RULES VERSUS STANDARDS IN *CITY OF ARLINGTON V. FCC*, 133 S. CT. 1863 (2013)

In the 1984 case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] the Supreme Court created a two-step test for judicial review of agency decisionmaking. In the first step the court must determine whether Congress has clearly spoken to the issue under review; if so, Congress's interpretation is binding.[2] If Congress has not clearly spoken on the issue, then during step two a reviewing court must determine whether the agency's interpretation of the statute is permissible and defer to the agency's interpretation if it is.[3] Since *Chevron*, the Court has continued to define the circumstances under which this *Chevron* deference applies. One line of cases has created a "step zero," under which some questions do not qualify for review under the *Chevron* framework at all.[4] Another line of cases has created a "major questions" doctrine, exempting some particularly contentious issues from *Chevron* deference on the theory that Congress would have been explicit had it intended the agency to resolve such an important issue.[5] As a result, judicial review of agency decisionmaking no longer simply involves applying the *Chevron* two-step framework, but necessitates a multi-step, multifactor inquiry.

Last term, in *City of Arlington v. FCC*,[6] the Court took a step towards simplifying the *Chevron* doctrine. The Court granted certiorari on the question of whether *Chevron* deference applies

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1. 467 U.S. 837 (1984).
2. *See id.* at 842–43.
3. *See id.* at 843.
4. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (finding that *Chevron* deference is warranted only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," and a less deferential standard, outlined in Skidmore v. Swift & Co., 323 U.S. 134 (1944), applied); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (finding agency interpretation lacked the "force of law" and thus *Skidmore*, rather than *Chevron*, applied).
5. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (declining to apply *Chevron* deference to the FDA's interpretation of the Food, Drug, and Cosmetic Act granting the FDA jurisdiction over tobacco products, partially due to the "nature of the question presented"); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) (declining to apply *Chevron* deference to an agency interpretation that would allow a "fundamental revision of the statute").
6. 133 S. Ct. 1863 (2013).

when the agency is resolving a statutory ambiguity concerning the scope of the agency's own jurisdiction.[7] Determining that the same standard of review applied to both jurisdictional and nonjurisdictional questions, the Court found that *Chevron* deference applied.[8] In declining to create a separate category of review for jurisdictional questions, the Court breathed new life into the unadorned two-step process laid out in *Chevron*. In the debate over whether rules or standards are the more appropriate means for developing the rule of law, *Arlington* represents a victory for rules. When *Arlington* is considered in the context of preceding cases, it becomes clear that this decision contains an explicit choice of a rule over a standard.

I. BACKGROUND

Section 332(c)(7)(B)(ii) of the Communications Act of 1934 requires state or local governments to act on applications for proposed tower or antenna sites by wireless networks within "a reasonable period of time" after the request is filed.[9] In 2008, an organization representing wireless service providers petitioned the Federal Communications Commission (FCC) to clarify the meaning of the phrase "within a reasonable period of time."[10] In a declaratory ruling, the FCC found that "lengthy and unreasonable" delays were occurring, which interfered with the provision of wireless services and competition, contrary to Congress's purpose in enacting the 1996 Act.[11] Accordingly, the

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7. *Id.* at 1867–68.

8. *Id.* at 1868 ("[T]he distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. 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*.").

9. 47 U.S.C. § 332(c)(7)(B)(ii) (2006) (as amended). The Telecommunications Act of 1996 reduced the discretion of state and local governments with regard to oversight of wireless telecommunications networks' facilities and incorporated those limitations into the 1934 Act. *Arlington*, 133 S. Ct. at 1866.

10. *Id.* at 1867.

11. *In re* Petition for Declaratory Ruling, 24 FCC Rcd. 13,994, 14,004–08 (2009); *Arlington*, 133 S. Ct. at 1867. The FCC determined that it had authority to interpret section 332(c)(7)(B)(ii) based on delegations by Congress throughout the Act including sections 1 (directing the FCC to "execute and enforce the provisions of this Act") and 201(b) (authorizing the FCC "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act"). *In re* Petition for Declaratory Ruling, 24 FCC Reg. at 14,001 (citing 47 U.S.C. §§ 151, 201(b)).

FCC defined "a reasonable period of time" as 90 days for collocation applications, and 150 days for all other applications.[12]

The cities of Arlington and San Antonio, Texas sought review of the Declaratory Ruling in the Court of Appeals for the Fifth Circuit.[13] The cities asserted that the FCC lacked the statutory authority to define "a reasonable period of time"[14] and challenged the specific timeframes chosen by the FCC as in conflict with the language of the statute.[15] The court first noted that there was a circuit split as to whether *Chevron* deference applied to an agency interpretation of the scope of its own jurisdiction.[16] The court nonetheless went on to apply *Chevron*, finding under step one that the statute was ambiguous as to the FCC's authority to establish time frames.[17] Furthermore, under step two the Fifth Circuit found that the FCC's interpretation of the statute—that the statute granted the FCC authority to establish time frames—was permissible.[18] The court also applied *Chevron* to the FCC's choice of 90 and 150-day time frames and found that it "pass[ed] muster."[19] The Supreme Court granted certiorari only on the question: "Whether . . . a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction."[20]

II. THE OPINION

The Supreme Court affirmed the Fifth Circuit's ruling.[21] Writing for the Court,[22] Justice Scalia found that "[n]o matter how it is framed, the question a court faces when confronted

12. *In re* Petition for Declaratory Ruling, 24 FCC Reg. at 14,012. A collocation application is an application to place a new antenna on an existing tower. *Arlington*, 133 S. Ct. at 1867.

13. City of Arlington v. FCC, 668 F.3d 229, 233 (5th Cir. 2012). Several organizations also petitioned the FCC for reconsideration of the Declaratory Ruling and the FCC denied their joint petition. *Id.* at 236.

14. *Id.* at 237.

15. *Id.* Among other claims, the cities also challenged the FCC's action as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" and as a violation of the Administrative Procedure Act. *Id.*

16. *Id.* at 248.

17. *Id.* at 251–52, 254.

18. *Id.*

19. *Id.* at 254–55.

20. City of Arlington v. FCC, 133 S. Ct. 1863, 1867–68 (2013).

21. *Id.* at 1875.

22. Justice Scalia was joined by Justices Thomas, Ginsburg, Sotomayor and Kagan. *Id.* at 1865.

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*."[23] The Court found that in the agency context there is no meaningful distinction between jurisdictional and nonjurisdictional questions.[24] Both an agency's power to act at all and the way in which it may act derive from a congressional grant, and therefore "the question . . . is always whether the agency has gone beyond what Congress has permitted it to do."[25] The Court went on to demonstrate that a small change in wording can make what is essentially the same question either jurisdictional or nonjurisdictional, concluding that "[t]he label is an empty distraction."[26] Therefore, the Court found *Chevron* analysis, and the resulting deference to an agency's permissible construction of the statute that it administers, appropriate when the ambiguity being interpreted concerns the scope of the agency's statutory authority.[27]

Justice Breyer wrote an opinion concurring in part and concurring in the judgment.[28] He called for a more nuanced approach in determining whether or not Congress "has left a deference-warranting gap for the agency to fill."[29] There is a background presumption in *Chevron* that when Congress creates ambiguity in a statute there is an implicit delegation to the agency to interpret that ambiguity.[30] Justice Breyer would have the Court perform the analysis developed through *United States v. Mead Corp.*[31] and *Skidmore v. Swift & Co.*[32] to determine whether Congress intended for the agency to resolve a statutory ambiguity.[33] Applying that analysis, Justice Breyer concluded

23. *Id.* at 1868.
24. *Id.* at 1868–69.
25. *Id.* at 1869.
26. *Id.* at 1870.
27. *Id.* at 1874–75. Addressing the concern that this ruling "leaves the fox in charge of the henhouse," the Court explained that by "applying rigorously . . . statutory limits on agencies' authority" that danger is avoided. *Id.* (internal quotation marks omitted).
28. *Id.* at 1875 (Breyer, J., concurring).
29. *Id.*
30. *Id.* at 1868.
31. 533 U.S. 218 (2001).
32. 323 U.S. 134 (1944).
33. *Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring); *see also* notes 51–57 and accompanying text.

that the 1996 Act "leaves a gap for the FCC to fill" and that "the FCC's lawful efforts to do so carry 'the force of law.'"[34]

Chief Justice Roberts dissented.[35] He disagreed with the majority on the "fundamental" ground that "the question whether an agency enjoys [authority conferred by Congress] must be decided by a court, without deference to the agency."[36] Chief Justice Roberts asserted that in order for an agency to enjoy *Chevron* deference, Congress must have intended for the agency to resolve the *specific* statutory ambiguity in question.[37] The court must make this determination on its own as a precondition to performing the *Chevron* two-step analysis.[38] Chief Justice Roberts would have vacated the decision and remanded to the Fifth Circuit to perform this independent analysis.[39]

III. ANALYSIS

The Court's decision in *City of Arlington v. FCC* fits into a larger debate over whether rules or standards are the more appropriate means for advancing the rule of law. In its simplest form, the debate concerns the amount of discretion that should be left to a given decisionmaker.[40] The case for rules has been laid out by

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34. *Id.* at 1877.

35. *Id.* (Roberts, C.J., dissenting). Chief Justice Roberts was joined by Justices Kennedy and Alito. *Id.* Roberts began by discussing the scope of the administrative state and the relative independence enjoyed by many agencies, stating that the question of an agency's power to interpret its own jurisdiction must be understood against this backdrop. *Id.* at 1877–79.

36. *Id.* at 1877. Acknowledging that the term jurisdiction can be "ambiguous," Chief Justice Roberts defined jurisdiction as "congressionally delegated authority to issue interpretations with the force and effect of law." *Id.* at 1880.

37. *Id.* at 1883. Whereas the majority would seem to find congressional intent for an agency to resolve statutory ambiguity arising anywhere in the statute that it administers, Chief Justice Roberts would make a separate determination for each instance of ambiguity.

38. *Id.* at 1883. "In other words, [courts] do not defer to an agency's interpretation of an ambiguous provision unless Congress wants [them] to, and whether Congress wants [them] to is a question that courts, not agencies, must decide. Simply put, that question is 'beyond the *Chevron* pale.'" *Id.* (quoting United States v. Mead Corp., 533 U.S. 218, 234 (2001)).

39. *Id.* at 1886.

40. Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992). In the modern debate over rules versus standards, the Supreme Court tends to divide along political lines with the more conservative Justices favoring rules and the more liberal Justices favoring standards. *See id.* at 26.

Justice Scalia: [41] Rules promote equality of treatment and uniformity, [42] they advance predictability, [43] they constrain judges,[44] and, finally, they can help judges make "courageous" rulings in the face of popular condemnation.[45] Standards, on the other hand, "allow for the decrease of errors of under- and over-inclusiveness."[46] The arguments in favor of standards are that they promote substantive justice, [47] they can be adapted to different circumstances, [48] they promote equality, [49] and they promote judicial accountability by necessitating deliberation.[50]

To understand the significance of the Court's decision in *Arlington*, it is necessary to understand the alternative approach, as outlined in *United States v. Mead Corp*.[51] In *Mead*, the Court considered the circumstances under which "administrative implementation of a particular statutory provision qualifies for *Chevron* deference."[52] The Court concluded that *Chevron* deference

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41. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Although by no means the only advocate of rules, Justice Scalia is considered "[t]he leading contemporary proponent of the rules-as-democracy argument." Sullivan, *supra* note 40, at 65.

42. Scalia, *supra* note 41, at 1177–78. Justice Scalia argues that equality of treatment is important to satisfy parties' sense of justice and that a "discretion-conferring" standard does not do so. Further he explains that the "idyllic notion" of the Court "gradually closing in" on a rule of law is inapplicable in the modern context where the Court hears such a small number of cases. *Id.*

43. *Id.* at 1179.

44. *Id.* at 1179–80.

45. *Id.* at 1180. Justice Scalia explains that adhering to the plain meaning of a statutory text and utilizing an originalist theory of constitutional interpretation "[facilitate] the formulation of general rules." *Id.* at 1183–84.

46. Sullivan, *supra* note 40, at 58.

47. *Id.* at 66 ("Rule-based decisionmaking suppresses relevant similarities and differences; standards allow decisionmakers to treat like cases that are substantively alike.").

48. *Id.* Whereas rules "tend toward obsolescence," standards can be adapted to keep up with the times.

49. *Id.* at 67 (explaining the view that "standards serve redistributive purposes better than rules").

50. *Id.* at 67–68.

51. 533 U.S. 218 (2001).

52. *Id.* at 226–27. In *Mead*, the Court considered whether a tariff classification ruling by the United States Customs Service (Customs) should receive judicial deference under *Chevron*. 19 U.S.C. § 1500(b) authorizes Customs to set merchandise classifications and rates of duty in compliance with guidelines prescribed by the Secretary of the Treasury. *Id.* at 221–22. These classifications are made by "ruling letters" which can be issued by any of the forty-six port-of-entry Customs offices and by the Customs Headquarters Office. They apply only to the particular issue or transaction addressed in the ruling letter or to identical articles.

is appropriate only "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."[53] The Court went on to determine that a less deferential standard, laid out in *Skidmore v. Swift & Co.*,[54] applied in the situation at hand.[55] The Court concluded that varying degrees of judicial deference could be applicable, necessitating that a court decide between applying *Chevron* or *Skidmore*.[56] This essentially added a step zero to the *Chevron* analysis wherein the Court would use "an open-ended, multifactor analysis" to determine whether there existed congressional intent to delegate authority to make rules carrying the force of law.[57]

The Court's decision in *Arlington* represents the selection of a rule over a standard. Looking at *Arlington* in isolation, this is clear enough. The Court could have elected to create a separate class of jurisdictional questions.[58] This would have required future courts to exercise discretion in determining whether a question was jurisdictional, weighing the specific facts of each case.[59] Such a decision would have moved the determination of

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Id. at 222–24. *Mead* concerned a classification of day planners imported by the Mead Corporation. *Id.* at 224.

53. *Id.* at 226–27. Such a congressional delegation can be shown in multiple ways including, but not limited to, granting an agency the power to engage in adjudication or notice-and-comment rulemaking. *Id.*

54. 323 U.S. 134 (1944). *Skidmore* is a pre-*Chevron* case in which the Court, after considering a variety of factors, found an agency's interpretation to be persuasive but not controlling. *See id.* at 140.

55. *Mead*, 533 U.S. at 238–39. The Court vacated and remanded, stating that "the *Skidmore* assessment called for here ought to be made in the first instance by the Court of Appeals for the Federal Circuit." *Id.*

56. *Id.* at 237–38. Justice Scalia dissented, stating that *Mead's* "consequences will be enormous, and almost uniformly bad" and advocating "[adherence] to . . . established jurisprudence," namely *Chevron*. *Id.* at 239–40, 261 (Scalia, J., dissenting).

57. *See* Patrick J. Smith, Chevron *Step Zero After* City of Arlington, 140 TAX NOTES 713, 714–15 (2013).

58. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) (discussing the idea of separate "jurisdictional" questions).

59. *See id.* at 1884 (Roberts, C.J., dissenting) ("[E]ven 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. A general delegation to the agency to administer the statute will often suffice to satisfy the court that Congress has delegated interpretive authority over the ambiguity at issue. But if Congress has exempted particular provisions from that authority, that exemption must be respected, and the determination whether Congress has done so is for the courts

whether to grant deference to an agency's interpretation of statutory ambiguity further towards the standards end of the continuum. In rejecting the dissent's approach, Justice Scalia stated that:

> [The dissenters] would simply punt [the jurisdictional] question back to the Court of Appeals, presumably for application of some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent. Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of Chevron.[60]

Justice Scalia thereby made his rejection of the standards-based approach explicit. Instead, the Court declined to create a separate class of jurisdictional questions, and chose to treat all agency interpretations of statutory ambiguity alike.[61] This approach constrains judicial discretion, leaving future courts with a clear mandate to apply the *Chevron* two-step analysis.[62] In so doing, *Arlington* creates a clear rule for future courts to follow.[63]

Viewing *Arlington* in the context of *Chevron* and *Mead* reinforces its status as a rule-oriented decision. *Chevron* itself is essentially a rule.[64] *Mead*, on the other hand, necessitates a more complex, standard-like analysis of agency interpretations.[65] In *Arlington*, the Court chose to "limit and simplify," rejecting the

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alone."). Thus, a reviewing court must determine not only whether a question is jurisdictional but, if it is, whether there is a general grant of interpretative authority from Congress and further, whether there is a specific grant of interpretive authority.

60. *Id.* at 1874.

61. *Id.* at 1868 ("[T]he distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage.").

62. *See id.* at 1874–75 (a court need only determine whether "'the agency's answer is based on a permissible construction of the statute'" (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984)).

63. Structurally, *Arlington* also represents a move towards a simpler, rule-like analysis of agency decisionmaking. Nowhere in the decision does the Court perform the *Mead* analysis, and *Skidmore* is never mentioned in the majority opinion.

64. *See id.* at 1868 ("*Chevron* thus provides a stable background rule against which Congress can legislate. . . .").

65. Justice Scalia described this in his dissent in *Mead*, stating "[t]he Court has largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th' ol' 'totality of the circumstances' test." United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

Mead Court's decision "to tailor deference to variety."[66] In declining to create a separate category of jurisdictional questions that would not receive *Chevron* deference, the Court revived the simple two-step inquiry laid out in *Chevron*. Writing for the Court, Justice Scalia made explicit the choice to defend *Chevron*:

> Make no mistake—the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the "jurisdictional" card in every case. . . . The effect would be to 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 federal courts. We have cautioned that "judges ought to refrain from substituting their own interstitial lawmaking" for that of an agency. That is precisely what *Chevron* prevents.[67]

The dissenters just as clearly favored *Mead*'s standard-like approach, stating that "before a court may grant [*Chevron*] deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue."[68] This essentially describes the *Chevron* step zero implemented in *Mead*.

The debate within the Supreme Court over rules versus standards is by no means settled by *Arlington*, and the most immediate implications of this case are in the area of administrative law.[69] To the extent that the decision represents the Court's choice of a rule over a standard, however, it has implications for many other areas of law.[70] The debate over

66. *Id.* at 236 (majority opinion) ("Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety.").

67. *Arlington*, 133 S. Ct. at 1873 (internal citations omitted).

68. *Id.* at 1880 (Roberts, C.J., dissenting).

69. The decision in *Arlington* has its most direct effect on anyone involved in areas of law where *Chevron* analysis is used. *See, e.g.*, Patrick J. Smith, *supra* note 57, at 713 (explaining to tax practitioners that the decision in *Arlington* is important to their practice because it clarifies step zero of *Chevron* and "the *Chevron* two-part test applies to actions taken by the IRS, just as it does to those taken by all other federal agencies").

70. In her Foreword to the Harvard Law Review's issue devoted to the Supreme Court's 1991 term, Professor Kathleen Sullivan analyzed the Court's 1991 Term within the overarching framework of rules versus standards. That Term included cases in areas of law as diverse and significant as "abortion rights, freedom of religion, freedom of speech, takings, and federalism." Sullivan, *supra* note 40, at 26.

rules versus standards concerns "legal form" and "can be analyzed in isolation from the substantive issues that the rules or standards respond to."[71] The choice of a rule signals a prioritization of "restraint of official arbitrariness and certainty" at the cost of being both over- and under-inclusive.[72] Therefore, the choice of a rule over a standard in *Arlington* represents a choice of judicial values, which could significantly shape the Court's decisions across all areas of law.

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71. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687 (1976).
72. *Id.* at 1688–89.