

Thus, although environmental advocates may be drawn toward Justice Stevens's opinion because it affords the widest discretion to the agency, his deference to the Corps would eliminate the educative benefits of Justice Kennedy's approach. In sum, by offering interpretive flexibility and investing the judge with an ecological role, Justice Kennedy ensured that his eco-pragmatism hung onto its "eco."<sup>87</sup>

Although Justice Kennedy's approach has been criticized for its potential to generate uncertainty,<sup>88</sup> his test may not do so any more than his colleagues' two alternatives would have. Justice Scalia's test, by curtailing the scope of the CWA, would create regulatory space for state and local governments, some of which would create new legislation to fill the void, others of which would not. The resulting patchwork of varying standards would burden economic actors who operate across state lines.<sup>89</sup> Under Justice Stevens's proposal, the Corps's inconsistent and opaque practices would likely continue unabated. Justice Kennedy's significant nexus requirement, although admittedly ambiguous on its own, may soon be clarified through new legislation by Congress<sup>90</sup> or through new regulations by the Corps and the EPA. While it is true that the Corps's and EPA's proposed rulemaking in response to *SWANCC* ultimately went nowhere, *Rapanos's* comparatively broader holding — which rejected the narrow reading of *SWANCC* that some lower courts had adopted<sup>91</sup> — means that the agencies will now be under more pressure to respond to the Court.

In advancing the goal of rendering environmental law and policy more pragmatic, Justice Kennedy's significant nexus test has many advantages over Justice Scalia's rigid rules and Justice Stevens's generous deference. But with proposed legislation now making its way through Congress, it remains to be seen whether the center will hold.

2. *Deference to Agency Interpretive Rules.* — The apparent clarity of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*'s<sup>1</sup> two-step framework<sup>2</sup> has become muddled over the years, in large part

---

<sup>87</sup> Cf. FARBER, *supra* note 65.

<sup>88</sup> See, e.g., Posting of Jonathan Adler to The Volokh Conspiracy, <http://www.volokh.com> (Aug. 11, 2006, 18:19) (describing Justice Kennedy's opinion as "hardly a paragon of clarity").

<sup>89</sup> Cf. Houck & Rolland, *supra* note 1, at 1310 ("A Delaware corporation knows what to expect from section 404 in California, Louisiana and Wisconsin.")

<sup>90</sup> See Clean Water Authority Restoration Act of 2005, S. 912, 109th Cong. (2005) (defining "waters of the United States").

<sup>91</sup> See, e.g., *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004); *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407, 415 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 708–13 (4th Cir. 2003).

<sup>1</sup> 467 U.S. 837 (1984).

<sup>2</sup> Under *Chevron*, when confronted with the permissibility of an agency's statutory interpretation, a court determines first whether the statute is ambiguous, and second, whether the interpretation offered by the agency charged with administering the statute is reasonable. *Id.* at 842–43,

by uncertainty over when exactly *Chevron* applies<sup>3</sup> — what scholars have taken to calling *Chevron*'s "Step Zero."<sup>4</sup> The Supreme Court addressed this question most explicitly in *United States v. Mead Corp.*,<sup>5</sup> yet it failed to articulate a clear test,<sup>6</sup> leading to confused and contradictory applications of *Mead* and its progeny by lower courts struggling to undertake (or avoid) Step Zero analysis.<sup>7</sup> Last Term, in *Gonzales v. Oregon*,<sup>8</sup> the Supreme Court held that, under *Mead*, the Attorney General's interpretation of certain provisions of the Controlled Substances Act<sup>9</sup> (CSA) was not entitled to *Chevron* deference, effectively upholding Oregon's physician-assisted suicide law. The Court's weak textual analysis of the CSA at Step Zero belies a deeper, legitimate concern with Congress's excessive delegation in the CSA and the executive overreaching that delegation enabled. Instead of undertaking a strained textual analysis, the Court should have explicated a functionalist Step Zero framework to better guide lower courts confronted with acts of agency aggrandizement.

Oregon voters enacted the Oregon Death with Dignity Act<sup>10</sup> (ODWDA) in 1994 through ballot initiative;<sup>11</sup> after a court challenge and a referendum seeking to repeal ODWDA failed, the Act took effect in 1997.<sup>12</sup> ODWDA established detailed procedures through which a terminally ill patient can request sufficient medication to end his or her life.<sup>13</sup> The medications prescribed under ODWDA are federally

845. If the answer to both questions is yes, then the court must defer to the agency's interpretation. *See id.* at 845.

<sup>3</sup> *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) (discussing variations of this question and their possible answers).

<sup>4</sup> *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

<sup>5</sup> 533 U.S. 218 (2001).

<sup>6</sup> *Mead* held that *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226–27. To determine whether ruling letters issued by the Customs Service carried "the force of law," the Court in *Mead* surveyed a range of factors but did not indicate their relative weight or whether any single factor was dispositive. *See id.* at 231–34. For a discussion of the questions raised but not answered by *Mead*, see, for example, Sunstein, *supra* note 4, at 222–28.

<sup>7</sup> *See* Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

<sup>8</sup> 126 S. Ct. 904 (2006).

<sup>9</sup> 21 U.S.C.A. §§ 801–904 (West 1999 & Supp. 2006).

<sup>10</sup> OR. REV. STAT. §§ 127.800–.897 (2005).

<sup>11</sup> *Oregon v. Ashcroft*, 368 F.3d 1118, 1122 (9th Cir. 2004).

<sup>12</sup> *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1081 (D. Or. 2002).

<sup>13</sup> *See* OFFICE OF DISEASE PREVENTION & EPIDEMIOLOGY, DEP'T OF HUMAN SERVS., EIGHTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT 7–8 (2006), available at <http://oregon.gov/DHS/ph/pas/docs/year8.pdf> (outlining ODWDA procedures). As of 2005, 246 Oregonians had used the ODWDA process to commit suicide with medical assistance. *See id.* at 4–5.

regulated under the CSA,<sup>14</sup> which Congress enacted in 1970 to “conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.”<sup>15</sup> The CSA groups drugs into five schedules depending on their medical usefulness and their potential for abuse. The Attorney General may amend these schedules, but he must defer to the recommendations of the Secretary of Health and Human Services (Secretary) on scientific and medical matters.<sup>16</sup> Drugs included in Schedule II — such as those dispensed by Oregon physicians under ODWDA<sup>17</sup> — require a written prescription;<sup>18</sup> under a 1971 regulation promulgated by the Attorney General, such prescriptions must “be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”<sup>19</sup> The CSA also charges the Attorney General with registering physicians who dispense scheduled drugs.<sup>20</sup> Congress amended the CSA in 1984 to allow the Attorney General to refuse to register or to choose to deregister a physician if he determines that the registration would be “inconsistent with the public interest.”<sup>21</sup> In making this determination, the Attorney General must consider, *inter alia*, “conduct which may threaten the public health and safety.”<sup>22</sup>

In November 2001, Attorney General John Ashcroft issued an interpretive rule that declared that “assisting suicide is not a ‘legitimate medical purpose’” under the 1971 regulation and that “prescribing, dispensing, or administering federally controlled substances to assist suicide violates the CSA.”<sup>23</sup> Further, pursuant to the 1984 statutory amendment, “[s]uch conduct by a physician . . . may ‘render his registration . . . inconsistent with the public interest’ and therefore subject to possible suspension or revocation.”<sup>24</sup> The rule made clear that it applied regardless of state law.<sup>25</sup>

Upon a challenge brought by the State of Oregon, the United States District Court for the District of Oregon permanently enjoined the en-

<sup>14</sup> *Oregon*, 126 S. Ct. at 914.

<sup>15</sup> *Gonzales v. Raich*, 125 S. Ct. 2195, 2203 (2005); *see also Oregon*, 126 S. Ct. at 911.

<sup>16</sup> *See* 21 U.S.C.A. §§ 811–812 (West 1999 & Supp. 2006).

<sup>17</sup> *Oregon*, 126 S. Ct. at 914.

<sup>18</sup> 21 U.S.C. § 829(a) (2000).

<sup>19</sup> *Oregon*, 126 S. Ct. at 912 (quoting 21 C.F.R. § 1306.04(a) (2005)) (internal quotation marks omitted).

<sup>20</sup> *See* 21 U.S.C.A. §§ 821–822.

<sup>21</sup> *Oregon*, 126 S. Ct. at 917–18 (quoting 21 U.S.C.A. § 823(f)) (internal quotation mark omitted). Previously, the Attorney General was simply required to register any physician authorized under the laws of his or her state. *Id.* at 917.

<sup>22</sup> 21 U.S.C.A. § 823(f).

<sup>23</sup> Dispensing of Controlled Substances To Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

forcement of the interpretive rule, finding that the Attorney General's interpretation did not warrant deference and was invalid because it exceeded Congress's grant of authority under the CSA.<sup>26</sup> The Ninth Circuit likewise found the rule to be unenforceable.<sup>27</sup> The court invoked a clear statement rule, holding that the Attorney General could not exercise control over medical policy — a traditional area of state authority — absent clear congressional authorization.<sup>28</sup> It also applied a purposive interpretation of the CSA to conclude that the Attorney General was acting outside the scope and structure of the statute.<sup>29</sup>

The Supreme Court affirmed. Writing for the majority, Justice Kennedy<sup>30</sup> determined that the Attorney General's interpretation warranted no deference and was unpersuasive because it exceeded his authority under the CSA.<sup>31</sup> First, the interpretive rule did not warrant deference under *Auer v. Robbins*<sup>32</sup> as an agency interpretation of its own regulation because the 1971 regulation itself did not sufficiently interpret the CSA: "An agency does not acquire special authority to interpret its own words when . . . it has elected merely to paraphrase the statutory language."<sup>33</sup>

Furthermore, Justice Kennedy reasoned, the interpretive rule did not warrant *Chevron* deference because the Attorney General lacked authority under the CSA to determine the legitimacy of a medical practice authorized by state law.<sup>34</sup> The CSA empowers the Attorney General "to promulgate rules and regulations . . . relating to the registration and control of the . . . dispensing of controlled substances" and to "promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions."<sup>35</sup> Justice Kennedy contrasted these limited grants of authority with more sweeping provisions in other statutes,<sup>36</sup> and he construed "control," "registration," and "functions" narrowly to

<sup>26</sup> *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1080, 1087 (D. Or. 2002).

<sup>27</sup> *Oregon v. Ashcroft*, 368 F.3d 1118, 1120 (9th Cir. 2004). Judge Lay, sitting by designation, joined the opinion written by Judge Tallman. Judge Wallace dissented.

<sup>28</sup> *Id.* at 1124–25. *But cf. Oregon*, 126 S. Ct. at 935 (Scalia, J., dissenting) (arguing that "no line of [the Court's] clear-statement cases is applicable" to this dispute); *Oregon*, 368 F.3d at 1140–43 (Wallace, J., dissenting) (arguing that the clear statement rule does not apply).

<sup>29</sup> See *Oregon*, 368 F.3d at 1125–27.

<sup>30</sup> Justice Kennedy was joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer.

<sup>31</sup> See *Oregon*, 126 S. Ct. at 916, 925.

<sup>32</sup> 519 U.S. 452, 461 (1997) (noting that an agency's interpretation of its own regulation controls unless "plainly erroneous or inconsistent with the regulation" (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)) (internal quotation marks omitted)).

<sup>33</sup> *Oregon*, 126 S. Ct. at 916.

<sup>34</sup> *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

<sup>35</sup> *Id.* at 917 (quoting 21 U.S.C. §§ 821, 871(b) (2000)).

<sup>36</sup> See *id.* at 916; see also *id.* at 917 ("Congress did not delegate to the Attorney General authority to carry out or effect all provisions of the CSA." (emphasis added)).

find that the Attorney General lacked the interpretive authority he claimed.<sup>37</sup> Moreover, Justice Kennedy noted, the expansive authority claimed by the Attorney General would be “inconsistent with the design of the statute in other fundamental respects,” for Congress left medical judgments under the CSA to the Secretary’s discretion.<sup>38</sup> The Attorney General’s claimed scope of authority was simply too significant for Congress to have implicitly delegated it in such a roundabout way, Justice Kennedy reasoned, especially given the importance and controversial nature of medical issues like physician-assisted suicide.<sup>39</sup>

Finally, the majority dismissed the Attorney General’s interpretation as unpersuasive under *Skidmore v. Swift & Co.*<sup>40</sup> Justice Kennedy stressed that the CSA was intended to control drug abuse and illegal trafficking, not to regulate medical practice, an area of traditional state control.<sup>41</sup> Thus the CSA’s prescription requirement was simply meant to prevent addiction and abuse of drugs under the guise of medical treatment, and “drug abuse,” in the sense it is used in the statute, does not include physician-assisted suicide.<sup>42</sup>

Justice Scalia dissented.<sup>43</sup> First, he argued, *Auer* deference should apply.<sup>44</sup> The majority simply invented an exception to *Auer*, but even accepting this innovation, the 1971 regulation did more than “parrot” the relevant section of the CSA.<sup>45</sup> Second, the Attorney General’s interpretation should also receive *Chevron* deference.<sup>46</sup> Justice Scalia argued that “control” in the Attorney General’s grant of authority should be given its plain meaning and that the plain meaning of “control of the . . . dispensing” of drugs clearly includes the power to interpret the prescription requirement.<sup>47</sup> Given this authority, as well as the ambiguity of the phrase “legitimate medical purpose” and the reasonableness of the Attorney General’s interpretation, the interpretive

<sup>37</sup> See *id.* at 917–20.

<sup>38</sup> *Id.* at 920. The majority also emphasized the extensive detail with which Congress limited the Attorney General’s authority under other provisions, concluding that his authority under the CSA was tightly circumscribed. See *id.* at 917–18.

<sup>39</sup> See *id.* at 921 (“[Congress] does not, one might say, hide elephants in mouseholes.” (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)) (internal quotation marks omitted)).

<sup>40</sup> 323 U.S. 134 (1944). In *Mead*, the Court held that an agency interpretation that does not qualify for *Chevron* deference might still receive deference under *Skidmore*. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001). *Skidmore* offers deference to an agency interpretation depending 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.” *Skidmore*, 323 U.S. at 140.

<sup>41</sup> See *Oregon*, 126 S. Ct. at 923–24.

<sup>42</sup> See *id.* at 925.

<sup>43</sup> Justice Scalia was joined by Chief Justice Roberts and Justice Thomas.

<sup>44</sup> *Oregon*, 126 S. Ct. at 927 (Scalia, J., dissenting).

<sup>45</sup> See *id.* at 927–28.

<sup>46</sup> *Id.* at 929.

<sup>47</sup> See *id.* at 929–30.

rule passed muster under both *Mead* and *Chevron* and should have been accorded deference.<sup>48</sup> Once physician-assisted suicide is established as a nonlegitimate purpose for a prescription, the interpretive rule's other two conclusions follow logically.<sup>49</sup> Third, Justice Scalia insisted that the Attorney General's interpretation of "legitimate medical purpose" is the most reasonable, even without any deference: "medicine" refers to a curative art and thus does not include hastening death, and the medical community consensus is that assisted suicide is not a legitimate medical practice.<sup>50</sup> Even if the Attorney General's interpretation of the prescription requirement were incorrect, Justice Scalia further argued, his conclusion that assisting suicide could render a physician's registration "inconsistent with the public interest" should still stand, as Congress empowered the Attorney General to enforce the CSA's registration and deregistration provisions.<sup>51</sup>

Justice Thomas also dissented. He suggested that he would have found the Attorney General's interpretation to overreach federalism boundaries, but given the Court's recent conclusion that the CSA is indeed constitutional in its general regulation of areas of traditional state concern, Justice Thomas found the rule to be a reasonable interpretation of an ambiguous statutory provision.<sup>52</sup>

Despite the majority's emphasis on textual analysis in *Gonzales v. Oregon*, it was not the plain language of the CSA but concerns about excessive delegation that seemed to drive the Court's reasoning. Yet while the Court's underlying nondelegation concerns were perhaps justified, the Court only further muddled the Step Zero inquiry by relying on a strained interpretation of the CSA's text to address these concerns. The Court should have instead focused on a functional, totality-of-the-statutory-circumstances analysis, explicating a clear Step Zero framework that would better guide lower courts.

Assuming the Court's refinement of the *Auer* deference standard is correct and advisable, questions beyond the scope of this comment, the majority's textual analysis at *Chevron* Step Zero still leaves much to be desired. A straightforward reading of the CSA's text would suggest that the Attorney General's authority over the "registration and control of the . . . dispensing of controlled substances" would include determining what it means for a physician's *registration* to be "inconsistent

---

<sup>48</sup> See *id.* at 930 n.3, 931.

<sup>49</sup> *Id.* at 931. Specifically, a physician who issues invalid prescriptions may be prosecuted under the CSA, and noncompliance with federal laws regarding controlled substances can be independent grounds for revoking a physician's registration. See *id.* (citing 21 U.S.C. §§ 841(a), 823(f)(4) (2000)).

<sup>50</sup> See *id.* at 931–32.

<sup>51</sup> See *id.* at 936–38.

<sup>52</sup> See *id.* at 939–41 (Thomas, J., dissenting) (discussing *Gonzales v. Raich*, 125 S. Ct. 2195 (2005)).

with the public interest” and for a prescription — required by the statute for the *dispensation* of controlled substances — to be for a “legitimate medical purpose.” Recognizing this authority and proceeding to *Chevron* Step One, however, would almost assuredly have led to an acceptance of the Attorney General’s interpretation, as the majority acknowledged: “the statutory phrase ‘legitimate medical purpose’ is . . . ambiguous in the relevant sense,” and his construction of it is “at least reasonable” in isolation.<sup>53</sup> The Court avoided this result by adopting strained interpretations of the relevant CSA terms. For example, the majority insisted that “control” is a “term of art” under the CSA referring only to the scheduling of drugs,<sup>54</sup> yet it then admitted that, in other parts of the statute, the term also refers to preventing diversion,<sup>55</sup> an acknowledgement that “control” has multiple meanings within the CSA.<sup>56</sup> Further, the majority stated that authority over “registration” cannot extend to defining what constitutes a valid prescription,<sup>57</sup> but it did not explain then under what authority the Attorney General promulgated the concededly valid 1971 regulation establishing prescription requirements.<sup>58</sup> The Court’s textual analysis was thus less than convincing, regardless of the validity of its ultimate conclusion.

This strict gatekeeping at Step Zero appears to be a function not of the CSA’s text, but of the majority’s deeper concerns about the problematic scope of delegation this text grants, making *Gonzales v. Oregon* akin to cases like *MCI Telecommunications Corp. v. AT&T Co.*<sup>59</sup> and *FDA v. Brown & Williamson Tobacco Corp.*<sup>60</sup> Like *Gonzales v. Oregon*, both *MCI* and *Brown & Williamson* involved statutes with broad delegations of authority, and the agencies in both cases arguably acted within the plain language of those broad grants.<sup>61</sup> The Court struck

---

<sup>53</sup> *Id.* at 916, 924 (majority opinion). Although the interpretive rule addresses the phrase “legitimate medical purpose” as it is used in the 1971 prescription regulation, the Court’s *Auer* analysis seems to have led it to view the rule’s treatment of this phrase as an interpretation of the statute itself, which the regulation merely “parroted,” *id.* at 929 (Scalia, J., dissenting).

<sup>54</sup> *Id.* at 917 (majority opinion).

<sup>55</sup> *See id.*

<sup>56</sup> Indeed, as Justice Scalia noted, insisting on defining “control” as a term of art leads to a nonsensical reading of the authorization provision: “It makes no sense to speak of ‘adding the manufacturing, distribution, and dispensing of substances to a schedule.’” *Id.* at 930 (Scalia, J., dissenting).

<sup>57</sup> *See id.* at 917–18 (majority opinion).

<sup>58</sup> *See id.* at 926–27 (Scalia, J., dissenting) (noting that no one disputes the 1971 regulation’s legitimacy).

<sup>59</sup> 512 U.S. 218 (1994).

<sup>60</sup> 529 U.S. 120 (2000).

<sup>61</sup> *MCI* involved the scope of the FCC’s power under the Communications Act to “modify” rate filing requirements for long-distance telephone carriers; the Court held that the power to “modify” did not include the power to make the rate filings merely optional for most carriers. *See MCI*, 512 U.S. at 228–29. In *Brown & Williamson*, the Court disallowed the FDA from regulat-

down the agency actions in both *MCI* and *Brown & Williamson* at *Chevron* Step One in a move that some scholars have criticized as applying a variant of the nondelegation doctrine under the guise of simple textual analysis.<sup>62</sup> Professor John Manning, for example, describes the Court's analysis in *Brown & Williamson* as an application of the canon of avoidance: the Court adopted a strained interpretation of a statute with a constitutionally suspect delegation in order to "cut[] it back to acceptable bounds."<sup>63</sup> The majority might have had such a canon in mind when it emphasized its concern that the Attorney General was attempting to define substantive criminal law,<sup>64</sup> a clear violation of separation-of-powers principles, but also a problem inherent in the scope of congressional delegation in the CSA.<sup>65</sup> In a slightly different approach, Professor Cass Sunstein sees a nondelegation canon at play when the Court insisted in these cases that Congress could not have intended to delegate big policy decisions, specifically decisions that "would massively alter the preexisting statutory scheme," to agencies through ambiguous provisions.<sup>66</sup> This "major question" concern surfaces in the *Gonzales v. Oregon* majority's skepticism that Congress would delegate authority so obliquely to settle a "subject of an 'earnest and profound debate' across the country,"<sup>67</sup> as well as in its reference to the *Brown & Williamson* Court's insistence that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."<sup>68</sup>

These scholars are generally critical of this backdoor nondelegation move,<sup>69</sup> yet the Attorney General's claimed scope of authority in *Gon-*

---

ing tobacco products, even though the FDA had demonstrated through notice-and-comment rulemaking that tobacco products constituted "drugs" and "devices" over which it had regulatory jurisdiction. See *Brown & Williamson*, 529 U.S. at 126–27.

<sup>62</sup> See, e.g., John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 227–28 (discussing *Brown & Williamson*); Sunstein, *supra* note 4, at 236–42 (discussing *MCI* and *Brown & Williamson*).

<sup>63</sup> Manning, *supra* note 62, at 242–43, 254; see also *id.* at 244–46 (discussing *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607 (1980), as another example of how the Court has used the canon of avoidance to resolve nondelegation concerns).

<sup>64</sup> See, e.g., *Oregon*, 126 S. Ct. at 918 ("If the Attorney General's argument were correct, his power to deregister necessarily would include the greater power to criminalize even the actions of registered physicians, whenever they engage in conduct he deems illegitimate.").

<sup>65</sup> If Congress did give the Attorney General authority to interpret and apply the prescription requirement, and if the validity of prescriptions bears on the question of criminal violation under the statute, then the statute presents a real delegation concern that the Court might wish to avoid.

<sup>66</sup> Sunstein, *supra* note 4, at 244–47.

<sup>67</sup> *Oregon*, 126 S. Ct. at 921 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

<sup>68</sup> *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)) (internal quotation mark omitted).

<sup>69</sup> See Manning, *supra* note 62, at 228 (arguing that such tactics upset congressional choice to legislate in broad terms and give the Court rather than Congress the ultimate responsibility for defining legislative policy); Sunstein, *supra* note 4, at 245–46 (arguing that there is no judicially manageable line between major questions and minor ones). Professor Sunstein, however, while

*zales v. Oregon* raised greater grounds for constitutional unease than the agency actions in these earlier cases. First, Professor Sunstein's criticism of *MCI* and *Brown & Williamson* for failing to recognize the relevance of an agency's "expertise and accountability" in the settling of significant statutory questions<sup>70</sup> is much less applicable to *Gonzales v. Oregon*: unlike these earlier cases, here the Attorney General acted not only outside his area of administrative expertise, but also unilaterally,<sup>71</sup> despite recent congressional refusals to ban assisted suicide.<sup>72</sup> As Professor Sunstein notes elsewhere, due process-type concerns partially underlie the nondelegation doctrine;<sup>73</sup> while formal agency procedures or notice-and-comment rulemaking might not be required for an agency's interpretation to receive *Chevron* deference,<sup>74</sup> lack of any evidence of what the *Mead* Court termed "fairness and deliberation"<sup>75</sup> raises the specter of arbitrary agency action. Second, the Attorney General's interpretation raised serious federalism concerns, as the majority noted: medical practice is traditionally regulated by the states,<sup>76</sup> and while the majority acknowledged that Congress could preempt this state power,<sup>77</sup> it saw no intention to do so in the CSA.<sup>78</sup> The majority thus painted a picture of an Attorney General encroaching on legislative powers, state powers, and even the domain of another executive department, all based on a novel, broad, and unilateral statutory interpretation — an image of executive aggrandizement that sets off constitutional alarm bells.

Given these concerns, what options did the Court have? The most straightforward option — to revive the actual nondelegation doctrine

---

wary of the "major question" approach in recent cases, is not necessarily critical of nondelegation canons per se. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000).

<sup>70</sup> Sunstein, *supra* note 4, at 246.

<sup>71</sup> See *Oregon*, 126 S. Ct. at 922 (taking into account the Attorney General's "lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment").

<sup>72</sup> The Court noted the failure of two congressional bills, in 1998 and 1999, that would have specifically prohibited assisted suicide. See *id.* at 913. Similarly, the Ninth Circuit stated that "the Attorney General [was] interfering with the democratic process," given that Oregon voters "twice declared their support for the legalization of physician assisted suicide in their state." *Oregon v. Ashcroft*, 368 F.3d 1118, 1124 (9th Cir. 2004).

<sup>73</sup> See Sunstein, *Nondelegation Canons*, *supra* note 69, at 320.

<sup>74</sup> *United States v. Mead*, 533 U.S. 218, 231 (2001).

<sup>75</sup> *Id.* at 230.

<sup>76</sup> See, e.g., *Oregon*, 126 S. Ct. at 923.

<sup>77</sup> *Id.*

<sup>78</sup> See *id.* at 925 ("[T]he background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power. It is unnecessary even to consider the application of clear statement requirements or presumptions against pre-emption to reach this commonsense conclusion." (citations omitted)).

— is, in practical terms, a nonstarter.<sup>79</sup> The option it took — to interpret the statutory text narrowly to avoid the potentially problematic delegation — gives too little guidance to lower courts. Professors Thomas Merrill and Kristin Hickman criticize the Court’s “dissembling” about the ambiguity of the statutes in cases like *MCI* and *Brown & Williamson* because it “threatens to contaminate the step-one inquiry in other cases in which the agency is concededly acting within the scope of its authority, sending confusing signals to the lower courts.”<sup>80</sup> Likewise, lower courts might take the Court’s textual stretch in *Gonzales v. Oregon* as a model for justifying greater judicial discretion at Step Zero in circumstances that might not sufficiently warrant it.

The Court might have instead opted for a third path: it could have seized this opportunity to acknowledge that Step Zero will often require a functional analysis and to build on *Mead* to clarify a framework for lower courts confronted with similar situations. If *Chevron* is premised upon a fiction regarding congressional intent — that Congress intended the agency, not the courts, to resolve any statutory ambiguity<sup>81</sup> — then the presence of certain factors might suggest that the presumption of congressional intent should simply be reversed.<sup>82</sup> There might be a benefit to gathering and articulating a nonexhaustive list of such factors that are weighty enough to be dispositive. Candidates might include the scope of the policy decision involved;<sup>83</sup> the content of subsequent, related congressional action;<sup>84</sup> encroachment of executive agencies on areas of traditional state authority; and due process-related concerns, such as a statute’s lack of required formal procedures.<sup>85</sup> Additionally, the latter two factors could be addressed

---

<sup>79</sup> See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001); *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

<sup>80</sup> Merrill & Hickman, *supra* note 3, at 912.

<sup>81</sup> See, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203; Merrill & Hickman, *supra* note 3, at 870–72; see also Note, “How Clear Is Clear” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687, 1689 & n.7 (2005) (collecting sources that agree that *Chevron* is about “the effectuation of congressional intent to delegate primary interpretive authority to the agency charged with implementing the statute”).

<sup>82</sup> See Merrill & Hickman, *supra* note 3, at 837 (“[T]he presumption in favor of *Chevron* deference should be subject to rebuttal based on the totality of the statutory circumstances. Thus, before courts employ the two-step *Chevron* doctrine, they may entertain evidence and argument that Congress clearly did not intend the agency to function as the primary interpreter with respect to the issue in dispute.”).

<sup>83</sup> See Sunstein, *supra* note 4, at 236–42. Professor Sunstein, however, does not believe the presence of “major questions” should be a dispositive factor in denying agency discretion. See *id.* at 245–47.

<sup>84</sup> This was a factor in both *Brown & Williamson* and *Gonzales v. Oregon*.

<sup>85</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to en-

through slightly different facets of a Step Zero framework. To address federalism concerns, the Court could articulate a clear statement rule for Step Zero purposes in response to executive encroachment on state police powers.<sup>86</sup> To address due process concerns, the Court could treat *Mead*'s holding as having established an inverse relationship between its two halves,<sup>87</sup> a sort of sliding scale along the procedural axis: the less procedural formality an agency employs, the more explicit the congressional grant of authority must be.<sup>88</sup> By better explicating a functionalist Step Zero framework, whether along these lines or any other, the Court could have addressed its deeper concerns about excessive delegation and agency aggrandizement in a manner that lower courts could replicate more forthrightly in future cases.

Both the CSA and the Attorney General's interpretation of it raise serious constitutional red flags, and the Court may well have been justified in its outcome. By not explicitly developing a functionalist framework for Step Zero, however, the Court risked suggesting that its strained textual analysis is a model for lower courts to follow with statutes that have similarly clear grants of authority but lack the functional or constitutional concerns that might warrant a more restrictive interpretation.

---

gage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”).

<sup>86</sup> The Ninth Circuit, for example, rested much of its argument on a federalism-based clear statement requirement. See *Oregon v. Ashcroft*, 368 F.3d 1118, 1125 (9th Cir. 2004). The Court might have taken this opportunity to clarify that such a federalism-based clear statement rule would indeed override judicial deference to agencies. See Recent Case, 118 HARV. L. REV. 1371 (2005).

<sup>87</sup> The two halves of *Mead*'s inquiry are whether “Congress delegated authority to the agency generally to make rules carrying the force of law” and whether “the agency interpretation claiming deference was promulgated in the exercise of that authority.” *Mead*, 533 U.S. at 226–27.

<sup>88</sup> Cf. Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. (forthcoming Dec. 2006) (demonstrating a strategic substitution effect between the level of procedural formality an agency employs and the aggressiveness of its statutory interpretation: when agencies use less formal procedures, courts will expect greater textual plausibility).