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

INTRODUCTION

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³ 5 H J X O D W R U \ $ F F R X Q W D E L O L W \ $ F W Z D V L Q W U R G X F H G L Q ´ Z Administration to fundamentally curtail the power and scope of administrative agencies.[4] Writing for The Atlantic, Peter M. Shane asserts that these two laws complicate an already complex rulemaking process to

1. See Andrew Soergel, *Trump Talks Scrapping Government Regulations*, U.S. NEWS & WORLD REPORT (Jan. 23, 2017, 11:42 AM), http://www.usnews.com/news/articles/2017-01-23/donald-trump-we-can-peel-back-government-regulations-memo.

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

4. See Shane, *supra* note 1.

UHJXODWRU\ ]HDO XVKHUHG LQ E\ 3UHVLGHQW 7
+RXVH DQG -XVWLFH *RUVXFK¶V[21] this dual case 6XSUHPH &RXUW
study of Arlington and Tennessee aims to provide insight into one of the ways in which the landscape of the post-New Deal administrative state is almost certain to fundamentally change for years to come, from within the highest courts in the land.

Part I provides an overview of the persuasive power of federalism-based arguments and dissenting opinions to influence and, more significantly, change substantive areas of law. In particular, it explains how Chevron deference works and illucidates how it fits within these federalism-based dissenting opinions as a prime substantive target to FXUWDLO 3DUW ,, H[DPLQHV WKH 6XSUHPH &R RSLQLRQV¶ XQGHUO\LQJ IHGHUDO-based arguments in Arlington. This five-to-IRXU GHFLVLRQ QDUURZO\ XSKHOG Chevron deference. WKH)&& 6SHFLILFDOO\ LW FRQWUDVWV Chevron-deference in 6FDOLD KLV PDMRULW\ RSLQLRQ ZLWK dissent. & KLHI -XVWLFH Particular attention is SDLG WR WKH GLVVHQW-based concerns RSLQLRQ¶V about what it perceived as the threat posed by the growth and power of the UHJXODWRU\ VWDWH 3DUW ,,, IRFXVHV-based RQ WKH denial of Chevron deference to the FCC in Tennessee. After providing background for the specific issues at stake, this art explains the fundamental change the Sixth Circuit made to the Chevron analysis, undercutting the power and scope of the FCC. Part IV evaluates the state of Chevron deference post-Tennessee E\ SODFLQJ WKH 6L[WK &LUFX within the current anti-regulatory political context. In essence, this Part VXJJHVWV WKDW WKH 6L[WK &LUFXLW¶V Chevron deference GHFLVL elucidates the rise of a potent federalism-based legal narrative that champions state sovereignty against what has been derisively characterized by critics since the New Deal era as a unconsti(t)-41i(t)-41i(t)- 61 0 g 0 ((t)- 61 0 g

GHFLVLRQ WKDW RYHUWXUQHG WKH)&&¶V WUDG
held *Chevron* deference.
This Part also explains how *Chevron*

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-XGLFLDU\¶V GHJUHH RI [32] XQFHUWDLQW\ UHVSHFW
RI VWDQGDUGV´ DSSOLHG WR WKH GHFLVLRQ
of federalism-based judicial reasoning that places issues of federal versus state and local rights front and center of many important constitutional questions of our time.[33]

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

Since federalism has occupied such a central role in many of the great GHEDWHV LQ RXU QDWLRQ¶V KLVWRU\ RQH ZRX
significant number of Supreme Court dissenting opinions. Indeed, Professors Vanessa Baird and Tonja Jacobi have found that federalism appears, not unsurprisingly, in a significant number of dissenting opinions across many substantive areas.[34] They identify federalism as a significant [3]FURVV FXWWLQJ´ LVVXH FDSDEOH RI VSOLWW
substantive policy area.[35] Given that dissenting opinions arguably indicate the presence of legal indeterminacy or, at least, the existence of divergent judicial vantage points about a particular dispute,[36] the invocation of federalism to affect judicial change is unsurprising.

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

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32. *Lopez*, 514 U.S. at 557.

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

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

35. *See id.*

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

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

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

is novel about their research is their focus on the specific influence of federalism-based dissents as their unit of analysis.[39] Their theory of judicial VLJQDOLQJ SRVLWV WKDW IHGHUDOLVP KDV D SD that judges use federalism EDVHG DUJXPHQWV VXFFHVVIXOO\ means of deciding cases. and as a means of achieving the reverse outcome in a FDVH GHFLGHG RQ WKH EDVLV RI[40] In WKH VXE WKLV ZD\ IHGHUDOLVP LV RQH ZD\ LQ ZKLFK D M legal issue can influence determinatively an adjudicatory outcome.[41] Their research confirms that federalism, when invoked by the dissent, moves

DJJUDQGL]HPHQW RI H[HFXWLYH SRZHU IURP 3UH
New Deal initiatives.[45] Indeed, this expansion has been derisively
described as spawning an unprecedHQWHG 3DOSKDEHW VRXS´ RI D
agencies.[46] And, some critics have gone so far as to allege the
unconstitutionality of the post-New Deal administrative state itself.[47]
Despite a treasure trove of dissenting opinions and academic self.

L Q W H U S U H W[54] D W L R Q V R I O D Z ´ They describe the nascence of

addressed.[64] At this stage, if Congress has spoken directly and clearly to W K H V W D W X W R U \ L V V X H W K H Q [65] & R Q J U H V V ¶ L Q W H & R Q J U H V V ¶ L Q W H Q W U H J D U G L Q J W K H T X H V W L R Q 7 Z R [3] W K H Q T I X H U V W L R F R X U W L V Z K H W K H U W K H D J H D S H U P L V V L E O H F R Q V W U X [66] Regardless of whether Congress leaves an explicit or implicit statutory gap, a reasonable D G P L Q L V W U D W L Y H L Q W H U S U H W D W L R Q [67] W U X P S V D

The next two parts chart two major challenges to Chevron deference,

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

authority beyond the executive power in this case.

function.[131] This Part first provides some background regarding the facts of WKLV FDVH DQG WKHQ GHVFULEHV WKH 6L[WK &R the Chevron framework at Step One when confronted with an issue of federal preemption of state law.

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

7KH FLW\ RI &KDWWDQRRJD [132]has been hailed H¶V IRX a high-tech success story.[133] The city was named one of seven global finalists for the Intelligent Comm;QLW\ )RUXP¶V 3 ,QWHO &RPPXQLW\ RI WKH [134]In fact, the Intelligent Community Forum UHFRJQL]HG &KDWWDQRRJD IRU KLJK-SHHG V\VWHPV LQ [135]both 2010 and 2012, the city was recognized for leveling the high-WHFK SOD\LQJ ILHOG E\ SURYLGLQJ 3Q ULFK RU SRRU >@ ZLWK WKH ZRUOG¶V [136] PRVW DI This placed Chattanooga, located in the southeastern part of the state and with a 2010 population of only 167,674,[137] in the company of past winners, including Singapore (1999), New York City (2001), Seoul (2002), Taipei (2006), Stockholm (2009), and Montreal (2010).[138] Several studies, along ZLWK &KDWWDQRRJD¶V &KDPEHU RI &RPPHUFH provided by the Electric Power Board of Chattanooga (3EPB´) with G\QDPLF MREV JURZWK DQG WKH FLW\¶V UREXVW H[[139]

Like Chattanooga, the city of Wilson provides the residents of Wilson &RXQW\ ZLWK 3RSWLFDO ILEHU´ EURDGEDQG FR

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

,Q LQ UHVSRQVH WR ³UHJXODU UHTXHVW areas, both the EPB of Chattanooga and the City of Wilson petitioned the FCC to preempt Tennessee and North Carolina state law.[152] Consequently, the FCC granted their petitions in 2015, preempting state law.[153] Nevertheless, on appeal in 2016, the Sixth Circuit, in *Tennessee v. FCC*, RYHUWXUQHG WKH DJHQF\¶V SUHHPSWLYH GHFL[154] In doing so, the Sixth Circuit undercut the deference historically accorded to the FCC that had been upheld in *Arlington*.[155] Specifically, in *Arlington*, the Court had DIILUPHG WKH)&&¶V DXWKRULW\ WR LQWHU Telecommunications Act by according the agency *Chevron* deference.[156] In WKH HQG WKH 6L[WK &LUFXLW XQGHUFXW WKH *Chevron* deference by RYHUWXUQLQJ WKH DJHQF\¶V SUHHPSWLYH GH interpretation of the Telecommunications Act.[157]

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

The case of *Tennessee v. FCC* is the epitome of one that petitioners successfully recast into federalism-EDVHG IRUP 7KH 6L[WK & GHFLVLRQ DJDLQVW WKH)&& ZDV FRQVHTXHQWL the preemption of North Carolina and Tennessee law turned, in part, on two EDVLF LVVXHV WKH)&&¶V LQWHUSUHWDWLRQ EURDGEDQG LQYHVWPHQW DQG FRPSHWLWLRQ *Chevron* deference in asserting this understanding.[158] *Chevron* emerged as a central DVSHFW LQ WKH)&&¶V FDVH XQGHU[159] The FCC framed the issue for the court as one in which *Chevron* deference is RZHG WR WKH DJHQF\¶V LQWHUSUHWDWLRQ RI ³V

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

152. *See id.*

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

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

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

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

that the agency administerV[160] Significantly, the FCC cited Arlington as support for its deference.[161] The agency described its regulatory power under Section 706 to preempt state law based on its general authority to maintain control of the communications industry as part of a comprehensive regulatory apparatus.[162] And, the FCC interpreted the encouragement of broadband as part of its central mandate.[163] In essence, the agency asserted WKDW LWV DXWKRULW\ WR ³UHJXODWH LQWHUVW promote broadband deployPHQW DQG FRPSHWLWLRQ VSHFL provided the agency with its regulatory preemption power.[164] As such, the)&& UHTXLUHG QR DGGLWLRQDO ³FOHDU VWDWHP state law.[165]

Conversely, North Carolina Attorney General Roy Cooper urged that the FCC had erroneously preempted state law.[166] The state contended that the plain language of Section 706 did not unambiguously provide the FCC with preemptive authority when viewed with other statutory provisions of the Act.[167] Furthermore, to bolVWHU 1RUWK &DUROLQD¶V FODL WKDW WKH)&&¶V LQWHUSUHWDWLRQ FXW WR WK FUHDWH DQG FRQWURO WKH DXWKRULW\ RI LW[168] This argument reframed the issue as cutting to the core of the sWDWHV¶ IXQFWLR UDWKHU WKDQ QRW WKH)&&¶V DUJXHG WKDW ZLWKRXW &R FOHDU SUHHPSWLYH DXWKRULW\ LQ 6HFWLRQ PDWWHU ³VROHO\ IRU WKH *HQHUDO $VVHPEO\ D RI WKH SHRSOH[169] RI WKLV VWDWH ´

In the end, Sixth Circuit Judge John M. Rogers, writing for the

DGPLQLVWUDWLYH SRVWXUH WKDW XOWLPDWHO\ authority.

This *Tennessee* decision is important because, as John F. Manning exSODLQHG LQ KLV DUWLFOH HQWLWOHG ³&OH &RQVWLWXWLRQ´ E\ LQVHUWLQJ WKH *Chevron* FOHDU V IUDPHZRUN WKH FRXUW HIIHFWLYHO\[184] LPSRVHG 7KLV ³FODULW\ WD[´ ZRUNV legislate exceptionally ³WKDW clearly when it wishes to achieve a statutory outcome that threatens to intrude upon some judicially identified constitutional value—such as IHGHUDO[185] &RQVHTXHQWO\ ZLWKRXW D ³FOHDU VWD administrative agHQF\¶V LQWHUSUHWDWLRQ WKDW WUDPS interest is afforded no deference. According to the State of North Carolina in its reply brief, this more robust version of Step One prevents the alleged conflation of *Chevron* Steps One and Two, a conflation that supposedly led to conclusions where administrative deference was almost assuredly granted.[186] Here, since the court found that the statutory provision of the Telecommunications Act fell short of providing such a clear statement of preemption at the *Chevron* 6WHS 2QH VWDJH WKH FRXUW UH preemptive order.[187] In the end, whereas in *Arlington* the Court affirmed *Chevron* deference against a challenge at Step Zero, in *Tennessee* the Sixth Circuit undercut &KHYURQ¶V scope at Step One.

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

7KH 6L[WK &LUFXLW¶V *Tennessee* decision has been hailed by some as a ³EROG DWWHPSW´ WR SUHYHQW WKH DJHQF\[188] IURP In particular, the critical role that the clear statement rule played in WUXPSLQJ WKH)&&¶V DWWHPSWHG[189] SUHHPSWLRQ Whether WKH 6L[WK &RXUW¶V UXOLQJ LV EDFNHG E\ IXWX decision by the Supreme Court remains to be seen. What is clear is that questions about the role and importance of *Chevron* deference in

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

185. *See id.*

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

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

188. *See* Randolph May & Seth Cooper, *Sixth Circuit Ruling Stops FCC¶V Unlawful Municipal Broadband Preemption*, THE FEDERALIST SOC¶Y FOR LAW AND PUB. POL¶Y STUD. (Aug. 12, 2017), https://fedsoc.org/commentary/blogposts/sixth-circuit [(l)-6(e)7(tn-6(l)-3(o)7(g)] TJ ET Q

law.[197] On the one hand, Heinzerling asserted that *Chevron* deference remained a dominant mode of statutory interpretation.[198] This, despite two rulings following *Arlington* where the Court, with Justice Scalia in the majority, did not apply *Chevron* deference to the Environmental Protection $ J H Q F \ ¶ V L Q W H U S U H W L Q J [199] On the other hand, Clement suggested that & K H Y U R Q ¶ V [200] Clement argued that while Justice Scalia may have embraced *Chevron* deference, his embrace came increasingly with a caveat.[201] Specifically, Clement interprets Justice 6 F D O L D ¶ V O D W H U G H F L V L R Q V D V K D U E R U L Q J D J U R I F D V H V E \ S D V V L Q J [202] explains that most statutes, according to Justice Scalia, would remain at Step One, thus failing to receive *Chevron* deference because the statutes were not ambiguous:

> How many statutes actually get you to Step Two? And, I think the answer to that question very much depends on who

Tennessee, following some of the federalism-based concerns echoed in $UOLQJWRQ¶V dissent, charts a way forward for a newly formed skeptical Court to strike at the heart of &KHYURQ¶V deferential weight. Of great significance for the future of Chevron GHIHUHQFH LV -XVWLFH *RUV VNHSWLFLVP RI ³FHUtain core doctrines of administrative law and the deference they provide to the agencies particularly on questions of how to UHDG WKHLU RSHUDWLYH VWDWXWHV´[205]

In 2008, Scott A. Keller¶V SLHFH HQWLWOHG ³+RZ &RXUWV Autonomy From Federal $GPLQLVWUDWLYH (QFURDFKPHQW´ kind of approach to protect state sovereignty.[206] Specifically, Keller argued IRU DQ H[SDQVLRQ RI ³-based clear statement canons of statutory FRQVWUXFWLRQ´ DV SULPDU\ ³SURFHGXUDO´[207] OL .HOOHU ZDUQHG DJDLQVW WKH LQDGHTXDF\ RI protection of state sovereignty.[208] Rather than utilizing clear statement canons as mere illegitimate bootstrapping arguments of last resort,[209] Keller suggested that with the insertion of the clear statement canon at Step One, ³FDVHV GHFLGHG RQ VKDN\ &KHYURQ 6WHS =HU under a firmer clear VWDWHPHQW FDQRQ´[210]

CONCLUSION

The outcome of a case can rest as much on the successful framing of a legal issue as on the raw potential of its facts. And, as we have seen, the DUUDQJHPHQW RI D FDVH¶V IDFWV WR ILW ZLWK power versus state sovereignty can compel judicial outcomes.[211] While SDUWLHV DOUHDG\ VXFFHVVIXOO\ utter contest ³IDP EHWZHHQ VWDWH DQG IHGHUDO DXWKRULW\´ ZKH federal regulations,[212] federalism-based framing will likely hold an even greater sway in a Supreme Court molded by President Trump. Whether embraced by judges in a penumbral sense or as a sway Tm 0 greater sway é‘% 0sw

federalism-based opinions within the administrative law arena, from both
PDMRULW\ DQG PLQRULW\ MXGLFLDO EORFV SU
WURYH´ IRU IXWXUH RSLQLRQV WKDW these QRG WRZD
pervasive foundational principles.[213] $V VXFK D ³SHQXPEUDO IHG
HPHUJHV DV D SUDJPDWLF SODXVLEOH DQG PD
YHUVLRQ RI IHGHUDOLVP WR WKH MXGLFLDO PLQ
DV D IRUPDO PDWWHU´ LQ RUGHU[214] LQ

Debates about the future of the administrative state will remain front
DQG FHQWHU XQGHU D 7UXPS SUHVLGHQF\ 'H
decision authored by Justice Scalia objecting a Chevron Step Zero challenge
to the F& & ¶V DXWKRULW\ WR robust application of Chevron Step
2QH LQTXLULHV PRGHOHG Deference increasingly [WK &LUF
on the judicial horizon. As such, WKH 6L[WK &LUFXLW¶V PRUH O
analytical framework could ultimately serve as a substantial tool in a future
arsenal against what has been referred to as our fourth branch of
government.

Carlos A. Hernandez

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213. See Edward Cantu, *The Roberts Court and Penumbral Federalism*, 84 CATH. U.L. REV. 271, 284-85.

214. See id. at 287-88.