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Authority with the Force of Law: Statutory Interpretation as Policymaking in *Gonzales v. Oregon*

*Gonzales v. Oregon*¹

I. INTRODUCTION

The Oregon Death with Dignity Act² was enacted in 1994 by the State of Oregon to allow physicians to aid terminally ill patients who wished to end their lives in a controlled manner.³ In 2001, Attorney General John Ashcroft issued an Interpretive Rule stating that prescribing a controlled substance for the purpose of physician-assisted suicide would not qualify as a requisite “legitimate medical purpose” under the federal Controlled Substances Act, and that any physician who prescribed a controlled substance for the purpose of ending a patient’s life faced deregistration.⁴ In *Gonzales v. Oregon*, the Supreme Court of the United States ruled that the Attorney General’s Interpretive Rule was invalid because it was outside of the scope of his authority delegated by Congress.

Because the issue of physician-assisted suicide is one that generates so much controversy, this case has received a large amount of publicity and comment from many spheres of public life. However, neither the Court nor the dissent spent much time discussing the issue of physician-assisted suicide, and instead, both of the opinions based their arguments in the framework of administrative law. Within this structure, two competing jurisprudential philosophies collide; as a result, *Gonzales v. Oregon* offers insight into how such disputes will be debated and resolved in the foreseeable future.⁵ This note examines the Court’s decision, the accompanying jurisprudential doctrines, and the potential ramifications of both this ruling and Justice Scalia’s dissent in light of an ongoing debate regarding physician-assisted suicide and the scope of agency rulemaking authority.

1. 126 S. Ct. 904 (2006).

2. OR. REV. STAT. §§ 127.800-.897.

3. *See id.* § 127.885 (2003).

4. Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001).

5. A full discussion of the two philosophies, for the purposes of this Note described as “textualism” and “intentionalism,” is outside the scope of this analysis. For a more thorough analysis of this topic, see Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005)

II. FACTS AND HOLDING

In 1994, the State of Oregon legalized assisted suicide when voters, through a ballot measure, approved the Oregon Death With Dignity Act (ODWDA).⁶ ODWDA exempts from civil or criminal liability physicians who dispense or prescribe a lethal dose of drugs to terminally ill patients in accordance with specific safeguards.⁷ The drugs used by physicians under ODWDA, while not specified in the Act itself,⁸ are regulated under the Controlled Substances Act (CSA),⁹ which restricts the availability of certain drugs for medically accepted uses only.¹⁰

In July 1997, Senator Orrin Hatch and Representative Henry Hyde, concerned by the passage of ODWDA, wrote a letter to Thomas Constantine, then Administrator of the Drug Enforcement Administration (DEA), suggesting that the DEA issue an interpretation of the CSA that would permit revocation of registration for any practitioner who issues a prescription pursuant to ODWDA.¹¹ In response, Constantine issued a letter stating the position that, if conducted in the method prescribed by ODWDA, physician-assisted suicide violated the CSA. In response, the Oregon Medical Association advised physicians against writing prescriptions under ODWDA until the issue was settled.¹² However, before any further action on the subject was taken, in June of 1998 the Justice Department determined that the DEA did not have the authority to take such a position under the terms of the CSA and reversed its position.¹³

Three years later, Attorney General John Ashcroft issued an Interpretive Rule stating that assisting suicide was not a "legitimate medical purpose" and that any physician who prescribed federally controlled substances for that purpose would be subject to the suspension or revocation of his or her regis-

6. OR. REV. STAT. §§ 127.800-.897.

7. *Gonzales v. Oregon*, 126 S. Ct. 904, 911 (2006).

8. *See* OR. REV. STAT. §§ 127.800-.897. The drugs used to carry out the provisions of the ODWDA are prescribed in smaller doses for pain alleviation. *Gonzales*, 126 S. Ct. at 911.

9. 21 U.S.C. §§ 801-904 (2000 & Supp. 2005).

10. *See Gonzales*, 126 S. Ct. at 911-12. The drugs used in order carry out physician-assisted suicide under ODWDA are all classified under schedule II of the CSA. *See infra* note 23 and accompanying text for more information about scheduling.

11. Raphael Cohen-Almagor & Monica G. Hartman, *The Oregon Death With Dignity Act: Review and Proposals for Improvement*, 27 J. LEGIS. 269, 275-76 (2001).

12. *Id.*

13. *Id.* at 276. In a letter to Senator Hatch, Attorney General Janet Reno "concluded that the DEA could not take the proposed action because the CSA did not authorize it to displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice." *Gonzales*, 126 S. Ct. at 913. This determination led to a Congressional attempt to expressly dictate the same proposition in the text of the CSA by passing the Pain Relief Promotion Act. *See infra* note 46.

tration under the CSA “regardless of whether state law authorizes or permits such conduct.”¹⁴ Because all prescriptions filled under ODWDA are classified under Schedule II of the CSA, this rule effectively preempted such prescription as a federal crime.¹⁵

In response to the Attorney General’s Interpretive Rule, the State of Oregon, joined by a number of interested Oregon residents, filed suit in federal court to block the Rule.¹⁶ On April 17, 2002, the U.S. District Court for the District of Oregon entered a permanent injunction against enforcement of the Rule, holding it exceeded the authority delegated to the Attorney General by the CSA.¹⁷ A divided Court of Appeals for the Ninth Circuit agreed, reasoning that because the Rule “interferes with Oregon’s authority to regulate medical care within its borders,” it “alter[s] the ‘usual constitutional balance between the States and the Federal Government’” without the requisite “unmistakably clear” authorization of Congress.¹⁸ The Supreme Court granted the Government’s petition for certiorari in February, 2005.¹⁹

On review, the Supreme Court affirmed the judgment of the Court of Appeals. The Court held that the government’s interpretation — that prescriptions for assisted suicide constituted “drug abuse” under the CSA — was “discordant with the phrase’s consistent use throughout the statute, not to

14. Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001). The relevant part of the rule in its original context:

For the reasons set forth in the OLC Opinion, I hereby determine that assisting suicide is not a “legitimate medical purpose” within the meaning of 21 CFR § 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the CSA. Such conduct by a physician registered to dispense controlled substances may “render his registration * * * inconsistent with the public interest” and therefore subject to possible suspension or revocation under 21 U.S.C. 824(a)(4). This conclusion applies regardless of whether state law authorizes or permits such conduct by practitioners or others and regardless of the condition of the person whose suicide is assisted. I hereby direct the DEA, effective upon publication of this memorandum in the Federal Register, to enforce and apply this determination, notwithstanding anything to the contrary in the June 5, 1998, Attorney General’s letter.

Id.

15. See *Gonzales*, 126 S. Ct. at 914. For more information about Scheduling under the CSA, see *infra* note 23.

16. *Gonzales*, 126 S. Ct. at 914.

17. *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1092-93 (D. Or. 2002), *aff’d*, 368 F.3d 1118 (9th Cir. 2004), *aff’d sub nom.* *Gonzales v. Oregon*, 126 S. Ct. 904 (2006). The court found that neither the plain language nor the legislative history of the CSA supported the Attorney General’s putative authority to issue such a regulation. *Id.* at 1088-91.

18. *Oregon v. Ashcroft*, 368 F.3d 1118, 1124-25 (9th Cir. 2004) (alteration in original) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991)).

19. *Gonzales v. Oregon*, 543 U.S. 1145 (2005).

mention its ordinary meaning.”²⁰ Additionally, the Court held that “the CSA’s prescription requirement does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct.”²¹

III. LEGAL BACKGROUND

A. *The Federal Controlled Substances Act*

The Controlled Substances Act (CSA) was enacted in 1970 to create a comprehensive uniform national scheme for regulating the manufacture, distribution, and dispensation of a variety of chemicals and substances.²² The CSA creates five schedules of controlled substances for the purpose of allowing each to be regulated at a different level.²³

Initially, Congress prescribed a number of specific substances to be included within the scheduling system,²⁴ and delegated to the Attorney General the power, via rulemaking authority, to add substances to a schedule, transfer substances between schedules, and remove substances from a schedule.²⁵ Such a rule must be made on the record, after a hearing pursuant to the procedures set forth in 5 U.S.C. § 553.²⁶ However, before initiating the rulemaking procedure, the Attorney General must gather data on the substance and request from the Secretary of Health and Human Services a scientific and medical evaluation in addition to the Secretary’s recommendation as to the

20. *Gonzales*, 126 S. Ct. at 925.

21. *Id.*

22. Scott Gast, *Who Defines “Legitimate Medical Practice?” Lessons Learned from the Controlled Substances Act, Physician-Assisted Suicide, & Oregon v. Ashcroft*, 10 VA. J. SOC. POL’Y & L. 261, 265 (2002). The CSA was designed to simultaneously protect access to those substances that “have a useful and legitimate medical purpose” while preventing their “improper use.” 21 U.S.C. § 801(1)-(2) (2000).

23. *See* 21 U.S.C. §§ 811-812. Drugs are included in a given schedule based on their perceived potential for abuse, their currently accepted medical use, and their potential to lead to dependence. *See id.* § 812(b). Schedule I drugs are those with “no currently accepted medical use in treatment in the United States” that have “a high potential for abuse,” and includes such substances as heroin and peyote. *Id.* § 812(b)(1), (c). All other schedules have some medically accepted use and are classified in decreasing levels of potential for abuse and dependence. *See id.* § 812(b)(2)-(5). For example, substances in schedule II are authorized for medical use “with severe restrictions.” *Id.* § 812(b)(2)(B).

24. *See id.* § 812(c).

25. *Id.* § 811(a).

26. *See id.*

proposed rule.²⁷ The recommendations of the Secretary as to the control or removal of a substance are binding on the Attorney General.²⁸

Except as authorized by the CSA, it is unlawful to “knowingly or intentionally . . . manufacture, distribute, or dispense . . . a controlled substance.”²⁹ Part C of Subchapter I deals generally with the registration of persons authorized to manufacture, distribute, or dispense controlled substances.³⁰ The Attorney General “shall register practitioners . . . to dispense . . . substances” in schedules II through V “if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.”³¹ The Attorney General may deny such an application “if he determines that the issuance of such registration would be inconsistent with the public interest.”³² Registrants are authorized to distribute controlled substances “to the extent

27. *Id.* § 811(b). Both the Attorney General and the Secretary must consider a number of factors regarding any decision to control or remove a substance from the schedules, including

- (1) Its actual or relative potential for abuse.
- (2) Scientific evidence of its pharmacological effect, if known.
- (3) The state of current scientific knowledge regarding the drug or other substance.
- (4) Its history and current pattern of abuse.
- (5) The scope, duration, and significance of abuse.
- (6) What, if any, risk there is to the public health.
- (7) Its psychic or physiological dependence liability.
- (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

Id. § 811(b)-(c).

28. *Id.* § 811(b).

29. *Id.* § 841(a)(1).

30. *See id.* §§ 821-30. Section 822 in particular regulates “[p]ersons required to register,” and requires those persons who dispense controlled substances to obtain registration “in accordance with the rules and regulations” established by the Attorney General. *Id.* § 822(a)(2).

31. *Id.* § 823(f). A practitioner is defined by the CSA as “a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.” *Id.* § 802(21).

32. *Id.* § 823(f). In determining whether such registration is inconsistent with the public interest, the Attorney General “shall” consider as factors

- (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
- (2) The applicant’s experience in dispensing, or conducting research with respect to controlled substances.
- (3) The applicant’s conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
- (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
- (5) Such other conduct which may threaten the public health and safety.

Id. § 823(f)(1)-(5).

authorized by their registration and in conformity” with the rest of Subchapter C of the Act.³³ Even after registration is granted, it may be revoked by the Attorney General. Prior to 1984, the Attorney General could only deregister a physician who provided false information on the application, who was convicted of a felony relating to controlled substances, or who had his state license or registration revoked.³⁴ Pursuant to the 1984 amendment,³⁵ registration may be suspended or revoked by the Attorney General upon a finding that the registrant “has committed such acts as would render his registration . . . inconsistent with the public interest” as determined under the requirements of Section 823 of the Act.³⁶

The Attorney General is also granted the power to create rules and regulations relating to the registration and control of controlled substances,³⁷ as well as any rules, regulations, or procedures deemed “necessary and appropriate for the efficient execution of his functions” under the Act.³⁸ In 1971, the Drug Enforcement Agency issued a regulation requiring prescriptions for controlled substances to “be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional prac-

33. *Id.* § 822(b).

34. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 304(a), 84 Stat. 1236, 1255 (1970) (current version at 21 U.S.C. § 824(a) (2000)).

A registration pursuant to section 303 to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General upon a finding that the registrant – (1) has materially falsified any application filed pursuant to or required by this title or title III; (2) has been convicted of a felony under this title or title III or any other law of the United States, or of any State, relating to any substance defined in this title as a controlled substance; or (3) has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances.

Id.

35. *See* Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, § 512, 98 Stat 1837, 2073 (1984) (current version at 21 U.S.C. § 824(a) (2000)).

36. *Id.* § 512(2). This is not the only possible reason for suspension; the others are detailed in § 824(a)(1)-(3), (5). For the factors in Section 823 applicable to the registration of practitioners, see *supra* note 32.

37. *Id.* § 821 (amended 2004). “Control” is defined as “to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise.” *Id.* § 802(5). Such “control” would necessitate the procedures outlined in section 811. *See supra* notes 25-28 and accompanying text. All definitions in section 802 are to “as used in this subchapter,” referring to Subchapter I of the CSA, codified as 21 U.S.C. §§ 801-903.

38. 21 U.S.C. § 871(b). This section includes the words “this subchapter,” relating to Subchapter I of the Act: “Control and Enforcement.”

“legitimate medical purpose.”³⁹ As a result, registration under the CSA may be revoked or suspended if a practitioner prescribes a controlled substance for something other than a

B. The Oregon Death with Dignity Act

In November 1994, Oregon voters approved by ballot initiative the Oregon Death with Dignity Act (ODWDA)⁴⁰ by a small margin.⁴¹ From its inception, ODWDA, which permitted physician-assisted suicide, was surrounded in controversy. Over the next few years, ODWDA survived a court challenge⁴² and an attempt by opponents to repeal it by the same ballot initiative method that was used to enact its passage.⁴³ By the time Oregon voters rejected its repeal, the Supreme Court had already handed down its decision in *Washington v. Glucksberg*,⁴⁴ effectively allowing the states to decide whether or not to legalize physician assisted suicide.⁴⁵ Though the issue was debated at the federal level after *Glucksberg*,⁴⁶ prior to the instant decision, ODWDA remained the law of Oregon.

39. 21 C.F.R. § 1306.04(a) (2005). *See also* Regulations Implementing the Comprehensive Drug Abuse Prevention and Control Act of 1970, 36 Fed. Reg. 7,799 (Apr. 24, 1971); Gast, *supra* note 22, at 268 n.31 (detailing further the authority under which this regulation was promulgated).

40. OR. REV. STAT. §§ 127.800-.897 (2003).

41. Cohen-Almagor, *supra* note 11, at 271-72. Fifty-one percent voted in favor of the Act, while forty-nine percent were opposed. *Id.* at 272.

42. The ODWDA was initially struck down on the grounds that it violated the Equal Protection Clause. *See Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995). However, this case was subsequently vacated for procedural reasons, specifically that the Federal courts did not have jurisdiction to entertain plaintiffs' claims on the basis that the plaintiffs lacked standing. *See Lee v. Oregon*, 107 F.3d 1382, 1387-92 (9th Cir. 1997).

43. Cohen-Almagor, *supra* note 11, at 274-75. The rejection of this ballot measure was by a 60%-40% margin, an increase in support that Cohen-Almagor and Hartman attribute to “anger over the fact that [voters] were forced to vote on the issue for the second time.” *Id.* at 275.

44. 521 U.S. 702 (1997).

45. While the court in *Glucksburg* did not expressly delegate to states the right to legalize physician-assisted suicide, it did leave the issue deliberately open. *See id.* at 735 (“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue”); *see also id.* at 788 (Souter, J., concurring) (“Legislatures, on the other hand, have superior opportunities to obtain the facts necessary for a judgment about [physician-assisted suicide] There is, indeed, good reason to suppose that . . . just such experimentation will be attempted in some of the States.” (citing OR. REV. STAT. §§ 127.800-.897 (Supp. 1996)) (acknowledging the Oregon Death with Dignity Act)).

46. Congress passed laws in 1997 that bar the use of federal funds in physician-assisted suicide. *See* Assisted Suicide Funding Restriction Act of 1997, Pub. L. No.

ODWDA authorizes a capable adult⁴⁷ who is an Oregon resident⁴⁸ that has been determined by an attending physician and a consulting physician to be suffering from a terminal disease to make an informed decision⁴⁹ to request medication for the purpose of ending his or her life.⁵⁰ A number of safeguards exist within the Act to ensure that no abuse of physician-assisted suicide occurs. A series of statutory requirements are prescribed for the attending physician,⁵¹ whose diagnosis must be confirmed in writing by the consulting physician after a second examination of the patient.⁵² There is a fifteen day waiting period between the patient's initial request and the date the prescription is issued, and a 48 hour waiting period between the written request and the issuance of the prescription.⁵³ At all times, the patient has an unequivocal right to rescind the request,⁵⁴ and anyone who, intending to cause the death of the patient, alters or forges a request for medication, con-

105-12, 111 Stat. 23 (codified as amended in scattered sections of 5, 10, 18, 22, 25, 29, 38, and 42 U.S.C.). In 1999, the Pain Relief Promotion Act, which would have amended the Controlled Substances Act to proscribe the use of controlled substances for assisting suicide, was proposed both in the House and Senate. *See* Pain Relief Promotion Act of 1999, H.R. 2260, 106th Cong. (1999). The Pain Relief Promotion Act died in part because Senator Ron Wyden of Oregon threatened a filibuster, and the bill never reached a floor vote in the Senate. Lindsay R. Kandra, Comment, *Questioning the Foundation of Attorney General Ashcroft's Attempt to Invalidate Oregon's Death With Dignity Act*, 81 OR. L. REV. 505, 515 (2002).

47. An "adult" is "an individual 18 years of age or older." OR. REV. STAT. § 127.800(1) (2005).

48. *See id.* § 127.860.

49. An "informed decision" is a decision "by a qualified patient . . . that is based on an appreciation of the relevant facts and after being fully informed by the attending physician of" a variety of factors. *Id.* § 127.800(7). The attending physician is responsible for verifying that the patient is making an informed decision immediately prior to writing a prescription for medicine under the Act. *Id.* § 127.830.

50. *Id.* § 127.805(1). Such a request must be made orally and in writing, and the patient must reiterate the oral request no less than fifteen days after it was initially made. *Id.* § 127.840. The written request must be witnessed by at least two individuals, one of whom is not a relative, or entitled to any portion of the individual's estate, or an owner, operator of a health care facility where the patient is receiving medical treatment, who can attest to its voluntary nature under the terms of the statute. *Id.* § 127.810.

51. *Id.* § 127.815. These requirements are extensive, and require, among other things, that the patient be informed of his or her diagnosis, the consequences of taking the prescription requested, and feasible alternatives to suicide. *Id.*

52. *Id.* § 127.820. Additionally, if in the opinion of either physician the patient may be suffering from a disorder or depression impairing the patient's judgment, the physician is required to refer the patient for counseling. *Id.* § 127.825.

53. *Id.* § 127.850.

54. *Id.* § 127.845.

ceals or destroys a rescission of a request, or exerts undue influence on a patient to request medication is guilty of a felony.⁵⁵

ODWDA protects those in good faith compliance with its provisions from a number of penalties, including being subject to civil or criminal liability or professional disciplinary action,⁵⁶ any penalty by a professional organization or health care provider,⁵⁷ and allegations of neglect.⁵⁸ Health care providers are not under any duty to participate in ODWDA and may prevent its provisions from being carried out on premises that they own.⁵⁹

C. The Administrative Procedure Act and Judicial Deference to Administrative Interpretations

The Administrative Procedures Act (APA)⁶⁰ is the law under which federal agencies create rules and regulations and adjudicate disputes to carry out their various mandates. Before promulgating a rule, agencies are required by the APA to provide notice of the proposed rule⁶¹ and to hear and consider comments on the proposal.⁶² This notice and comment procedure does not apply to “interpretive rules.”⁶³ Interpretive rules are not formally defined in the text of the APA, but can be generally thought of as rules “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”⁶⁴

When agencies make rules or issue adjudications, there are often competing interests and authorities at work. As a result, courts have often had to decide whether a given agency-issued rule or adjudication is correctly enforceable. One of the earliest cases to establish a doctrine as to the enforceability of agency rules purporting to interpret statutes was *Skidmore v. Swift & Co.*⁶⁵ In *Skidmore*, the Supreme Court observed that the APA does not address the amount of deference courts should give administrative conclusions, and held that such conclusions are “entitled to respect” because they

55. *Id.* § 127.890(1)-(2).

56. *Id.* § 127.885(1).

57. *Id.* § 127.885(2).

58. *Id.* § 127.885(3).

59. *Id.* § 127.885(4)-(5). Subsection (5) requires that the prohibiting provider notify other providers on its premises and prescribes a number of permitted sanctions if such a prohibition is flouted. *Id.*

60. 5 U.S.C. §§ 551-599 (2000).

61. This notice “shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.” *Id.* § 553(b).

62. *Id.* § 553(c).

63. *Id.* § 553(b)(3)(A).

64. See Elizabeth Williams, *What Constitutes “Intepretative Rule”* [sic] of Agency so as to Exempt Such Action from Notice Requirements of Administrative Procedure Act, 126 A.L.R. FED. 347 § 2[a] (1995).

65. 323 U.S. 134 (1944).

embody the purported experience and expertise of a given agency.⁶⁶ However, the weight given to an administrative conclusion was limited to its “power to persuade.”⁶⁷ *Skidmore* enumerated some considerations that illuminated the scope of this power and essentially amounted to a multi-factored balancing test.⁶⁸

Skidmore essentially remained the law for forty years until a revolution occurred in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁶⁹ In *Chevron*, the Supreme Court held that if Congress has clearly or directly spoken to an issue in the text of the statute, courts are bound to defer to the language therein.⁷⁰ If, however, a statute is silent or ambiguous on a given issue, courts are to determine whether an agency’s interpretation is “based on a permissible construction of the statute.”⁷¹ A specific agency’s construction is permissible if Congress has explicitly or implicitly left a “gap” for the agency to fill.⁷²

In *Chevron*, the Supreme Court established a two-prong test that was alluringly simple when compared to *Skidmore*’s multi-factored inquiry; the only question under the first prong was whether Congress had clearly spoken to an issue, and only if this question was answered in the negative did the court even address whether the agency’s construction were permissible.⁷³ If the latter event, *Chevron* dictates that if there is an “express delegation of authority to the agency” to interpret the statute via regulation, the regulation is afforded “controlling weight” unless it is “arbitrary, capricious, or manifestly contrary to the statute.”⁷⁴ Similarly, if there is implicit delegation to an agency by Congress, a court is still required to uphold a “reasonable interpre-

66. *Id.* at 139-40 (discussing that “[t]here is no statutory provision as to what, if any, deference courts should pay to the Administrator’s conclusions” but that such conclusions “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”).

67. *Id.* at 140.

68. “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* The other “factors which give [agency interpretations] power to persuade” were not discussed in *Skidmore*, and subsequent courts added their own considerations over the following years. See Jamie A. Yavelberg, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations after EEOC v. Aramco*, 42 DUKE L. J. 166, 180-81 (1992) (alteration in original).

69. 467 U.S. 837 (1984).

70. *Id.* at 842-43. The judiciary is the final authority on this issue. See *id.* at 843 n.9 (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”).

71. *Id.* at 843.

72. See *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

73. See *Chevron*, 467 U.S. at 842-43.

74. *Id.* at 843-44.

tation made by the . . . agency.”⁷⁵ Agency decisions properly made after such delegation that “represent[] a reasonable accommodation of conflicting policies” are entitled to deference “unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”⁷⁶ Only in the event that Congress had neither clearly spoken to an issue nor explicitly or implicitly delegated authority to an agency to interpret such an ambiguity was the court not required to defer, in which case it defaulted to a *Skidmore* analysis.⁷⁷

Two cases in recent years have significantly altered the landscape with regard to questions of agency deference. The first, *Christensen v. Harris County*,⁷⁸ delineated between agency interpretations that have “the force of law” and those that do not. In *Christensen*, the question of deference involved an opinion letter, and the Court held that agency interpretations contained in “policy statements, agency manuals, and enforcement guidelines” which lack the force of law do not warrant *Chevron* deference in part because they contain no formal procedural requirements for their issuance.⁷⁹ Barring the application of *Chevron* for rules that have not undergone formal procedures under the APA, the Court held that these types of informal rules are only entitled to *Skidmore* deference and found the agency’s interpretation unpersuasive in that case.⁸⁰

The following year, this doctrine was refined in *U.S. v. Mead Corp.*⁸¹ In *Mead*, the Court held that agency regulations interpreting statutes will only be afforded deference if Congress has delegated “authority to the agency generally to make rules carrying the force of law,” and if the rule in question was created *in the exercise of that authority*.⁸² Whereas *Christensen* held that no informal rules or non-binding adjudications would be afforded *Chevron* def-

75. *Id.* at 844.

76. *Id.* at 845 (quoting *U.S. v. Shimer*, 367 U.S. 374, 383 (1961)).

77. Though defaulting to *Skidmore* in the event of failing the second prong is not explicitly discussed in the text of *Chevron*, courts cited *Skidmore* with approval in the post-*Chevron* era even before *Mead*. See Yavelberg, *supra* note 68, at 188 n.116.

78. 529 U.S. 576 (2000).

79. *Id.* at 587 (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-58 (1991); *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 157 (1991)).

80. *Id.* Justice Scalia foreshadowed his later dissents in *Mead*, see *infra* note 81, and *Gonzales v. Oregon*, see *infra* Part IV.B. in the concurrence to *Christensen*, in which he labeled *Skidmore* deference “an anachronism.” *Id.* at 589 (Scalia, J., concurring).

81. 533 U.S. 218 (2001).

82. *Id.* at 226-27. The *Mead* standard has been criticized by Justice Scalia, who would adhere to the pre-*Mead* *Chevron* standard, as “unduly constrained.” *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 244-45 (2005) (Scalia, J., concurring); see also *Mead*, 533 U.S. at 239-59 (Scalia, J., dissenting) (expressing the opinion that if *Chevron* deference is unwarranted, then no deference at all is preferable to *Skidmore* deference).

erence, *Mead* muddied the waters by taking a step back from that proscription. In *Mead*, the Court specifically held that a lack of formal rulemaking process is not in and of itself a bar to the application of *Chevron*.⁸³ Rather, it is the delegation of authority from Congress that is controlling, which may be shown in “a variety of ways,” including “an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”⁸⁴ Further, the rule must be created in the exercise of that authority, which it is not if a statute unambiguously forbids the agency’s interpretation or if for other reasons the interpretation exceeds the bounds of the permissible.⁸⁵

Other judicial doctrines of agency deference have arisen since the inception of the APA. As early as 1945, the Supreme Court held that if an agency has issued an ambiguous regulation and interprets this regulation with a subsequent rule, that administrative interpretation is “of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”⁸⁶ Specifically, the Court has been loathe to overrule agency interpretation unless a contrary reading is compulsory because of “the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation.”⁸⁷ The Court has consistently upheld this idea,⁸⁸ solidifying it in the 1997 case, *Auer v. Robbins*.⁸⁹ *Auer* involved the interpretation of a rule promulgated under the Fair Labor Standards Act of 1938, specifically a passage “exempt[ing] ‘bona fide executive, administrative, or professional’ employees from overtime pay requirements.”⁹⁰ In holding that the Secretary’s interpretation of his own regulation is controlling, the Court defined its attitude as a “deferential standard.”⁹¹

83. *Mead*, 533 U.S. at 230-31.

84. *Id.* at 226-27.

85. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002) (citing *Chevron*, 467 U.S. at 843).

86. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

87. *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

88. *See, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 511 (1994); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *U.S. v. City of Chicago*, 400 U.S. 8, 10 (1970) (per curiam); *Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

89. 519 U.S. 452 (1997). “*Auer* deference,” as the court in *Gonzales v. Oregon* frames it, is recognized as a subset of *Chevron* deference by many scholars. *See Ballard v. Comm’r*, 544 U.S. 40, 70 n.4 (2005) (referring to this doctrine as “*Seminole Rock* deference”).

90. *Auer*, 519 U.S. at 454-55 (quoting 29 U.S.C. § 213(a)(1) (2000)).

91. *Id.* at 461.

IV. THE INSTANT DECISION

In *Gonzales v. Oregon*, the Supreme Court addressed the question of whether the CSA allows the Attorney General to prohibit the prescription of regulated drugs for the purpose of physician-assisted suicide in the face of a state law permitting such a prescription.⁹² The Court split, with Justice Kennedy writing the opinion of the court, and Justice Scalia (who was joined by both the Chief Justice and Justice Thomas) and Justice Thomas writing dissents.

A. *The Opinion of the Court*

Discussing the legal background of the case,⁹³ the Court first turned to the text and structure of the CSA itself, pointing out that the CSA explicitly reserves a role for States in the regulation of controlled substances.⁹⁴ The Court continued, explaining the history of ODWDA and the Congressional attempt in the late nineties to prevent its implementation through the CSA.⁹⁵ Finally, the Court addressed Attorney General Ashcroft's November 9, 2001 Interpretive Rule, finding that it "would substantially disrupt the ODWDA regime," because the prescriptions filled under ODWDA all involve drugs classified under Schedule II of the CSA.⁹⁶

1. *Auer* Deference

The first substantive issue addressed by the Court was whether the Interpretive Rule is entitled to "substantial deference" under *Auer v. Robbins*,⁹⁷ which requires that it interpret the Attorney General's own ambiguous regulation.⁹⁸ The Court found that *Auer* was distinguishable from the case at bar because, while the underlying regulations in *Auer* gave specificity to a statutory scheme that the agency was charged with enforcing and reflected the experience of the Department of Labor regarding the Fair Labor Standards Act, the regulation that the Attorney General's Interpretive Rule purported to clarify merely restated the language of Congress.⁹⁹ Because the language of the regulation and the CSA are nearly equivalent, the Rule was not entitled to the substantial deference afforded under the *Auer* standard.¹⁰⁰

92. 126 S. Ct. 904, 911 (2006).

93. Much of the Court's discussion mirrors Part III of this note. See *supra* notes 22-91 and accompanying text.

94. *Gonzales*, 126 S. Ct. at 912 (citing 21 U.S.C. § 823(f)(4)).

95. *Id.* at 912-13; see also *supra* notes 6-15 and accompanying text.

96. *Gonzales*, 126 S. Ct. at 914.

97. See *supra* text accompanying notes 89-91.

98. *Gonzales*, 126 S. Ct. at 915.

99. *Id.*

100. *Id.*

In finding that the language between the regulation and the CSA was similar enough to warrant equivalence, the Court focused on two phrases in the regulation: “legitimate medical purpose” and “the course of professional practice.”¹⁰¹ The first phrase closely resembled language found in several different places in the statute,¹⁰² and the second is nearly identical to statutory language found throughout the CSA.¹⁰³ The Court stated that because the regulation does not elaborate on who decides whether a particular activity is in “the course of professional practice” or done for a “legitimate medical purpose,” the Interpretive Rule could not be an interpretation of the regulation.¹⁰⁴ The Court further stated that, “[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”¹⁰⁵ The Court also found it important that the statutory authority to issue the Interpretive Rule came from 1984 amendments to the CSA giving the Attorney General the power to register and deregister physicians based on the public interest; these amendments postdate the regulation purportedly interpreted by thirteen years and do not carry a correlative intent.¹⁰⁶

2. *Chevron* Deference

The Court next turned its attention to whether the Interpretive Rule was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, deference that is dependent upon the explicit or implicit delegation to the Attorney General of the authority to elaborate on an ambiguous statute.¹⁰⁷ The Court found that the rulemaking power delegated by Congress

101. *Id.*

102. *See* 21 U.S.C. § 812(b)(1)(B) (2000) (“currently accepted medical use”); *Id.* § 829(c) (“No controlled substance in schedule V . . . may be distributed or dispensed other than for a medical purpose.”); *Id.* § 830(b)(3)(A)(ii) (“The term ‘valid prescription’ means a prescription which is issued for a legitimate medical purpose.”).

103. *See id.* § 802(15) (“in the course of his professional practice”); *Id.* § 802(21) (“in the course of professional practice or research”); *Id.* § 827(c)(1)(A) (“acting in the lawful course of their professional practice”); *Id.* § 828(e) (“in the course of his professional practice or research”); *Id.* § 830(b)(3)(A)(ii) (“acting in the usual course of the practitioner’s professional practice”); *Id.* § 844(a) (“acting in the course of his professional practice”); *Id.* § 885(a)(2) (“acting in the course of his professional practice”).

104. *Gonzales*, 126 S. Ct. at 915-16 (“Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute.”).

105. *Id.* at 916.

106. *Id.* (“That the current interpretation runs counter to the ‘intent at the time of the regulation’s promulgation,’ is an additional reason why *Auer* deference is unwarranted.” (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994))).

107. *Id.*; *see also supra* notes 71-86 and accompanying text.

to the Attorney General through the CSA did not authorize him to make a rule illegitimizing a medical standard authorized under state law.¹⁰⁸

In coming to this conclusion, the Court began with the language of the delegation provision.¹⁰⁹ The CSA does give the Attorney General limited rulemaking powers in two provisions: first, the Attorney General may “promulgate rules and regulations and . . . charge reasonable fees relating to the registration and control” of controlled substances,¹¹⁰ and second, “[t]he Attorney General may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions.”¹¹¹ These sections indicate that the Attorney General was not delegated general authority over all provisions of the CSA, but rather to “promulgate rules relating only to ‘registration’ and ‘control,’ and ‘for the efficient execution of his functions’ under the statute.”¹¹²

The Court first examined the Attorney General’s authority to make regulations relating to the “control” of drugs, turning to the text of the CSA for the definition of “control,” which, “[a]s used in this subchapter”¹¹³ “means to add a drug or other substance . . . to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise.”¹¹⁴ Because the CSA prescribes a very specific manner in which such authority must be exercised by the Attorney General¹¹⁵ — procedures which were not observed in the issuance of the Interpretive Rule in question — and because the Rule had nothing to do with the scheduling of substances under the CSA, it could not fall under the Attorney General’s control authority.¹¹⁶ Despite this finding, the Court went on to examine the Rule under the assumption that “control” means something other than its statutory definition, but found that, even un-

108. *Oregon*, 126 S. Ct. at 916.

109. *Id.* Giving some examples where the statute had given an agency “broad power to enforce all provisions of the statute,” the court found that the CSA did not grant “this broad authority to promulgate rules” to the Attorney General. *Id.* (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004)).

110. 21 U.S.C. § 821 (Supp. 2005). The court apparently does not contemplate that this statute, amended in 2004, was not effective at the time the Interpretive Rule was issued. Regardless, the version of the statute that was effective at the time of the issuance, “[t]he Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to the registration and control of regulated persons and of regulated transactions,” was not substantively different so as to affect the Court’s reasoning. *See id.* § 821 (reflecting the statutory language before the 2004 amendments).

111. 21 U.S.C. § 871(b) (2000).

112. *Gonzales*, 126 S. Ct. at 917.

113. 21 U.S.C. § 802 (2000); *see supra* note 38.

114. 21 U.S.C. § 802(5).

115. *See supra* notes 25-28 and accompanying text.

116. *Gonzales*, 126 S. Ct. at 917.

der such a reading, the Attorney General did not have authority to define “legitimate medical practice.”¹¹⁷

Having disposed of the notion that the Interpretive Rule was promulgated pursuant to the Attorney General’s authority to make rules relating to the “control” of substances, the Court examined the registration provisions of the CSA.¹¹⁸ The Court found that on its face, the Interpretive Rule could not be justified under these provisions because it neither comports with the five-factor analysis required under the CSA nor claims to be an application of Section 823(f).¹¹⁹ Rather, the Interpretive Rule simply announced that assisting suicide is not in accord with any legitimate medical purpose and criminalized any such conduct notwithstanding its otherwise legal status.¹²⁰ The Court found most problematic the Interpretive Rule’s failure to explain from where the Attorney General’s authority derived to decide that which constitutes a violation of the CSA.¹²¹ Because Congress “painstakingly described” the procedure for deregistering a physician and scheduling a drug under the CSA, the Court was unwilling to extend more expansive authority through a putatively implied delegation in the same statute.¹²²

The Court held that a delegation of authority to “decide ‘[c]ompliance’ with the law” did not allow the Attorney General to “decide what the law says.”¹²³ This mirrors the fact that the Attorney General’s responsibility to determine generally whether a party is in compliance with federal law when

117. *Id.* Such a reading was possible in light of statutory references that allowed the Attorney General to establish controls “against diversion,” but the Court found that such provisions did not give him authority to define “diversion,” and that reading “control” to give the Attorney General authority to define “legitimate medical practice” would “transform the carefully described limits on the Attorney General’s authority over registration and scheduling into mere suggestions.” *Id.*

118. *Id.*; see 21 U.S.C. § 823(f) (2000); see also *supra* notes 31-36.

119. *Gonzales*, 126 S. Ct. at 918.

120. *Id.*

121. *Id.*

The explanation the Government seems to advance is that the Attorney General’s authority to decide whether a physician’s actions are inconsistent with the “public interest” provides the basis for the Interpretive Rule.

By this logic, however, the Attorney General claims extraordinary authority. . . . to criminalize even the actions of registered physicians, whenever they engage in conduct he deems illegitimate. This power to criminalize . . . would be unrestrained.

Id.

122. *Id.*

123. *Id.* at 919 (alternation in original) (quoting 21 U.S.C. § 823(f)(4) (2000)) (“Were it otherwise, the Attorney General could authoritatively interpret ‘State’ and ‘local laws,’ which are also included in 21 U.S.C. § 823(f), despite the obvious constitutional problems in his doing so.”).

deciding whether to prosecute does not entitle such a decision to *Chevron* deference.¹²⁴

To complete its analysis of whether the Interpretive Rule was entitled to *Chevron* deference, the Court addressed the Attorney General's section 871(b) authority to make rules relating to the "efficient execution of his functions."¹²⁵ The Court found that if this delegation authorized the Attorney General to define the substantive standards of medical practice, it would not only put section 871(b) in opposition with the CSA's otherwise-narrow delegation to the Attorney General, but it would go against the plain language of the statute by allowing "a delegation for the 'execution' of [the Attorney General's] functions" to create authority in the Attorney General to define other functions beyond those specifically contemplated by the CSA.¹²⁶

Important to this finding is the fact that the Attorney General not only shares authority under the CSA with Secretary of Health and Human Services, but is even required to defer to the Secretary's judgment in some instances.¹²⁷ The Secretary is primarily responsible for medical and scientific research related to the CSA, and Congress' delegation of the authority to control substances to the Attorney General did not carry with it any mandate to conduct medical or scientific research.¹²⁸ The Court found that the structure and history of the CSA show that Congress lacked the intention to give the Attorney General the authority to make "quintessentially medical judgments," notwithstanding the Government's conclusion to the contrary.¹²⁹ Similarly, the Government's contention that the Interpretive Rule was a legal, as opposed to a medical, decision was unconvincing in part because the Rule relies on medical judgments and the views of the medical community.¹³⁰

The Court found the idea that Congress would "hide elephants in mouseholes" by delegating such broad authority to the Attorney General through the registration provision an untenable one that, if sustained, would cede to the Attorney General the authority to decide whether any use of a drug under the CSA was grounds for deregistration of a physician.¹³¹ Ulti-

124. *Id.* (citing *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring)).

125. 21 U.S.C. § 871(b) (2000).

126. *Gonzales*, 126 S. Ct. at 919-20 ("When Congress chooses to delegate a power of this extent, it does so not by referring back to the administrator's functions but by giving authority over the provisions of the statute he is to interpret." (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232 (2004))).

127. *Id.* at 920 ("In the scheduling context, for example, the Secretary's recommendations on scientific and medical matters bind the Attorney General. The Attorney General cannot control a substance if the Secretary disagrees." (citing 21 U.S.C. § 811(b) (2000))).

128. *Id.* (quoting H.R. REP. NO. 91-1444, at 33 (1970)).

129. *Id.* at 921.

130. *Id.*

131. *Id.*

mately, the Court ruled that the CSA did not grant the Attorney General authority to issue the Interpretive Rule “with the force of law.”¹³² Accordingly, the Court held that *Chevron* deference was improper in this case.¹³³

3. *Skidmore* Deference

Because the Court found that the Interpretive Rule was not entitled to *Chevron* deference, it instead received deference in accordance with *Skidmore v. Swift & Co.*¹³⁴ *Skidmore* deference affords an administrative interpretation respect in accordance with “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”¹³⁵ The Court noted that such deference in this case is tempered by the Attorney General’s lack of expertise in the area of medicine and the unilateral nature of his issuance of the Interpretive Rule.¹³⁶

Because the Court had little opportunity to deal with this issue in the past, it began the *Skidmore* analysis by examining the text and design of the statute.¹³⁷ The Court found that the statute indicated no intent to regulate medical practice, a silence that the Court found in line with the principles of federalism.¹³⁸ The Court then focused on the registration provision of the CSA, section 823(f), which requires the Attorney General to consider several factors when considering whether to revoke a physician’s registration, including recommendations of the state licensing board and the registrant’s compliance with local drug laws.¹³⁹ The Court reasoned that this consideration, when considered in concert with Section 903 — a provision that precludes the CSA from occupying fields to the exclusion of any state law “absent a posi-

132. *Id.* at 922. The Court refrained from deciding whether *Chevron* deference was appropriate for an interpretation concerning matters closer to the Attorney General’s role. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

136. *Id.* The Court criticized the Attorney General for issuing the rule in “the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment.” *Id.*

137. *Id.* at 922-23.

138. *Id.* at 923.

139. *Id.* “[T]he structure and limitations of federalism . . . allow[s] the States ‘great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)); see also *supra* note 31. Section 823(f) is relevant to the revocation of a physician’s registration pursuant to section 824(a)(4), which allows the Attorney General to suspend or revoke a registration if “the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.” 21 U.S.C. § 824(a) (2000).

tive conflict” — cautions against the conclusion that the CSA displaces the States’ regulation of medicine.¹⁴⁰

Recognizing that ODWDA is one such state medical regulation that the CSA anticipates, the Court acknowledged that the federal government can set national standards for the regulation of health and safety despite the fact that such regulation has historically been “a matter of local concern.”¹⁴¹ Nonetheless, the Court found that Congress has only done so in one situation: Title I of the Comprehensive Drug Abuse Control Act of 1970, of which the CSA was Title II.¹⁴² Because Congress set national standards for practice in Title I in such an explicit manner, the Court reasoned that the silence of the CSA on the regulation of medical practice makes the Attorney General’s position that the CSA “impliedly criminalizes physician-assisted suicide . . . difficult to defend.”¹⁴³ In the view of the Court, while the Government’s argument — that because a prescription is required by the CSA for any dispensation of a Schedule II substance, the implication exists that the substance is being made available for a legitimate medical purpose — is “[o]n its own . . . at least reasonable,” the argument as a whole is flawed because it rests on the assumption that by mere implication the CSA allows the Attorney General to invalidate a use merely because it might contravene a single reasonable understanding of medical practice.¹⁴⁴

The Court emphasized that the CSA is centered on preventing drug abuse, and to this end, the conditions to be considered when scheduling a drug revolve around the drug’s tendency to induce psychological or physical dependence.¹⁴⁵ The prescription requirement is properly understood as preventing addiction or recreational use by ensuring the use of controlled substances under physician supervision.¹⁴⁶ Thus, extending the definition of “drug abuse” to include prescriptions for physician-assisted suicide would be “discordant with the phrase’s consistent use throughout the [CSA], not to mention its ordinary meaning.”¹⁴⁷

140. *Gonzales*, 126 S. Ct. at 923 (“[N]one of the Act’s provisions should be ‘construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State.’” (quoting 21 U.S.C. § 903 (2000))).

141. *Id.*

142. *Id.* at 923-24. Title I of the Act provides that the Secretary of Health and Human Services, after consultation with the Attorney General and national experts, shall determine the appropriate methods of professional practice with regard to treating narcotic addiction. *See* 42 U.S.C. § 290bb-2a (2000).

143. *Gonzales*, 126 S. Ct. at 924.

144. *Id.* (“[S]tatutes ‘should not be read as a series of unrelated and isolated provisions.’” (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995))).

145. *Id.* at 924-25.

146. *Id.* at 925.

147. *Id.*

Because of the above reasoning, and the fact that the Attorney General is “an unlikely recipient” of such obscurely granted broad authority “to regulate areas traditionally supervised by the States’ police power,” the Court held that the Attorney General is not authorized by the CSA’s prescription requirement to bar dispensing controlled substances for physician-assisted suicide in the face of a state regime that authorizes such conduct.¹⁴⁸

Finally, the Court held that Congress never intended to alter the federal-state balance inherent in the regulation of professional medical conduct by implicitly authorizing the Attorney General to, by fiat, “define general standards of medical practice in every locality.”¹⁴⁹ The Court affirmed the judgment of the Court of Appeals for the Ninth Circuit.¹⁵⁰

B. Justice Scalia’s Dissent

The first dissent in *Gonzales v. Oregon*, written by Justice Scalia and in which Chief Justice Roberts and Justice Thomas joined, largely followed the form of the Opinion of the Court in its analysis. Stating that the Opinion of the Court is a “question-begging conclusion [that] is obscured by a flurry of arguments that distort the statute and disregard settled principles of our interpretive jurisprudence,” Scalia found that the Ninth Circuit’s judgment should be reversed on three “independently sufficient grounds.”¹⁵¹

Scalia began his analysis with the text of the Interpretive Rule issued by Attorney General Ashcroft,¹⁵² finding that the Rule purports to accomplish three things: first, it interprets the phrase ‘legitimate medical purpose’ in the Attorney General’s own regulation to exclude physician-assisted suicide; second, it determines that the administration of controlled substances to assist suicide violates the CSA; and third, it determines that participation in physician-assisted suicide may render a practitioner’s registration “inconsistent with the public interest” under the CSA.¹⁵³ Because neither the validity of the Rule’s interpretation of “prescription” nor the propriety of its “legitimate medical purpose” interpretation were at issue in this case, Scalia found that “[i]t is beyond dispute . . . that a ‘prescription’ under [section] 829 must issue for a ‘legitimate medical purpose.’”¹⁵⁴

148. *Id.* The Court found it unnecessary to consider the application of clear statement requirements or presumptions against preemption to reach “this commonsense conclusion.” *Id.*

149. *Id.*

150. *Id.* at 926.

151. *Id.* (Scalia, J., dissenting).

152. For the relevant text of this rule, see *supra* note 14.

153. *Gonzales*, 126 S. Ct. at 926 (Scalia, J., dissenting).

154. *Id.* at 926-27.

1. *Auer* Deference

According to Scalia, this case requires straightforward application of the *Auer* rule that “an agency’s interpretation of its own regulations is ‘controlling unless plainly erroneous or inconsistent with the regulation.’”¹⁵⁵ Turning first to the Court’s assertion that the Rule merely repeats the language of the statute and is thus not entitled to *Auer* deference, Scalia took issue with the existence of any such exception to *Auer*.¹⁵⁶ In Scalia’s opinion, even if such an exception does exist, it would have no application to the Interpretive Rule issued by Ashcroft, as “[t]he Court’s description of [the Interpretive Rule] as a regulation that merely paraphrase[s] the statutory language . . . is demonstrably false.”¹⁵⁷

To corroborate this assertion, Scalia relied on the possibility of divergent reasonable interpretations of the word “prescription” as it is used in the CSA.¹⁵⁸ Because the original 1971 Regulation modified by Ashcroft’s Interpretive Rule clarified the statute by explicitly adopting the narrowest interpretation of the statutory term, Scalia maintained that it added content to the statute itself.¹⁵⁹ Any resemblance by the language in the Regulation to phrasing employed in unrelated sections of the CSA is not relevant because this language “significantly clarifies” the statute, and those sections are not identical to “the *only* phrase in the Regulation that the [Interpretive Rule] pur-

155. *Id.* at 927 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

156. *Id.* (“The Court cites no authority for [this exception], because there is none. To the contrary, our unanimous decision in *Auer* makes clear that broadly drawn regulations are entitled to no less respect than narrow ones.”).

157. *Id.* (third alteration in original).

158. *Id.* “First, it might mean any oral or written direction of a practitioner for the dispensation of drugs.” *Id.* (citing *U.S. v. Moore*, 423 U.S. 122, 137 n.13 (1975)). “On its face [section] 829 addresses only the form that a prescription must take.” *Id.* (quoting *Moore*, 423 U.S. at 137 n.13). “Second, in light of the requirement of a ‘medical purpose’ for the dispensation of Schedule V substances . . . it might mean a practitioner’s oral or written direction for the dispensation of drugs that the practitioner believes to be for a legitimate medical purpose.” *Id.* at 927-28 (citing 21 U.S.C. § 829(c) (2000)). “Finally, ‘prescription’ might refer to a practitioner’s direction for the dispensation of drugs that serves an *objectively* legitimate medical purpose, regardless of the practitioner’s *subjective* judgment about the legitimacy of the anticipated use.” *Id.* at 928.

159. *Id.* (“The medical purpose requirement explicit in subsection (c) [of § 829] could be implicit in subsections (a) and (b). Regulation § [1]306.04 makes it explicit.” (alterations in original) (quoting *Moore*, 423 U.S. at 137 n.13)). Scalia admits that the acknowledgement in *Moore* overlooks the significance of the word “legitimate,” which he asserts “is most naturally understood to create an objective, *federal* standard for appropriate medical uses.” *Id.* at 928 n.1 (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (“We start . . . with the general assumption that in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.”) (omissions in original)).

ported to construe.”¹⁶⁰ Thus, even if a “parroting” exception exists to *Auer* deference, the Regulation does not run “afowl” of such an exception and is fully entitled to the substantial deference due an agency’s interpretation of its own rule.¹⁶¹

Assuming that this was the case, Scalia continued, answering “the only question remaining,” whether the Interpretive Rule is “plainly erroneous or inconsistent with the regulation.”¹⁶² Citing *Webb v. U.S.*¹⁶³ for the proposition that the Court had itself adopted a similar interpretation as the Interpretive Rule of “prescription,” Scalia found that the Rule’s conclusion that physician-assisted suicide is not “legitimate medical practice” was valid as the “most natural interpretation of that phrase.”¹⁶⁴

2. *Chevron* Deference

According to Scalia, even if *Auer* deference was not warranted, the Interpretive Rule should still be entitled to *Chevron* deference.¹⁶⁵ Without explaining his reasoning for this assertion, Scalia began his analysis by attacking the Court’s reading of “control” in Section 821 as pertaining only to the Attorney General’s power to add substances to or move substances between schedules under the CSA¹⁶⁶ as “manifestly erroneous.”¹⁶⁷

160. *Id.* at 928 (citation omitted). Scalia focuses once again on the importance of the word “legitimate” and its omission from most of the provisions within the CSA cited by the Court. *Id.*; see *supra* note 101. Additionally, Scalia points out that the only place where the phrase “legitimate medical purpose” actually appears in the text of the CSA is Section 830(b)(3)(A)(ii), the language of which was not added to the CSA until 2000. *Gonzales*, 126 S. Ct. at 928 n.2. Reasoning that because Congress did not define “prescription” in section 829, even if the 1971 Regulation had quoted an identical statutory phrase that existed at the time of its promulgation, the Attorney General was delegated the authority to resolve any ambiguity therein. *Id.* at 928. That he “did so by deeming relevant a technically inapplicable statutory definition contained elsewhere in the statute [section 830(b)(3)(A)(ii)] does not make him a parrot.” *Id.*

161. *Id.* at 928-29. Scalia’s heavy, and heavy-handed, use of the Court’s own language (“parroting”) regarding the *Auer* exception crescendos into this rather belabored pun, the humor of which is not lost on this author despite the fact that a parrot, as a bird not of a barnyard variety, or in a wider sense a bird not generally used for food, is not what is commonly thought of as “fowl.” See THE OXFORD ENGLISH DICTIONARY 1069 (Compact ed. 1971) (“Fowl: . . . [t]he prevailing sense: A ‘barn-door fowl,’ a domestic cock or hen; a bird of the genus *Gallus*. In the U.S. applied also to ‘a domestic duck or turkey’); but see *id.* (“Fowl: . . . [a]ny feathered vertebrate animal.”).

162. *Gonzales*, 126 S. Ct. at 929 (Scalia, J., dissenting).

163. 249 U.S. 96 (1919).

164. *Gonzales*, 126 S. Ct. at 929 (Scalia, J., dissenting).

165. *Id.*

166. See *supra* notes 114-15.

167. *Gonzales*, 126 S. Ct. at 929 (Scalia, J., dissenting).

Scalia's first point of contention with this reading was the fact that the statutory definition of "control" relied upon by the Court was "defined . . . to mean 'to add a drug or other substance . . . to a schedule *under part B of this subchapter*,'" the portion containing those provisions relating to the scheduling of controlled substances.¹⁶⁸ Scalia maintained that, because Section 821 is not included in part B of subchapter I of the CSA, but rather in part C, the definition of "control" contained in Section 802(5) and cited by the Court is not applicable to "control" as used in Section 821.¹⁶⁹ In contrast to the uses of "control" in part B, in which the term takes some form of "a substance" as its direct object,¹⁷⁰ Section 821 has the "*processes of 'manufacture, distribution, and dispensing of controlled substances'*" as the analogue to "a substance" under the part B uses of "control."¹⁷¹ Scalia claimed that this difference renders "the artificial definition of 'control' in [Section] 802(5) . . . inapplicable," and as it is used for its ordinary meaning elsewhere in part C of subchapter 1,¹⁷² it should be given that ordinary meaning in Section 821.¹⁷³

168. *Id.* (second omission in original) (quoting 21 U.S.C. § 802(5) (2000)). The full language of Section 802(5) is actually "As used in this subchapter . . . [t]he term 'control' means to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise." 21 U.S.C. § 802(5) (2000). "This subchapter" refers to the portion of the Controlled Substances Act titled "Subchapter I – Control and Enforcement," codified in 21 U.S.C. §§ 801-904 (2000). Part B of Subchapter I, titled "Authority to Control; Standards and Schedules" is codified in Sections 811-814 of the Act, whereas Part C, titled "Registration of Manufacturers, Distributors, and Dispensers of Controlled Substances" is codified in Sections 821-830 of the Act.

169. *Gonzales*, 126 S. Ct. at 929-30 (Scalia, J., dissenting). An analysis of the omitted portion of the Section 802(5) in Scalia's characterization of this definition makes it apparent that his interpretation runs, perhaps deliberately, contrary to the plain language of the statute, in which "under part B of this subchapter" clearly modifies "schedule," contained in the same clause of the sentence and for the purpose of defining "schedule," rather than "[t]he term 'control'" which merely "means to add a drug or other substance . . . to a schedule," and carries this meaning independent of the intermediate clause (which could be described as a parenthetical) containing "under part B of this subchapter." 21 U.S.C. § 802(5).

170. *See, e.g.*, 21 U.S.C. § 811(b) ("proceedings . . . to control a drug or other substance"); *Id.* § 811(c) ("each drug or other substance proposed to be controlled or removed from the schedules"); *Id.* § 811(d)(1) ("If control is required . . . the Attorney General shall issue an order controlling such drug"); *Id.* § 811(d)(4)(A) ("shall issue a temporary order controlling the drug or substance"); *Id.* § 812(b) ("Except where control is required . . . a drug or other substance may not be placed in any schedule.").

171. *Gonzales*, 126 S. Ct. at 930 (Scalia, J., dissenting).

172. *See, e.g.*, 21 U.S.C. § 823(a)(1), (b)(1), (d)(1), (e)(1), (h)(1) ("maintenance of effective controls against diversion"); *Id.* § 823(g)(2)(H)(i) ("Nothing in such regulations . . . may authorize any Federal official or employee to exercise . . . control over the practice of medicine."); *Id.* § 830(b)(1)(C) ("a listed chemical under the control of the regulated person").

173. *Gonzales*, 126 S. Ct. at 930 (Scalia, J., dissenting).

Scalia noted that this meaning is further evidenced by Section 821's status as the opening provision of part C of the subchapter, which relates to registration with regard to the "manufacture, distribution, and dispensing of controlled substances."¹⁷⁴ As it makes no sense for the opening provision of part C to authorize rulemaking pertaining to those powers enumerated in part B, a reading of Section 821 that grants interpretive authority over part C, including both Section 829's prescription requirement and criteria for registration and deregistration in Sections 823 and 824, is "[t]he only sensible interpretation."¹⁷⁵

Scalia concluded that the Attorney General's interpretation of "legitimate medical purpose" is a valid interpretation of the agency's own regulation, or at least a valid agency interpretation of the statute.¹⁷⁶ The Interpretive Rule provides "*the most natural* interpretation" of the Regulation and of the statute, and so is entitled to *Auer* and/or *Chevron* deference "definitively establish[ing] that a doctor's order authorizing the dispensation of a Schedule II substance for the purpose of assisting a suicide is not a 'prescription' within the meaning of [Section] 829."¹⁷⁷

Despite this seemingly definitive conclusion, Scalia continued to analyze the Interpretive Rule in light of the Court's ultimate holding that it was entitled to neither *Auer* nor *Chevron* deference. In his eyes, the same conclusion should result from "the most reasonable interpretation of the Regulation and of the statute" because the intentional assistance of suicide is not a "legitimate medical purpose" as defined by nearly all authorities.¹⁷⁸ Scalia emphasized this point and claimed that the Court's assertion that this under-

174. *Id.*

175. *Id.*

176. *Id.* at 931.

177. *Id.* Scalia takes this to its logical conclusion, that physician-assisted suicide "may 'render [a physician's] registration . . . inconsistent with the public interest' and therefore subject to *possible* suspension or revocation under 21 U.S.C. § 824(a)(4)." *Id.* (omission in original) (quoting Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,608 (Nov. 9, 2001)).

178. *Id.* (footnote omitted) "'Medicine' refers to '[t]he science and art dealing with the prevention, cure, or alleviation of disease.'" *Id.* (alteration in original) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1954 (2d. ed. 1950)). In support of this claim, Scalia refers to the Office of Legal Counsel opinion, "Whether Physician-Assisted Suicide Serves a 'Legitimate Medical Purpose' Under the Drug Enforcement Administration's Regulations Implementing the Controlled Substances Act" dated June 27, 2001, for the assertion that "virtually every medical authority from Hippocrates to the current American Medical Association (AMA) confirms that assisting suicide has seldom or never been viewed as a form of prevention, cure, or alleviation of disease" and that it is not a "legitimate" branch of medicine. *Id.* at 931-32. The OLC opinion, originally attached as an appendix to the Interpretive Rule, does not appear in the Federal Register, but "[i]t is available from the Drug Enforcement Administration." Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,608 (Nov. 9, 2001).

standing of medicine is “‘at least reasonable’ tests the limits of understatement.”¹⁷⁹ This point is confirmed by the fact that the “overwhelming weight of authority” has declined to extend the boundaries of medicine to cover physician-assisted suicide.¹⁸⁰

According to Scalia, the Court has rejected both a uniform federal standard for the medically proper use of controlled substances,¹⁸¹ and what he felt was the most plausible alternative — that any use authorized by the states is a “legitimate medical purpose” — in favor of “a hazily defined *federal* standard based on its purposive reading of the CSA,” and derived from only tangentially related sections of the CSA.¹⁸² Focusing on the Court’s “narrow view” that the only purpose of the CSA is to regulate substances with regard to addiction and recreational use, Scalia excoriated the Court’s reasoning on this subject. In Scalia’s view, the CSA should be used in a more sweeping fashion, even though regulation of substances is its main concern.¹⁸³ Scalia concluded by stating that the Court’s reasoning precludes the prohibition of anabolic-steroid use for bodybuilding purposes. He also stated that the Court’s invocation of the explicit Congressional action controlling these substances under Schedule III of the CSA fails because, “[i]f the only *basis* for control is . . . addiction and recreational abuse, dispensation of these drugs for bodybuilding could not be proscribed.”¹⁸⁴

Scalia further criticized the Court’s reliance on Sections 823(f) and 903 for the proposition that the CSA relies on a medical profession regulated under State police powers.¹⁸⁵ According to Scalia, the registration provisions of Section 823(f) are inapplicable because they were amended by Congress in 1984 “in order to *liberate* the Attorney General’s power over registration from the control of state regulators.”¹⁸⁶ Similarly, the non-preemption clause in Section 903 is “embarrassingly inapplicable” because it only proscribes

179. *Gonzales*, 126 S. Ct. at 932 (Scalia, J., dissenting) (citation omitted) (quoting majority at 924).

180. *Id.*

181. (178) Scalia finds that such a uniform, objective standard of medicine is connoted by the use of the word “legitimate.” *Id.* at 931-32 (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)).

182. *Id.* at 932-33.

183. *Id.* at 933. Scalia contends that a number of references within the CSA shed light on the undefined term “abuse” that the CSA is designed to restrain; his main point revolves around a series of factors the Attorney General must consider, such as “[t]he state of current scientific knowledge regarding the drug,” “[w]hat, if any, risk there is to the public health,” and “such *other* factors as may be relevant to and consistent with the public health and safety.” *Id.* (alteration in original).

184. *Id.* at 933-34.

185. *Id.* at 934.

186. *Id.* See also Brief for the Petitioners at 34-35, *Gonzales v. Oregon*, 126 S. Ct. 904 (2006) (No. 04-623), 2005 WL 1126079 (“Congress wanted to ‘make it easier’ for DEA ‘to suspend or revoke the authority of physicians and pharmacists.’” (quoting 130 CONG. REC. 25,849 (1984) (statement of Rep. Hughes))).

field preemption while reaffirming preemption in the event of an active conflict between state and federal law.¹⁸⁷ Even if these provisions should apply, Scalia believed that the Interpretive Rule did not preempt state law “unless the court is under the misimpression that some States *require* assisted suicide.”¹⁸⁸ Rather, in his view, it merely interpreted the terms of the CSA.¹⁸⁹

Furthermore, for Scalia, the Court erred in concluding that the Attorney General’s reading of the CSA fundamentally alters the regulatory scheme by affording the Attorney General additional power to address other forms of drug abuse.¹⁹⁰ Because, Scalia reasoned, such additional power does not interfere with the prosecution of drug abuse, it “does *absolutely nothing* to undermine the central features of” the CSA.¹⁹¹ Similarly, the argument that the Attorney General is required to defer to state-law judgments about the constitution of legitimate medical practices because Congress must speak clearly to preempt such state provisions is flawed for three reasons: first, the Interpretive Rule “does not push the outer limits of Congress’s commerce power;” second, the Interpretive Rule does not preempt any state law, and third, the Interpretive Rule does not intrude on an area traditionally reserved for the States.¹⁹² Requiring such a clear statement simply because Congress has prohibited conduct contrarily permitted by a state “would be a novel and massive expansion of the clear-statement rule.”¹⁹³

Scalia finally addressed the possibility that “prescription,” as it appears in Section 829, could not be interpreted to require a “legitimate medical purpose,” and found that the Interpretive Rule would still be “unassailable” because of the authorization to register and deregister physicians granted to the Attorney General by Sections 823(f) and 824(a).¹⁹⁴ Three considerations spell out that the CSA explicitly grants the Attorney General broad authority over physician registrations.¹⁹⁵ First, the Attorney General has the exclusive charge to administer the registration provisions, and the ambiguity inherent in the guidelines therein implicitly delegates to the Attorney General the power

187. *Gonzales*, 126 S. Ct. at 934 (Scalia, J., dissenting) (emphasis omitted).

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903 (2000).

188. *Gonzales*, 126 S. Ct. at 934 (Scalia, J., dissenting).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 935.

193. *Id.*

194. *Id.*

195. *See id.* at 935-37.

to interpret the required factors for consideration.¹⁹⁶ Second, even if explicit delegation is necessary, such delegation is provided in the language of Section 821 authorizing the Attorney General to make rules regarding registration and control of controlled substances.¹⁹⁷ Third, because the ordinary meaning of “control” must apply to Section 821, the provision grants the Attorney General rulemaking authority over all provisions in Part C of Subchapter I of the CSA.¹⁹⁸

With these justifications in tow, Scalia attacked the Court’s reasoning that the Attorney General was not authorized to make the determinations incumbent in the Interpretive Rule because the CSA instead reserved exclusive authority over “scientific and medical determinations” for the Secretary of Health and Human Services.¹⁹⁹ To the contrary, Scalia asserted that Congress granted the Secretary exclusive authority only in the areas of scheduling and addiction treatment, and did not establish “a general principle of Secretary supremacy with regard to all scientific and medical determinations.”²⁰⁰ Even if this were the case, he argued, the registration and deregistration of physicians under the CSA requires neither a “scientific” nor a “medical” determination, but instead implicates only a “naked value judgment.”²⁰¹

Scalia further criticized as “sophistic” the Court’s claim that the Interpretive Rule does not purport to exercise any authority to interpret Section 823(f) because it fails to undertake the required five factor analysis.²⁰² Because the factors can only be applied within the confines of an actual enforcement hearing, it would have been “impossible” for the Attorney General to do so in the Interpretive Rule.²⁰³ Rather, the Attorney General merely sought to clarify or signal his interpretation of these factors, which is indi-

196. *Id.* at 936. Scalia focuses on those criteria within the statute that contain such ambiguities as “conduct which may threaten the public health and safety,” and “acts [that] would render . . . registration under [the Act] inconsistent with the public interest.” See 21 U.S.C. §§ 823(f)(5), 824(a)(4) (2000). Scalia characterizes the Court’s focus on explicit delegation provisions within the CSA as “a fossil of our pre-*Chevron* era.” *Gonzales*, 126 S. Ct. at 936 (Scalia, J., dissenting).

197. *Gonzales*, 126 S. Ct. at 936 (Scalia, J., dissenting) (omission in original) (quoting 21 U.S.C. § 821 (2000)) (“Because dispensing refers to the delivery of a controlled substance pursuant to the lawful order of a practitioner, the deregistration of such practitioners for writing impermissible orders relat[es] to the registration . . . of the . . . dispensing of controlled substances.” (alteration in original) (omissions in original) (citation omitted)).

198. *Id.* at 936-37.

199. *Id.* at 937.

200. *Id.*

201. *Id.* (“It is entirely reasonable to think (as Congress evidently did) that it would be easier for the Attorney General occasionally to make judgments about the legitimacy of medical practices than it would be for the Secretary to get into the business of law enforcement.”).

202. *Id.* at 938. See also *supra* note 33.

203. *Gonzales*, 126 S. Ct. at 938 (Scalia, J., dissenting) (emphasis omitted).

cated by the conditional terms used in the Rule.²⁰⁴ From this, it follows that the Attorney General may weigh a physician's participation in physician-assisted suicide as a factor against registration or in favor of deregistration.²⁰⁵ Scalia took issue with the Court's assertion that the mere citation of "public interest" or "public health" could not be used by the Attorney General to deregister a physician, claiming that the Attorney General's discretion is "certainly no broader than other congressionally conferred Executive powers that we have upheld in the past."²⁰⁶

Scalia's argument concluded with his speculation that the Court was driven to this result by a "feeling that the subject of assisted suicide is none of the Federal Government's business."²⁰⁷ While expressing sympathy for such a position, Scalia countered that sentiment by drawing attention to the history of using federal commerce power to protect public morality.²⁰⁸ In Scalia's view, "[t]he question . . . is not whether Congress *can* . . . or even whether Congress *should* do this; but simply whether Congress *has* done this in the CSA," and unsurprisingly, he concluded that it had.²⁰⁹

C. Justice Thomas's Dissent

Justice Thomas, writing a brief dissent, presumably to expound upon Scalia's opinion in which he joined, began his opinion by discussing the Court's ruling in *Gonzales v. Raich*,²¹⁰ which was decided "a mere seven months" prior.²¹¹ Thomas characterized the Court's ruling in *Oregon* as "beat[ing] a hasty retreat from" this conclusion, as it instead held "that the CSA is merely concerned with fighting 'drug abuse' and only insofar as that abuse leads to 'addiction or abnormal effects on the nervous system.'"²¹²

204. *Id.* "Such conduct by a physician . . . may 'render his registration . . . inconsistent with the public interest' and therefore subject to *possible* suspension or revocation under 21 U.S.C. [§]824(a)(4)." *Id.* (alteration in original) (omissions in original) (quoting Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001)).

205. *Id.* ("[T]he condemnation of assisted suicide by 50 American jurisdictions supports the Attorney General's view.").

206. *Id.*

207. *Id.* at 939.

208. *Id.*

209. *Id.*

210. 125 S. Ct. 2195 (2005).

211. *Gonzales*, 126 S. Ct. at 939 (Thomas, J., dissenting). In *Raich*, the Court held that the "manner" in which controlled substances can be used "for medicinal purposes" is a "core ac-tivit[y] regulated by the CSA." *Id.* (quoting *Raich*, 125 S. Ct. at 2211).

212. *Id.* at 939-40. Thomas noted that "[t]he majority does not expressly address whether the ingestion of a quantity of drugs that is sufficient to cause death has an 'abnormal effec[t] on the nervous system,' though it implicitly rejects such a conclusion." *Id.* at 940 n.1 (alteration in original) (citation omitted). Thomas was further

To illustrate this point, Thomas compared the reasoning in *Raich*, in which the majority held that the CSA was applicable to intrastate possession of a controlled substance because “‘Congress could have rationally’ concluded that such an application was necessary to the regulation of the ‘larger interstate marijuana market,’” to the reasoning in the instant case, in which the Court’s “restrictive interpretation of the CSA is based in no small part on ‘the structure and limitations of federalism.’”²¹³ Depicting the consideration of federalism as “water over the dam,”²¹⁴ Thomas attacked the court’s justification on the basis thereof as irrelevant for two reasons: first, the issue at bar was merely one of statutory interpretation,²¹⁵ and second, the respondents have not pressed a constitutional claim.²¹⁶ Because the Court here relied on the principles it expressly rejected in *Raich*, Thomas felt that the decision was wrongly reached.²¹⁷

V. COMMENT

Though both the Opinion of the Court and Scalia’s dissent in *Gonzales v. Oregon* seem to treat the issue at hand as a *Chevron* case, the reality is that despite its numerous invocations throughout, *Chevron* is only tangentially implicated by the Opinion. Under the original *Chevron* analysis, the question of whether such deference is due the Attorney General would have been, on its face, a relatively simple one, at least in comparison to earlier doctrines.²¹⁸

puzzled, as this “newfound understanding of the CSA . . . rests upon constitutional principles that the majority of the Court rejected in *Raich*.” *Id.* at 940.

213. *Id.* (quoting *Raich*, 125 S.Ct. at 2213). Though Thomas felt that the Attorney General’s power under the CSA may be “troubling” in its scope, he reiterated Scalia’s opinion that it is not out of character given the Court’s recent opinions, and is even “the inevitable and inexorable consequence of this Court’s Commerce Clause and separation-of-powers jurisprudence.” *Id.*

214. “The relevance of such considerations was at its zenith in *Raich*, when we considered whether the CSA could be applied to the intrastate possession of a controlled substance consistent with the limited federal powers enumerated by the Constitution.” *Id.* at 941.

215. “[W]e are interpreting broad, straightforward language within a statutory framework that a majority of this Court has concluded is so comprehensive that it necessarily nullifies the States’ ‘traditional . . . powers . . . to protect the health, safety, and welfare of their citizens.’” *Id.* (omissions in original) (quoting *Raich*, 125 S.Ct. at 2195 n.28).

216. *Id.* at 941 n.2 (“[R]espondents have not seriously pressed a constitutional claim here, conceding at oral argument that their ‘point is not necessarily that [the CSA] would be unconstitutional.’ . . . Framed in this manner, the claim must fail.” (alteration in original)).

217. *Id.* at 941.

218. See Note, “How Clear is Clear” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687, 1688-90 (2005) (“On its face, the *Chevron* decision seemed categorical with respect to when the two-step approach should apply.”).

However, as case law since *Chevron* has indicated, the questions driven by even the simple-seeming first step — whether Congress has clearly spoken to an issue — are not so clear in most instances, and the inquiry surrounding the Attorney General’s Interpretive Rule is no exception.

This case provides an example of how courts can use statutory interpretation in a *Chevron* analysis to define the outcome of a case. If a court finds that deference is warranted, there is a very strong inference that the agency decision will be upheld. Contrarily, if a court decides that deference is unwarranted it is free to discard the decision, and though *Skidmore* still receives favorable treatment, it is virtually no barrier from overruling agency decisions if a court so desires. As judges are human beings, it is more than likely that they have personal opinions on a given agency decision, and this case is no exception. The way that the Court’s opinion and Justice Scalia’s dissent interpreted the CSA to determine whether *Chevron* deference was warranted in the instant decision undoubtedly provides insight into the predisposed substantive conclusions on both sides of the decision. While this is by no means an allegation that such a predisposition is the sole or even the primary reason for whether the Court defers in a given case, it would be truly naïve to suggest that such a consideration has never entered and will never enter into the decision making process with regard to a *Chevron* analysis.

Chevron questions, particularly post-*Mead*, have become a question of constructive statutory meaning, with the real differences in opinion occurring in how best to derive such meaning, whether it be a purely textual approach or one derivative of legislative intent.²¹⁹ As a result, the heart of the dispute between the majority and the dissenting Justices results not merely from statutory interpretation, but a fundamental philosophical difference in *how* to interpret statutes.²²⁰ In formulating the meaning of the CSA for this case, the specific question that must be answered in the affirmative before *Chevron* deference is proper is whether the Attorney General was delegated the authority to issue Interpretive Rules on the subject matter at hand with the force of law.

219. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 992 n.101 (1992). Merrill disagrees with Scalia’s belief that “textualism leads to determinate results in most cases and that introducing evidence of intent to ‘impeach’ the text muddies things up and thus requires deference.” *Id.* Rather, he asserts that “textualism will answer the ‘precise question’ at issue in so few cases that it leads courts to abandon the quest for specific congressional answers, thus allowing a dramatically expanded judicial role at step one.” *Id.* This assertion is borne out in the instant decision, in which a purely textual approach as Scalia takes seems to leave almost infinite room for ambiguity.

220. For a full discussion of textualism versus intentionalism, see Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005).

1. Delegation with the Force of Law?

Justice Scalia, often a torch-bearer for the textualist school,²²¹ goes to great lengths to demonstrate that such delegation did here exist, and indeed, scores some compelling points along the way. But ultimately, though much of his approach rings true, such truth lies in a superficial analysis, and while Scalia's argument focuses on many of the details, it fails to take into account the whole picture. In framing his arguments in the language of textualism, Scalia imputes his interpretation to a plain, common sense reading of the statute. In reality, this reading is simply another way of deriving Congressional intent, which Scalia finds was to delegate authority to the Attorney General to interpret the meaning of "legitimate medical purpose."

Scalia attempted to approach the problem from every possible angle to justify his conclusion that the Attorney General's Interpretive Rule is entitled to substantial deference from the Court, and his argument suffers as a result. For example, in asserting the correctness of *Auer* deference, he balks at the idea of a "parroting" exception, relying on the presumption that the absence of evidence for such a doctrine is evidence of its absence.²²² Scalia did abandon this *reductio ad absurdum*²²³ argument in favor of an analysis of the Interpretive Rule, by focusing on the fact that the language of the 1971 Regulation is not identical to that of the statute.²²⁴ In doing so, Scalia missed the point that, though there may exist differences between the two in their syllabic and lexical manifestations, substantively the Regulation is at least substantially similar if not virtually identical to the Statute.²²⁵

Scalia's argument about the issue at the center of this controversy — that Congress, through the CSA, used the federal commerce power to prevent physician-assisted suicide through an implicit delegation to the Attorney General to regulate the process of registering physicians in such a manner as to dictate what is medically permissible conduct²²⁶ — is appealing when one merely focuses on the details he uses as support.²²⁷ However, any evidence

221. For one analysis of the jurisprudential philosophy of Justice Scalia, see DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 29-54 (2002).

222. *Gonzales v. Oregon*, 126 S. Ct. 904, 927 (2006) (Scalia, J., dissenting).

223. "Reduction to the absurd."

224. *See supra* note 159.

225. *Gonzales*, 126 S. Ct. at 915.

226. *Id.* at 939 (Scalia J., dissenting) ("The question . . . is . . . simply whether Congress *has* [delegated this authority] in the CSA.").

227. Scalia is undoubtedly correct in that no reasonable reading of the statute could possibly encompass the interpretation of every iteration of the word "control" to pertain solely to the scheduling, removal from the schedules, and reclassification between schedules of controlled substances. And creative use of ellipses notwithstanding, *see supra* notes 169-170, he is also correct that, in Section 829 of the CSA, the use of the word "control" does not appear, within a commonsense reading, to be bound by the definition in the first part of the Act.

that this delegation exists is buried deep within the CSA, and finding it requires looking past the plain language of the statute to reinterpret Congress' clear definition of "control" to only take hold if the word "take[s] a *substance* as its direct object."²²⁸ Such a reading, though couched in the language of textualism, is at its heart a constructive extrapolation of the *possible* intention of Congress to delegate what amounts to sweeping de facto authority to the Attorney General to decide unilaterally what is medically permissible. Essentially, it is the narrowest possible interpretation of what constitutes whether Congress has "clearly spoken" to the issue. The inference drawn as a result is at best an unlikely conclusion, even taking into account the 1984 amendments to the CSA liberating from state oversight the Attorney General's power to register physicians.

A conclusion that is at least equally likely is that which the Court reached in its opinion: that such an indirect and obfuscatory delegation, assuming it exists, does not carry the force of law. Though the Attorney General is free to view the use of controlled substances as disfavored in light of the "public health and safety" factor explicitly defined within the CSA, other factors must be weighed in deciding whether a physician's conduct is consistent with the public interest, including state laws and regulations.²²⁹ By examining the CSA as a whole, and interpreting the statute in light of its other provisions, the Court's reasoning in this regard invokes the intentionalist canon of conveying the policy decisions Congress made when enacting the CSA.²³⁰ Its holding is straightforward: in order for a rule to qualify for *Chevron* deference, it is fundamentally important that the rule was promulgated within the scope of Congress' delegation.²³¹ The Court rightly concluded on the basis that Congress has not explicitly delegated authority to define "legitimate medical practice" to the Attorney General that his Interpretive Rule was not entitled to the substantial deference afforded by *Chevron*. Such a conclusion is further bolstered by three important considerations.

2. Shared Authority

The first consideration is that the CSA delegates shared authority to both the Secretary of Health and Human Services and the Attorney General. Though Section 823(f) does relegate exclusive control of rulemaking authority regarding the registration of physicians to the Attorney General, an examination of the CSA as a whole yields the conclusion that it was the intent of Congress that the Attorney General's responsibility for scientific and medical decisions is shared with and deferential to the judgment of the Secretary of Health and Human Services.

228. *Gonzales*, 126 S. Ct. at 929-30 (Scalia, J., dissenting).

229. *See* 21 U.S.C. § 823(f) (2000).

230. *See* Nelson, *supra* note 224, at 351-53.

231. *Gonzales*, 126 S. Ct. at 922.

Scalia's first counter-argument to this holistic reading of the CSA — that the Secretary's primacy in medical matters does not apply because Congress' explicit assertion of this primacy is limited to the areas of scheduling and addiction treatment — relies on two assumptions. First is the presumption that Congress decided it was more reasonable for the Attorney General to make medical judgments than it was for the Secretary to "get into the business of law enforcement."²³² This argument, which essentially posits that deciding what is a "legitimate medical purpose" is within the exclusive purview of law enforcement, moves beyond the realm of false dichotomy and approaches spuriousness.²³³ Second is the assumption that Congress must explicitly delegate such primary authority within the text of the statute for every aspect to which it is to apply. This same reasoning is characterized by Scalia himself as "a fossil of our pre-*Chevron* era" when he accuses the majority of focusing on explicit delegation provisions in concluding that the Attorney General lacked authority to declare physician-assisted suicide illegitimate.²³⁴

It is Scalia's second counter-argument to the Court's assertion of Secretary primacy that is the most interesting. Scalia asserted that, even if the Secretary was the ultimate authority on scientific and medical judgments within the CSA, the legitimacy of physician-assisted suicide is no more dependent upon a scientific or medical judgment, than is "the legitimacy of polygamy."²³⁵ Rather, Scalia claimed that the question of physician-assisted suicide is a "naked value judgment" that renders the Secretary's "medical expertise . . . strikingly irrelevant."²³⁶ This argument fails for two reasons.

First, the act of defining that which constitutes a "legitimate medical purpose" is lexically, rhetorically, and substantively a "medical" judgment. Scalia cleverly casts the issue in different terms (using the rhetorical flourish of polygamy as a capstone) to disguise its true nature, but at issue is not whether the Attorney General has authority to decide if the use of controlled substances to carry out physician-assisted suicide is morally correct, but whether he has the authority to decide if it is medically legitimate.

Second, if we are to reduce issues of controversy to "naked value judgments" regardless of their context, as Scalia asserted, the meaning of statutory language asymptotically approaches the realm of total deconstruction. Taken

232. *Id.* at 937 (Scalia, J., dissenting).

233. This is not meant to be a purely pejorative assessment, but the absurdity of such a position is evident if extrapolated beyond the arcane world of agency interpretation to a family doctor's office. One can imagine the indignation of medical practitioners and patients alike were Congress to assert that diagnosis techniques would be better decided by law enforcement officials if there was any danger of illegal activity becoming tangentially involved, or worse, were law enforcement officials to make the same assertion based on a "gap" in legislation.

234. *Gonzales*, 126 S. Ct. at 936 (Scalia, J., dissenting).

235. *Id.* at 937-38.

236. *Id.* at 938 (citation omitted).

to the extreme, this idea effectively undermines the very legitimacy of agency expertise, the foundation upon which agency authority is built. Science, to take one example, often generates controversy, both within a given discipline, and between the scientific community and other facets of society.²³⁷ If a disagreement, albeit a fundamental one, on the “rightness” of a method, action, or decision is all that is required to remove what can be extraordinarily complicated assessments from the purview of agencies or actors that at least purport to have scientific expertise, no end of “naked value judgments” could presumably arise to deprive these agencies of their authority to make the very judgments for which they were created. Put succinctly, such a doctrine is antithetical to the purpose of *Chevron* itself, in that deference to agency authority is predicated on the notion that technical experts are better situated than the courts, who would presumably retain the ultimate decision-making authority, to make complicated determinations.

3. Unilateral Circumvention of Required Analysis

The second consideration that bolsters the Court’s ruling is that Attorney General Ashcroft, in issuing the Interpretive Rule, did so unilaterally and without undergoing any of the statutorily required analyses. When the CSA has delegated rulemaking authority to the Attorney General, it is either in conjunction with the Secretary of Health and Human Resources, subject to a specific analysis with prescribed factors for the Attorney General’s consideration, or both. If delegated rulemaking authority with the force of law is to be inferred from what are essentially a few linguistic inconsistencies, the assertion that Congress would impliedly delegate greater authority to the Attorney General than that which is explicitly defined confounds a common sense understanding of the law. This is particularly true in light of both the complexity of the CSA and the fact that the purportedly delegated authority is not subject to strictures at least as restrictive as that which is explicitly granted. Rather, a sensible understanding that implied authority is subordinate to that which is explicitly delegated yields the conclusion that the Interpretive Rule was not issued within the scope of even an implicit delegation by Congress, and is therefore not entitled to *Chevron* deference.

4. Past Congressional Gridlock

The third and perhaps most important consideration is that after Attorney General Reno had made the determination in 1997 that her office was not authorized under the CSA to declare physician-assisted suicide outside the bounds of “legitimate medical practice,” members of Congress unsuccessful-

237. See, e.g., Jay A. Labinger & Steve J. Weininger, *Controversy in Chemistry: What Counts as Evidence? – Two Studies in Molecular Structure*, 43 *ANGEWANDTE CHEMISTRY INT. ED.* 2612 (2004).

fully attempted to amend the CSA to proscribe the use of controlled substances for physician-assisted suicide.²³⁸ It is perhaps telling that neither the majority nor the dissents took up this issue, but the implications are truly at the center of this controversy.

In 1997, when they first petitioned the DEA to enact the Interpretive Rule eventually promulgated by Ashcroft, Senator Hatch and Representative Hyde may well have been under the good faith impression that the CSA authorized the Attorney General, and by proxy the DEA, to restrict the definition of “legitimate medical purpose” unilaterally. When ultimately rebuked by Attorney General Reno’s legal opinion, they sought to give the CSA that explicit definition through the legislative process by passing the Pain Relief Promotion Act (PRPA). Only after the failure of this effort did Attorney General Ashcroft, who, as a senator himself in 1999, and who had no doubt witnessed the Senatorial debate that eventually killed the PRPA, attempt to enact by executive fiat what the legislature had failed to do by constitutionally delegated process two years earlier.

Although this unquestionably novel approach did circumvent delay and defeat by the legislative process, it raises some provocative questions. If Congress fails to enact a change that even many of its members desire, and the Executive claims general authority as a result of Congress’ purported failure to speak clearly on the issue to enact the very change Congress tried and failed to do, is the Executive entitled to substantial deference in its attempt to “fill the gap” effectively caused by Congressional disagreement? One argument against such deference lies in the assumption that *Chevron* deference is fundamentally a method for extrapolating constructive legislative intent from the ambiguities of a given statutory scheme. There is a strong case that when an agency attempts to claim constructive legislative intent for authority to enact change on an issue over which there has been Congressional deadlock, this deadlock is evidence of a contrary intent not to allow the Executive to unilaterally enact the very change upon which Congress could not agree. From a purely textualist standpoint, the counter-argument that the absence of consensus is no evidence for Congressional intent specifically not to delegate authority is easily made, but the agency at question should still ultimately bear the burden of proof for any such delegation.

It is not difficult to sympathize with a desire to avoid this sort of debate, if indeed such a desire were present on either side of this case, as it could lead to still more questions about the foundation of *Chevron* and deference to agency interpretation generally. The Court found no need here to address such issues, though they undoubtedly lurk beneath the surface of the arguments both for the majority and the dissent.

238. *Gonzales*, 126 S. Ct. at 913 (majority opinion).

VI. CONCLUSION

Presumably, were this case to be heard today, the decision would be rendered in much the same terms, though the substitution of Justice Alito for Justice O'Connor would likely make it numerically closer.²³⁹ Nothing present in this case, or indeed in much of recent administrative law jurisprudence, amounts to a definitive resolution of agency deference. And certainly the majority opinion made no attempt to resolve the issue of whether physician-assisted suicide is an acceptable practice, though Scalia's dissent did not refrain from answering that question in the negative. But the substance matter of this case is still wide open; the Court did not close the door to further Congressional tinkering with the CSA in order to effectuate the delegation that it refused to find implicit in the Act.

In the end, these are undoubtedly controversies that will be revisited. Physician-assisted suicide is still legal in Oregon, and will be debated in the future, whether in statehouses, in Congress, or in the courts. *Chevron* deference, likewise, remains an unsettled issue; Scalia will continue fighting the battle he presaged with his *Mead* dissent, perhaps with an increasing number of votes as time progresses. Further, implementation of the seemingly ever-evolving doctrine will continue to shift as courts try to come to a consensus on just what it looks like when Congress has "clearly spoken to" a given issue, or failing that, just how much authority has been delegated in a given "gap" when they have not.

On an even wider scope, the debate about the propriety of textualism and intentionalism will continue to be influenced by the growing body of cases evincing the results of one methodology or the other. This really is a false dichotomy, as *Gonzales v. Oregon* demonstrates, in that no matter what they espouse as philosophical or jurisprudential canons of statutory interpretation, Justices and Judges alike can, do, and should utilize elements of both as tools in their quest for the most satisfying resolution of a given controversy. If there is a "war" of ideas ongoing in the Court, it only makes sense that each side would employ all the tools available to "win." Given the highly charged political climate, courts purporting to use either method will draw accusations of judicial activism as a result of the substantive outcome in a given dispute, and no doubt to a certain extent such a label is not entirely untrue, though whether it deserves its recently acquired pejorative connotation is an entirely separate discussion. And while the analogy of war is undoubtedly hyperbole and overstates the atmosphere surrounding controversy like physician-assisted suicide, for many within and outside of the judicial system, the stakes are no less high.

ALFRED J. LUDWIG

239. See, e.g., Jane Roh, *Supreme Court Backs Oregon Assisted Suicide Law*, FOX NEWS, Jan. 17, 2006, <http://www.foxnews.com/story/0,2933,181881,00.html> (last visited Oct. 9, 2006).