panel Jurisdictions: Is There a Deference?*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 15 (2009).



Therefore, *Chevron* represents a significant departure from the “case-by-case evaluation” approach adopted by pre-*Chevron* courts.<sup>41</sup> For instance, prior to *Chevron*, the Supreme Court ruled in *Skidmore* that an agency’s rulings, interpretations and opinions were not necessarily controlling.<sup>42</sup> *Chevron* makes it clear that reviewing courts are required to defer to the agency’s interpretation when it is reasonable.

### C. The Application of Chevron Deference

*Chevron* deference is based upon the notion that the agency to which Congress has delegated authority to administer the law is “often in the best position to interpret that scheme.”<sup>43</sup> In reaching its decision in *Chevron*, the Supreme Court relied upon “agency accountability and agency expertise to justify judicial deference to agency interpretations of regulations.”<sup>44</sup> Despite the clear principles established in *Chevron*, in the post-*Chevron* era, the Court has not applied *Chevron* deference to all agency interpretations of statutes.

#### 1. Limitations on the *Chevron* Framework

As mentioned earlier, in *Chevron*, the Supreme Court deferred to the EPA’s interpretation contained in CAA, a legislative regulation.<sup>45</sup> Legislative rules are established through Congress’s grant of power to agencies, which have the binding effects of statutes.<sup>46</sup> These legislative rules are different from interpretive

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<sup>41</sup> See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 971 (1992) (“*Chevron* is widely understood to mark a significant transformation in the Supreme Court’s jurisprudence of deference”); see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453–55 (1989) (concluding that the establishment of *Chevron* deference “announced the end of judicial vacillation between two principal interpretive models”).

<sup>42</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>43</sup> *Weaver & Schweitzer*, *supra* note 6, at 419.

<sup>44</sup> Jonathon T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 100–01 (2000).

<sup>45</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 840 (1984).

<sup>46</sup> Yavelberg, *supra* note 23, at 167–68; see also Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 2 ADMIN. L. REV. 547 (2000).

rules, which are made by agencies without Congress's grant of power.<sup>47</sup> "An agency may issue [interpretive rules] in a variety of formats, including manuals, policy statements, staff instructions, opinion letters, audits, correspondence, guidelines, press releases, and internal memoranda."<sup>48</sup>

In addition to mandating deference to agency interpretations of legislative rules, the Supreme Court has also at times given *Chevron* deference to non-legislative rules. For instance, in *Auer v. Robbins*, the Court granted deference to the Secretary of Labor's interpretation contained in the form of a legal brief.<sup>49</sup> Justice Scalia, writing for a unanimous court, noted that this format did not, "in the circumstances of this case, make it unworthy of deference."<sup>50</sup> More specifically, in *Auer*, police sergeants sued city board of police commissioners under the FLSA for overtime wage benefits.<sup>51</sup> The city board responded that the plaintiffs were not entitled to such pay because of their exempt status.<sup>52</sup> Under regulations promulgated by the Secretary of Labor, one requirement for exempt status was that the employee earned a specified minimum amount on a salary basis, rather than an hourly rate.<sup>53</sup> The Court held that the Secretary's interpretation of the salary-based test was entitled to *Chevron* deference because it was a permissible reading of its own regulation.<sup>54</sup>

In contrast, in *Christensen v. Harris County*, the Supreme Court ruled against the validity of an opinion letter when deciding whether the letter, promulgated by the agency to interpret a regulation, was entitled to *Chevron* deference.<sup>55</sup> In *Christensen*, Harris County wrote to the Department of Labor's Wage and Hour Division, asking whether it could require its employees to schedule time off in order to reduce the amount of accrued compensatory

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<sup>47</sup> Yavelberg, *supra* note 23, at 167–68.

<sup>48</sup> Fiola, *supra* note 24, at 160; *see also* Yavelberg, *supra* note 23, at 168.

<sup>49</sup> *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 455.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 462–63.

<sup>55</sup> *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000).

time.<sup>56</sup> The Acting Administrator of the Division gave his reply to the county's inquiry in an opinion letter.<sup>57</sup>

Distinguishing *Christensen* from *Auer*, in which the Court held that the agency's interpretation of its own regulation contained in a legal brief was entitled to deference,<sup>58</sup> Justice Thomas noted in his majority opinion:

*Auer* deference is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.<sup>59</sup>

Furthermore, regarding the application of *Chevron* deference to informal agency interpretive formats such as interpretive rules or opinion letters, the Court, providing some guidance to reviewing courts, explained:

Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.<sup>60</sup>

Shortly after *Christensen*, in *United States v. Mead Corp.*, another important decision, the Supreme Court found the opportunity again to carve out more exceptions to the application of *Chevron* deference, further limiting an agency's rulemaking power.<sup>61</sup> In

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<sup>56</sup> *Id.* at 580.

<sup>57</sup> *Id.* at 580–81.

<sup>58</sup> *Id.* at 588.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 587.

<sup>61</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

*Mead*, the Mead Corporation (Mead) imported “day planners.”<sup>62</sup> In January 1993, the United States Customs Service (Customs) issued a ruling letter changing its classification of Mead’s day planners from an “other” category to “[d]iaries . . ., bound” category, subject to different tariff schedules.<sup>63</sup>

The *Mead* Court thus confronted the issue concerning whether a tariff classification change in the form of a ruling letter was entitled to *Chevron* deference.<sup>64</sup> Taking into consideration the limits of *Chevron* deference on agency interpretations, the Court stated:

We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.<sup>65</sup>

Ruling letters, as the Court noted, “respond to transactions of the moment . . . are not subject to notice and comment before being issued, [and] may be published but need only be made ‘available for public inspection.’”<sup>66</sup> Thus the Court held that the Customs’ ruling failed to qualify for *Chevron* deference because it fell far short of the notice-and-comment process.<sup>67</sup> Yet where *Chevron* deference is inapplicable, reasonable agency interpretations will be considered as persuasive under the Court’s ruling in *Skidmore*.<sup>68</sup> Furthermore, the Court acknowledged that Customs could “bring the benefit of specialized experience to bear on the subtle questions in this case.”<sup>69</sup>

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<sup>62</sup> *Id.* at 224.

<sup>63</sup> *Id.* at 224–25.

<sup>64</sup> *Id.* at 221.

<sup>65</sup> *Id.* at 226–27.

<sup>66</sup> *Id.* at 223 (quoting 19 U.S.C. § 1625(a) (2000)).

<sup>67</sup> *Id.* at 231.

<sup>68</sup> *Id.* at 234–35.

<sup>69</sup> *Id.* at 235.

Finally, the Court noted that “[s]uch a ruling may surely claim the merit of its writer’s thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.”<sup>70</sup>

Based on our analyses of the post-*Chevron* Court rulings in *Auer*, *Christensen*, and *Mead*, we can conclude that *Chevron* deference is applicable when the agency makes a formal adjudication, when it follows rulemaking proceedings by providing notice and an opportunity for individuals or groups to make comments, or when it exercises some other comparable implementations of law-making authority. On the other hand, where *Chevron* deference is not applicable, the agency interpretations might nevertheless be considered persuasive by reviewing courts under the principles of “thoroughness,” “validity,” and “consistency” established in *Skidmore*.<sup>71</sup>

## 2. The Controversy over “*Chevron* Step Zero”

The initial inquiry into whether the *Chevron* framework applies at all has been referred to as “*Chevron* Step Zero.”<sup>72</sup> As analyzed above, in *Auer*, *Christensen*, and *Mead*, the Supreme Court considered whether *Chevron* deference applied to agencies’ interpretations depending on what types of procedures and actions those agencies took.<sup>73</sup> In other words, the binding effect and authoritativeness of a procedure was among the factors relevant to whether a decision carried the force of law.<sup>74</sup> The real concern behind the Court’s considerations focused upon whether Congress

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<sup>70</sup> *Id.*

<sup>71</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>72</sup> Thomas W. Merrill and Kristin E. Hickman used the term “step zero” in 2001 in *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001) (“Together, these principles comprise what might be called ‘step zero’ in the *Chevron* doctrine: the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to the *Skidmore* framework or deciding the interpretational issue de novo.”).

<sup>73</sup> See also *Gonzales v. Oregon*, 546 U.S. 243 (2006) (ruling that *Chevron* deference does not apply to the Attorney General’s interpretation because there is no general grant of rulemaking power to the Attorney General).

<sup>74</sup> See Mary Holper, *Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1263–72 (2011).

had made an implicit delegation of interpretive authority to an agency.<sup>75</sup>

The Court's consideration of an agency's choice of procedures constitutes only one aspect of the "*Chevron* Step Zero" inquiry. Another important aspect of the inquiry is whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction. Before the Court decided the issue in *City of Arlington*, the circuit courts had adopted different approaches in answering the question.<sup>76</sup>

Besides those circuits that decided not take a position,<sup>77</sup> two opposing views existed on the issue. More specifically, one group of circuits had applied *Chevron* deference to disputes over the scope of an agency's jurisdiction. In *Puerto Rico Maritime Shipping Authority v. Valley Freight Systems, Inc.*, for instance, the Third Circuit held, "When Congress has not directly and unambiguously addressed the precise question at issue, a court must accept the interpretation set forth by the agency so long as it is a reasonable one . . . . This rule of deference is fully applicable to an agency's interpretation of its own jurisdiction."<sup>78</sup> Similarly, in *Hydro Resources, Inc. v. EPA*, the Tenth Circuit concluded that courts should "afford considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care, . . . including statutory ambiguities affecting the agency's jurisdiction . . . ."<sup>79</sup>

The other group of circuits refused to apply the *Chevron* framework to an agency's determination of its own statutory

<sup>75</sup> See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 207–20 (naming the three cases *Christensen*, *Mead*, and *Barnhart v. Walton*, 535 U.S. 212 (2002), a "Step Zero" trilogy where the Court attempted to sort out the applicability of the *Chevron* framework).

<sup>76</sup> See *City of Arlington v. FCC*, 668 F.3d 229, 248 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013) (noting that there was a circuit split on the issue); *Pruidze v. Holder*, 632 F.3d 234, 237 (6th Cir. 2011) (observing that the question remained to be resolved over whether *Chevron* applies to disputes concerning the agency's scope of jurisdiction).

<sup>77</sup> See *Pruidze*, 632 F.3d at 237; see also *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996) (leaving the question open); *City of Arlington*, 668 F.3d at 248 ("[S]ome circuits have thus far avoided taking a position.").

<sup>78</sup> *P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988) (citation omitted).

<sup>79</sup> *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145–46 (10th Cir. 2010) (en banc) (citations omitted).

jurisdiction. For example, in *Bolton v. Merit Systems Protection Board*, the Federal Circuit reviewed an agency's legal conclusion regarding the scope of its own jurisdiction and did not apply *Chevron* deference to the agency's own determination.<sup>80</sup> In *Northern Illinois Steel Supply Co. v. Secretary of Labor*, the Seventh Circuit reached a similar conclusion, holding that courts should conduct *de novo* review on an agency's interpretation of its own scope of jurisdiction.<sup>81</sup>

In view of such a circuit split, in *City of Arlington*, the Court sought to resolve the disputes and determine whether a court should apply *Chevron* deference to an agency's interpretation of its jurisdiction under a particular law when that interpretation is called into question. This represented the Court's further effort to resolve the controversy over "*Chevron* Step Zero," and to explore the limitations and boundaries of *Chevron* deference concerning the doctrine's application. Whether questions regarding an agency's "jurisdiction" were somewhat special was the principal inquiry underlying the Court's opinion.

### III. FACTS AND THE PROCEDURAL HISTORY OF *CITY OF ARLINGTON*

#### A. *Facts*

##### 1. The Wireless Association's Petition to the FCC

On July 11, 2008, CTIA—The Wireless Association (CTIA),<sup>82</sup> which represents wireless service providers, filed a petition requesting that the Federal Communications Commission (FCC) issue a Declaratory Ruling clarifying provisions in Section 332(c)(7) of the Communications Act of 1934, as amended (Communications Act), regarding state and local review of wireless facility siting

<sup>80</sup> *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998).

<sup>81</sup> *N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 846–47 (7th Cir. 2002).

<sup>82</sup> When the organization was founded in 1984, it was known as the Cellular Telecommunications Industry Association. "In 2000, CTIA merged with the Wireless Data Forum and became the Cellular Telecommunications & Internet Association." Amy Storey, *Is CTIA an Acronym?*, CTIA—WIRELESS ASS'N BLOG (June 1, 2009), <http://blog.ctia.org/2009/06/01/is-ctia-an-acronym/#>.

applications.<sup>83</sup> The petition alleged that ambiguities in the statute had made it possible for local governments to obstruct the placement and construction of wireless facilities, harming consumers' access to wireless services.<sup>84</sup>

In particular, CTIA petitioned the FCC to clarify the meaning of Section 332(c)(7)(B)(ii)'s requirement that zoning authorities act on siting requests "within a reasonable period of time," and to "provide guidance on what constitutes a 'failure to act' for purposes of [Section] 332(c)(7)(B)(v)."<sup>85</sup> The FCC was asked to specify "the time periods within which a state or locality must act on wireless facility siting applications."<sup>86</sup> Furthermore, CTIA suggested to the FCC that a local government has failed to act if there is no final action "within 45 days from the submission of a wireless facility application and within 75 days from submission of other wireless siting facility applications."<sup>87</sup>

## 2. The Communications Act of 1934: Section 332(c)(7)

Wireless telecommunications networks need towers and antennas; local zoning authorities are required to process and approve siting facility applications for those towers and antennas.<sup>88</sup> In the 1996 Telecommunications Act, "Congress 'impose[d] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities,'" and amended the 1934 Communications Act by incorporating those limitations and adding Section 332(c)(7).<sup>89</sup> In addition, in Section 201(b) of the Communications Act, Congress granted rule-making authority to the FCC; the agency can "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions."<sup>90</sup> There is no dispute that the FCC's

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<sup>83</sup> *City of Arlington v. FCC*, 668 F.3d 229, 233–34 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

<sup>84</sup> *Id.* at 234.

<sup>85</sup> *Id.* at 234–35; 47 U.S.C. § 332(c)(7) (2012).

<sup>86</sup> *City of Arlington*, 668 F.3d at 234–35.

<sup>87</sup> *Id.*

<sup>88</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1866 (2013).

<sup>89</sup> *Id.* (citing *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005)).

<sup>90</sup> 47 U.S.C. § 201(b); *see also City of Arlington*, 133 S. Ct. at 1866.



power in administering the law extends to the subsequently added provisions of the Communications Act.<sup>91</sup>

Section 332(c)(7) was added to the Communications Act for the purpose of balancing two competing interests: on one hand, Congress desires to “preserve the traditional role of state and local governments in regulating land use and zoning”;<sup>92</sup> on the other hand, Congress is interested in promoting “the rapid development of new telecommunications technologies by removing the ability of state and local governments to impede the construction and modification of wireless communications facilities through delay or irrational decision-making.”<sup>93</sup>

Section 332(c)(7) of the Communications Act is titled “Preservation of Local Zoning Authority,” which addresses “the authority of a State or local government . . . over decisions regarding placement, construction, and modification of personal wireless service facilities.”<sup>94</sup> Subsection (A) is known as the “saving clause,” stating that nothing in the Communications Act limits such authority except as provided in Section 332(c)(7).<sup>95</sup> Subsection (B) identifies five such limitations, and only one of them, Section 332(c)(7)(B)(ii), was at issue in *City of Arlington*. That provision mandates that state or local governments act on wireless siting applications “within a reasonable period of time after the request is duly filed.”<sup>96</sup> If the state or local governments fail to act, Section 332(c)(7)(B)(v) permits the applicant adversely affected to “commence an action in any court of competent jurisdiction” within thirty days after failure to act.<sup>97</sup>

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<sup>91</sup> *City of Arlington*, 133 S. Ct. at 1866.

<sup>92</sup> *City of Arlington*, 668 F.3d at 234.

<sup>93</sup> *Id.*; see also *City of Rancho Palos Verdes*, 544 U.S. at 115; *T-Mobile, Cent., LLC v. Unified Gov’t of Wyandotte Cnty.*, 546 F.3d 1299, 1306 (10th Cir. 2008).

<sup>94</sup> 47 U.S.C. § 332(c)(7).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

## B. Procedural History

### 1. The FCC's Declaratory Ruling

After receiving CTIA's petition, the Wireless Telecommunications Bureau<sup>98</sup> (WTB) issued a public notice requesting comments.<sup>99</sup> It was reported that the FCC received hundreds of comments from wireless service providers, local zoning authorities, and other interested parties.<sup>100</sup> Industry commentators supported the petition, arguing that the FCC had the power to interpret Section 332(c)(7) and that the FCC's clarification of the reasonable time frames would promote the development of advanced wireless networks.<sup>101</sup> In contrast, state and local governments opposed the petition, contending that Congress gave the authority to courts, not the FCC, to determine what was "a reasonable period of time" and when a "failure to act" had occurred.<sup>102</sup>

In its declaratory ruling released on November 18, 2009, the FCC agreed with the wireless providers, holding that it had the authority to interpret Section 332(c)(7).<sup>103</sup> The FCC identified four statutory sources from which it received its jurisdiction power.<sup>104</sup> First, it contended that Section 1 of the Communications Act directed the FCC to "execute and enforce the provisions of the Act" in order to regulate the national wireless services.<sup>105</sup> Second, the FCC argued that Section 201(b) of the Act delegated power to the FCC because the agency could "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."<sup>106</sup> Third, the FCC relied upon Section 303(r) of the Communications Act, which provides that "the [FCC] from time to

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<sup>98</sup> WTB is a division of FCC that "regulates domestic wireless telecommunications programs and policies, including licensing." It also "implements competitive bidding for spectrum auctions and regulates wireless communication services." FEDERAL COMMUNICATIONS COMMISSION, <http://www.fcc.gov/bureaus-offices> (last visited Jan. 4 2013).

<sup>99</sup> 24 FCC Rcd. 13994, 13997-98 (2009).

<sup>100</sup> *Id.* at 13998.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 14001.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> 47 U.S.C. § 201(b) (2012); *see also* 24 FCC Rcd. at 14001.

time, as public convenience, interest or necessity requires shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.”<sup>107</sup> Finally, the FCC argued that Congress granted authority to the agency in Section 4(i) of the Communications Act, which states that the FCC “may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions.”<sup>108</sup>

In addition to relying on these statutory grants of power, the FCC also pointed out that the Sixth Circuit, in deciding *Alliance for Community Media v. FCC*,<sup>109</sup> held that the FCC possessed “clear jurisdiction authority to formulate rules and regulations interpreting the contours of section 621(a)(1)” according to its authority under Section 201(b) to administer the provisions of the Communications Act.<sup>110</sup> Furthermore, the FCC highlighted the Sixth Circuit’s reasoning that “the statutory silence in section 621(a)(1) regarding the agency’s rulemaking power does not divest the agency of its express authority to prescribe rules interpreting that provision.”<sup>111</sup>

Disagreeing with the state and local zoning authorities’ contention that the FCC’s interpretation imposed “new” limitations on state and local governments, the FCC stated, “Our interpretation of Section 332(c)(7) is not the imposition of new limitations, as it merely interprets the limits Congress already imposed on State and local governments.”<sup>112</sup> Moreover, the FCC insisted that Section 332(c)(7)(B)(v), the judicial review provision, did not by itself prohibit the agency from interpreting the provisions of the Communications Act.<sup>113</sup>

Dissatisfied with the FCC’s ruling, several interested governmental entities filed another petition to the FCC for reconsideration, requesting the agency to stay its ruling pending review and any judicial appeals.<sup>114</sup> In its Reconsideration Order

<sup>107</sup> 47 U.S.C. § 303(r); *see also* 24 FCC Rcd. at 14001.

<sup>108</sup> 47 U.S.C. § 154(i); *see also* 24 FCC Rcd. at 14001.

<sup>109</sup> *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

<sup>110</sup> *Id.* at 773–74; *see also* 24 FCC Rcd. at 14002.

<sup>111</sup> *Alliance for Cmty. Media*, 529 F.3d at 774; *see also* 24 FCC Rcd. at 14002.

<sup>112</sup> 24 FCC Rcd. at 14002.

<sup>113</sup> *Id.* at 14002–03.

<sup>114</sup> *City of Arlington v. FCC*, 668 F.3d 229, 248 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

released on January 29, 2010, the FCC denied the stay request and reaffirmed its declaratory ruling.<sup>115</sup>

## 2. The Fifth Circuit's Ruling

Before the Reconsideration Order was issued, the cities of Arlington and San Antonio, Texas, filed a petition in the Court of Appeals for the Fifth Circuit for review of the FCC's declaratory ruling.<sup>116</sup> In response to the cities' contention that the FCC violated the Administrative Procedure Act's<sup>117</sup> (APA) notice-and-comment requirements for rulemaking, the Fifth Circuit sided with the FCC, holding that the agency's declaratory ruling was the product of adjudication, not rulemaking.<sup>118</sup> Despite the fact that "agencies enjoy broad discretion in choosing whether to establish a rule through adjudication or rulemaking," the Fifth Circuit emphasized that the APA still requires courts to review agencies' actions to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>119</sup> After reviewing the records, the Fifth Circuit concluded that "any error in the FCC's choice to establish the time frames in the Declaratory Ruling instead of through notice-and-comment rulemaking was plainly harmless" because the cities received notice of the issues and more than sixty governmental entities had the opportunity to submit their comments.<sup>120</sup>

Furthermore, the Fifth Circuit acknowledged that the *Chevron* two-step standard of review applies only when an agency's interpretation of a statute is made within its jurisdiction; otherwise *Chevron* deference does not apply.<sup>121</sup> The principal issue presented to the Fifth Circuit, therefore, was whether *Chevron* deference applied in determining the scope of the FCC's statutory authority where the agency had been charged by Congress to administer

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<sup>115</sup> 25 FCC Rcd. 1215, 1217–18 (2010).

<sup>116</sup> *City of Arlington*, 668 F.3d at 236.

<sup>117</sup> For details on the APA, see 5 U.S.C. § 553 (2012), available at <http://www.archives.gov/federal-register/laws/administrative-procedure/553.html> (last visited Jan. 5, 2014).

<sup>118</sup> *City of Arlington*, 668 F.3d at 239–41.

<sup>119</sup> *Id.* at 241; see also *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000); 5 U.S.C. § 706(2)(A) (2012).

<sup>120</sup> *City of Arlington*, 668 F.3d at 245.

<sup>121</sup> *Id.* at 247–48.

Subsections 332(c)(7)(B)(ii) and (v), and it had decided to adopt the 90- and 150-day time frames.<sup>122</sup> The FCC insisted that “an agency’s interpretation of its own statutory authority is subject to review under *Chevron*.”<sup>123</sup> The cities, on the other hand, contended that the court should conduct a *de novo* review because the issue presented a “a pre-*Chevron* question of law.”<sup>124</sup>

The Fifth Circuit was well aware of the circuit split on the issue, and eventually sided with those sister circuits that decided to apply the *Chevron* two-step standard of review to an agency’s interpretation of its own statutory jurisdiction.<sup>125</sup> Therefore, in determining whether the FCC possessed the authority to establish the time frames, the Fifth Circuit first considered whether Congress had “directly spoken in a manner that reveal[ed] its expressed intent.”<sup>126</sup> After analyzing the statute, the court concluded that Congress was silent regarding Section 332(c)(7)(A)’s effect on the FCC’s power to implement the limitations in Section 332(c)(7)(B).<sup>127</sup> Furthermore, the Fifth Circuit reasoned that Section 332(c)(7)(B)(v), the courts’ jurisdiction review provision, did not resolve the ambiguity.<sup>128</sup>

After its determination of *Chevron* step-one, the Fifth Circuit proceeded to a *Chevron* step-two analysis where courts must defer to an agency’s interpretation if it is a reasonable construction of the law.<sup>129</sup> The Fifth Circuit found the cities’ arguments unconvincing that Section 332(c)(7)’s legislative history contradicted the FCC’s reading of the statute, that the FCC’s interpretation of Section 332(c)(7)(B)’s limitations preempted a power traditionally exercised by state and local governments, and that the FCC’s exercise of authority conflicted with “the FCC’s own longstanding interpretation of its jurisdiction.”<sup>130</sup> In conclusion, the Fifth Circuit held that courts must defer to the FCC’s interpretation regarding the agency’s exercise of authority in interpreting Subsections 332(c)(7)(B)(ii) and (v).<sup>131</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 248.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 248–49.

<sup>127</sup> *Id.* at 252.

<sup>128</sup> *Id.* at 250–52.

<sup>129</sup> *Id.* at 252.

<sup>130</sup> *Id.* at 252–54.

<sup>131</sup> *Id.* at 254.

On October 5, 2012, the Supreme Court granted the cities' petition for writ of certiorari as to the first question presented: "Whether, contrary to the decisions of at least two other circuits, and in light of this Court's guidance, a court should apply *Chevron* to review an agency's determination of its own jurisdiction."<sup>132</sup> The case was argued on January 16, 2013, and on May 20, 2013, the Court delivered a divided opinion.

#### IV. ANALYSIS OF THE COURT'S OPINION

##### A. *Justice Scalia's Majority Opinion*

Justice Scalia delivered the Court's opinion,<sup>133</sup> which affirmed the Fifth Circuit's decision, holding that courts must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's jurisdiction.<sup>134</sup> Accordingly, *Chevron* deference applied to the FCC's declaratory ruling regarding the scope of its jurisdictional power.<sup>135</sup>

Justice Scalia began his majority opinion by highlighting the canonical formulation of the *Chevron* framework in a court's review of an agency's construction of the statute that it is charged to administer.<sup>136</sup> He pointed out that the background presumption that *Chevron* deference relies upon is congressional intent.<sup>137</sup> When Congress left a statute ambiguous, Justice Scalia explained that it "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."<sup>138</sup> Thus, for the majority, *Chevron* constituted a stable rule where

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<sup>132</sup> See *City of Arlington, Tx v. FCC*, OYEZ, [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_1545](http://www.oyez.org/cases/2010-2019/2012/2012_11_1545) (last visited Jan. 10, 2014). Brief for Petitioner, at i, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545), 2012 WL 2516693. A total of one hour was allotted for oral argument, which took place on January 16, 2013.

<sup>133</sup> Justices Thomas, Ginsburg, Sotomayor, and Kagan joined Justice Scalia's majority opinion.

<sup>134</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1866-75 (2013).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1868.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (citing *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996)).

“[s]tatutory ambiguities [would] be resolved, within the bounds of reasonable interpretation, not by the courts, but by the administering agency.”<sup>139</sup>

### 1. False Dichotomy Between “Jurisdictional” and “Nonjurisdictional” Interpretations

Justice Scalia stated that the so-called *Chevron* “step-zero” question regarding whether *Chevron* deference applied to an agency’s interpretation of its scope of authority rested on the premise that there existed two distinct classes of agency interpretations. In his words, “Some interpretations—the big, important ones, presumably—define the agency’s ‘jurisdiction’” whereas “[o]thers—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has.”<sup>140</sup>

Declaring the falsity of this premise, Justice Scalia emphasized that there was no meaningful distinction between “jurisdictional” and “nonjurisdictional” interpretations, and any distinction would merely be “a mirage.”<sup>141</sup> Interestingly, even though the Court granted writ of certiorari to consider whether *Chevron* deference applied to an agency’s “jurisdictional” interpretation, the majority refused to recognize the existence of any meaningful category of “jurisdictional” questions. As Justice Scalia concluded, “No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*”<sup>142</sup>

The majority contemplated that the misconception about the distinction between “jurisdictional” and “nonjurisdictional” interpretations derived “from a reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to courts.”<sup>143</sup> Whereas there is a meaningful distinction in the judicial context, Justice Scalia stated, “That is not so for agencies charged with administering congressional statutes.”<sup>144</sup>

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<sup>139</sup> *Id.*; see also *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

<sup>140</sup> *City of Arlington*, 133 S. Ct. at 1868.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1869.

The explanation for the difference is that Congress not only delegates powers to the agencies but also prescribes rules on how they are to act.<sup>145</sup> Therefore when agencies “act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.”<sup>146</sup>

## 2. Dangers of Labeling Interpretations “Jurisdictional”

The majority used a hypothetical statute, the “Common Carrier Act,” to illustrate the impossibility of, or rather the meaninglessness in, separating jurisdictional interpretations from nonjurisdictional interpretations.<sup>147</sup> The danger of labeling an

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* at 1869–70. Justice Scalia gave two formulations of the imaginary statute “Common Carrier Act.” *Id.* In the first version, the Act contains only one section: “The Agency shall have jurisdiction to prohibit any common carrier from imposing an unreasonable condition upon access to its facilities.” *Id.* at 1869. Justice Scalia noted that the terms “common carrier” and “unreasonable condition” both define the Agency’s jurisdiction. *Id.* Under the petitioner’s proposition, courts must apply the de novo standard of review to determine the scope of that jurisdiction. *Id.*

In the second version, Justice Scalia formulated the Act slightly differently:

SECTION 1. No common carrier shall impose an unreasonable condition upon access to its facilities.

SECTION 2. The Agency may prescribe rules and regulations necessary in the public interest to effectuate Section 1 of this Act.

*Id.*

According to Justice Scalia, since Congress makes it clear that the agency has such power to interpret the statute for implementation, *Chevron* deference applies under the petitioner’s theory and courts must defer to the Agency’s interpretation of the terms “common carrier” and “unreasonable condition.”

*Id.*

Through such a comparison, Justice Scalia questioned the soundness of the petitioner’s argument. *Id.* at 1869–70. He wrote:

In the first case, by contrast, petitioner’s theory would accord the agency no deference. The trouble with this is that in both cases, the underlying question is *exactly the same*: Does the statute give the agency authority to regulate Internet Service Providers and cap prices, or not? The reality, laid bare, is that there is *no difference*, insofar as the validity of agency action is concerned, between an agency’s exceeding the scope of its



agency’s interpretation “jurisdictional,” cautioned Justice Scalia, was that it would become “an empty distraction” as “every new application of a broad statutory term can be reframed as a questionable extension of the agency’s jurisdiction.”<sup>148</sup> Furthermore, Justice Scalia warned that it would be a waste of time for judges to do the “mental acrobatics” in making distinctions between jurisdictional and nonjurisdictional questions in order to decide whether *Chevron* deference applies.<sup>149</sup>

The majority went back to the case law, identifying a number of examples in the Court’s jurisprudence to further support and strengthen its position.<sup>150</sup> By creating a false dichotomy between “jurisdictional” and “nonjurisdictional” agency interpretations,<sup>151</sup> the Court cautioned that the ultimate target was *Chevron* itself.<sup>152</sup> In Justice Scalia’s words, “Like the Hound of the Baskervilles, it [was] conjured by those with greater quarry in sight.”<sup>153</sup> The consequence would be a transfer of “any number of interpretive decisions—archetypal *Chevron* questions” from the agencies that implement the

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authority (its “jurisdiction”) and its exceeding authorized application of authority that it questionably has.

*Id.*

<sup>148</sup> *Id.* at 1870. One of the briefs supporting the petitioners explained that “[j]urisdictional questions concern the *who*, *what*, *where*, and *when* of regulatory power: which subject matters may an agency regulate and under what conditions.” *See id.* Justice Scalia noted that all of these so-called “jurisdictional” questions can be “reframed as questions about the scope of the agencies’ regulatory jurisdiction—and they are all questions to which the *Chevron* framework applies.”

*Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See id.* at 1871–72. The cases that Justice Scalia listed include *United States v. Eurodif S.A.*, 555 U.S. 305 (2009), *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), *Chemical Manufacturers Ass’n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985), and *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

<sup>151</sup> *City of Arlington*, 133 S. Ct. at 1872 (“The false dichotomy between ‘jurisdictional’ and ‘nonjurisdictional’ agency interpretations may be no more than a bogeyman, but it is dangerous all the same.”).

<sup>152</sup> *Id.* at 1872–73.

<sup>153</sup> *Id.* (“Savvy challengers of agency action would play the ‘jurisdictional’ card in every case. . . . Some judges would be deceived by the specious, but scary-sounding, ‘jurisdictional’-‘nonjurisdictional’ line; others tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands.”).

statutes to federal courts regarding “how best to construe an ambiguous term in light of competing policy interests.”<sup>154</sup> Justice Scalia thus warned that judges should not take away the rule-making power that belonged to the agencies, a constitutional concern that the *Chevron* framework intended to address.<sup>155</sup>

### 3. Response to Federalism and Agency Power

Rejecting the cities’ contention that the FCC asserted jurisdiction over matters of traditional state and local concern, Justice Scalia stated, “this case has nothing to do with federalism.”<sup>156</sup> Section 332(c)(7)(B)(ii) of the Communications Act, as observed by Justice Scalia, required the local zoning authorities to make decisions about siting applications “within a reasonable period of time,” which served as proof that the ambiguity in the statute was “indisputably a question of federal law.”<sup>157</sup> Again, the majority warned that the federalism argument was mainly used as a disguise and the real target was *Chevron* deference.<sup>158</sup>

In response to the dissenting opinion, the majority stated that the dissent neither put up any defense for the “jurisdictional-nonjurisdictional” line<sup>159</sup> nor identified any case where “a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency’s substantive field.”<sup>160</sup> The majority

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<sup>154</sup> *Id.* at 1873.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Justice Scalia wrote, “We rejected a similar faux-federalism argument in the *Iowa Utilities Board* case, in terms that apply equally here: ‘This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.’” *Id.*; see also *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

<sup>159</sup> *City of Arlington*, 133 S. Ct. at 1873–74 (“Perhaps sensing the incoherence of the ‘jurisdictional-nonjurisdictional’ line, the dissent does not even attempt to defend it . . . but proposes a much broader scope for *de novo* judicial review.”).

<sup>160</sup> *Id.* at 1874. The dissent identified *Mead* to support its proposition that “for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted.” *Id.* Justice Scalia stated that he did not dispute that, but he emphasized, “*Mead* denied

rejected the dissent's view that, before applying *Chevron* deference, courts must conduct a *de novo* review on each particular issue even when the agency's general rulemaking power is clear.<sup>161</sup> The consequence of this rule, Justice Scalia warned, was that it would "render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*."<sup>162</sup> Finally, the majority was unconvinced that applying *Chevron* to jurisdictional interpretations would "[leave] the fox in charge of the henhouse," because such a distinction does not exist, and *Chevron* deference is sufficient to ensure that an agency does not exceed its power when interpreting ambiguous terms contained in the statute.<sup>163</sup>

### B. Justice Breyer's Concurring Opinion

Justice Breyer agreed with the majority of the Court that there is no meaningful distinction between jurisdictional and nonjurisdictional interpretations and the question that courts normally confront, which is "simply, *whether the agency has stayed within the bounds of its statutory authority*."<sup>164</sup> He cautioned, however, that it is not always easy to decide the statutory bounds under the *Chevron* framework.<sup>165</sup> He further emphasized that "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill" because "other, and sometimes context-specific, factors" can affect the application of *Chevron*.<sup>166</sup>

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*Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking." *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* ("The excessive agency power that the dissent fears would be replaced by chaos. There is no need to wade into these murky waters.")

<sup>163</sup> *Id.* ("The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decisionmaking that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority.")

<sup>164</sup> *Id.* at 1875 (Breyer, J., concurring).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* The relevant factors that Justice Breyer identified include "[t]he subject matter of the relevant provision," "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction," and "[s]tatutory purposes, including those revealed in part by legislative and regulatory history." *Id.* at 1875–76.

After considering a variety of factors in *City of Arlington*, Justice Breyer was satisfied with the application of the *Chevron* formula to the FCC's interpretation, affirming that *Chevron* was "a workable way to approximate how Congress would likely have meant to allocate interpretive law-determining authority between reviewing court and agency."<sup>167</sup> Rejecting the cities' arguments about the "saving clause" and the "judicial review provision," Justice Breyer concurred with the majority to rule in favor of the FCC, which, he declared, had the authority under the circumstances to fill the gap left by Congress through the application of *Chevron* deference.<sup>168</sup>

### C. Chief Justice Roberts's Dissenting Opinion

Joined by Justices Kennedy and Alito, Chief Justice Roberts delivered the dissenting opinion, declaring at the very beginning that "[m]y disagreement with the Court is fundamental."<sup>169</sup> Refusing to apply *Chevron* deference to the "jurisdictional" question, the dissent stated that a court must determine for itself that Congress has delegated power to an agency before the agency can issue any interpretations with the force of law.<sup>170</sup> In its *City of Arlington* ruling, although the Fifth Circuit "correctly recognized that it could not apply *Chevron* deference to the FCC's interpretation unless the agency 'possessed statutory authority to administer Section 332(c)(7)(B)(ii),' " the dissent concluded that the Fifth Circuit decided incorrectly by granting *Chevron* deference to the FCC's view on the "jurisdictional" question.<sup>171</sup>

The dissent was deeply concerned about the growing power possessed by administrative agencies.<sup>172</sup> Even though these agencies belong to the executive branch, in practice they exercise all three powers: legislative, executive, and judicial.<sup>173</sup> Furthermore, federal

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<sup>167</sup> *Id.* at 1876.

<sup>168</sup> *Id.* at 1876–77.

<sup>169</sup> *Id.* at 1877 (Roberts, C.J., dissenting).

<sup>170</sup> *Id.* at 1877–86.

<sup>171</sup> *Id.* at 1886.

<sup>172</sup> *Id.* at 1877–80.

<sup>173</sup> *Id.* at 1877–78 ("Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by

bureaucracy continues to expand and more new agencies have been created in recent years.<sup>174</sup> “[W]ith hundreds of federal agencies poking into every nook and cranny of daily life,” Chief Justice Roberts warned that presidential oversight would not always be an effective safeguard against the abuse of power by agencies.<sup>175</sup> In particular, Chief Justice Roberts noted that the FCC is “routinely described as the ‘headless fourth branch of government.’”<sup>176</sup>

Even though judicial oversight serves as another check on the power of administrative agencies, the dissent maintained that agencies enjoy broad power under *Chevron* deference to interpret ambiguous statutes over which Congress has delegated authority.<sup>177</sup> “It is against this background that we consider whether the authority of administrative agencies should be augmented even further,” Chief Justice Roberts stated, “to include not only broad power to give definitive answers to questions left to them by Congress, but also the same power to decide when Congress has given them that power.”<sup>178</sup>

The dissent disagreed with the majority’s reasoning that there was no meaningful distinction between “jurisdictional” and “nonjurisdictional” interpretations.<sup>179</sup> According to Chief Justice Roberts, the majority made its ruling based on the wrong argument:

The parties, *amici*, and court below too often use the term “jurisdiction” imprecisely, which leads the Court to misunderstand the argument it must confront. That argument is not that “there exist two distinct classes of agency interpretations,” some “big, important ones” that “define the agency’s ‘jurisdiction,’” and other “humdrum, run-of-the-mill” ones that “are simply applications of jurisdiction the agency plainly has.” The argument is instead that a court should not defer to an agency on whether Congress has granted the

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adjudicating enforcement actions and imposing sanctions on those found to have violated their rules.”).

<sup>174</sup> *Id.* at 1878.

<sup>175</sup> *Id.* at 1878–79.

<sup>176</sup> *Id.* at 1878.

<sup>177</sup> *Id.* at 1878–79.

<sup>178</sup> *Id.* at 1879.

<sup>179</sup> *Id.*

agency interpretive authority over the statutory ambiguity at issue.<sup>180</sup>

Whether or not it is called a “jurisdictional” question, the dissent emphasized that it is the duty of the judiciary department to say what the law is.<sup>181</sup> Before a court can apply the *Chevron* two-step analysis and defer to an agency’s interpretation when it is a permissible construction of the statute, the court must decide *de novo* whether the agency possesses the authority to interpret the ambiguity at issue.<sup>182</sup>

The dissent insisted that Congress’s delegation of general rule-making power to an agency is not sufficient to prove that the agency has power to interpret a specific provision of the statute by regulation.<sup>183</sup> Relying on a number of decisions in the Court’s jurisprudence,<sup>184</sup> the dissent emphasized that “[w]e have never faltered in our understanding of this straightforward principle, that whether a particular agency interpretation warrants *Chevron* deference turns on the court’s determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue.”<sup>185</sup> Thus the dissent rejected the FCC’s argument that it could exercise authority over the particular ambiguity at issue because Congress had delegated general power to the agency to administer the Communications Act.<sup>186</sup>

The dissent criticized the majority’s approach of line-drawing between “jurisdictional” interpretation and “nonjurisdictional” interpretation.<sup>187</sup> It noted that the type of “jurisdictional” question that the dissent emphasized would not be as difficult to distinguish as the type of “jurisdictional” question that the majority had identified.<sup>188</sup> To further expose the weaknesses of the majority’s

<sup>180</sup> *Id.* at 1879–80.

<sup>181</sup> *Id.* at 1880.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1880–81.

<sup>184</sup> *Id.* at 1880–83. The cases that Chief Justice Roberts listed include *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Gonzales v. Oregon*, 546 U.S. 243 (2006).

<sup>185</sup> *City of Arlington*, 133 S. Ct. at 1881.

<sup>186</sup> *Id.* at 1883–84.

<sup>187</sup> *Id.* at 1884 (“As the preceding analysis makes clear, I do not understand petitioners to ask the Court—nor do I think it necessary—to draw a ‘specious, but scary-sounding’ line between ‘big, important’ interpretations on the one hand and ‘humdrum, run-of-the-mill’ ones on the other.”).

<sup>188</sup> *See id.* at 1884.

reasoning, the dissent reused the majority's hypothetical "Common Carrier Act" to illustrate its point.<sup>189</sup> No matter how the "Common Carrier Act" is drafted, according to the dissent, courts always need to inquire "whether Congress has delegated to the agency authority to interpret the ambiguous terms, before affording the agency's interpretation *Chevron* deference."<sup>190</sup>

Furthermore, the dissent rejected the majority's concern and warning about the potential destabilization of the *Chevron* doctrine if courts are mandated to decide *de novo* the "jurisdiction" question regarding an agency's scope of power.<sup>191</sup> The dissent maintained that courts have never deferred and should never defer to agencies regarding whether Congress has authorized an agency to interpret the ambiguity in the statute.<sup>192</sup>

Finally, the dissent rejected the majority's view that it is "a judicial power-grab" if courts decide on their own whether an agency possesses the authority to interpret ambiguous terms, as those interpretations often carry the force of law.<sup>193</sup> Even though the majority's opinion "touches on a legitimate concern" under the constitutional structure of separation of powers, the dissent reminded the majority that "there is another concern at play, no less firmly rooted in our constitutional structure. That is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well."<sup>194</sup> In addition, the dissent emphasized, "Our [the judiciary's] duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive."<sup>195</sup>

In conclusion, *City of Arlington* has resolved, at least for now, the principal issue regarding the applicability of *Chevron* deference to an agency's interpretation of its own scope of authority. Interestingly, despite Justice Scalia's strong "anti-federalism bluster"<sup>196</sup> in his majority opinion that "this case has nothing to do

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<sup>189</sup> *See id.* at 1885.

<sup>190</sup> *Id.*

<sup>191</sup> *See id.* at 1185–86.

<sup>192</sup> *Id.* at 1885.

<sup>193</sup> *See id.* at 1885–86.

<sup>194</sup> *Id.* at 1886.

<sup>195</sup> *Id.*; *see also* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1428 (2012).

<sup>196</sup> Rick Hills, *How Did Scalia's Anti-Federalism Bluster in City of Arlington v. FCC Go Unnoticed by Six Justices?*, PRAWFSBLAWG (May 24, 2013, 11:35

with federalism,”<sup>197</sup> the dissent was silent on the issue and did not make any responses in its opinion.<sup>198</sup> As one commentator asked, “Were Justice Kennedy’s clerks asleep? Or did [the Justices] simply dismiss [the bluster] as dicta . . . ?”<sup>199</sup> The dissent’s “silence” on federalism is certainly a “mystery” left to everyone’s speculation.

## V. IMPACT OF THE COURT’S DECISION

### A. *The Judiciary’s Review of Administrative Agencies’ Rulemaking Power*

The majority and the dissent were arguing from two different angles about the appropriate power division between the judiciary and the executive when it comes to agencies’ interpretations of ambiguous terms of statutes as enacted by the legislative branch. It seems to be equally true, however, that they both were concerned about maintaining the stability of the constitutional structure and charting out the proper boundaries for the three separate yet overlapping powers.

*Marbury v. Madison* established that it is “emphatically the province and duty of the judicial department to say what the law is.”<sup>200</sup> The reason that the executive branch is not allowed to interpret statutory ambiguities is because “foxes are not permitted to guard henhouses”; that is to say, “those who are limited by law cannot decide on the scope of the limitation.”<sup>201</sup> Enacted in 1946, the APA is the basic charter that governs administrative agencies.<sup>202</sup> To limit agencies’ rule-making power, the APA provides that “the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions.”<sup>203</sup> Despite these governing principles, there were important contrary indications in the

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AM), <http://prawfsblawg.blogspot.com/2013/05/scalias-odd-view-of-federalism-in-city-of-arlington-v-fcc.html>.

<sup>197</sup> *City of Arlington*, 133 S. Ct. at 1873 (majority opinion).

<sup>198</sup> *See id.* at 1877–86 (Roberts, C.J., dissenting).

<sup>199</sup> Hills, *supra* note 196.

<sup>200</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>201</sup> Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L. J. 2580, 2584 (2006).

<sup>202</sup> *See* 5 U.S.C. §§ 551–557, 701–706 (2000); *see also* Sunstein, *supra* note 201, at 2585.

<sup>203</sup> 5 U.S.C. § 706.



Court's jurisprudence before *Chevron* where courts suggested that agency interpretations would be upheld if they were made on rational bases.<sup>204</sup>

The *Chevron* two-step inquiry that the Supreme Court established almost two decades ago officially acknowledged and confirmed the agencies' rule-making power, which mandates the reviewing court to defer to an agency's interpretation of statutory ambiguities if it is reasonable.<sup>205</sup> Yet in *Chevron*, as one commentator noted, the Court did not discuss *Marbury* or the governing provisions of APA; instead it put forward two "pragmatic" arguments: "judges lack expertise," and "they are not politically accountable."<sup>206</sup> More specifically, according to the Court, interpreting statutory ambiguities calls for technical expertise and political accountability, and therefore agencies have "conspicuous" advantages compared to courts.<sup>207</sup> Furthermore, agencies can act more promptly and effectively to adapt statutes than courts, as courts are relatively decentralized and the judicial processes are considerably more cumbersome.<sup>208</sup>

Therefore, even though *Marbury* holds that it is up to the judicial department to say what the law is, the Court has legitimated the executive's rule-making power in *Chevron* regarding its interpretations of ambiguous statutory terms. Borrowing one scholar's words, this "reflects a salutary appreciation of the fact that the law's meaning is not a 'brooding omnipresence in the sky.'"<sup>209</sup> In other words, "the executive, with its comparative expertise and accountability, is in the best position to make the judgments of policy and principle on which resolution of statutory ambiguities often depends."<sup>210</sup>

The dispute in *City of Arlington* was over whether courts should defer under *Chevron* to an agency's interpretation of its own

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<sup>204</sup> See Sunstein, *supra* note 201, at 2585; see also *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980); *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Gray v. Powell*, 314 U.S. 402, 412 (1941).

<sup>205</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–44 (1984).

<sup>206</sup> Sunstein, *supra* note 201, at 2586–87.

<sup>207</sup> See *id.* at 2587–88.

<sup>208</sup> See *id.*

<sup>209</sup> *Id.* at 2580.

<sup>210</sup> *Id.*

scope of authority.<sup>211</sup> Essentially it was a “*Chevron* Step Zero” issue, which was distinct from the issue in *Chevron* where the dispute was over the agency’s interpretation of a statutory ambiguity when the agency was acting within its jurisdictional power.<sup>212</sup> Deciding in favor of applying *Chevron* deference to the “Step Zero” inquiry regarding an agency’s determination of its own scope of jurisdiction, the majority in *City of Arlington* followed the same path of reasoning in *Chevron* and further expanded agencies’ rule-making power. As one commentator analyzed:

For the majority, as dangerous as giving agencies broad interpretive power under *Chevron* may be, it is better than giving judges leeway to pick and choose when to defer to agencies and when not to. Judges are even less politically accountable than are agencies, and more prone to generating disuniform interpretations of statutes based on ad hoc judgments. According to the majority: “The excessive agency power that the dissent fears would [absent a strong *Chevron* deference doctrine] be replaced by chaos.”<sup>213</sup>

The decision in *City of Arlington* has the long-term effect of further strengthening and expanding the executive’s rule-making power, as courts are now required to give deference to an agency’s determination of its own scope of jurisdiction. Concluding that courts should defer to both “jurisdictional” and “nonjurisdictional” interpretations made by agencies that administer the ambiguous statutes, the majority maintained that “judges ought to refrain from substituting their own interstitial lawmaking for that of an agency.”<sup>214</sup> By declaring that there are no meaningful distinctions between “jurisdictional” and “nonjurisdictional” interpretations, the majority

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<sup>211</sup> See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1866 (2013).

<sup>212</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

<sup>213</sup> Vik Amar, *Supreme Court’s Ruling in Arlington v. FCC Highlights Debate over the Meaning and Future of Chevron Deference Doctrine in Administrative Law*, UC DAVIS SCHOOL OF LAW FACULTY BLOG (May 24, 2013, 12:53 PM), <http://facultyblog.law.ucdavis.edu/post/Supreme-Courte28099s-Ruling-in-Arlington-v-FCC-Highlights-Debate-Over-the-Meaning-and-Future-of-Chevron-Deference-Doctrine-in-Administrative-Law.aspx>.

<sup>214</sup> See *City of Arlington*, 133 S. Ct. at 1873 (citation omitted).

refused to create any additional limitations on the applicability of the *Chevron* framework.<sup>215</sup> For the majority, the *Chevron* two-step inquiry is a sufficient protection device that can prevent agencies from acting irrationally or abusing the powers delegated to them by Congress.<sup>216</sup>

Although it acknowledged the legitimate and canonical status of *Chevron* deference, the dissent disagreed with the majority that the doctrine should be further expanded to include an agency's interpretation of its own scope of authority.<sup>217</sup> Rather, the Court should have continued the route that it took in *Christensen* and *Mead* to put further limitations on the applicability of the *Chevron* framework, and particularly, to instruct courts to conduct a *de novo* review when there are disputes over an agency's interpretation of "Step Zero" jurisdictional questions.<sup>218</sup>

Citing *Marbury* and the language and history of the APA, Chief Justice Roberts emphasized that the Judiciary should perform its duty to "police the boundary between the Legislature and the Executive" because an agency "acquires its legitimacy from a delegation of lawmaking power from Congress."<sup>219</sup> The danger of leaving the fox in charge of the henhouse is the accumulation of all powers, legislative, executive, and judiciary in the same hands of the Executive, which may lead to "tyranny."<sup>220</sup> With the rapid growth and expansion of the modern administrative state, it is foreseeable that abuse of power can happen more frequently where courts are required to defer to an agency's determination of its own scope of jurisdiction.

The rather optimistic picture that the majority depicted and the relatively pessimistic picture that the dissent depicted regarding the political effects of agencies' rule-making power should be placed side-by-side and viewed as a whole picture. It is not entirely true that

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<sup>215</sup> See *id.* at 1868–69.

<sup>216</sup> In his concurring opinion, Justice Breyer did not share this optimistic view. He cautioned that the picture that the majority depicted about *Chevron* was too simple, because, in the Court's jurisprudence, courts take into consideration a number of factors when applying *Chevron*'s two-step analysis. See *id.* at 1875–77 (Breyer, J. concurring).

<sup>217</sup> See *id.* at 1877–86 (Roberts, C.J., dissenting).

<sup>218</sup> See *id.*

<sup>219</sup> See *id.* at 1886.

<sup>220</sup> See *id.* at 1877; see also JAMES MADISON, THE FEDERALIST NO. 47, 324 (Jacob Cooke ed. 1961).

the distinction between “jurisdictional” and “nonjurisdictional” questions is meaningless and merely “a mirage.”<sup>221</sup> Rather, it depends heavily on where the line is drawn and how the question is presented. As the dissent stated, drawing a line between “big, important” interpretations and “humdrum, run-of-the-mill” ones may well be difficult. Yet “[d]istinguishing between whether an agency’s interpretation of an ambiguous term is reasonable and whether that term is for the agency to interpret is not nearly so difficult.”<sup>222</sup> In the *City of Arlington* case, for instance, neither the FCC nor the Fifth Circuit was confused about the “jurisdiction” question in their rulings and identified the issue correctly; that is, they were asked to decide whether the FCC possessed statutory authority to interpret Section 332(c)(7)(B)(ii) within its scope of power as delegated by Congress.<sup>223</sup>

On the other hand, the danger of confusion exists where the “application of a broad statutory term can be reframed as a questionable extension of the agency’s jurisdiction”<sup>224</sup> as the line between jurisdictional and nonjurisdictional questions is not always clear.<sup>225</sup> On top of that, it is skeptical that the underpinnings of *Chevron* themselves are sufficient to limit an agency’s power when it comes to the agency’s determination of its own scope of authority, although one scholar has argued that “the considerations that underlie *Chevron* support its application to jurisdictional questions.”<sup>226</sup> As deeply rooted in the Court’s jurisprudence and this country’s

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<sup>221</sup> In arbitration, the power of an arbitral tribunal to decide upon its own jurisdiction is referred to as “competence/competence,” which is an “inherent power.” Under modern international and institutional rules of arbitration, the usual practice is to “spell out in express terms the power of an arbitral tribunal to decide upon its own jurisdiction or, as it is often put, its competence to decide upon its own competence.” NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 347 (5th ed. 2009). Essentially, the issue debated in *City of Arlington* is a “competence/competence” issue; yet interestingly, Justice Scalia reasoned that there is no meaningful distinction between such “jurisdictional” questions and those “nonjurisdictional” questions.

<sup>222</sup> See *City of Arlington*, 133 S. Ct. at 1884–85 (Roberts, C.J., dissenting).

<sup>223</sup> See *id.*

<sup>224</sup> *Id.* at 1870.

<sup>225</sup> See Sunstein, *supra* note 201, at 2605 (“The line between jurisdictional and non-jurisdictional questions is far from clear, and hence any exemption threatens to introduce much more complexity into the deference inquiry.”).

<sup>226</sup> See *id.*

constitutional structure, unlimited and unchecked powers are dangerous, and could bring corruption and tyranny.

Under the *Chevron* framework, if Congress has directly spoken to the precise question at issue and its intent is clear, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>227</sup> The notion that Congress must speak with clarity is closely associated with the nondelegation doctrine, where it is widely held that Article I of the Constitution mandates Congress not to “delegate” its power to anyone else, and open-ended grants of authority are unconstitutional.<sup>228</sup> “It is tempting to object to *Chevron* on nondelegation grounds, because the decision grants the executive the authority to interpret the very statutes that limit its power.”<sup>229</sup> Yet because the executive is politically more accountable than the judiciary, “an allocation of policymaking authority to executive” actually “seems to reduce the nondelegation concern.”<sup>230</sup>

To guard against the abuse of power by agencies on “jurisdictional” questions, Harvard Law Professor Cass R. Sunstein proposed that “the principal qualification has to do with certain sensitive issues, most importantly those involving constitutional rights. When such matters are involved, Congress should be required to speak unambiguously; executive interpretation of statutory ambiguities is not sufficient.”<sup>231</sup> This seems to be a workable solution to ensure proper power allocation among the executive, the judiciary, and the legislative, but actually, its effectiveness depends heavily upon the premise that Congress speaks with clarity and leaves no “gaps” for agencies to fill when dealing with those sensitive constitutional issues. The reality, however, is that Congress often speaks with ambiguity either intentionally or inadvertently. Therefore, with the majority’s ruling that *Chevron* deference applies equally to “Step Zero” jurisdictional questions, the visible impact is that agencies now possess a higher degree of discretion in rule-making and interpreting statutory ambiguities, which can be a

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<sup>227</sup> See *Chevron*, 467 U.S. at 842–43.

<sup>228</sup> See generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). See also Sunstein, *supra* note 201, at 2607–08.

<sup>229</sup> See also Sunstein, *supra* note 201, at 2608.

<sup>230</sup> See *id.*

<sup>231</sup> See *id.* at 2580.

blessing if its powers are used appropriately, or a disaster if used inappropriately.

*B. Power Balancing Between the Executive and the Judicial Branches*

When the *Chevron* two-step inquiry was first established, the Court applied the framework with inconsistency and did not immediately recognize its revolutionary nature or landmark status.<sup>232</sup> One scholar noted, however, “The doctrine quickly gained currency on . . . the D.C. Circuit, particularly among Reagan appointees like then-judges Antonin Scalia . . . who recognized it as a ‘landmark’ . . . for deregulation.”<sup>233</sup> Under *Chevron* deference, courts could no longer impose artificial “obstacles” “when an agency that has been a classic regulator decides to go in the other direction” or when it “simply sits on its hands and does not choose to do additional things that could be done.”<sup>234</sup>

Since his elevation to the Supreme Court in 1986, Justice Scalia has been a staunch defender of and advocate for the *Chevron* framework. For instance, in *Immigration and Naturalization Service v. Cardoza-Fonseca*,<sup>235</sup> Justice Scalia drafted a concurring opinion in which he criticized the Court’s analysis of the question regarding whether the INS’s interpretation of “well-founded fear” was entitled to deference.<sup>236</sup> Following the *Chevron* two-step analysis closely and strictly, Justice Scalia stated, “Since the Court quite rightly concludes that the INS’s interpretation is clearly inconsistent with the plain meaning of that phrase and the structure of the Act . . . there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference.”<sup>237</sup> Furthermore, as to the Court’s implication that “courts may substitute their interpretation of a statute for that of an agency whenever they face ‘a pure question of

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<sup>232</sup> See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–81 (1992).

<sup>233</sup> Andrew M. Grossman, *City of Arlington v. FCC: Justice Scalia’s Triumph*, 2013 CATO SUP. CT. REV. 331, 335 (2013); see also Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 193 (1986).

<sup>234</sup> See Scalia, *supra* note 233, at 191; see also Grossman, *supra* note 233, at 335.

<sup>235</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>236</sup> See *id.* at 453 (Scalia J., concurring).

<sup>237</sup> *Id.* (citations omitted).

statutory construction for the courts to decide,” Justice Scalia made a fiery response, declaring that “[n]o support is adduced for this proposition.”<sup>238</sup>

Similarly, in *Mead*, Justice Scalia defended *Chevron*’s two-step analysis in his dissenting opinion, where the majority of the Court held that a “gap” alone was not enough to grant deference to an agency’s interpretation and a variety of factors must be considered in deciding whether Congress has granted interpreting authority to the agency.<sup>239</sup> Rejecting the Court’s holding that the agency’s interpretation qualified for *Skidmore* deference even when it fell short of *Chevron* deference, Justice Scalia remarked:

[I]n an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation. To condemn a vast body of agency action to that regime (all except rulemaking, formal (and informal?) adjudication, and whatever else might now and then be included within today’s intentionally vague formulation of affirmative congressional intent to “delegate”) is irresponsible.<sup>240</sup>

Therefore, it is not surprising that one commentator announced that *City of Arlington* was Justice Scalia’s triumph, where a broad rule of judicial deference was adopted and the multi-factor inquiry relating to the application of the *Skidmore* framework was replaced by “a simple and easily administrable rule of deference to agencies that reasonably and authoritatively interpret ambiguities in the statutes that they administer.”<sup>241</sup>

In *City of Arlington*, Justice Scalia consistently and constantly emphasized the importance of the clarity, certainty, and stability of the *Chevron* doctrine. Calling the distinction between “jurisdictional” and “nonjurisdictional” interpretations a “mirage,”

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<sup>238</sup> *Id.* at 454–55.

<sup>239</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 227, 229 (2001).

<sup>240</sup> *Id.* at 250 (Scalia, J., dissenting).

<sup>241</sup> See Grossman, *supra* note 233, at 331–32.

Justice Scalia stated that, if required to make such a distinction, lower court judges would be wasting their time in doing “mental acrobatics” in order to figure out whether an agency’s interpretation of a statutory ambiguity is “jurisdictional” or “nonjurisdictional.”<sup>242</sup>

In addition, Justice Scalia also used harsh words in his response to the dissenting opinion, suggesting that *Chevron* itself was the ultimate target.<sup>243</sup> The real concern that Justice Scalia had was about the stability of the *Chevron* doctrine, which would be “destroyed” if “*Chevron* Step Zero” jurisdictional questions are now subject to courts’ *de novo* review, as proposed by the dissent. Justice Scalia warned that thirteen courts of appeals, in applying a totality-of-the-circumstances test, “would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*.”<sup>244</sup>

In defending the stability of *Chevron* deference in *City of Arlington*, it was Justice Scalia’s belief that the executive, with its comparative expertise and political accountability, is in a better position than the judicial branch in making policy judgments, on which the interpretations of statutory ambiguities often depend. The establishment of *Chevron* deference about two decades ago has made a real impact on the executive’s actions in rule- and policy-making. For instance, E. Donald Elliott, a former General Counsel of the EPA, accounted that “*Chevron* opened up and validated a policy-making dialogue within agencies about what interpretation the agency *should* adopt for policy reasons, rather than what interpretation the agency *must* adopt for legal reasons.”<sup>245</sup> Although “the political commitments of reviewing judges continue to play a significant role in the decision whether to uphold interpretations by the executive branch,”<sup>246</sup> the upholding of the applicability of *Chevron* deference to “Step Zero” jurisdictional questions in *City of Arlington* would probably further reduce such attempts by the judicial branch in claiming its superior position in interpreting statutory laws.

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<sup>242</sup> See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868, 1870 (2013).

<sup>243</sup> See *id.* at 1872–73.

<sup>244</sup> *Id.* at 1874.

<sup>245</sup> E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 *VILL. ENVTL. L.J.* 1, 12 (2005); see also Sunstein, *supra* note 201, at 2599.

<sup>246</sup> See Sunstein, *supra* note 201, at 2601–02.



In terms of efficiency and predictability of the law, the majority's ruling, compared to the dissent's approach, should be credited with the merit of providing a clear and uniform standard for lower courts to follow in determining the applicability of *Chevron* deference within different contexts. The reviewing court needs not to spend time and judicial resources to distinguish "jurisdictional" interpretations from "nonjurisdictional" interpretations, which, as discussed earlier, could be a daunting task under certain circumstances. As George Mason University Law Professor Michael S. Greve illustrated, D.C. Circuit Judge David S. Tatel "is . . . smart and clever, and he decides more AdLaw cases in a month than the Supremes will see in a decade. You don't want to arm him."<sup>247</sup> Moreover, because of the clarity of the law, it becomes easier for parties to predict the results of their legal disputes, and thus it would discourage litigation and give them the incentive to reach a settlement.

Finally, *City of Arlington*'s long-term impact on the actions of the judicial branch has also been an interesting debating point. One commentator noted:

So long as administrative agencies' activity generally falls short of the full extent of their regulatory authority—as it surely must, by a large margin, given Congress's preference for capacious delegations and "moods"—*Chevron* at least stands as an obstacle to judicial decisions that push the agencies to undertake new missions that they would otherwise lack the political capital to carry out.<sup>248</sup>

Thus it is likely that courts, instead of overturning the policy decisions made by the executive branch, would now turn to Congress and require that it speak with clarity so that there are no "gaps" for the agencies to fill. In addition, the judicial branch is aware that there is certainly a real danger, as strongly voiced by the dissent, that the administrative agencies might abuse their powers because of the expansion of *Chevron* deference to the "Step Zero" jurisdictional

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<sup>247</sup> Michael S. Greve, *City of Arlington: Some Cheerful Thoughts*, LIBERTY LAW BLOG (May 27, 2013), <http://www.libertylawsite.org/2013/05/27/city-of-arlington-some-cheerful-thoughts/>.

<sup>248</sup> Grossman, *supra* note 233, at 361.

questions. One solution for the judicial branch to guard against such a danger is that the reviewing court would be required to undertake the hard work of statutory construction to hold an agency strictly to the *Chevron* standard where the agency must stay within the bounds of its statutory authority.

## VI. CONCLUSION

Justice Scalia, a member of the Supreme Court's conservative bloc, authored the majority opinion in *City of Arlington*, which was supported and joined by three of the four "liberals"—Justices Ginsburg, Kagan, and Sotomayor. One commentator has made an interesting observation about this composition of the majority of the Court, suggesting that "this time around, the Court's *Chevron* coalition may be more durable."<sup>249</sup>

Even though Justice Scalia and Chief Justice Roberts did not see eye to eye in *City of Arlington* on the issue of *Chevron*'s applicability to "Step Zero" jurisdictional questions, it appears that they still "share the same concern, each struggling for a way to assert control over an administrative state that does not fit the Constitution's separation of powers but is, at this late date, a fact of life."<sup>250</sup> Chief Justice Roberts emphasized that the judicial branch should perform its duty to police the boundary between the legislature and the executive, and agencies should not be given any additional rule-making power to decide "*Chevron* Step Zero" questions.

On the other hand, Justice Scalia prefers to defer to agencies, but he is not necessarily "soft" on them; he can use "the heavy artillery of thoughtful interpretation to limit the bounds of permissible agency action."<sup>251</sup> As one commentator observed, "*City of Arlington* sends a significant signal to lower court judges that, in reviewing agency readings of ambiguous statutes, they should remain in a deferential mood. But judges and justices persuaded that

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<sup>249</sup> *Id.* at 359.

<sup>250</sup> *See id.* at 332; *see also* Tom Donnelly & Doug Kendall, *Scalia vs. Roberts: Conservatives Face Off on the Supreme Court*, JURISPRUDENCE (May 24, 2013, 11:24 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/05/scalia\\_vs\\_roberts\\_conservatives\\_face\\_off\\_on\\_the\\_supreme\\_court.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/scalia_vs_roberts_conservatives_face_off_on_the_supreme_court.html).

<sup>251</sup> Grossman, *supra* note 233, at 332.

agencies have gone too far in exercising their powers are not without leverage to rein them in.”<sup>252</sup>

*City of Arlington* holds a special place and commands considerable importance in the field of administrative law. Professor Sunstein, the former administrator of the White House Office of Information and Regulatory Affairs, has remarked that *City of Arlington* is “an important victory” for the Obama administration that “will long define the relationship between federal agencies and federal courts.”<sup>253</sup> Another commentator has also noted that the Court’s ruling in *City of Arlington* “may mark the most ‘avulsive’ change in administrative law in at least the last 13 years.”<sup>254</sup> The simple and easily administrable *Chevron* two-step framework now applies to an agency’s interpretation of its own scope of jurisdiction when there is statutory ambiguity. It is foreseeable that this decision would further shape the operation of a modern administrative state and this country’s constitutional structure.

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<sup>252</sup> Peter M. Shane, *City of Arlington v FCC: Boon to the Administrative State or Fodder for Law Nerds?* (June 6, 2013); Bloomberg BNA Daily Report for Executives B1-B5; Ohio State Public Law Working Paper No. 217, SSRN, <http://ssrn.com/abstract=2284308> (last visited Mar. 26, 2014).

<sup>253</sup> Cass R. Sunstein, *Scalia Gives Obamacare a Big Boost*, BLOOMBERG POLITICS (May 29, 2013, 3:00 PM), <http://www.bloomberg.com/news/2013-05-29/the-biggest-supreme-court-ruling-you-haven-t-heard-of.html>.

<sup>254</sup> Grossman, *supra* note 233, at 331.