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Tennessee v. FCC and the Clear Statement Rule

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TENNESSEE V. FCC AND THE CLEAR STATEMENT RULE

TABLE OF CONTENTS

I. INTRODUCTION

A court wields great power when interpreting federal statutes. A court can, in effect, override Congress's true intention when Congress has not made its intention clear in the language of the statute. The court can interpret the statute narrowly to restrict Congress's power or expansively to allow Congress to act more freely. Such judicial discretion is especially powerful—and important—when matters of constitutional significance are at stake. In such cases, the court must be certain that Congress intended for the statute to allow the federal government to act in the manner claimed. If the court requires clarification from Congress as to its intention, the court will make such a request through its decisions. Congress can then either choose to amend the statute or do nothing, with the latter leaving the statute impotent as to the claimed power. The court's call for clarity provides Congress with notice on how the court will likely treat a given statute in the future, helping Congress draft more efficient and clear legislation.

This is how it should work in theory. In practice, however, the above process is riddled with distrust, inconsistency, and capriciousness. Judicial discretion, while important, has served to break down rather than foster the relationship between the judicial and legislative branches. The courts' inconsistency in using canons of statutory interpretation to provide notice to Congress as to how it will interpret federal statutes has left congressional drafters confused and discouraged. This has, in turn, increased the costs of legislation and rendered the notice the courts provide Congress almost useless.

This Note will focus on a substantive canon[1] of statutory interpretation, the clear statement rule, through the lens of the recent Sixth Circuit decision *Tennessee v. FCC*.[2] The clear statement rule requires Congress to provide "a 'clear statement' on the face of the statute to rebut a policy presumption the Court has

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[1] *Substantive Canon*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An interpretive principle that reflects a policy drawn from the common law, a statute, or the Constitution.").

[2] 832 F.3d 597 (6th Cir. 2016).

created."[3] The presumption at issue in *Tennessee v. FCC* was the presumption against federal preemption of state law, which is the principle that courts should not interpret ambiguous federal statutes to preempt state law.[4] In the case, the court thwarted the Federal Communications Commission's (FCC) attempt to use § 706 of the Telecommunications Act of 1996 to preempt state laws restricting municipal broadband providers from expanding their services outside of their municipal borders.[5] The court held that the statute was ambiguous as to its grant of preemption power in that regard.[6] Although the statute does indeed contain such an ambiguity, it is unclear whether rectifying that ambiguity alone would be enough to satisfy the clear statement rule applied in the case. In other words, the call for clarity by the Sixth Circuit is itself unclear.

This Note will proceed as follows. Section II will provide the necessary background to *Tennessee v. FCC*. In addition to outlining the petitioners' grievances with the state laws at issue, this Section will detail the relevant parts of § 706 and introduce the grounds for the Sixth Circuit's reversal of the FCC's 2015 order.

Section III will explicate the canons of statutory interpretation at issue: the presumption against preemption and the clear statement rule. The presumption will be discussed in less detail than the clear statement rule because the primary reason for overturning the FCC's order was that § 706 was not sufficiently clear to overcome the presumption. Subsection B will then discuss the main precedents for the court's decision in *Tennessee*: *Gregory v. Ashcroft*,[7] which provides the relevant clear statement rule, and *Nixon v. Missouri Municipal League*,[8] which applied *Gregory*'s rule to facts similar to those in *Tennessee*.

Section IV will analyze the above primarily in light of how the judicial branch interacts with the legislative branch regarding the clear statement rule. Subsection A will assess the constitutional

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[3] William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4 (1992).

[4] *See infra* notes 36–39 and accompanying text (defining the presumption against preemption as applied in *Tennessee v. FCC*).

[5] *Tennessee*, 832 F.3d at 599–600.

[6] *Id.* at 613.

[7] 501 U.S. 452 (1991).

[8] 541 U.S. 125 (2004).

justifications for the use of the clear statement rule in *Tennessee*. It is important to see *why* the clear statement rule is applied to fully grasp the significance of the court's discretion when interpreting federal statutes. To demonstrate this, this Note will place the Sixth Circuit's concerns in the context of Professor Nina Mendelson's federalism-based justifications for the presumption against preemption. The justifications provide insight into why courts require a clear statement to overcome the presumption.

In Section IV.B, the discussion will then move to the purposes of the clear statement rule itself and how—and if—the rule affects legislative drafting practices. This discussion will be informed by Professors Abbe Gluck and Lisa Bressman's comprehensive empirical study into the influence of the substantive canons on congressional drafting practices.[9] Subsection C will discuss how the clear statement rule may have affected how Congress deliberated over and ultimately drafted the act at issue, § 706 of the Telecommunications Act of 1996.

Section IV.D will then discuss how the "feedback loop" between the courts and Congress is failing, because of the courts' capricious articulation of its requirements for satisfying the clear statement rule. Subsection E will build on this concern by analyzing the increased costs of legislating caused by the courts' failures to articulate these requirements effectively. Subsection E will discuss Congress's reaction to the Supreme Court's application of the clear statement rule in two cases, *Dellmuth v. Muth*[10] and *EEOC v. Arabian American Oil Co.*[11] In both cases, the Court frustrated Congress's intent by applying a new clear statement rule to the relevant statutes, the Education of the Handicapped Act of 1975 and the Civil Rights Act of 1964, respectively, forcing legislative costs upon Congress to amend the statutes to satisfy the rule.

Finally, Section IV.F will outline another unpredictable element that Congress must consider when drafting effective legislation: how the political power of the affected class can move a court to

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[9] *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

[10] 491 U.S. 223 (1989).

[11] 499 U.S. 244 (1991).

read a statute either expansively or narrowly. Courts tend to give a stingy reading to a statute in its consideration of a clear statement rule when the affected class is politically powerful, yet give an expansive reading when the class is politically subordinate. This is relevant to the court's reading of § 706 since the unserved and underserved communities relevant to the municipal broadband restrictions in *Tennessee* could arguably become politically subordinate in years to come.

II. BACKGROUND

On July 24, 2014, two municipal broadband providers, the Electric Power Board of Chattanooga, Tennessee, and the City of Wilson, North Carolina, petitioned the FCC to preempt their respective state laws which, the providers contended, constituted barriers to broadband investment and competition.[12] The laws imposed geographic restrictions on the providers by effectively limiting their service areas to their respective municipal borders.[13] The FCC granted the providers' petitions and found that the Tennessee and North Carolina laws erected barriers to the expansion of broadband service into surrounding unserved and underserved communities.[14] This finding led the FCC to determine that "advanced telecommunications capability [was not] being deployed to all Americans in a reasonable and timely fashion."[15]

Once the FCC has made this determination, the agency has the power under § 706 of the Telecommunications Act of 1996 to "take immediate action to accelerate deployment of [high-speed broadband] by removing barriers to infrastructure investment and

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[12] *In re* City of Wilson, 30 FCC Rcd. 2408 (2015).

[13] *See* TENN. CODE ANN. § 7-52-601 (West 2011) ("Each municipality operating an electric plant . . . is authorized *within its service area* . . . to . . . operate . . . Internet services . . . ." (emphasis added)); N.C. GEN. STAT. ANN. § 160A-340.1(a)(3) (West 2011) ("A city-owned communications service provider shall . . . [l]imit the provision of communications service to *within the corporate limits of the city* providing the communications service." (emphasis added)).

[14] *See* Press Release, FCC, FCC Grants Petitions to Preempt State Laws Restricting Community Broadband in North Carolina, Tennessee (Feb. 26, 2015) ("A Memorandum Opinion and Order adopted by the [FCC] finds that provisions of the laws in North Carolina and Tennessee are barriers to broadband deployment, investment and competition, and conflict with the FCC's mandate to promote these goals.").

[15] *Id. See also* 47 U.S.C.A. § 1302 (West 2016) (stating the goals of the FCC mandate and what the FCC can do to promote those goals).

by promoting competition in the telecommunications market."[16] Section 706 grants the FCC the authority to "[utilize], in a manner consistent with the public interest, convenience, and necessity, . . . [among other things], other regulating methods that remove barriers to infrastructure investment."[17] In its 2015 order, the FCC concluded that federal preemption of state law is one of the regulating methods it can use to act under § 706.[18] The FCC preempted state laws that acted as barriers to broadband infrastructure investment, where the laws restricted municipal broadband providers from expanding outside of their municipal borders or service areas into surrounding communities.[19] The FCC's preemption order effectively nullified state laws that served to restrict municipal broadband providers' service areas to municipal borders.

In May, 2015, North Carolina petitioned the Fourth Circuit to review the FCC's preemption order.[20] The Fourth Circuit case was then transferred to the Sixth Circuit and consolidated with Tennessee's own petition for review of the order.[21] On August 10, 2016, the Sixth Circuit reversed the FCC's order on the ground that § 706 fell "far short" of a clear statement from Congress that it intended the statute to preempt state law.[22] Such a clear statement is required in cases where important constitutional values, such as federalism, are at stake.[23]

The court stated that, because there are no federal laws that require telecommunications providers to have a set geographic service area, "[p]roviders thus have discretion to choose the geographic areas that they serve, whether that means expansion

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[16] *Id.* § 1302(b).

[17] *Id.* § 1302(a).

[18] See, for example, *In re City of Wilson*, 30 FCC Rcd. at *38–41, where the FCC stated that, because § 706 operates as an independent grant of authority, functions as a regulation of state commerce, uses urgent language ("*immediate action*," "*shall* . . . encourage the deployment on a . . . *timely* basis" (emphasis added)), and is a "necessary fail-safe," and because Congress, legislating against the history of the FCC's use of preemption as a regulatory tool, understood preemption to be among the regulatory tools that the FCC might use to act under § 706, the FCC has general authority to preempt under § 706.

[19] *Id.* at *49–54 (preempting the North Carolina and Tennessee laws).

[20] Tennessee v. FCC, 832 F.3d 597, 609 (6th Cir. 2016).

[21] *Id.*

[22] *Id.* at 600.

[23] *See id.* ("[P]reemption by the FCC of the allocation of power between a state and its subdivisions requires at least a clear statement in the authorizing federal legislation.").

or restriction."[24] The court found that the FCC wanted to "decide *who*—the state or its political subdivisions—gets to make these choices."[25] Picking the decision maker in this way interferes with states' discretion over the powers of their subdivisions.[26] To the Sixth Circuit, these municipal subdivisions are the state's "convenient agencies," and "the state generally retains the power to make discretionary decisions for its subdivisions."[27] Any attempt by the federal government to encroach on this power "implicate[s] concerns about core state sovereignty"[28]—an issue which the FCC attempted to avoid in its order by framing the issue as one of regulation of interstate communications services rather than constitutional federalism.[29] The court held that if the federal government seeks to interfere with the state-municipality relationship—an act which implicates constitutional federalism—a clear statement from Congress granting such action is required.[30] Since the court held § 706 contained no such clear statement, the FCC could not use the statute as authority to preempt Tennessee and North Carolina law restricting municipal broadband expansion.[31] The court stated that, because § 706 was ambiguous as to "whether ['infrastructure'] applies to public *and* private infrastructure investment or *only* private infrastructure investment," Congress had not clearly stated its intent—if any—for the statute to apply to municipal broadband infrastructure investment, which, of course, is part of the public sphere.[32] The lack of a clear statement in § 706 proved fatal to the FCC's preemption order, thereby reverting power over municipal

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[24] *Id.* at 610.

[25] *Id.* (emphasis in original).

[26] *Id.*; *see also* Randolph J. May & Seth L. Cooper, *FCC Preemption of State Restrictions on Government-owned Broadband Networks: An Affront to Federalism*, 16 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 39, 42 (2015) ("[T]he Constitution confers upon [state citizens] the authority to exert their will through their elected representatives to adopt laws that restrict municipal activities.").

[27] *Tennessee*, 832 F.3d at 610.

[28] *Id.* at 611–12.

[29] *In re City of Wilson*, 30 FCC Rcd. at *44–45.

[30] *Tennessee*, 832 F.3d at 610.

[31] *Id.* at 613.

[32] *Id.*

broadband regulation back to the states.[33] The FCC does not intend to appeal the Sixth Circuit's decision.[34]

III. THE CANONS OF STATUTORY INTERPRETATION AT ISSUE

A. PRESUMPTION AGAINST PREEMPTION

When Congress legislates in a field in which the states have traditionally occupied, and the legislation and the relevant state law are arguably inconsistent, courts presume that the states' police powers are not preempted by federal law "unless that was the clear and manifest purpose of Congress."[35] Federal preemption is "the principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation."[36] When Congress has clearly stated that it intends for the statute to supersede state law, the presumption against preemption is rebutted and the courts will find the state action preempted.[37] Where the federal statute is ambiguous, however, courts presume against preemption of state law.[38] When the Sixth Circuit found no clear statement from

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[33] *Id.* For a short discussion of the practical consequences of the FCC order's reversal see Jon Brodkin, *Muni ISP Forced to Shut off Fiber-to-the-Home Internet after Court Ruling*, ARSTECHNICA (Sept. 16, 2016, 12:29 PM), http://arstechnica.com/information-technology/2016/09/muni-isp-forced-to-shut-off-fiber-to-the-home-internet-after-court-ruling/, which discusses the City of Wilson's termination of its broadband service to the neighboring underserved town of Pinetops in compliance with state law.

[34] *See* Cecilia Kang, *Broadband Law Could Force Rural Residents off Information Superhighway*, N.Y. TIMES (Aug. 28, 2016), http://www.nytimes.com/2016/08/29/technology/broadband-law-could-force-rural-residents-off-information-superhighway.html?_r=0 ("The F.C.C. does not plan to appeal the federal court's decision 'after determining that doing so would not be the best use of commission resources.' " (quoting FCC spokesperson, Mark Wigfield)).

[35] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 367–75 (2d ed. 2006) (discussing the federalism canons). For a description of the police power, see *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) ("[P]owers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' [are] held by governments more local and more accountable than a distant federal bureaucracy." (quoting THE FEDERALIST NO. 45, at *293 (James Madison))).

[36] *Preemption*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[37] *See* Eskridge & Frickey, *supra* note 3, at 595 n.4 (" 'Clear statement rules' require a 'clear statement' on the face of the statute to rebut a policy presumption the Court has created.").

[38] *See* Gluck & Bressman, *supra* note 9, at 942 ("[T]he federalism-enforcing canon[ ] . . . the 'presumption against preemption[ ]' [is] the default principle that courts should not interpret ambiguous federal statutes to preempt state law."); *Tennessee*, 832

Congress in § 706 to grant preemption power to the FCC, the court was applying the presumption against preemption to the statute.

Substantive canons of statutory interpretation, such as the presumption against preemption and the clear statement rule, are designed to protect state authority from federal encroachment.[39] Courts employ these canons "to ameliorate the tension between the Supremacy Clause . . . and the underlying principles of federalism . . . ."[40] Under the Supremacy Clause, which states that federal statutes, together with the Constitution, are the "supreme Law of the Land,"[41] "Congress may preempt state law if it chooses."[42] "[T]he Constitution requires that the central decision to preempt state law be meaningfully traceable to Congress"—a principle that "is hardwired into the Supremacy Clause."[43] When Congress chooses to preempt state law through its agencies, therefore, the delegation of that power must be "meaningfully traceable" back to it.[44] Practically, a general delegation of authority is not enough to confer preemption power upon an agency.[45] In fact, "a federal agency may [preempt] state law only when and if it is acting within the scope of its congressionally delegated authority."[46] When preempting state law would affect

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F.3d at 612 n.4 ("[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting United States v. Locke, 529 U.S. 89, 108 (2000))).

[39] *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 35, at 367–75 (discussing the federalism canons which require clear congressional authority to allow federal interference with the operations of state government).

[40] *Id.* at 367.

[41] U.S. CONST. art. VI, cl. 2.

[42] *See* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698 & n.10 (2008) ("Congress might directly answer the question [of whether agency preemption of state law is legitimate] by expressly confirming or limiting the authority of agencies to preempt state law.").

[43] Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2134 (2008) (emphasis omitted).

[44] *Id.*

[45] *See* Mendelson, *supra* note 42, at 708–09, 716 & nn.111–15 ("[A]n agency's general authority . . . is particularly dubious where an administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." (internal quotation marks omitted)).

[46] Benjamin & Young, *supra* note 43, at 2135 (quoting La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)).

the federal-state balance, Congress can only delegate such authority to an agency through a clear statement.[47]

B. THE CLEAR STATEMENT RULE

Two cases influenced the court's decision in *Tennessee v. FCC*: *Gregory v. Ashcroft*[48] and *Nixon v. Missouri Municipal League*.[49] *Gregory* established the clear statement rule that was applied to the federal government's interference with the state-municipality relationship in *Nixon*.[50] The Sixth Circuit in *Tennessee* relied heavily on the *Nixon* case because the FCC sought to interfere with a state's right to order the decision-making structure between it and its municipalities.[51] Because the FCC's 2015 order impinged on state sovereignty, the issue in *Tennessee*, therefore, implicated the clear statement rule as articulated in *Gregory* and as applied in *Nixon*.[52]

In *Gregory*, the Supreme Court, in an opinion written by Justice O'Connor, relied heavily on federalism arguments in rejecting preemption of a Missouri law, which required state judges to retire at seventy. The Court held that the Missouri law did not violate the Age Discrimination in Employment Act of 1967 (ADEA), because the federal statute was ambiguous as to whether it included state judges as "appointee[s] on the policymaking level."[53] The Court could not rely on a "mere congressional ambiguity" to maintain preemption of Missouri's law.[54] In other words, Congress had not spoken clearly enough on the preemption issue in the statute. The Court was concerned about the ADEA's effect on the balance of power between the states and the federal government and its effect on a state's sovereignty. The Court held that, as a

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[47] *See* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) ("[The clear] statement rule . . . acknowledg[es] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

[48] *Id.* at 452.

[49] 541 U.S. 125 (2004).

[50] *See infra* note 65 and accompanying text (discussing why the *Nixon* court applied the *Gregory* rule).

[51] Tennessee v. FCC, 832 F.3d 597, 610–12 (6th Cir. 2016).

[52] *Id.*

[53] *Gregory*, 501 U.S. at 456, 467 ("The ADEA makes it unlawful for an 'employer' 'to discharge any individual' who is at least 40 years old 'because of such individual's age.' ") (citing 29 U.S.C. §§ 623(a), 631(a)).

[54] *Id.* at 464 (emphasis omitted) (citation omitted).

state's right to prescribe the qualifications of its officers, including its state judges, "go[es] to the heart of representative government," the clear statement rule applied so the Court could be "absolutely certain" that Congress intended to preempt that right in the ADEA.[55]

Professor Eskridge, in recognizing the Court's need for "absolute[ ] certain[ty]" when Congress attempts to regulate core state functions, has termed the *Gregory* rule a "super-strong" clear statement rule.[56] A clear statement rule has "super-strong" bite when the rule is applied to protect particularly important constitutional values, such as the core state functions at issue in *Gregory*.[57] Super-strong clear statement rules "require a clearer, more explicit statement from Congress in the text of the statute, without reference to legislative history, than prior clear statement rules have required."[58] Eskridge has suggested that this is a form of "quasi-constitutional law" where "[j]udicial review does not prevent Congress from legislating, but judicial interpretation of the resulting legislation requires an extraordinarily specific statement on the face of the statute for Congress to limit the states . . . ."[59] Interestingly, although Congress's intent to grant preemption power must be made "unmistakably clear in the language of the statute,"[60] the Court in *Gregory* states that this language does not have to be explicit.[61]

In *Nixon*, the Court upheld an FCC order rejecting preemption of a Missouri law, which prohibited Missouri's municipalities from providing telecommunications services or facilities, because the federal statute did not provide the clear statement needed to overcome the *Gregory* rule.[62] The municipal respondents, including municipal utilities, petitioned the FCC to use 47 U.S.C. § 253(a) to

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[55] *Id.* at 461, 464.

[56] Eskridge & Frickey, *supra* note 3, at 623–25 (emphasis omitted).

[57] *Id.* at 597–98; *see also* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW 323–27 (2016) (discussing the federalism canons and the super-strong statement requirement).

[58] Eskridge & Frickey, *supra* note 3, at 597.

[59] *Id.*

[60] *Gregory*, 501 U.S. at 460–61 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

[61] *Id.* at 467. The Court stated that the ADEA did not have to explicitly mention judges, it just had to be unmistakably clear that the statute applied to judges.

[62] Nixon v. Missouri Mun. League, 541 U.S. 125, 125 (2004) (referencing MO. ANN. STAT. § 392.410(7) (West 2017)).

preempt the Missouri law by preventing states from "prohibiting the ability of *any entity* to provide . . . telecommunications service[s]."[63] Due to the conflict between the federal statute and the Missouri law, the Court stated that "preemption would come only by interposing federal authority between a State and its municipal subdivisions," which "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion."[64] As interpreted by the municipal respondents, § 253(a) would, therefore, affect a core state function. As Missouri's ability to exercise a core state function was at risk, the Court applied *Gregory*'s clear statement rule and found that the phrase "any entity" in § 253(a) was ambiguous as to whether it referred to only a public or private entity, or both.[65] Since "any entity" was not restricted to one meaning, the Court found that § 253(a) was not worded clearly enough to overcome *Gregory* and preempt the Missouri statute.[66] Interestingly, unlike the ADEA in *Gregory*, § 253 actually allowed for preemption of state law if "a State . . . imposed any statute . . . that violate[d] subsection (a) . . . ."[67] The significance of explicit preemption wording in federal statutes is discussed in Section IV.D.

Although the Sixth Circuit in *Tennessee* used *Nixon*'s application of *Gregory*'s super-strong clear statement rule to demonstrate that § 706 had no clear statement regarding preemption, neither the *Nixon* nor the *Gregory* case is clear on what is required to satisfy the rule. Also, the significance of the Court's treatment of "explicit" statutory language and when "clear" language becomes "explicit" is unclear.

IV. ANALYSIS

A. *TENNESSEE V. FCC* AND FEDERALISM

In its 2015 order, the FCC preempted Tennessee and North Carolina laws that restricted municipal broadband providers in those states from expanding their broadband services outside of

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[63] *Id.* at 129 (quoting 47 U.S.C. § 253(a)) (emphasis added).
[64] *Id.* at 140–41 (citations omitted).
[65] *Id.* at 132–33.
[66] *Id.* at 140–41.
[67] 47 U.S.C.A. § 253(d) (West 2016).

their respective municipal borders.[68] The Sixth Circuit in *Tennessee v. FCC* reversed the FCC's order and rejected the FCC's argument that § 706 of the Telecommunications Act of 1996 contained language that showed Congress had conferred upon the FCC the power to preempt state laws.[69] Relying on *Nixon*, the court stated that, because the FCC was "trench[ing] on the [states'] core sovereignty" by interfering with the states' relationship with their respective municipalities, only a clear statement of Congress's intent to confer such a power would be enough to grant the power in this case.[70] The Sixth Circuit held that when a federal agency seeks to encroach on the state-municipality relationship through one of the powers arguably conferred upon it by Congress, Congress is, in effect, encroaching upon an area traditionally occupied by the states.[71] When the federal government attempts to supplant a state law with a federal statute, courts employ a presumption against preemption, which "erects an additional barrier before state law can be held to be preempted."[72]

To overcome this presumption, Congress must state clearly in the statute that it intends for the statute to contain such a power.[73] To justify the additional barrier—that is, the clear statement rule—federalism-based arguments are usually raised to protect a state's autonomy to regulate within its borders.[74] The court in *Tennessee* is no exception to this. In fact, the opinion is quite clear that its ruling is grounded in the preservation of federalism.[75] To demonstrate this, placing the Sixth Circuit's

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[68] *See supra* notes 18–19 and accompanying text.

[69] *See supra* note 22 and accompanying text.

[70] Tennessee v. FCC, 832 F.3d 597, 610–11 (6th Cir. 2016).

[71] *See supra* note 35 and accompanying text.

[72] Mendelson, *supra* note 42, at 710.

[73] *See supra* note 37 and accompanying text.

[74] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." (citation omitted)). *See also* Mendelson, *supra* note 42, at 710 ("[Requiring a clear statement] gives some protection to state regulatory autonomy.").

[75] *See supra* note 70 and accompanying text.

concerns in the context of Nina Mendelson's justifications for the presumption against preemption proves helpful.[76]

Mendelson's federalism-based justifications for the presumption against preemption provide insight into why courts treat federal preemption of state law more harshly than, for example, regulation of interstate commerce by requiring a clear statement.[77] First, a state's authority to respond to the preferences of its citizens without federal interference is valued in a federalist society. Second, states' experiments with policy and governance can be a useful source of information to other states and to the federal government. Third, preserving state autonomy helps maintain the federal-state balance as envisioned by the Framers. Lastly, the presumption helps ensure that legislative decisions to preempt are thoughtful and deliberate rather than simply "incidental."[78]

First, the Sixth Circuit appears to value the ability of the states to respond to the preferences of its residents. The FCC's order, the court says, sought to pick who—the state or its municipalities—decided the municipal broadband providers' service areas.[79] The municipality itself is arguably in the best position to make this decision because it can best assess the relative benefits of the service in light of the available local resources.[80] On the other hand, the state, as the ultimate insurer of its municipalities, is entitled to be risk-averse in its decisionmaking.[81] By leaving this decision to Tennessee and North Carolina—a decision which they had already made[82]—the court respected the states' ability to

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[76] *See* Mendelson, *supra* note 42, at 709–10 (enumerating some of the justifications for the presumption against preemption of state law).

[77] See, for example, *In re City of Wilson*, 30 FCC Rcd. 2408, at *45 (2015), where the FCC sought to frame its jurisdiction over the matter not as a preemption issue, but as a regulation of interstate communications, which requires no clear statement.

[78] Mendelson, *supra* note 42, at 709–10.

[79] Tennessee v. FCC, 832 F.3d 597, 610 (6th Cir. 2016).

[80] *See* Tejas N. Narechania, *Federal and State Authority for Broadband Regulation*, 18 STAN. TECH. L. REV. 456, 493–94 (2015) (discussing municipalities' institutional competence regarding allocation of its local resources to the deployment of municipally owned-and-operated broadband deployment).

[81] *See id.* at 494 ("[A]ny losses incurred by the municipal entity beyond its ability to pay are likely to be borne by the state . . . .").

[82] *See Tennessee*, 832 F.3d at 610 ("[The FCC] wants to provide [the municipal broadband providers] with these options notwithstanding Tennessee's and North Carolina's statutes that have already made these choices.").

weigh these and the many other factors involved in this decision[83] in light of their respective citizens' preferences.

Second, it appears that the court addressed Tennessee's concerns that preempting its statute could, in fact, lead to outright *bans* on municipal broadband experimentation.[84] Citing *Nixon*, the court notes that preempting in this case would not prevent states from banning municipal broadband services altogether.[85] The court, therefore, chose the middle road, allowing states to continue to experiment with municipal broadband services while maintaining state laws restricting those services.

This is consistent with the long-held principle that states are laboratories of "novel social and economic experiments."[86] Although states are arguably best able to engage in these experiments because the risk will be contained within its borders,[87] the *extent* to which states can serve as centers of policy experimentation might be best decided by the President.[88] In fact, President Obama, in recognizing the lack of competition in the broadband market in rural communities, urged the FCC to address the barriers inhibiting local communities from responding to the broadband needs of their citizens.[89] This suggests that the President wanted to set the parameters within which states could experiment with municipal broadband services. Although the FCC adopted this message in its 2015 order, the Sixth Circuit was not

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[83] See Narechania, *supra* note 80, at 490–91, for a brief discussion of the mixed results of municipal broadband services, including the relatively successful Martin County, Florida broadband service, which is estimated to save the community $30 million over twenty years, and the failed Provo, Utah service, which was over $8 million in debt before being sold to Google for one dollar.

[84] *See* Reply Brief for Petitioner at 23, Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016) (No. 15-3291), 2015 WL 7574400, at *1 ("[T]he [FCC's] Order may discourage States from authorizing municipal broadband in the first place. States may decide to ban municipal broadband experimentation outright rather than risk unleashing boundless federal intervention by authorizing limited municipal broadband projects.").

[85] *Tennessee*, 832 F.3d at 611.

[86] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[87] *Id.*

[88] *See* Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 772 (2004) ("[T]he President may be more apt to consider the 'national' benefits of federalism, such as the extent to which states can serve as centers of policy experimentation or democracy or serve as a means of dividing power among units of government.").

[89] Letter from Lawrence E. Strickling, Assistant Sec'y for Commc'ns and Info., U.S. Dep't of Com., to Tom Wheeler, Chairman, FCC (Jan. 14, 2015), http://www.ntia.doc.gov/files/ntia/publications/ntia_ltr_01142015.pdf.

persuaded. To allow states more flexibility to decide how and to what extent they will experiment with broadband policy, the court applied the clear statement rule to protect federalism values. In addition, § 706 allows a state to serve as a laboratory for broadband policy.[90] As preempting state law could lead to a complete shutdown of municipal broadband experimentation, the court put the decision whether to expand or restrict publicly-owned broadband services back in the hands of the states.

Third, the court preserved states' autonomy and control over its municipalities. In the court's view, the FCC's attempt to interpose itself between the states and their political subdivisions was an affront to core federalist principles.[91] Without a clear statement from Congress allowing such an interposition, the federal-state balance as envisioned by the Constitution's framers was in jeopardy.[92] The court, thus, ruled against the FCC and preserved state autonomy and discretion over its political subdivisions.

Lastly, the court's decision arguably helps ensure that legislative decisions to preempt are thoughtful and deliberate through its call for clarity on § 706's preemption power. It is especially important that the courts push Congress to deliberate thoughtfully on the preemption issue because of the federalism concerns at stake. Several issues arise, however, when courts attempt to incentivize congressional drafters to deliberate thoughtfully on substantive canons such as the clear statement rule. These issues will be discussed in the following subsection.

B. THE CLEAR STATEMENT RULE AS NOTICE TO CONGRESS

In theory, the clear statement rule helps ensure that the legislature considers the canon when drafting statutes. The courts put legislative drafters on notice of the canon through their decisions, and the legislature responds by writing or amending

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[90] *See* Narechania, *supra* note 80, at 496 ("[S]ection 706 allows a state to serve as a laboratory; and try novel social and economic experiments with broadband policy." (quotation omitted)).

[91] *See supra* notes 69–71 and accompanying text (discussing the federalism principles at stake in *Tennessee*); *see also* May & Cooper, *supra* note 26, at 42 ("A federal agency cannot turn local governments into separatist enclaves by granting them powers that their respective states never delegated in the first place.").

[92] *See generally* THE FEDERALIST NO. 45 (James Madison) (discussing the powers delegated by the Constitution to the federal government and the state governments, respectively).

statutes in a way that will stand up to judicial scrutiny.[93] This creates a "feedback loop" where the legislative and judicial branches act in accordance with the concerns of the other.[94] Courts seek to put the legislature on notice of the substantive canons, specifically, because of the constitutional values at stake when such canons are at issue.[95] In the case of the presumption against preemption and the clear statement rule, federalism is the primary constitutional value at issue.[96] Intriguing justifications for putting Congress on notice of the canon are that it enhances democracy because it "encourag[es] congressional debate on preemption,"[97] and it teaches Congress how to communicate its intentions to the judicial branch more effectively.[98] Whether these justifications are valid, however, is debatable. The justifications assume that Congress will actually deliberate on the canons. If Congress does not consider courts' use of the substantive canons, then the "feedback loop" fails.

Professors Gluck and Bressman's empirical study of congressional drafting (hereinafter "Gluck's study") shines some light on the matter. Gluck's study surveyed 137 congressional drafters "on topics ranging from their knowledge and use of the canons of interpretation, to legislative history, the administrative law deference doctrines, the legislative process, and the courts-Congress relationship."[99] Of the 137 survey respondents, approximately 80% said they were familiar with the presumption against preemption canons or one of the other federalism canons, and of that 80%, 90% knew of the presumption against preemption specifically.[100] Sixty-five percent of those familiar with either

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[93] *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 278 (1994) ("Once Congress becomes aware of the Court's . . . canons . . . it can easily adjust its drafting process to take account of them.").

[94] *See* Gluck & Bressman, *supra* note 9, at 942–46 (discussing the empirical evidence for a courts-Congress "feedback loop" as it relates to federalism, preemption, and clear statement rules).

[95] *See* ESKRIDGE, *supra* note 93, at 286–87 (discussing how clear statement rules protect "underenforced" constitutional norms by alerting the political process to those values).

[96] *See supra* Section III.A (examining the presumption against preemption and the relevance of federalism to the canon).

[97] Mendelson, *supra* note 88, at 755 (quoting ESKRIDGE, *supra* note 93, at 286).

[98] *See* Gluck & Bressman, *supra* note 9, at 943 ("[The canons] teach Congress how better to communicate in general, and how specifically to telegraph its intentions to the courts.").

[99] *Id.* at 902.

[100] *Id.* at 942 n.126 and accompanying text.

canon said "at least one played a role when drafting."[101] Additionally, 19% of respondents stated that the presumption "encouraged more specificity once pen was put to paper," and 14% said that "the canons serve to tee up debate about the issue when conceptualizing a statutory scheme."[102] These responses tend to support the "feedback loop" concept under both justifications for putting Congress on notice of the substantive canons[103] as they appear to affect the drafting process.

Less encouraging, however, are the responses of the survey participants regarding which way the presumption falls. A mere 6% of respondents believed that ambiguities in federal statutes relating to preemption were construed in favor of state law—which is precisely how courts apply the presumption.[104] Twelve percent, however, believed that the presumption fell entirely in favor of federal law—which is incorrect—and the rest were "completely clueless."[105] Similar results were found regarding clear statement rules specifically, where a paltry 4% of respondents could even name the rule.[106]

Gluck's study, therefore, demonstrates that the substantive canons are not fulfilling their purpose, namely providing notice to Congress of the interpretive rule that courts will apply to the statute and Congress actually taking that rule into account when drafting. By ruling whether a statute contains a clear enough statement to grant preemption power, courts effectively remand the decision to amend the statute to the legislative branch rather than leave it in the hands of the judiciary.[107] According to Gluck's study, however, this is—at least partially—a futile exercise.[108] Most congressional drafters seem to be familiar with the presumption against preemption, but either consider it in the opposite way that courts apply the canon or are "clueless" on how

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[101] *Id.* at 942.

[102] *Id.* at 943.

[103] *See supra* notes 97–98 and accompanying text.

[104] Gluck & Bressman, *supra* note 9, at 944.

[105] *Id.*; William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 572 (2013) (book review).

[106] Gluck & Bressman, *supra* note 9, at 945.

[107] *See id.* at 959 ("[The clear statement rule] effectively remand[s] important decisions to elected officials rather than leave[s] them to courts.").

[108] *Id.*

it is applied; and only a small minority of the drafters surveyed could even name the clear statement rule. This is particularly damaging to the purpose of the clear statement rule and the presumption against preemption—that the feedback loop works as it should—because if congressional drafters do not know which way the presumption cuts, then drafting in favor or against preemption would lead to an unexpected result. It would, therefore, prove very difficult to draft a clear statement to overcome a presumption that is not properly interpreted.

C. CONGRESSIONAL DELIBERATION AND THE TELECOMMUNICATIONS ACT OF 1996

The legislative history of the Telecommunications Act of 1996 (the Act) tells a different story, however. The Act sought to respond to the developments in telecommunications technologies[109] by overhauling the Communications Act of 1934 to regulate telecommunications carriers.[110] The general purpose of the 1996 Act is "to open up markets to competition by removing unnecessary regulatory barriers" to ensure that the country does not "develop into a nation of information 'haves and have-nots.' "[111] Regarding § 706 of the Act, the Senate's bill and the version which was eventually enacted included roughly the same language. Both versions gave the FCC a duty to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion."[112] The two houses, however, needed to compromise on the type of action that the FCC would be obligated to take when its determination came out in the negative.[113]

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[109] *See* ANGELE A. GILROY, CONG. RESEARCH SERV., 96-223, THE TELECOMMUNICATIONS ACT OF 1996 (P.L. 104-104): A BRIEF OVERVIEW 1 (1998) ("The melding of telecommunications, video, and computers is having an impact on telecommunications industry structure . . . ."); *see generally* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123 (1996) (discussing the ways the Act addresses the technological developments of the twentieth century).

[110] See Cong. Res. Serv., *S. 652(104th): Telecommunications Act of 1996*, GOVTRACK.US, https://www.govtrack.us/congress/bills/104/s652/summary#libraryofcongress (last visited Jan. 16, 2017), for a summary of the duties imposed by the Telecommunications Act.

[111] *See* GILROY, *supra* note 109, at 1–2 (summarizing the policy objectives of the 1996 Act).

[112] *Compare* S. 652, 104th Cong. § 304 (as passed by Senate, June 15, 1995), *with* S. 652, 104th Cong. § 706 (1996) (enacted).

[113] *See infra* pp. 966–966 and note 116.

The bill that eventually passed both houses of Congress stated the FCC "shall take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[114] This language was retained for the final version signed into law and is part of the current version of the statute.[115] The Senate's bill, however, did not include the above language but instead included preemption language. The Senate's version stated the FCC "shall take immediate action under this section, and it may preempt State commissions that fail to act to ensure [the availability of advanced telecommunications capability]."[116] This language would have allowed the FCC to preempt state commissions that failed to make advanced telecommunications capability available to its citizens in a reasonable and timely manner. During conference, the Senate's version of the bill was accepted "with a modification"—that is, the preemption language was removed and replaced with the House language.[117]

It can only fall to speculation as to why the preemption language was removed in the final version of the bill. In light of Gluck's study, Congress may have believed that the "removing barriers" language in § 706(b), in combination with the language in § 706(a)—"*other regulating methods* that remove barriers to infrastructure investment"[118]—was clear enough to grant preemption power.[119] On the other hand, there is also a strong argument that Congress removed the Senate's preemption language because it did not want to grant the FCC the power to preempt state law in § 706.[120] Alternatively, and also in light of

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[114] S. 652, 104th Cong. § 706 (1996) (enacted).

[115] *See* 47 U.S.C.A. § 1302(b) (West 2016).

[116] S. 652, 104th Cong. § 304 (as passed by Senate, June 15, 1995).

[117] S. REP. NO. 104–230, at 210 (1996) (Conf. Rep.).

[118] 47 U.S.C.A. § 1302 (West 2016) (emphasis added).

[119] The FCC certainly thought so. *See In re* City of Wilson, 30 FCC Rcd. 2408, at *41 (2015) ("Our preemption authority falls within the 'measures to promote competition in the local telecommunications market' and 'other regulating methods' of section 702(a) that Congress directed the Commission to use to remove barriers to infrastructure investment.").

[120] *See* Matthew Berry, Chief of Staff to FCC Comm'r Ajit Pai, Remarks at the National Conference of State Legislatures' 2014 Legislative Summit 3 (Aug. 20, 2014) (transcript available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-328916A1.pdf) (arguing on behalf of Commissioner Ajit Pai, a dissenter to the FCC's 2015 order, that the modification

Gluck's study, Congress may not have considered preemption as strongly as it appears, but instead merely replaced the preemption language with what it may have perceived to be more forceful language[121]—or, indeed, less forceful language,[122] depending on the interpretation.

Regardless of which reason is more likely, the inclusion and subsequent removal of the preemption language shows that there was at least a modicum of deliberation of the preemption issue by at least one, if not both, houses of Congress. As the legislative history shows, it is almost certain the Senate, in its version of the bill, sought to grant the FCC the power to preempt state law.[123] This seems to run contrary to Gluck's study, which appeared to dismiss the idea that legislative drafters properly consider the substantive canons when drafting. It is possible that the Senate even considered the clear statement rule—something that Gluck's study claims only 4% of congressional drafters could even name—when drafting its preemption language.[124]

But even if both houses had deliberated on the canons and the Senate's language was retained for the final version that became the Telecommunications Act of 1996, would it have made a difference in *Tennessee v. FCC*? Would the Senate's preemption language have been clear enough for the Sixth Circuit to grant the FCC the power to preempt? If providing notice to legislative drafters is the purpose of the canons, what do drafters need to know to draft effectively with these in mind? Perhaps the Senate took the hint that, if it wanted to grant preemption power here, it would have to clearly state that is what it intended to do.[125] It is important to remember that the Senate was drafting among the

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shows that "Congress contemplated giving the FCC preemption authority in [§] 706 and expressly decided not to do so").

121 See, for example, *In re City of Wilson*, 30 FCC Rcd. 2408, at *41, where the FCC argues Congress conferred preemption power upon the Agency in § 706 because of the "urgent" and "generous phrasing" in the statute.

122 *See* Tennessee v. FCC, 832 F.3d 597, 613 (6th Cir. 2016) (concluding that § 706 does not clearly confer preemption power upon the FCC).

123 *See* S. REP. NO. 104-23, at 50 ("The FCC may pre-empt State commissions if they fail to act to ensure reasonable and timely access."); *see also supra* note 116 and accompanying text (quoting the Senate's version of the bill).

124 *See supra* note 106 and accompanying text.

125 *See supra* notes 53–61 and accompanying text (discussing the *Gregory* clear statement rule).

Supreme Court's creation of new constitutionally-based canons in the 1980s and 1990s.[126] Could the Senate have been taking notice of the creation of new clear statement rules when drafting the 1996 Act?

D. THE FEEDBACK LOOP ON PREEMPTION IS FAILING

Even assuming the Senate had drafted with the clear statement rule in mind, it is unlikely that it would have made a difference in *Tennessee v. FCC*. Even with the explicit preemption wording, the single ambiguity in the statute would likely still be enough for the Sixth Circuit to determine that Congress had not clearly intended § 706 to confer preemption power in this case. It is also unclear whether an amended ambiguity *plus* explicit preemption language would be sufficient.

The court in *Tennessee* used *Nixon*'s application of the clear statement rule to § 253 of the 1996 Act to hold that § 706 was not clear on preemption in this case. Section 253 differs from § 706 in one important way: § 253 explicitly grants preemption power to the FCC.[127] Section 706's preemption power is, according to the FCC, implied through the "other regulating methods that remove barriers to infrastructure investment" and not explicit like § 253.[128] According to *Gregory*, the statute does not have to be explicit in order for preemption to apply.[129] Therefore, the absence of explicit language is not determinative. It has been argued, however, that the absence of preemption language weakened the FCC's case as it shows that Congress considered granting preemption power and decided against it.[130] In that case, do legislative drafters need to put such language in the statute? How much stronger would the FCC's case have been if the Senate's preemption language had made it into § 706?

Since the Senate at least considered drafting preemption language into the statute, it is proof that the feedback loop might

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[126] *See* ESKRIDGE, *supra* note 93, at 285–89 (discussing justifications for the Rehnquist Court's "activism" in statutory interpretation cases).

[127] *See supra* note 67 and accompanying text.

[128] *See supra* note 17 and accompanying text.

[129] Tennessee v. FCC, 832 F.3d 597, 613 (6th Cir. 2016) (citing Gregory v. Ashcroft, 501 U.S. 452, 467 (1991)).

[130] *See supra* note 120 and accompanying text.

be working as it should: Congress has learned what courts look for and has drafted according to that guide. But if the Senate's language—its *explicit* grant of preemption—would not have made a difference, then, frustratingly, the feedback loop breaks down because statutory interpretation is left to the whims and changing values of judicial branches.

In *Nixon*, § 253 had preemption language and yet the Court ruled that it was not enough because the corresponding section included an ambiguous word—"entity."[131] In *Tennessee*, assuming the Senate's preemption language found its way into § 706, it is very likely that the court would have *still* ruled in the states' favor because it ruled that the word "infrastructure" was ambiguous.[132] So, even when Congress explicitly states it is granting preemption power to an agency, courts can find a single ambiguous word to quash that intention. As trained lawyers, a given judge's ability to find an ambiguity, however slight, is unlikely to be a difficult task. Therefore, even when Congress is explicit (or, at least thinks it is), courts can still find no grant of preemption power.

Even more frustrating is the relatively short shrift the court gave to the offending word, "infrastructure," in *Tennessee*. Mirroring *Nixon*'s analysis of "entity," the court stated that it is "unclear regarding whether ["infrastructure"] applies to public *and* private infrastructure investment or *only* private infrastructure investment."[133] "Infrastructure," the court stated, "by itself, is not specific to the public sphere."[134] It has been argued, however, that, because Congress was, during the drafting of the original 1996 Act, "well aware" of the role municipalities play in communications network deployment, the Act would have been drafted with public infrastructure in mind.[135] But Congress could have made this intention clear in the statute, yet it did not. This is where the feedback loop has arguably succeeded here. Through its decision in *Tennessee*, the Sixth Circuit has called on Congress to clarify this statutory wording to bring out its true intention. If Congress

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[131] *See supra* note 66 and accompanying text.

[132] *See supra* note 32 and accompanying text.

[133] *Tennessee*, 832 F.3d at 613.

[134] *Id.*

[135] Brief for Senator Edward J. Markey as Amici Curiae Supporting Respondents, Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016) (Nos. 15-3291/3555), 2015 WL 7185070, at *8.

chooses not to amend the "infrastructure" wording, then the message to the judicial branch is likely that the FCC has no power to preempt using § 706. If Congress chooses to amend the statutory language, the issue of whether even that is enough would remain because it is still unclear what a given court would require.

The feedback loop is intended to provide the branches of government a means to communicate how it wishes the other branch to respond to its intentions. But if the judiciary's standards are impossibly high or are inconsistent, then that branch can make life very difficult for the others. Here, it appears the judicial branch is playing this role regarding the clear statement rule and preemption. The Sixth Circuit has applied the *Gregory* "super-strong" clear statement rule to protect federalist values and state autonomy over municipal broadband expansion. As Gluck's study shows, Congress is at least partially to blame as congressional drafters are not listening to what the courts are telling them regarding the clear statement rule and preemption.[136] But if the interpretive rules within which statutes are drafted can be changed at any time by the courts, then Congress can be perpetually frustrated in its purposes. The Sixth Circuit's unwillingness to provide Congress with clear instructions on what would be sufficient to satisfy the clear statement rule in this case demonstrates its unwillingness to restrict how a court could interpret § 706 in a future case, thus allowing for capricious interpretation.

E. THE COSTS OF LEGISLATING AND FEEDBACK LOOP FRUSTRATION

In *Gregory*, the Court created a super-strong clear statement rule against federal regulation of core state functions.[137] The Court stated that Congress's authority under the Supremacy Clause to preempt state law "in areas traditionally regulated by the States" is "an extraordinary power in a federalist system." Therefore, the Court must be "absolutely certain" that Congress

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[136] *See supra* notes 104–06 and accompanying text (stating that congressional drafters incorrectly interpret the presumption against preemption).

[137] *See supra* note 56 and accompanying text.

intended to exercise such power.[138] The Court suggested that "[t]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking . . . [that] protect[s] states' interests."[139] In response, Congress can either amend the ambiguity in the statute with a clear statement or do nothing. Insisting upon clarity increases the costs of legislation, effectively imposing a "judicial tax" upon legislation that seeks to overcome constitutional doctrines.[140] The costs of clarifying statutory ambiguity include "difficulty of planning . . . and reliance costs"; "the legal costs of extra research and litigation"; and "frustration of statutory purpose."[141] Raising the cost of legislation is justified, however, by the importance of encouraging Congress to deliberate thoughtfully on sensitive areas in which legislative intrusion should be resisted.[142] Federal regulation of core state functions is such an area and so requires a super-strong clear statement by Congress to overcome the constitutional values at issue.

The purpose of the canons of statutory construction is to provide the legislature with clear interpretive rules so legislative drafters can predict the courts' application of the statutes and draft accordingly.[143] Knowing the relevant interpretive rules allows legislators to better predict the effects that different statutory language will have. This allows for leaner and economically efficient statutes, which ultimately lessens the cost of

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[138] Gregory v. Ashcroft, 501 U.S. 452, 460, 464 (1991).

[139] *Id.* at 464 (alteration omitted) (emphasis in original) (citation omitted).

[140] *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 425, 425 n.135 (2010) ("[J]udicial demands for a clear congressional statement, in addition to whatever other effects they may have, can serve to increase legislative enactment costs for constitutionally problematic policies" (quoting Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 40 (2008))).

[141] ESKRIDGE, *supra* note 93, at 276 n.5 (citation omitted).

[142] *See* ESKRIDGE, *supra* note 57, at 317 (stating that "clear statement rules are justified by the notion that courts should raise . . . the costs of legislation [that touches] upon sensitive areas").

[143] *See* ESKRIDGE, *supra* note 93, at 276–77 (arguing that knowing the "interpretive regime"—"the rules, presumptions, and practices"—that a court will apply to the statute allows legislative drafters to better "predict what effects the statutory language will have," thus permitting them to "leave much unsaid in the statute," which in turn makes enacting statutes more economically efficient).

legislating.[144] As demonstrated by Gluck's study, a problem arises when legislators are not attuned to what the courts are telling them. When courts are inconsistent in their notice to Congress, Congress may become skeptical that new rules will last any longer than the rules they replaced.[145] This undermines the advantages of clarifying the canons as Congress may become more cautious of trusting the judiciary to be consistent over time.[146] To avoid this, three conditions must be met. First, Congress must be institutionally capable of knowing and working from a canon that the courts are institutionally capable of communicating in a coherent form.[147] Second, the application of the canon "must be transparent to Congress."[148] Lastly, the previous two conditions must be met for both "the enacting Congress as well as the current Congress."[149] If the canon and its application changes in an unpredictable way, then the last condition is unlikely to be met.

The concern of institutional capability is, in theory, easily solved: "if the courts establish clearly defined baselines, legislative drafters ought to be able to anticipate their effect and to draft statutes accordingly."[150] The issue in *Tennessee*, and, generally, with courts' use of the clear statement rule, however, is that the courts provide no "clearly defined baseline" for Congress to work from. The court in *Tennessee* stated only that, as per the *Nixon* decision, because "infrastructure" is not limited to the public sphere, "§ 706 cannot be read to limit a state's ability to trump a municipality's exercise of discretion otherwise permitted by FCC regulations."[151] This finding does not make it clear what is required to satisfy the clear statement rule. It is unlikely that amending "infrastructure" alone would satisfy the rule—it is possible that the court could also require *Nixon*-like language mentioning preemption specifically, like the Senate's language during the drafting of § 706, or more. With no clearly defined baseline, legislative drafters are left guessing at what could satisfy

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[144] *Id.* at 277.
[145] *Id.* at 284.
[146] *Id.*
[147] *Id.* at 278.
[148] *Id.*
[149] *Id.*
[150] *Id.* at 279.
[151] Tennessee v. FCC, 832 F.3d 597, 613 (6th Cir. 2016).

the clear statement rule, thus demonstrating very little institutional capability.

Congress's difficulty in effectively anticipating how the courts will apply a clear statement rule is not isolated to the Telecommunications Act. For example, following the Court's shifting use of the clear statement rule as it applied to the Education of the Handicapped Act of 1975 (EHA), Congress struggled to amend the statute in a way that would satisfy the Court's new super-strong clear statement rule.[152] In *Dellmuth v. Muth*, the Court held that the EHA did not allow for damage suits against the states despite the presence of a provision in the statute for judicial review of state decisions.[153] The Court based the decision on its 1985 ruling in *Atascedero State Hospital v. Scanlon*, which created a super-strong clear statement rule.[154] The EHA was enacted in 1975, however, when the statutory language of the Act was likely clear enough to rebut the then-presumption against congressional abrogation of the states' Eleventh Amendment immunity against suit.[155] In fact, the Senate expected that the statute would allow for suit against the states and satisfy any clear statement challenge, as articulated on the Senate floor.[156]

Congress responded to *Atascedero* in 1986 by enacting legislation that it believed would overcome any super-strong clear statement challenge.[157] Yet, in *Dellmuth*, the Court stated that the 1986 legislation did not apply to the case in question.[158] Congress then responded to *Dellmuth* in 1990 by enacting legislation that would finally satisfy the Court's super-strong clear statement rule.[159] This legislation *explicitly* stated that "[a] State shall not be immune under the eleventh amendment to the Constitution . . . from suit in Federal court for a violation of [the

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[152] *See* ESKRIDGE, *supra* note 93, at 284–85 (detailing Congress's struggle to communicate its intent in a way that would satisfy the Court's clear statement rule).

[153] 491 U.S. 223, 232 (1989).

[154] *Id.* at 231; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

[155] *See* ESKRIDGE, *supra* note 93, at 284 ("[W]hen Congress enacted the EHA, the jurisdictional language covering actions against the states, plus the specific legislative history, were arguably enough . . . to satisfy a traditional clear statement rule. This was in fact the belief of the main Senate sponsor of the EHA.").

[156] *Id.*

[157] *Id.*

[158] *Id.* at 284–85.

[159] *Id.* at 285.

EHA]."[160] That it took Congress three statutes to achieve what it likely thought it had done in 1975 not only frustrates Congress's statutory purposes, but also frustrates the purpose of the canons of statutory construction themselves: lowering legislative costs by providing Congress with proper notice of what canons the Court will apply.

Another example is *EEOC v. Arabian American Oil Company* (*Aramco*), where the Rehnquist Court held that Title VII of the Civil Rights Act of 1964 was not clear enough to rebut the presumption against extraterritorial application of United States statutes (the *Foley Brothers* presumption[161]).[162] The Court interpreted Title VII to not apply to American employees working abroad for American companies, even though the statute is "broadly written, with specific reference to extraterritorial commerce and [makes] no indication that it was meant to apply only to domestic employment . . . ."[163] Although Title VII likely had a clear statement,[164] the Court required a super-strong clear statement to rebut the *Foley Brothers* presumption.[165] Congress, either in 1964 or in 1991, likely would have been surprised by this requirement even if its drafters had been aware of the *Foley Brothers* presumption.[166] A reasonable congressional observer in 1964 likely would have thought that the broad jurisdictional grant in Title VII would have been sufficient to rebut any such presumption or that the presumption would not apply to an American plaintiff suing an American defendant.[167] But the Court's unpredictable shift from a traditional clear statement rule to a super-strong clear statement rule forced Congress to amend

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[160] Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 604, 104 Stat. 1103 (1990).

[161] 499 U.S. 244, 255 (1991).

[162] Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) ("The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is based on the assumption that Congress is primarily concerned with domestic conditions.").

[163] ESKRIDGE, *supra* note 93, at 277.

[164] *See id.* at 283 (stating Title VII was likely worded sufficiently clearly to satisfy a traditional clear statement rule).

[165] *Id.* at 283–84.

[166] *Id.* at 281.

[167] *See id.* at 281–82 (discussing the Court's treatment of the *Foley Brothers* presumption in the years leading up to the Civil Rights Act of 1964).

the statute to accomplish what it probably thought it had done in 1964.[168] *Aramco* suggests that the substantive canons can be invoked or ignored at will by the court and their weight can fluctuate over time.[169]

Being able to anticipate how a court will treat the substantive canons is vital to reducing the overall cost of legislating. The allocational effects of the substantive canons, as opposed to the textual canons, can add to this cost.[170] For example, in *Tennessee*, the presumption against preemption could only be rebutted by a super-strong clear statement because § 706 could potentially allocate who—the state or its political subdivisions—had the power to decide whether municipal broadband services could expand outside of municipal borders.[171] In *Aramco*, the presumption against extraterritorial application of United States law "systematically advantages transnational companies," so deciding whether Title VII applied to American workers working for American companies overseas was an allocational issue.[172] Unpredictable application of the substantive canons, therefore, can prove expensive for Congress. Because the allocational effects of a statute bring opposition from the side that has most to lose from the allocation, legislative bargaining costs are increased.[173] For example, "[t]he Civil Rights Act of 1964 was a particularly hard statute to get through Congress" because of the "two-thirds vote required to overcome the southern filibuster.[174] Facing a challenge from the business community would have made the bill's sponsors' task even harder. Strong debate on the extraterritoriality issue, therefore, might have cost legislators too much in light of the overall importance of the Civil Rights Act. Where allocation of power is implicated, clear and predictable applications of the canons would, therefore, reduce the costs of legislative bargaining.

Tennessee is distinguishable from *Dellmuth* and *Aramco*, however. The *Gregory* super-strong clear statement rule already

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[168] *Id.* at 285.

[169] *Id.* at 283.

[170] *Id.* at 279.

[171] Tennessee v. FCC, 832 F.3d 597, 610 (6th Cir. 2016).

[172] ESKRIDGE, *supra* note 93, at 279.

[173] *See id.* ("In a legislative bargaining game every extra provision costs something, as it may trigger opposing votes and/or lobbying.").

[174] *Id.*

existed when Congress drafted the Telecommunications Act of 1996,[175] whereas the Court in *Dellmuth* and *Aramco* applied a new super-strong rule to the existing statutes. The question remains, however, that, if Congress was to amend § 706, what would be required to overcome the Sixth Circuit's application of the super-strong clear statement rule, short of an explicit grant of power? For the substantive canons to work as per their purpose and for the feedback loop to operate effectively, courts need to be clear on what they require to satisfy the rules that they create. If the court is not clear or is unpredictable in its application of the rules, then Congress picks up the bill as the costs of legislating are increased.

With courts providing Congress shifting and inconsistent notice of which interpretive rules it will apply in each case, it is no wonder that evidence of a feedback loop for clear statement rules is almost entirely absent. In fact, 81% of respondents to Gluck's study "said it would make a difference to their drafting practices if courts were more consistent about the canons they applied."[176] Because the rules can be changed at the courts' will, legislative costs will always be higher than expected because Congress has little incentive to legislate deliberately and thoughtfully on the canons during the initial drafting of the statute. Instead, amending an already-passed statute might incur less legislative costs than deliberating thoughtfully during the initial drafting stages.[177]

In *Tennessee*, the court stated that "preemption by the FCC of the allocation of power between a state and its subdivisions requires at least a clear statement" in § 706, but the "statute falls far short of such a clear statement."[178] If § 706 falls "far short" of a clear statement primarily because of this single ambiguity, then what incentive does Congress have to deliberate thoughtfully in its drafting process? If Congress were to fix the "infrastructure" ambiguity, would that be enough, or would § 706 now only be

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[175] *Gregory v. Ashcroft* was decided in 1991, and the Act was considered by Congress throughout 1995 and signed into law by President Clinton in 1996. *See supra* notes 109–17 and accompanying text.

[176] Gluck & Bressman, *supra* note 9, at 945 n.140.

[177] *See, e.g.*, *supra* pp. 975–976 and note 174 (weighing the importance of passing the Civil Rights Act with the legislative bargaining costs of adding the business community as an adversary during deliberation).

[178] Tennessee v. FCC, 832 F.3d 597, 600 (6th Cir. 2016).

"short" of a clear statement as opposed to "*far* short"? Would adding the Senate's preemption language be enough to satisfy *Gregory*'s super-strong clear statement rule? Or would it have to be explicit, like Congress's remedial legislation in *Dellmuth*? The fact that the rule in *Dellmuth*, although not the *Gregory* rule, specifically, was a super-strong rule,[179] does not leave much hope that Congress needs anything but explicit language in the statute to satisfy the super-strong clear statement rule, despite the Supreme Court in *Gregory* explicitly stating otherwise.[180]

F. THE TWENTY-FIRST CENTURY AND THE CLEAR STATEMENT RULE

Another challenge Congress faces when drafting legislation is the difficulty of predicting how certain groups might be affected by the statute and what that means for how the courts will interpret the statute. Eskridge asserts that the substantive canons can be used by the courts "to ameliorate dysfunctions in American democracy."[181] For example, the Court in *Chisom v. Roemer* gave a generous reading to the Voting Rights Act where the voting rights of African Americans were at stake.[182] In contrast, the Court in *Gregory* gave a particularly "stingy reading" to the ADEA because, unlike African Americans, "elderly people who are judges are a politically powerful group" and so receive less protection from the Court in its statutory interpretations.[183] Eskridge suggests a "meta-canon" which leads courts to "decide close cases against politically salient interests and in favor of interests that have been subordinated in the political process."[184]

In its interpretation of § 706, the FCC attempted to preempt the states' barriers to the expansion of broadband service into surrounding unserved and underserved communities.[185] The Sixth Circuit in *Tennessee* interpreted § 706 narrowly to prevent the FCC from using the statute to preempt. This suggests that the court likely did not view rural communities who lack broadband

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[179] ESKRIDGE, *supra* note 93, at 284.
[180] *See supra* note 61 and accompanying text.
[181] ESKRIDGE, *supra* note 93, at 294.
[182] *Id.*; Chisom v. Roemer, 501 U.S. 380, 403 (1991).
[183] ESKRIDGE, *supra* note 93, at 294.
[184] *Id.*
[185] *See supra* note 14 and accompanying text.

access as a politically subordinated group. It is also unlikely, however, that unserved or underserved rural communities are a "politically powerful group" like judges. In fact, the "winning" group in this case is likely the incumbent private internet service providers who now do not have to compete with expanding municipal broadband services, unless, of course, the individual states themselves allow the practice.[186] In a world where the internet is becoming increasingly important to daily life, communities without access to adequate internet services could soon become a "politically subordinated group."[187] If so, courts could read § 706 more generously to find preemption of state law. Either way, it is another consideration that Congress must take into account when drafting legislation, adding to the unpredictable nature of the substantive canons of statutory interpretation.

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[186] *See* Harold Feld, *FCC Loses It's Muni Broadband Test Case. What Comes Next?*, WETMACHINE: TALES OF THE SAUSAGE FACTORY (Aug. 16, 2016), http://www.wetmachine.com/tales-of-the-sausage-factory/fcc-loses-its-muni-broadband-test-case-what-comes-next/ ("Needless to say, incumbent providers don't like competition at all, let alone competition provided by local government. Incumbents have therefore pushed laws at the state level barring localities from providing commercial broadband service, or putting in lots of barriers making it really difficult for localities to provide service.").

[187] *See* Aaron Smith et al., *The Internet and Civic Engagement*, PEW INTERNET AND AMERICAN LIFE PROJECT 37 (2009), http://www.pewinternet.org/Reports/2009/04/01/the-internet-and-civic=engagement/ ("[A]t least one factor responsible for lower levels of online political activity among those at the lower end of the income spectrum is lack of internet access."); *cf.* Human Rights Council Res. 32/13, U.N. Doc. A/HRC/RES/32/13 (July 1, 2016) ("Expressing concern that many forms of digital divides remain between and within countries and between men and women, boys and girls, and recognizing the need to close them . . . ." (italics omitted)); Jeffrey Gottfried et al., *The 2016 Presidential Campaign—A News Event That's Hard to Miss*, PEW RESEARCH CENTER (Feb. 4. 2016), http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-that's-hard-to-miss/ ("About two-thirds (65%) of U.S. adults learned about the 2016 election in the past week from digital source types, which includes social networking sites and news websites, as well as digital communication from issue-based groups and the candidates."); *see generally* Aaron Smith, *Civic Engagement in the Digital Age*, PEW RESEARCH CENTER (Apr. 25, 2013), http://www.pewinternet.org/2013/04/25/civic-engagement-in-the-digital-age/ ("The well-educated and the well-off are more likely than others to participate in civic life online . . . and community affairs offline. Political activity in social networking spaces shows a somewhat more moderate version of that trend."); *Socioeconomic Effects of Broadband Speed*, ERICSSON (Sept. 2013), http://www.ericsson.com/res/thecompany/docs/corporate-responsibility/2013/ericsson-broadband-final-071013.pdf (summarizing the research into the socioeconomic effects of broadband speed on communities).

V. CONCLUSION

In its 2015 order the FCC attempted to use § 706 of the Telecommunications Act of 1996 to preempt state laws prohibiting municipal broadband providers from expanding their services outside their municipal borders. In *Tennessee*, the Sixth Circuit stated that, because the federal agency sought to interpose itself between states and their municipalities, and that states' control over their municipalities was a core state function, only satisfying the *Gregory* clear statement rule as applied in *Nixon* could overcome the presumption against federal preemption of state law. The court held that § 706 did not satisfy the rule and therefore could not be used to preempt state law. A purpose of the substantive canons is for the courts to establish clearly defined baselines so congressional drafters can anticipate the effect of the canons and draft statutes accordingly.[188] Although the court in *Tennessee* stated that § 706 was not clear enough to allow for preemption of state law, the court failed to articulate a clear baseline for what would satisfy its clear statement rule. It appears that rather than contribute to an effective feedback loop between the judicial and legislative branches, the Sixth Circuit has left congressional drafters guessing. As demonstrated by Gluck's study, it appears that most congressional drafters are not aware of the clear statement rule—only 4% of respondents were able to name the rule—and most cannot correctly apply the presumption against preemption—only 6% correctly believed that ambiguities in federal statutes were construed in favor of state law. The *Tennessee* decision, therefore, hinders rather than helps the legislative drafting process.

This problem does not appear to have an easy fix. The more inconsistent and capricious the courts are when handling the substantive canons, the more frustrating Congress's job becomes.[189] Also, when courts are especially unpredictable in how they will interpret a given statute, the costs of legislating increase. Because the court could shift the applicable rules at will, Congress has increasingly less incentive to deliberate thoughtfully on the

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[188] *See supra* note 150 and accompanying text.

[189] *See, e.g.*, *supra* notes 155–60 (discussing the *Dellmuth* case and Congress's three attempts to satisfy the Court's new rule).

canons. This is especially pertinent in the *Tennessee* case not only because of the federalism issues at stake, but also because, as the internet becomes essential to everyday life, communities who are either unserved or underserved by broadband services may become a politically subordinated class. Members of subordinated classes benefit from a more generous reading of statutes than members of politically powerful classes, such as judges. The court then may feel it necessary to read statutes, such as § 706, more generously in their favor, adding to the unpredictable circumstances surrounding the drafting and amending of legislation.

In *Tennessee*, it is unclear what Congress could do to amend § 706 to satisfy the *Gregory* super-strong clear statement rule short of being explicit—something that the Supreme Court says the *Gregory* rule does not require. This mixed message and lack of a clear baseline for satisfying the rule not only frustrates the feedback loop and damages the relationship between the legislative and judicial branches of government, but also serves to reduce the incentive for Congress to consider the rules as part of its drafting practices.

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