City of Arlington v. FCC: The Death of *Chevron* Step Zero?

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I. INTRODUCTION

While much attention has been paid to the Supreme Court's marquee opinions this last Term on gay rights,[1] voting rights,[2] and affirmative action,[3] a potentially significant administrative law decision has largely escaped notice. In *City of Arlington v. Federal Communications Commission*, the Supreme Court held that an agency should receive *Chevron* deference for its interpretation of a statutory ambiguity concerning its "jurisdiction"—that is, the scope of its regulatory authority.[4] Some Courts of Appeals had previously held that an agency's decisions regarding the scope of its jurisdiction should not receive *Chevron* deference, distinguishing jurisdictional questions from other questions of statutory interpretation.[5] In an opinion authored by Justice Scalia, the Supreme Court rejected that view, holding that "judges should not waste their time . . . decid[ing] whether an agency's interpretation of a statutory provision is 'jurisdictional' or 'nonjurisdictional.' Once those labels are sheared away, it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not."[6] And with respect to that question, *Chevron* applies and the agency receives deference.[7]

Arlington is potentially significant, however, less for its holding than for its dialogue between the majority opinion and the concurrence and dissenting opinions. Interestingly, neither the concurrence by Justice Breyer nor the dissent by Chief Justice Roberts takes issue with the majority's resolution of the question presented.[8] None of the Justices believed that a distinction should be made between jurisdictional and non-jurisdictional questions. Nonetheless, the case produced heated disagreement among the Justices, tracking a long-running battle over a different question: whether, prior to invoking *Chevron* deference, a court must first make a separate judicial determination that Congress intended to

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1. *See* United States v. Windsor, 133 S. Ct. 2675 (2013); Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
2. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).
3. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).
4. City of Arlington v. FCC, 133 S. Ct. 1863 (2013).
5. *See, e.g.*, City of Arlington v. FCC, 668 F.3d 229, 248 (5th Cir. 2012) (noting the question presented in the case was "whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts have adopted different approaches to the issue").
6. *City of Arlington*, 133 S. Ct. at 1870–71.
7. *Id.*
8. *See id.* at 1875–77 (Breyer, J., concurring); *id.* at 1877–86 (Roberts, C.J., dissenting).

delegate to the agency the power to interpret the particular statutory provision at issue.[9]

According to Justice Scalia and the majority, when Congress has conferred general rulemaking authority to an agency to administer a statute, and the agency has promulgated its interpretation of the statute through notice-and-comment rulemaking or adjudication, then *Chevron* applies and the agency should receive deference for its resolution of any ambiguity in statutory language.[10] However, according to Justice Breyer and the dissenters led by the Chief Justice, before deferring under *Chevron*, a court must first ask whether—notwithstanding Congress' general conferral of rulemaking authority—Congress intended to delegate to the agency the authority to interpret the particular statutory provision.[11] If so, then *Chevron* applies and the agency's interpretation receives deference.[12] If not, then a court must use the tools of statutory interpretation to divine Congress's intent as best it can, informed by the agency's view only to the extent that the court finds it to be persuasive.[13]

The difference in these two approaches can be traced back to *Chevron* itself and the initial administrative law cases following it. *Arlington* is potentially significant because it could be read to resolve that long-running dispute in favor of Justice Scalia's expansive view of agency authority. Such a resolution could have significant consequences for administrative law. In many cases the difference in approach may not matter to the outcome (here, for example, Justice Breyer found that Congress had intended to delegate to the agency interpretive authority over the provision at issue, and thus, he too applied *Chevron*);[14] however, in some cases the difference in approach will matter. For example, when *Arlington* is read in conjunction with cases such as *Brown & Williamson*,[15] it is unclear whether a court should take a harder look when an agency's interpretation significantly expands the agency's authority to regulate matters of great economic and social importance than it should when an agency's interpretation concerns a minor, interstitial issue.

Moreover, the Court's decision could place pressure on other administrative law doctrines—such as the long-dormant nondelegation doctrine—to do the work of constraining administrative agencies. Significantly, the first third of the Chief Justice's dissent is devoted to describing the "danger posed by the growing power of the administrative

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9. *Compare id.* at 1873–75 (majority opinion) *with id.* at 1879–80 (Roberts, C.J., dissenting).

10. *See id.* at 1874 (majority opinion).

11. *See id.* at 1875 (Breyer, J., concurring); *see also id.* at 1880 (Roberts, C.J., dissenting).

12. *See id.* at 1875 (Breyer, J., concurring).

13. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

14. *See City of Arlington*, 133 S. Ct. at 1877 (Breyer, J., concurring).

15. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (holding that Congress had not given the FDA authority to regulate tobacco products).

state,"[16] fostered by a toothless nondelegation doctrine that essentially allows an agency to legislate in Congress's place.

Part II of this Article describes in greater detail the issue presented to the Court in *Arlington* and the majority's decision in the case. Circuit courts had divided on the question of whether an agency should be afforded *Chevron* deference when deciding the scope of its own jurisdiction. The Court held in *Arlington* that the scope of an agency's jurisdiction was no different than any other statutory question that an agency must decide: an agency can only ever act within the limits set forth by Congress, and *Chevron* commands that the agency receive deference in resolving any ambiguities concerning those limits.

Part III considers the dissent and concurrence, and explains that the significant issue raised by the case is not the question presented to the Court, but the distinct question of whether a court must assess, with respect to the statutory provision at issue in a particular case, whether Congress intended to delegate to the agency the authority to resolve any ambiguity in that provision. The majority concluded that the agency should receive deference, so long as Congress generally delegated to the agency the power to administer the statute through rulemaking and the agency used those procedures in reaching its interpretation of the statute. The concurrence and dissent argued that a court must ask whether Congress intended to delegate interpretive authority to the agency with respect to the particular question at issue, and the answer might vary, for example, depending upon the nature or importance of the question to the statutory scheme.

Part IV considers the implications of the case in two respects. First, the decision calls into doubt other cases that have held that the nature and importance of an interpretive question should have a bearing on the degree of deference that an agency should receive in resolving it. The D.C. Circuit's review of the Open Internet (or "net neutrality") rules issued by the Federal Communications Commission ("FCC") presents a good example of the kind of case that could be significantly affected by the decision in *Arlington*.[17] Second, one of the most striking features of the Chief Justice's dissent was its long discussion of the dangers of allowing agencies untrammeled deference. One question is whether the broad interpretive authority enjoyed by agencies under *Arlington* will result in an effort to rejuvenate the nondelegation doctrine as a tool that judges can use to constrain agency action.

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16. *Id.* at 1879 (Roberts, C.J., dissenting).

17. *See* Brief for Appellee/Respondents at 25–37, Verizon v. FCC, No. 11-1355 (D.C. Cir. filed Jan. 16, 2013) [hereinafter FCC Brief] (arguing that the FCC's interpretation of the disputed section of the Telecommunications Act of 1996 is entitled to deference). Net neutrality refers to efforts to obtain a free, open Internet and prevent Internet providers from blocking consumers' access to certain web content. In this way, net neutrality "seeks to preserve ISPs' role as gateways to the Internet rather than gatekeepers." Emily R. Roxberg, Note, *FCC Authority Post-Comcast: Finding a Happy Medium in the Net Neutrality Debate*, 37 J. CORP. L. 223, 225 (2011).

II. THE COURT'S DECISION IN *CITY OF ARLINGTON V. FCC*

As every student of administrative law knows, the *Chevron* case addressed a basic question in administrative law: whether courts should interpret a statute *de novo* or should, instead, defer to an agency's interpretation of the statute that the agency administers.[18] Of course, Congress sometimes speaks unequivocally,[19] and in those cases effect must be given to Congress's clear intent. But when a statute has more than one possible construction, *Chevron* directs a court to defer to the agency's choice among the various reasonable interpretations. That is, "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."[20]

The *Chevron* doctrine rests on a dual rationale. First, it reflects the assumption that the agency tasked with administering a statute has greater expertise than a court, and thus is better able to decide among competing policy choices.[21] That is most obviously so when the question of statutory interpretation involves a technical or complex regulatory scheme, as such questions of interpretation often do.[22] But even when not, an agency's familiarity with the regulatory backdrop allows the agency to make a more informed judgment than a court about how best to advance the purpose of the statute and Congress' intent. Second, *Chevron* reflects the assumption that an agency is more democratically accountable than the courts and is therefore better situated to make judgments about the wisdom of policy alternatives. As *Chevron* explained,

> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.[23]

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18. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

19. *Id*. at 842–43 ("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.").

20. *Id*. at 843.

21. *Id.* at 865.

22. *Id.*

23. *Id.* at 865.

A. The Circuit Split Leading to Arlington

In the years leading up to *Arlington*, Courts of Appeals had divided on whether courts should apply *Chevron* when confronted with a statute confining the scope of an agency's jurisdiction. The basic arguments on each side of the debate were first articulated by Justice Scalia and Justice Brennan in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, a case involving the question of whether an order by the Federal Energy Regulatory Commission ("FERC") preempted certain action by the Mississippi Public Service Commission.[24] Although the majority did not directly address the issue, Justice Scalia and Justice Brennan both wrote separately to discuss what they viewed as the pivotal question in the case: whether FERC had authority under the Federal Power Act to issue its order.[25]

Justice Scalia, in a concurring opinion, invoked *Chevron* and deferred to FERC's construction of the statute, concluding that FERC did have authority to issue its order.[26] He asserted that prior decisions of the Court had already held that a "rule of deference applies to an agency's interpretation of a statute designed to confine its authority."[27] Moreover, Justice Scalia argued, such a policy makes sense. Deference is "*necessary* because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority."[28] Indeed, he continued, "[v]irtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the 'authority.'"[29] Moreover, Justice Scalia argued, "deference is *appropriate* because . . . Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction" and would not wish that "every ambiguity in statutory authority would be addressed, *de novo*, by the courts."[30]

Justice Brennan, in a dissenting opinion, argued that deference to the agency was improper concerning a statute that Congress had intended to confine the scope of the agency's authority.[31] He would have concluded, based upon his own reading of the statute, that FERC did not have authority to issue its order.[32] In arguing that the "normal reasons for agency deference" do not apply when jurisdictional questions are at issue, Justice

24. 487 U.S. 354, 356–57 (1988).
25. *See id*. at 377–91.
26. *See id.* at 377–83 (Scalia, J., concurring).
27. *Id.* at 380 (Scalia, J., concurring).
28. *Id.* at 381 (Scalia, J., concurring).
29. *Id.* (Scalia, J., concurring).
30. *Id.* at 381–82 (Scalia, J., concurring).
31. *See id.* at 383–91 (Brennan, J., dissenting).
32. *Id.* at 387–88 (Brennan, J., dissenting).

Brennan distinguished between statutes defining the scope of an agency's jurisdiction and those delegating particular policy choices to an agency.[33] He reasoned that "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies."[34] Indeed, such statutes "do not reflect conflicts between policies that have been committed to the agency's care . . . but rather reflect policies in favor of limiting the agency's jurisdiction that, by definition, have not been entrusted to the agency."[35] Nor can an agency claim "special expertise in interpreting a statute confining its jurisdiction."[36] Finally, Justice Brennan rejected the assumption that Congress "intended an agency to fill 'gaps' in a statute confining the agency's jurisdiction . . . since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power."[37]

In the years following, a circuit split arose on this issue.[38] Some courts agreed with Justice Scalia and asserted that the Supreme Court had already decided the issue.[39] Others sided with Justice Brennan.[40] The D.C.

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33. *Id.* at 387 (Brennan, J., dissenting).

34. *Id.* at 386–87 (Brennan, J., dissenting).

35. *Id.* at 387 (Brennan, J., dissenting) (citation omitted).

36. *Id.* (Brennan, J., dissenting). Although Justice Brennan did not further explain this conclusion (or cite to a particular authority), presumably his argument would be that courts, rather than agencies, are particularly well-suited to analyze and interpret statutes to discern the reach of their provisions and the jurisdiction afforded. Justice Brennan did suggest, however, that agency interpretation would not prove optimal because statutes limiting the scope of an agency's jurisdiction "may indeed conflict not only with the statutory policies the agency *has* been charged with advancing but also with the agency's institutional interests in expanding its own power." *Id.* (Brennan, J., dissenting).

37. *Id.* (Brennan, J., dissenting) (citation omitted). Thomas Merrill and Kristin Hickman argued that, although "Justice Brennan was surely right in principle, . . . Justice Scalia's critique based on the practical difficulties of defining agency action in excess of authority has been sufficiently persuasive that it has discouraged the Court from developing any scope-of-jurisdiction exception." Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 910, 911 (2001). Thus, although the "Court appear[ed] to be aware of the need to police against agency aggrandizement (and abrogation), . . . it has done so primarily by exercising especially vigorous statutory interpretation at *Chevron*'s step one when agencies press the limits of their authority, not by creating an exception to *Chevron* deference." *Id.*

38. *See City of Arlington*, 668 F.3d at 248 (explaining that the Supreme Court "has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuits of appeals have adopted different approaches to the issue"). The Sixth Circuit described the split as arising because the Court, "so far as we can tell, has yet to resolve the debate that Justice Scalia and Justice Brennan first waged over the point in 1988." Pruidze v. Holder, 632 F.3d 234, 237 (6th Cir. 2011) (citing *Mississippi Power*, 487 U.S. at 382–83, 386–87).

39. *See, e.g.*, Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1145–46 (10th Cir. 2010) (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844 (1986) and Justice Scalia's concurrence in *Mississippi Power*); Texas v. United States, 497 F.3d 491, 501 (5th Cir. 2007) (citing generally *Brown & Williamson*, 529 U.S. 120); Connecticut *ex rel.* Blumenthal v. U.S. Dep't of the Interior, 228 F.3d 82, 93 (2d Cir. 2000); P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc., 856 F.2d 546, 552 (3d Cir. 1988) (citing *Schor*, 478 U.S.

Circuit decided cases going both ways.[41] And commentators described the issue as "[t]he most important—and vexing—question involving *Chevron*'s domain."[42]

B. The Background Surrounding the Arlington *Case*

The Supreme Court granted certiorari in *City of Arlington v. FCC* to resolve the split. As the majority framed the case, "[w]e consider whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron*."[43]

The case concerned the rules governing permitting for the siting of wireless telecommunication antennas. When extending wireless coverage to a particular area, network providers must construct the requisite facilities either by adding additional antennas to existing network towers or by constructing new towers altogether. Such proposals, generally referred to as "siting requests" or "siting applications,"[44] must be approved by local

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at 844); EEOC v. Seafarers Int'l Union, 394 F.3d 197, 201 (4th Cir. 2005) (citing *Schor*, 478 U.S. at 844–47).

40. N. Ill. Steel Supply Co. v. Sec'y of Labor, 294 F.3d 844, 847 (7th Cir. 2002). Similarly, the Federal Circuit merely asserted that "[w]e review the Board's legal conclusion regarding the scope of its own jurisdiction for correctness and without deference to the Board's determination." Bolton v. Merit Sys. Prot. Bd., 154 F.3d 1313, 1316 (Fed. Cir. 1998).

41. *Compare, e.g.*, Am. Library Ass'n v. FCC, 406 F.3d 689, 699 (D.C. Cir. 2005) (noting that *courts* must first determine the threshold question of whether "the agency acted pursuant to delegated authority"), *and* Am. Civil Liberties Union v. FCC, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (arguing that, for *Chevron* purposes, "a pivotal distinction exists between statutory provisions that are jurisdictional in nature . . . and provisions that are managerial"), *with* Bhd. of Locomotive Eng'rs v. United States, 101 F.3d 718, 726 (D.C. Cir. 1996) (holding that petitioner's "argument that we should adopt a less deferential standard of review because the decisions concern the scope of the Commission's jurisdiction is without merit"), *and* Okla. Natural Gas Co. v. FERC, 28 F.3d 1281, 1284 (D.C. Cir. 1994) (similarly applying *Chevron* to jurisdictional interpretation).

42. Merrill & Hickman, *supra* note 37, at 909. Contrary to the position taken by the majority of circuits that had actually passed on the issue, many scholars contended that application of *Chevron* to jurisdictional claims was illogical. *See, e.g.*, Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 206 (2004); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1786–88 (2012); Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 1008–09 (1999); Merrill & Hickman, *supra* note 37, at 909–14; Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1466 (2000); Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1532–33.

43. *City of Arlington*, 133 S. Ct. at 1866.

44. *See, e.g.*, *id.* (referring to "siting applications"); Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), FCC 09-99, 24 FCC Rcd. 13994, paras. 1–2 (2009) [hereinafter *Declaratory Ruling*] (referring to "siting requests" and "siting applications").

zoning authorities. Nevertheless, to encourage construction of wireless networks, "Congress 'impose[d] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification'" of such towers and antennas.[45] Specifically, Congress provided that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government . . . shall not unreasonably discriminate among providers of functionally equivalent services; and . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[46]

In order to ensure that states or localities could not impede Congress' objectives merely by refusing to act on a siting application, Congress also required in section 332(c)(7)(B)(ii) that a state or local government "act on wireless siting applications 'within a reasonable period of time after the request is duly filed.'"[47] If a state or locality failed to do so, the aggrieved party enjoyed a right to "commence an action in any court of competent jurisdiction."[48]

Finally, Congress stated that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."[49] Congress enacted these provisions as amendments to the existing Communications Act of 1934, section 201(b) of which provides the FCC with general rulemaking powers.[50]

CTIA–The Wireless Association ("CTIA") filed a petition with the FCC on July 11, 2008, requesting, among other things, that the Commission clarify the meaning of a "reasonable period of time."[51] In support, the record provided evidence of significant delays in various localities.[52] The FCC favorably cited CTIA's statistics showing that, of 3,300 pending personal wireless siting applications, "approximately 760" applications had been pending "for more than one year," while more than 180 of those applications were "awaiting final action for *more than 3*

45. *City of Arlington*, 133 S. Ct. at 1866 (quoting Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005)).

46. 47 U.S.C. § 332(c)(7)(B)(i) (2006).

47. *City of Arlington*, 133 S. Ct. at 1866 (quoting 47 U.S.C. § 332(c)(7)(B)(ii) (2006)).

48. 47 U.S.C. § 332(c)(7)(B)(v) (2006).

49. 47 U.S.C. § 332(c)(7)(A) (2006).

50. 47 U.S.C. § 201(b) (2006) (empowering the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter").

51. *See Declaratory Ruling*, *supra* note 44, at para. 2. Although not relevant for the purposes of the *Arlington* decision, CTIA also requested that the FCC answer a related ambiguity: when a local authority will be deemed to have "failed to act" such that the aggrieved party may then commence a court action. *See id.* at para. 10.

52. *See id.* at paras. 32–36.

years."[53] Relying on these figures, the FCC found that "the record shows that unreasonable delays are occurring in a significant number of cases" and, further, that the "unreasonable delays . . . have obstructed the provision of wireless services" and have proven "lengthy and costly" for wireless providers.[54] Moreover, the Commission determined that such delays "impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996."[55]

In response, and "[t]o provide guidance, remove uncertainty and encourage the expeditious deployment of wireless broadband services," the Commission interpreted section 332(c)(7)(B)(ii) as establishing a rebuttable presumption governing the amount of time that is "reasonable" for a locality to respond to a siting application.[56] The FCC determined that a locality presumptively has ninety days to process a siting application seeking to collocate services, or attach a new antenna to a pre-existing tower, and 150 days to process applications for all other facilities.[57] The FCC cautioned that these time periods are only presumptions; a state or locality "will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable."[58]

The cities of Arlington and San Antonio, Texas, supported by several intervenors, sought judicial review of the Commission's ruling before the U.S. Court of Appeals for the Fifth Circuit, arguing (among other things) not only that the FCC's presumptive timeframes were not a reasonable interpretation of the provision requiring states and localities to act on a siting application "within a reasonable period of time after the request is duly filed,"[59] but also that the FCC should not be accorded *Chevron* deference with respect to that issue of statutory interpretation.[60] According to the challengers, the statute's savings clause in 47 U.S.C. section 332(c)(7) showed that Congress did not intend to give the FCC authority to interpret the meaning of the timeframe requirement.[61]

The Fifth Circuit rejected these arguments. It first found that Congress did not unambiguously preclude the FCC from interpreting the timeframe requirement in section 332(c)(7)(B)(ii)—that is, the Fifth Circuit applied *Chevron* to the question of whether the agency enjoyed the authority to interpret the timeframe requirement.[62] Having found that the statute was "silent on the question of whether the FCC can use its general

53. *Id.* at para. 33.
54. *Id.* at paras. 33–34.
55. *Id.* at para. 35.
56. *Id.* at para. 32.
57. *Id.* at para. 32.
58. *Id.* at para. 42.
59. 47 U.S.C. § 332(c)(7)(B)(ii) (2006).
60. *See City of Arlington*, 668 F.3d at 248.
61. *Id.* at 247.
62. *Id.* at 247–52.

authority under the Communications Act to implement section 332(c)(7)(B)'s limitations,"[63] the Fifth Circuit deferred to the FCC's answer to that question, which it found to be reasonable.[64] The Fifth Circuit then turned to the merits issue, namely, whether the FCC's timeframes were a reasonable interpretation of the phrase "reasonable period of time." The court found that the "time frames are based on a permissible construction of § 332(c)(7)(B)(ii) and (v) and are thus entitled to *Chevron* deference."[65]

C. The Majority Opinion

The Supreme Court granted certiorari to address whether "a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction." [66] The majority opinion, authored by Justice Scalia and joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, rejected any distinction between jurisdictional and other interpretive questions for the purposes of *Chevron* deference.[67] Echoing his concurrence in *Mississippi Power & Light*, Justice Scalia argued that the entire "premise is false, because the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage."[68] Regardless of how a particular question 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*."[69] Whenever the agency strays beyond the bounds that Congress has prescribed, it has acted *ultra vires*—regardless of whether the "jurisdictional" label is used to describe those bounds.[70]

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63. *Id.* at 252.

64. *See id.* at 252–54.

65. *Id.* at 256.

66. *City of Arlington*, 133 S. Ct. at 1867–68 (quoting Petition for a Writ of Certiorari at i, *City of Arlington*, 133 S. Ct. 1863 (No. 11-1545)).

67. *Id.* at 1868. Interestingly, Justice Scalia argues at length that the case's resolution was aptly supported by many of the Court's existing precedents. Although noticeably quoting an Administrative Law Treatise—and not an opinion of the Court—for the punch line, he states that "[f]ortunately . . . we have consistently held 'that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.'" *Id.* at 1871 (quoting 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5, at 187 (2010)); *see generally id.* at 1871–73 (citing, among other cases, *Schor*, 478 U.S. 833, and *Brown & Williamson*, 529 U.S. 120, and concluding that "[t]he U.S. Reports are shot through with applications of *Chevron* to agencies' constructions of the scope of their own jurisdiction").

68. *City of Arlington*, 133 S. Ct. at 1868. Even more derisively, Justice Scalia depicts this as a fictitious distinction as separating "the big, important [interpretations] . . . defin[ing] the agency's 'jurisdiction'" from more "humdrum, run-of-the-mill stuff" which "are simply applications of jurisdiction the agency plainly has." *Id.*

69. *Id.*

70. *Id.* at 1879.

Prudential considerations also infused Justice Scalia's reasoning. First, he was concerned that the jurisdictional/nonjurisdictional line would become a dangerous exercise in semantics.[71] Indeed, the majority worried that such an artificial dividing line would lead "[s]avvy challengers of agency action . . . [to] play the 'jurisdictional' card in every case."[72] After all, "every new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction."[73] Such a dividing line would force judges to "waste their time in the mental acrobatics" required to divine if a particular agency interpretation is "jurisdictional" or "nonjurisdictional."[74] And "[t]he federal judge as haruspex, sifting the entrails of vast statutory schemes to divine whether a particular agency interpretation qualifies as 'jurisdictional,' is not engaged in reasoned decisionmaking."[75]

Second, and worse still, allowing judges to second-guess an agency's interpretation of its authority would empower judges to engage in the very policymaking that they would deny to the agency. Distinguishing between jurisdictional and non-jurisdictional decisions would "transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to the federal courts."[76] Justice Scalia warned that some federal judges would be "tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands."[77] In choosing whether the limits of an agency's authority should be drawn "by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges," Justice Scalia favored the former, who at least have expertise in the substantive area.[78]

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71. *Id.* at 1872–73.

72. *Id* at 1873. As an example, the majority cited *Cellco Partnership v. Federal Communications Commission*, 700 F.3d 534 (D.C. Cir. 2012). In that case, Verizon challenged an FCC rule requiring that a cellular phone network provide roaming access to mobile-data, in addition to voice-telephone services, to a wireless subscriber from another carrier when that user travels outside his own carrier's coverage area. *Cellco Partnership*, 700 F.3d at 537. Among other arguments, Verizon sought to invoke this jurisdictional line—despite the court's assertion that circuit precedent would have required *Chevron* be applied in any event—in contending that the FCC had no statutory authority to implement those regulations at all. *Id.* at 541. The court held, however, that Title III of the act "clearly affords the Commission the ability to promulgate the data roaming rule." *Id.* (citing *Chevron*, 467 U.S. at 842–43).

73. *City of Arlington*, 133 S. Ct. at 1870.

74. *Id.*

75. *Id.* at 1871.

76. *Id.* at 1873.

77. *Id.*

78. *See id*. at 1873.

III. THE REAL QUESTION PRESENTED IN *ARLINGTON*: THE DISSENT AND THE CONCURRENCE

Strikingly, neither the concurrence by Justice Breyer, nor the dissent authored by Chief Justice Roberts and joined by Justice Kennedy and Justice Alito, defended the distinction between jurisdictional and non-jurisdictional issues.[79] Rather, as the dissent noted, the concept of "jurisdiction"—a term which the Court has described as having "many, too many, meanings"[80]—obscures the real issue in the case and "leads the Court to misunderstand the argument it must confront."[81]

Both the concurrence and dissent instead pressed a more fundamental question that the majority's analysis largely omitted: whether, rather than automatically according *Chevron* deference to an agency's interpretation of an ambiguous statute, a court must first determine for itself that Congress intended to delegate interpretive authority to the agency concerning the particular provision at issue. The Fifth Circuit had deferred to the agency on that second-order question. Yet according to the concurrence and the dissent, the question is a judicial one and no deference is appropriate: "[a] court should not defer to an agency on whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue."[82] Binding deference is afforded under *Chevron* because agencies are given that power by Congress,[83] and a court must decide whether Congress "has in fact delegated to the agency lawmaking power over the ambiguity at issue."[84]

The majority opinion briefly addressed this argument, which it described as an "apparent rejection of the theorem that the whole includes all of its parts—its view that a general conferral of rulemaking authority does not validate rules for *all* the matters the agency is charged with administering."[85] In the majority's view, "the dissent proposes that even when general rulemaking authority is clear, *every* agency rule must be

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79. *See id*. at 1875–77 (Breyer, J., concurring); *id.* at 1877–86 (Roberts, C.J., dissenting).

80. *Id.* at 1879 (Roberts, C.J., dissenting) (quoting Union Pacific R. Co. v. Locomotive Engineers, 558 U.S. 67, 81 (2009).

81. *Id.* (Roberts, C.J., dissenting).

82. *Id.* at 1879–80 (Roberts, C.J., dissenting).

83. *Id.* at 1880 (Roberts, C.J., dissenting) (citing United States v. Mead Corp., 533 U.S. 218, 229 (2001)) (arguing that courts "give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law'").

84. *Id.* (Roberts, C.J., dissenting). Throughout his dissent, and in line with his more general critique of administrative agencies discussed below, the Chief Justice refers to agencies' powers as legislative (or judicial or executive). But as the majority points out, administrative law—as required by separation of powers—*depends* upon agencies exercising only executive functions. *See id* at 1870 n.4.

85. *Id.* at 1874.

subjected to a *de novo* judicial determination of whether *the particular issue* was committed to agency discretion."[86]

Yet, in the dissent's view, it is a mistake to believe that the conferral of general rulemaking authority necessarily entitles the agency to deference with respect to any interpretive question arising from the statute it administers.[87] Congress' intention may be different with respect to different parts of the statutory scheme.[88] Thus, its "delegation must extend to the specific statutory ambiguity at issue."[89] The need to focus on the specific statutory ambiguity at issue is particularly visible in a situation where Congress has "parcel[led] out authority to multiple agencies."[90] In such a situation, it is apparent that Congress could not have intended for each agency to interpret the statute that it administers, for multiple agencies administer the same statute and their interpretations may conflict.[91] Rather, in such a situation, "the question is whether authority over the particular ambiguity at issue has been delegated to the particular agency."[92] "By the same logic," the Chief Justice continued, "even when Congress provides interpretive authority to a single agency, a court must decide if the ambiguity the agency has purported to interpret with the force of law is one to which the congressional delegation extends."[93] The dissenters would have remanded the case for the Court of Appeals to answer that question.[94]

The majority also criticized the dissent as "offer[ing] no standards at all to guide this open-ended hunt for congressional intent," instead inviting the court "to make an ad hoc judgment regarding congressional intent" based on a totality of the circumstances.[95] According to the majority, such an approach would "destroy the whole stabilizing purpose of *Chevron*" and foster "chaos."[96] Justice Breyer's concurrence offers an example, however, of how the dissent's approach might be applied.

Justice Breyer began his concurrence with the same proposition as the dissent: "[a] reviewing judge . . . will have to decide independently

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86. *Id.*

87. *Id.* at 1883 (Roberts, C.J., dissenting).

88. *Id.* (Roberts, C.J., dissenting).

89. *Id.* (Roberts, C.J., dissenting). The Chief Justice points to the decision in *Chevron* itself, finding that there "the Court did not ask simply whether Congress had delegated to the EPA the authority to administer the Clean Air Act generally" but asked "whether Congress had 'delegat[ed] authority to the agency to elucidate a *specific provision* of the statute by regulation.'" *Id.* at 1881 (Roberts, C.J., dissenting) (quoting *Chevron*, 467 U.S. at 843–44). The majority's answer, of course, is that a general delegation automatically confers authority on all provisions included in a particular statute. *Id.* at 1874 ("Where we differ from the dissent is in its apparent rejection of the theorem that the whole includes all of its parts . . . .").

90. *Id.* at 1883 (Roberts, C.J., dissenting).

91. *See id.* at 1883–84 (Roberts, C.J., dissenting).

92. *Id.* at 1884 (Roberts, C.J., dissenting).

93. *Id.* (Roberts, C.J., dissenting).

94. *Id.* at 1886 (Roberts, C.J., dissenting).

95. *Id.* at 1874.

96. *Id.*

whether Congress delegated authority to the agency to provide interpretations of, or to enact rules pursuant to, the statute at issue."[97] A statutory ambiguity "is a sign—but not always a conclusive sign—that Congress intends a reviewing court to pay particular attention to (*i.e.*, to give a degree of deference to) the agency's interpretation."[98] And in making the assessment of whether Congress intended to delegate its authority to the agency, various "context-specific[] factors" may prove relevant: for example, whether the legal question is interstitial, whether it draws upon the agency's expertise, whether it is important to the administration of the statute and central to the agency's statutory duties, whether the administrative scheme is complex, and whether the agency has considered the question for a long period of time.[99] Legislative and regulatory history can also provide insight into whether Congress intended to invest an agency with the authority "to fill a gap with an interpretation that carries the force of law."[100] This multi-faceted inquiry is intended "to approximate how Congress would likely have meant to allocate interpretive law-determining authority between reviewing court and agency."[101]

Weighing these factors in the case before him, Justice Breyer identified "[m]any factors favor[ing] the [FCC's] view" that it deserves deference in interpreting the timeframe requirement in section 332(c)(7)(B)(ii), including the statute's language delegating broad authority, the ambiguous nature of the statute, the complexity of the subject matter, and the value of agency expertise in resolving that ambiguity.[102] Although Justice Breyer acknowledged that the petitioners "point to two statutory provisions [the savings clause and the judicial review provision] which, they believe, require a different conclusion," ultimately he concluded that "these two provisions cannot provide good reason for reaching the conclusion advocated by petitioners."[103] Thus, he found that Congress intended the FCC to enjoy authority to interpret the timeframe requirement, and arrived at the same ultimate conclusion as the majority: the FCC deserves *Chevron* deference for its interpretation of section 332(c)(7)(B).[104]

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97. *Id.* at 1875 (Breyer, J., concurring).
98. *Id.* (Breyer, J., concurring).
99. *Id.* (Breyer, J., concurring) (citing Barnhart v. Walton, 535 U.S. 212, 222 (2002)).
100. *Id.* at 1876 (Breyer, J., concurring).
101. *Id.* (Breyer, J., concurring).
102. *Id.* (Breyer, J., concurring).
103. *Id.* at 1877 (Breyer, J., concurring).
104. *Id.* (Breyer, J., concurring).

IV. THE IMPLICATIONS OF *ARLINGTON*

A. Chevron *Step Zero?*

Whether *Arlington* has more than passing significance depends on whether one reads the majority opinion as definitively rejecting the notion, advanced by the dissent and concurrence, that there is a "*Chevron* Step Zero"[105]—that, prior to applying the *Chevron* framework, a court must first ask whether Congress intended to give the agency interpretive authority over the provision at issue. The battle over that question has been long-running, and in a series of cases, a majority of the Court has appeared to adopt the approach of the concurrence and dissent in *Arlington*, suggesting that the approach has remained at least viable.

In asking whether Congress intended to delegate interpretative authority to the agency, the Court has invoked two sets of distinctions. The first, which tends to arise in judicial review of agency adjudications, concerns the *nature* of the question at issue: whether it presents a pure question of statutory construction, or instead involves an aspect of policymaking or a mixed question of fact and law. For example, in *INS v. Cardoza-Fonseca*,[106] the Court declined to defer to the agency with respect to whether the standard governing withholding-of-removal under 8 U.S.C. section 1253(h), which requires an alien to show that he or she is *more likely than not* to be subject to persecution if removed to her home country, also applies to an application for asylum under 8 U.S.C. section 1158, which requires an alien to establish a *well-founded fear* of persecution. The Court determined that this was a "pure question of statutory construction for the courts to decide."[107] The Court then rejected the Board of Immigration Appeals' interpretation, which treated the two standards as identical, and, after employing the usual tools of statutory construction, held that Congress did not intend them to be identical. [108]

The second set of distinctions concerns the *importance* of the question at issue: whether it is merely interstitial, or instead is a major question going to the heart of the statutory regime and the agency's regulatory authority. Ironically, perhaps the best recent example of a case in which the Court has drawn that distinction is *FDA v. Brown & Williamson Tobacco Corp.*,[109] in an opinion joined by Justice Scalia that purported to apply *Chevron*. The question in that case was whether the FDA was correct in concluding that it enjoyed authority to regulate tobacco products as drugs.[110] The statute, which defined a "drug" to include

105. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 200–02 (2006).
106. 480 U.S. 407, 430 (1987).
107. *Id.* at 446.
108. *Id.* at 448.
109. 529 U.S. 120 (2000).
110. *Id.* at 131.

"articles (other than food) intended to affect the structure or any function of the body,"[111] appeared sufficiently broad to permit the agency's view. Nonetheless, the majority rejected the agency's interpretation on the ground that Congress had directly spoken to the issue and precluded the FDA from regulating tobacco products.[112] Its conclusion, it said, was "guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[113] This mode of analysis bears much in common with the approach advocated by the concurrence and dissent in *Arlington*. Indeed, in a notable passage at the end of the majority opinion in *Brown & Williamson*, the Court acknowledged,

> [O]ur inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation . . . .
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> This is hardly an ordinary case . . . . Given th[e] history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.[114]

MCI Telecommunications Corp. v. American Telephone & Telegraph Co.[115] presents another example of a case in which the Court's willingness to defer to an agency's interpretation of a statute was informed by the importance of the question. That case concerned whether section 203(b) of the Communications Act of 1934—which gave the FCC discretion to "modify any requirement" under the statute—allowed the FCC to make voluntary the obligation on long distance carriers to file their rates with the agency.[116] The Court, in an opinion authored by Justice Scalia, rejected the agency's interpretation of the phrase "modify any requirement."[117] It held that "[i]t is highly unlikely that Congress would leave the determination of

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111. 21 U.S.C. § 321(g)(1)(C) (1994).

112. *Brown & Williamson*, 529 U.S. at 133 (finding that Congress chose "instead to create a distinct regulatory system for scheme focusing on the labeling and advertising of cigarettes and smokeless tobacco").

113. *Id.*

114. *Id.* at 159–60 (citations omitted).

115. 512 U.S. 218 (1994).

116. *Id.* at 225.

117. *Id.*

whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[118]

One key question about *Arlington*, then, is the degree to which it can be squared with the kind of analysis offered by the Court in *Brown & Williamson* and *MCI*. On the one hand, *Brown & Williamson* and *MCI* both purported to apply the *Chevron* framework. The majority in those cases viewed the importance of the question as influencing their plain language reading of the statute at "Step One" of the *Chevron* analysis—not as influencing its decision of whether to apply *Chevron* at all. Indeed, the *Arlington* majority cited both cases approvingly as examples in which *Chevron* had been applied to an "important" question concerning the scope of the agency's authority.[119]

On the other hand, the effort to characterize *Brown & Williamson* and *MCI* as merely ordinary applications of *Chevron* is less than satisfying. Both *Brown & Williamson* and *MCI* appear to recognize that deference should not necessarily be a reflexive responsive to statutory ambiguity. Rather, by the Court's own rationale in these cases, the nature and importance of the question should properly influence the degree of leeway that the Court accords to the agency in interpreting the statute. That is because the nature or importance of a question may inform one's judgment of whether it is the kind of question that Congress would have wanted to give the agency freedom to resolve, or instead whether it is a question that Congress should be presumed to have decided itself. *Arlington* calls that mode of analysis into question. Indeed, Justice Scalia in *Arlington* makes fun of the notion that courts should distinguish between "the big, important" questions and the "humdrum, run-of-the-mill stuff."[120]

B. The Open Internet Case

The petition to review the FCC's Open Internet Order, currently pending in the D.C. Circuit, presents a test case for how broadly to read *Arlington*. In that Order, promulgated on December 21, 2010, by a 3–2 party-line vote, the agency asserted jurisdiction to regulate Internet access providers.[121] The Open Internet Order mandates, among other things, that all broadband Internet providers carry the lawful content of all edge-suppliers altered only as required by reasonable network management and,

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118. *Id.* at 231.

119. *City of Arlington*, 133 S. Ct. at 1872 (*Chevron* applies even "where concerns about agency self-aggrandizement are at their apogee: in cases where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme.").

120. *City of Arlington*, 133 S. Ct. at 1868.

121. *See* Preserving the Open Internet, Broadband Indus. Practices, *Report and Order*, FCC 10-201, 160 FCC Rcd. 17905, para. 1 (2010) [hereinafter *Open Internet Order*].

for fixed providers, they not unreasonably discriminate in their carriage of content.[122]

The Open Internet Order relies on a number of statutory provisions as bases for its authority.[123] Most broadly, the Order asserts that Congress provided the Commission direct authority to regulate broadband Internet in section 706 of the Telecommunications Act of 1996.[124] Subsection (a) of that provision charges the Commission (as well as state utility commissions) to encourage the deployment of advanced telecommunications capabilities, such as broadband internet access, "by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[125] Subsection (b) similarly requires the Commission to undertake a yearly inquiry to determine if such capabilities are not being "deployed to all Americans in a reasonable and timely fashion," and, if not, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[126] The Order finds that advanced telecommunication capabilities are not being timely deployed, and thus invokes both subsections of 706 to support the Commission's rules.[127]

The FCC argues that section 706 provides authority for the Open Internet Order, because, the FCC asserts, the Order will encourage investment in broadband services.[128] By requiring broadband Internet access providers to provide consumer access to all edge-user content, the argument goes, consumers will have access to the most innovative content available.[129] This access will, in turn, drive up demand for more, better, and faster Internet connections and make investment in such projects more

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122. *Id.* at paras. 63–68. Other rules define reasonable network management, *id.* at paras. 80–92, and set forth transparency rules requiring disclosure of the provider's network management practices, *id.* at paras. 53–61. For a helpful discussion of the rules' content, see generally KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R40234, THE FCC'S AUTHORITY TO REGULATE NET NEUTRALITY AFTER *COMCAST V. FCC* (2013), *available at* http://www.fas.org/sgp/crs/misc/R40234.pdf.

123. The FCC relied on both direct and so-called ancillary jurisdiction. The FCC may invoke "ancillary jurisdiction" under section 4(i) of the Telecommunications Act of 1934. *See* 47 U.S.C. § 154(i) (2006) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."). This authority permits the Commission to regulate new industries and activities otherwise falling outside of its general statutory mandate, so long as that authority is "necessary to ensure the achievement of the Commission's statutory responsibilities." FCC v. Midwest Video Corp., 440 U.S. 689, 706 (1979).

124. *Open Internet Order*, *supra* note 121, at para. 122.

125. 47 U.S.C. § 1302(a) (2006).

126. 47 U.S.C. § 1302(b) (2006).

127. *See Open Internet Order*, *supra* note 121, at paras. 122–23.

128. *See id.* at para. 42.

129. *Id.* at para. 42 n.140.

economically attractive.[130] Against counterarguments that section 706 only allowed the FCC to use its *existing* statutory authority to encourage broadband deployment, the Commission points to legislative history that suggested the provision was intended to be a "fail-safe" to ensure the deployment of broadband services.[131] The Commission concluded that "it would be odd" for Congress to describe that section as a "fail-safe" if it did not confer authority beyond that already in the hands of the Commission.[132]

In addition to asserting direct authority under section 706, the Commission also asserts ancillary jurisdiction under a variety of provisions of the Communications Act of 1934.[133] As just one example, the Commission argued that it has authority ancillary to its Title II regulations of voice telephone ("VoIP") services because VoIP voice services are now used interchangeably with traditional telephone services.[134] But this argument—and other similar assertions for authority in the Open Internet Order—at best supports authority for only particular applications of the Order (*e.g.* prohibiting the blocking of competing VoIP applications in the case of the Title II argument). It is likely that even an amalgamation of the different provisions cited in the Order cannot justify the full breadth of the rules the FCC adopted, at least without the assertion of some penumbra-like gloss. For that reason, the Open Internet Order is likely to stand or fall based on the FCC's interpretation of section 706.

Arlington could have a potentially dispositive impact on whether the FCC's reading of section 706 is upheld. The FCC's interpretation is perhaps a permissible reading of the statute, but it is likely not one a court would adopt on *de novo* review. Among other things, the regulatory approaches explicitly mentioned in section 706(a)—price cap regulation and regulatory forbearance—are approaches for which the FCC clearly has authority from other statutory provisions, thus casting doubt on the notion that section 706 was intended to provide the agency additional authority. Likewise, as opponents have pointed out, section 706 appears to promote *deregulatory* action, making its invocation to justify a new regulatory regime an awkward fit.[135] Thus, securing deference for the Commission's reading may be a necessary condition for the Commission to win.

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130. *See* FCC Brief, *supra* note 17, at 37–43.

131. *See id.* at 36. *See also* S. REP. NO. 104-23, at 51 (1995) (describing section 706 as a "necessary fail-safe to ensure . . . accelerate[d] deployment" of broadband infrastructure); *id.* at 50 (stating that the section "intended to ensure that one of the primary objectives of the [1996 Act]—to accelerate deployment of advanced telecommunications capability—is achieved," and that it empowered the FCC to "provide the proper incentives for infrastructure investment").

132. *Open Internet Order*, *supra* note 121, at para. 120.

133. *Id.* at para. 122. For a balanced review of these provisions, see generally RUANE, *supra* note 122, at 19–22.

134. *Open Internet Order*, *supra* note 121, at para. 125.

135. *Id.* at paras. 145–72 (Dissenting Statement of Commissioner Robert M. McDowell); RUANE, *supra* note 122, at 16–18.

Yet the FCC's ruling draws on linguistic ambiguity to extend the agency's regulatory authority to a new field of substantial economic importance. If *Arlington* is broadly read to make that fact irrelevant in determining whether deference is warranted, then the FCC has a reasonable chance of prevailing. The Order arises from the very same agency that the *Arlington* majority described as being "unambiguously vested . . . with general authority to administer the Communications Act."[136] Congress likely understood that the FCC would draw upon its longstanding expertise on technical matters as well as its experience in administering different kinds of regulatory regimes to determine the boundaries of its authority with respect to the Internet. Thus, for example, in the *Brand X* case, the Supreme Court deferred to the FCC's ruling that broadband Internet access provided via cable modem service is an information service falling outside of the agency's Title II regulatory regime, suggesting that the FCC had substantial discretion to go either way on the issue.[137] As the Court stated, "[t]he questions the Commission resolved in the order under review involve a 'subject matter [that] is technical, complex, and dynamic.' The Commission is in a far better position to address these questions than we are."[138] If, as the *Brand X* majority suggested, Congress meant to delegate to the FCC the question whether broadband Internet access is subject to the Communications Act's Title II regulatory regime, why wouldn't Congress have delegated to the FCC the question of the extent to which section 706 allows the agency to regulate aspects of the Internet?

However, if *Arlington* is read to be consistent with *Brown & Williamson* and *MCI*—thereby allowing the court to consider the important consequences of the FCC's order in deciding whether Congress has spoken clearly to the question at issue—the result of the case is less clear. The Open Internet Order plainly implicates a question of such importance—perhaps as important to the communications industry as the issue in *Brown & Williamson* was to the tobacco industry—that one might conclude that, whatever Congress may have intended in drafting section 706, it clearly did not mean to authorize the agency to expand its regulatory authority to this new field. Indeed, if the FCC's reading of section 706 were upheld, it is hard to conceive of any regulation of the Internet that could not be similarly justified.

C. The Nondelegation Doctrine

One more feature of the *Arlington* decision is worthy of note, and it concerns the dissent. Rather than immediately focus on the question at issue, the Chief Justice engaged in an elongated detour criticizing the

136. *City of Arlington*, 133 S. Ct. at 1874.
137. NCTA v. Brand X Internet Servs., 545 U.S. 967, 969 (2005).
138. *Id.* at 1002–03 (citations omitted) (quoting NCTA v. Gulf Power Co., 534 U.S. 327, 339 (2002)).

modern administrative state as wielding authority "over our economic, social, and political activities" at a level which "[t]he Framers could hardly have envisioned."[139] He warned that the "accumulation" of executive, legislative, and judicial power "in the same hands" has become "not an occasional or isolated exception to the constitutional plan" but "a central feature of modern American government."[140] Indeed, he stated, "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating."[141] While the majority focused on the dangers created when "the Judiciary arrogat[es] to itself policymaking properly left" to the other branches,[142] the dissent concentrated instead on "another concern [that is] 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."[143]

These observations, of course, relate to the long-dormant nondelegation doctrine. That doctrine protects against a wholesale delegation of legislative authority to agencies[144] and requires that Congress "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[145] The Court has largely foresworn any strong nondelegation principle and instead upheld Congress's use of relatively vague, ambiguous terms, such as "public interest," as sufficient to cabin agency discretion.[146]

According to the Chief Justice, the combination of a toothless nondelegation doctrine and a broad reading of *Chevron* places in an agency's hands "a potent brew of executive, legislative, and judicial power" that erodes the separation of powers so essential to the Framers' constitutional design.[147] Indeed, Chief Justice Roberts wrote that, although "[i]t would be a bit much to describe the result as 'the very definition of

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139. *City of Arlington*, 133 S. Ct. at 1878 (Roberts, C.J., dissenting). The Chief Justice even cites to scholarly works written by Justices Breyer and Kagan as supporting his view that bureaucrats are largely unaccountable. *See id.* (quoting Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001) and STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 110 (2010)).

140. *City of Arlington*, 133 S. Ct. at 1878 (Roberts, C.J., dissenting).

141. *Id.* at 1879 (Roberts, C.J., dissenting).

142. *Id.* at 1886 (Roberts, C.J., dissenting).

143. *Id.* (Roberts, C.J., dissenting).

144. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.").

145. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

146. *But see* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (arguing that, although the Court no longer invokes the nondelegation doctrine itself, it has repackaged the doctrine as a series of canons of statutory construction designed to cabin the scope of agency authority in certain circumstances in the absence of a clear statement by Congress).

147. *City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting).

tyranny,' . . . the danger posed by the growing power of the administrative state cannot be dismissed."[148]

The last case addressing the nondelegation doctrine, *Whitman v. American Trucking*, was decided by the Court in 2001,[149] before the Chief Justice or Justice Alito—two of the three dissenters in *Arlington*—had joined the Court. And Justice Thomas—a member of the majority in *Arlington*—concurred in *American Trucking*, stating that "[o]n a future day, . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[150] Will the Roberts Court hasten that future day? Time will tell.

V. CONCLUSION

The Court granted certiorari in *Arlington* to decide the question of whether an agency should receive deference when interpreting the scope of its own jurisdiction. But the case ended up turning on a different question: whether, prior to applying *Chevron*, a court must determine if Congress intended to delegate to the agency the power to interpret the particular provision at issue. *Arlington* could simply be read as the latest skirmish in a long-running battle over that issue, and to leave its final resolution for another day. Or, more momentously, the case could be read to decide that issue in favor of agency deference. If the latter, then the *Arlington* decision is significant indeed. While the Supreme Court has previously modulated the degree of deference it gives to an agency depending on the nature or importance of the statutory question presented, the majority in *Arlington* appears to reject such an approach. The appeal of the FCC's Open Internet Order currently pending in the D.C. Circuit provides a good example of the kind of case that might be affected by one's reading of *Arlington*. The Open Internet Order extends the FCC's regulatory authority into a new area of great economic and social importance, premised on a statutory interpretation that may be within the bounds of reasonableness, but is unlikely to be regarded as the most natural interpretation. A key issue in the case, therefore, is whether the FCC should receive full *Chevron* deference, or instead whether the court should exercise its own judgment about what Congress intended, in light of the importance of the question. If the court concludes that full *Chevron* deference is warranted, and that the agency is free to extend its authority into new regulatory domains through creative statutory interpretation, pressure will build to constrain agency action in other ways—potentially including a reinvigoration of the nondelegation doctrine.

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148. *Id.* at 1879 (Roberts, C.J., dissenting).
149. *See generally Whitman*, 531 U.S. 457.
150. *Id.* at 487 (Thomas, J., concurring).