

## CASE COMMENTS

**Administrative Law**—Attorney General Directive Prohibiting Use of Controlled Substances for Physician-Assisted Suicide Invalid—*Gonzales v. Oregon*, 126 S. Ct. 904 (2006)

In 1970, Congress enacted the Controlled Substances Act (CSA) to combat drug abuse and to control both the legitimate and illegitimate trafficking of controlled substances.<sup>1</sup> Under the CSA, the United States Attorney General has the power to revoke a physician's authority to administer controlled substances.<sup>2</sup> In *Gonzales v. Oregon*,<sup>3</sup> the United States Supreme Court considered whether an interpretive rule issued by the Attorney General exceeded the scope of the Attorney General's authority under the CSA.<sup>4</sup> The Attorney General's interpretive rule defined "legitimate medical purpose" narrowly to prohibit the use of controlled substances for physician-assisted suicide.<sup>5</sup> The Court invalidated the rule, concluding that the CSA does not authorize the United States Attorney General to make determinations of legitimate medical practice or to prohibit medical acts permitted under state law.<sup>6</sup>

Congress enacted the CSA as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, an act designed to curtail the recreational use of dangerous and addictive substances.<sup>7</sup> The CSA created a comprehensive regulatory scheme that criminalized the unauthorized distribution, manufacture, dispensing, and possession of specified drugs.<sup>8</sup> Under the CSA, a physician may only prescribe a controlled substance for a "legitimate medical purpose"

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1. See Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 (1970) (stating purpose of act, highlighting focus on prevention, rehabilitation, treatment, and increased law enforcement).

2. 21 U.S.C. § 841 (2000) (granting U.S. Attorney General power to deregister physicians). Deregistration prevents a physician from prescribing controlled substances and therefore also prevents him or her from performing medical procedures requiring the use of such controlled substances. *Oregon v. Ashcroft*, 368 F.3d 1118, 1122 (9th Cir. 2004), *aff'd*, 126 S. Ct. 904 (2006).

3. 126 S. Ct. 904 (2006).

4. *Id.* at 911 (stating issue in case).

5. *Id.* Under the CSA, prescriptions for controlled substances may only be provided for "legitimate medical purpose[s]." 21 C.F.R. § 1306.04 (2006).

6. 126 S. Ct. at 925 (holding Attorney General lacks power under CSA to criminalize medical practices authorized by state law).

7. Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 (1970) (stating purpose of act); see also 126 S. Ct. at 911 (describing CSA's history and objective).

8. 126 S. Ct. at 911-12 (describing CSA's regulatory scheme). The CSA authorized the Attorney General to add, remove, or alter the list of controlled substances, but the Attorney General must follow formal proceedings on the record and defer to the Secretary of Health and Human Services on issues relating to science and medicine. *Id.*

and the Attorney General may deny, suspend, or revoke a physician's registration to prescribe controlled substances if such registration is against the "public interest."<sup>9</sup>

In 1994, Oregon enacted the Oregon Death With Dignity Act (ODWDA), allowing Oregon physicians to prescribe lethal doses of medication to terminally ill patients upon the patient's request.<sup>10</sup> In 2001, Attorney General John Ashcroft issued an interpretive rule announcing that, under the CSA, physician-assisted suicide did not serve a "legitimate medical purpose," that practicing physician-assisted suicide pursuant to ODWDA was inconsistent with the public interest, and that continued use of the practice would subject physicians to suspension or revocation of their registration to prescribe controlled substances.<sup>11</sup>

In response, the state of Oregon, along with a group of physicians and terminally ill patients, brought suit in federal court challenging the validity of the interpretive rule.<sup>12</sup> Applying a federalism-based rule of statutory construction, the Ninth Circuit Court of Appeals invalidated the interpretive rule.<sup>13</sup> The Ninth Circuit held that because the interpretive rule altered the balance of power between the federal government and state governments,

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9. 21 U.S.C. § 824 (2000) (listing circumstances for physician deregistration, including "public interest" violation); 21 C.F.R. § 1306.04 (2006) (stating "legitimate medical purpose" requirement); *see also* 126 S. Ct. at 912 (noting U.S. Attorney General's authority under CSA to register physicians). While Congress granted the Attorney General authority to make determinations regarding registration of physicians, it mandated that the Attorney General defer to state licensing boards. *Oregon v. Ashcroft*, 368 F.3d 1118, 1122 (9th Cir. 2004), *aff'd*, 126 S. Ct. 904 (2006).

10. OR. REV. STAT. § 127.815 (1999) (detailing Oregon physician's authority to administer controlled substance to assist terminally ill patient's suicide); *see also Oregon v. Ashcroft*, 368 F.3d 1118, 1122 (9th Cir. 2004), *aff'd*, 126 S. Ct. 904 (2006) (relating ODWDA history). ODWDA passed by ballot measure in 1994 and in 1997 reaffirmed when Oregon voters defeated a ballot measure seeking to repeal the law. *Oregon v. Ashcroft*, 368 F.3d 1118, 1122 (9th Cir. 2004), *aff'd*, 126 S. Ct. 904 (2006). After the 1997 ballot measure was defeated, then-Senator John Ashcroft, along with other members of Congress, unsuccessfully campaigned then-Attorney General Janet Reno to declare that the CSA prohibited physician-assisted suicide. *Id.* at 1123. Janet Reno responded by declaring that the CSA did not authorize the Drug Enforcement Administration to revoke a physician's registration for performing medical practices approved by Oregon law. *Id.* Members of Congress then tried to amend the CSA to explicitly authorize the Attorney General to revoke a physician's registration if a physician assisted a patient in committing suicide by prescribing a controlled substance. *Id.* at 1123 n.4. This attempt to amend the CSA failed, as did a second attempt in 1999. *Id.*

11. *Oregon v. Ashcroft*, 368 F.3d 1118, 1120-24 (9th Cir. 2004), *aff'd*, 126 S. Ct. 904 (2006) (describing interpretive rule's development). Soon after his appointment as U.S. Attorney General, John Ashcroft renewed his efforts to prohibit physician-assisted suicide via the CSA and issued an interpretive rule to that effect. *Id.* at 1123. The record does not reveal whether, in creating this interpretive rule, Attorney General John Ashcroft consulted with persons outside of his department or with officials in Oregon. 126 S. Ct. at 913.

12. *Oregon v. Ashcroft*, 368 F.3d 1118, 1122-24 (9th Cir. 2004), *aff'd*, 126 S. Ct. 904 (2006) (outlining Oregon's challenge to Ashcroft's interpretive rule prohibiting physician-assisted suicide). The Ninth Circuit noted that this case was particularly "ripe for review" because Oregon physicians risked being criminally prosecuted by the United States Attorney General's Office if they chose to assist terminally ill patients pursuant to Oregon's ODWDA. *Id.* at 1121.

13. *Oregon v. Ashcroft*, 368 F.3d 1118, 1125 (9th Cir. 2004), *aff'd* 126 S. Ct. 904 (2006) (holding interpretive rule invalid because in violation of federalism principles).

Congress must provide a clear statement that it intended the CSA to supercede state authority over the practice of medicine in order for the rule to be valid.<sup>14</sup> On grant of certiorari, the United States Supreme Court affirmed the decision but avoided the Ninth Circuit's application of a clear statement rule.<sup>15</sup> In *Gonzales v. Oregon*, the Court held that the Attorney General's interpretive rule was invalid, not because the CSA lacked a clear statement from Congress intending it to supercede state laws, but because the statute was ambiguous and, under its interpretation of the CSA, Congress had not ceded authority over determinations of legitimate medical practice to the Attorney General.<sup>16</sup>

A reviewing court is obligated to enforce the clear meaning of a federal statute as revealed by its "language, purpose, and history."<sup>17</sup> Only if a statute's meaning is ambiguous does the reviewing court have the authority to determine meaning based on theories of statutory construction.<sup>18</sup> When a statute is ambiguous, the court must clarify its meaning by considering the interpretation given by the agency charged with its administration.<sup>19</sup> However, while a reviewing court is to grant some level of deference to an agency's interpretation of an ambiguous statute, the amount of deference depends on several factors.<sup>20</sup>

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14. *Oregon v. Ashcroft*, 368 F.3d 1118, 1124-25 (9th Cir. 2004), *aff'd*, 126 S. Ct. 904 (2006) (determining clear statement rule violation). The Ninth Circuit based its decision on Supreme Court jurisprudence requiring a clear expression of congressional intent for a federal law to supercede state authority. *Id.* Citing Supreme Court jurisprudence, the Ninth Circuit noted, "[a]bsent an unmistakably clear expression of intent to alter the usual constitutional balance between the States and the Federal Government, we will interpret a statute to preserve rather than destroy the States' substantial sovereign powers." *Id.* at 1125 (quoting *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 208-09 (1998)). The Ninth Circuit therefore determined that because Congress did not provide any clear statement authorizing the Attorney General to make determinations of legitimate medical practice, the Attorney General's interpretive rule violated "the clear statement rule" and was therefore invalid. *Id.*

15. 126 S. Ct. at 926 (affirming lower court decision invalidating Ashcroft's interpretive rule). The Court stated that it was not necessary to address the clear statement rule because, before reaching this issue, it was clear the Attorney General's interpretive rule was beyond the scope of authority granted to the Attorney General under the CSA. *Id.* at 925.

16. *Id.* (holding Congress did not grant Attorney General authority to determine medical practice legitimacy). The Court stated that the Attorney General was "an unlikely recipient of such broad authority" and noted that, for issues of medical policy, the CSA affords substantial decision-making power to the Secretary of Health. *Id.*

17. See *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (noting courts' obligation to honor plain meaning in statutory language).

18. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (noting courts' authority regarding statutory construction). The Supreme Court, in *Chevron*, stated that where an agency interpretation of an ambiguous statute exists, the question for the reviewing court is whether the agency's interpretation is a "permissible construction of the statute." *Id.* at 843. The Court further noted that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

19. See *Fry v. United States*, 421 U.S. 542, 546 n.6 (1975) (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)) (applying "great weight" to agency interpretation construing ambiguous statute).

20. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding administrative opinions, rulings, and interpretations not binding on courts); *Estate of Sanford v. Comm'r*, 308 U.S. 39, 52 (1939) (noting courts not required to adopt agency interpretations concerning ambiguous statutes "regardless of consequences"); *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 280 (1929) (stating courts not bound by administrative construction

Two cases, *Chevron v. NRDC*<sup>21</sup> and *Skidmore v. Swift*,<sup>22</sup> set forth the primary doctrines for courts to use in determining the level of deference to apply to an agency's interpretation of an ambiguous statute.<sup>23</sup> Under the *Chevron* doctrine, if Congress delegates authority to an agency to promulgate rules under an ambiguous statute, the reviewing court must grant substantial deference to the agency's interpretation.<sup>24</sup> Courts may only reject the interpretation if it is procedurally defective, arbitrary and capricious, or contrary to the statute's express purpose.<sup>25</sup> Conversely, if Congress's delegation of authority to the agency is unclear, *Chevron* is inapplicable and the court should apply the *Skidmore* doctrine.<sup>26</sup>

Under the *Skidmore* doctrine, a reviewing court is required to provide "some level" of deference to the agency's interpretation of the ambiguous statute.<sup>27</sup> If the reviewing court is not persuaded by the agency's interpretation, it may reject the interpretation and apply its own.<sup>28</sup> In recent years, the Supreme Court has narrowed the application of *Chevron* deference, rejecting it when the agency's interpretation of an ambiguous statute was not the result of a formal administrative process as outlined by the Administrative Procedure Act

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regarding ambiguous statute).

21. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

22. *Skidmore v. Swift*, 323 U.S. 134, 139 (1944).

23. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 863 (2001) (noting competing doctrines exist for determining deferential level courts afford agency interpretation).

24. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (explaining substantial deference for agency interpretations concerning statutes under their administration). *Chevron's* rigid structure limits the ability of the judicial branch to interpret federal statutes and grants near mandatory deference to an executive branch interpretation of a congressional statute deemed ambiguous. See *id.*; see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970-71 (2000) (noting *Chevron* increases executive branch powers while diminishing judicial and legislative powers).

25. *Chevron U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (stating reviewing court must accept agency interpretation unless exception applies); *United States v. Morton*, 467 U.S. 822, 834 (1984) (holding procedurally defective agency interpretation may negate *Chevron* deference application).

26. See *United States v. Mead Corp.*, 533 U.S. 218, 237-38 (2001) (stating when *Chevron* doctrine inapplicable, reviewing court to apply *Skidmore* deference as default). The Supreme Court noted that because *Chevron* affords either substantial deference or no deference, it is overly rigid. *Id.* at 236-37. Thus, *Skidmore* should be applied as the default doctrine when *Chevron* is inapplicable. *Id.* at 237-38.

27. See *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) (stating *Skidmore* doctrine requires some deference afforded to agency's interpretation of ambiguous statute). In *Skidmore*, the Supreme Court determined that a court must consider an agency's interpretation for its persuasive weight because the agency possesses "specialized experience and broader investigations and information." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). The question under a *Skidmore* analysis is not whether an agency's interpretation is permissible; it is whether there is a persuasive argument that the agency's interpretation should be followed. *U.S. v. Mead Corp.*, 533 U.S. 218, 235 (2001). The factors that a court should consider under *Skidmore* include such things as the thoroughness of the agency's investigation, the strength of its logic, its consistency with prior decisions and the overall level of expertise the agency possesses regarding the matter at issue. Merrill & Hickman, *supra* note 23, at 855.

28. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (stating court not bound by agency interpretation); see also *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (agency interpretation entitled to *Skidmore* deference only to extent it has "power to persuade").

(APA).<sup>29</sup>

When ambiguous language is contained in an agency's own regulation, rather than a congressional statute, yet another doctrine of deference applies.<sup>30</sup> In *Auer v. Robbins*,<sup>31</sup> the Supreme Court held that when determining the meaning of an ambiguous agency regulation, the reviewing court should grant substantial deference to the agency's interpretation of the ambiguous regulation.<sup>32</sup> Under *Auer*, a reviewing court may only invalidate an agency's interpretation of its own regulation if it "is plainly erroneous or inconsistent with the regulation."<sup>33</sup> Because the three doctrines involve such vastly different levels of deference, ranging from near-total deference to very little deference, the legitimacy of an agency's interpretation of a regulation or statute will turn on which doctrine the reviewing court applies.<sup>34</sup>

In *Gonzales v. Oregon*, the United States Supreme Court determined that the United States Attorney General's interpretive rule defining "legitimate medical purpose" and prohibiting the use of controlled substances for physician-assisted suicide exceeded the scope of his authority under the CSA.<sup>35</sup> To reach this conclusion, the Supreme Court did not rely on a clear statement rule based in

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29. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (determining Chevron deference not always applicable). In *Christensen*, the Supreme Court ruled that only interpretations having the "force of law" and adopted through notice and comment rulemaking or adjudication are eligible for *Chevron* deference. *Id.* The Court differentiated between interpretations resulting from procedures outlined by Congress in the Administrative Procedures Act (APA) and interpretations that were informally implemented through opinion letters or policy statements. *Id.* Agency interpretations not implemented via formal processes of notice and comment or adjudication warrant only a *Skidmore* level of deference. *Id.* In essence, *Christensen* is an attempt to dissuade agencies from evading statutorily required rule making procedures by narrowing the application of *Chevron's* rigid deferential standard. *The Supreme Court, 1999 Term Leading Cases*, 114 HARV. L. REV. 359, 373-74 (2000) (noting Supreme Court motivation to restrict *Chevron* doctrine application).

30. See Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 54-55 (2000) (noting *Chevron* doctrine inapplicable to informal agency interpretations concerning agency regulations); Joseph Cordaro, *Who Defers to Whom? The Attorney General Targets Oregon's Death With Dignity Act*, 70 FORDHAM L. REV. 2477, 2493-95 (2002) (noting application of *Auer* deference to informal agency interpretations concerning agency regulations).

31. *Auer v. Robbins*, 519 U.S. 452 (1997).

32. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding agency interpretations concerning ambiguous regulations controlling unless clearly erroneous). In *Auer*, Justice Scalia, writing for the majority, noted that because the Secretary of Labor's salary basis test was a "creature of the Secretary's own regulations," his interpretation warranted substantial deference. *Id.*

33. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (granting substantial deference to agency interpretation concerning agency regulation unless clearly inconsistent with regulation). Academics argue that granting substantial deference to an agency's interpretation of its own regulation violates the purpose of the APA and contradicts the United States Constitution's premise of a separation of powers. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 1-6 (1996) (describing APA notice and comment requirements as check on agency powers); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617-18 (1996) (noting substantial deference for agency interpretations violates constitutional premise of separation of powers).

34. See Merrill & Hickman, *supra*, note 23, at 853-56 (noting reviewing court determination depends substantially on which deference doctrine applied).

35. 126 S. Ct. 904, 925 (2006) (noting United States Attorney General's lack of authority under CSA).

principles of federalism, but instead rejected the Attorney General's interpretive rule by proffering its own interpretation of the ambiguous language in the CSA.<sup>36</sup> The Court declined to provide substantial deference to the Attorney General's interpretation as mandated by *Auer* because the interpretive rule was based on an agency regulation that merely "parroted" the congressional statute.<sup>37</sup> Similarly, the Supreme Court declined to provide *Chevron's* substantial deference, reasoning that the Attorney General's interpretive rule had not been implemented via the CSA's statutorily authorized means or through a notice and comment period.<sup>38</sup> As a result, the Court applied *Skidmore* and afforded the Attorney General's interpretation of the CSA only minimal deference.<sup>39</sup>

Applying *Skidmore*, the Supreme Court was not persuaded by the Attorney General's interpretation of the CSA.<sup>40</sup> The Court reasoned that the primary focus of the CSA is to curtail recreational drug use and the illicit trafficking of drugs.<sup>41</sup> Consequently, the Court determined Congress did not likely intend for the statute to grant a Justice Department official with no medical training broad unilateral authority over the practice of medicine.<sup>42</sup> After holding that the Attorney General's interpretation of the CSA was unpersuasive, the Court determined that the CSA did not cover the regulation of physician-assisted suicide nor did it authorize the Attorney General to make unilateral determinations over the practice of medicine.<sup>43</sup> The Supreme Court thus invalidated the Attorney General's interpretative rule determining that it

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36. *Id.* at 914-17 (noting but not applying lower court's clear statement analysis and applying analysis based on deference).

37. *Id.* at 915-16 (determining *Auer* deference not applicable). The Court stated that the existence of a regulation paraphrasing the ambiguous statute did not change the fact that the question at issue was the meaning of the ambiguous statute. *Id.* The Court further determined that an agency does not obtain substantial deference in the interpretation of its regulations by merely restating statutory language in regulations. *Id.* Justice Scalia, in dissent, critiqued the majority's refusal to apply substantial deference, asserting that no "anti-parroting" doctrine existed. *Id.* at 927 (Scalia, J., dissenting). He argued that *Auer* should be applied because it was an agency interpretation of an agency regulation. *Id.* at 928-29 (Scalia, J., dissenting).

38. 126 S. Ct. at 922 (stating *Chevron* doctrine inapplicable because interpretive rule implemented contrary to CSA requirements). The CSA limits the manner in which the Attorney General may promulgate rules and specifies the procedures and process for exercising this authority. *Id.* at 916-18. Because the Attorney General did not promulgate the interpretive rule via the manner specified under the CSA, it was not implemented in a congressionally authorized manner and thus the substantial deference of *Chevron* was not warranted. *Id.* at 922.

39. *Id.* (determining *Skidmore's* minimal deference applicable).

40. *Id.* (finding Attorney General's opinion unpersuasive). The Court noted that the persuasiveness of the Attorney General's interpretation was diminished by the Attorney General's lack of medical experience and the lack of any evidence that the Attorney General consulted with persons outside the Justice Department before implementing the interpretive rule. *Id.*

41. *Id.* at 925 (noting CSA carefully allocates decision-making powers).

42. 126 S. Ct. at 925 (describing nature of statute and likelihood Congress would grant Attorney General authority over medical issues).

43. *Id.* at 924-25 (determining CSA not intended to regulate practice of medicine).

exceeded the scope of the CSA.<sup>44</sup>

In *Gonzales v Oregon*, the Supreme Court reaffirmed both traditional state legislative authority over the practice of medicine and congressional authority to overrule state laws relating to the practice of medicine.<sup>45</sup> The Court achieved this dual result by focusing on the level of deference afforded to the Attorney General's interpretation of the CSA rather than the constitutional balance of power between the federal government and state governments.<sup>46</sup> Applying *Skidmore*, the Court was able to disregard the Attorney General's interpretation of the CSA while avoiding the application of a federalism-based theory of statutory construction favoring state sovereignty.<sup>47</sup> As a result, the United States Supreme Court's decision preserves an open discourse among the states regarding issues of physician-assisted suicide while avoiding an amplification of state authority over the practice of medicine.<sup>48</sup>

The Supreme Court's holding in *Gonzales v. Oregon* stresses that control over lawmaking resides with Congress and state legislatures, not administrative agencies.<sup>49</sup> In striking down the Attorney General's interpretive rule, the Court balanced its argument not on a fulcrum of states' rights versus federal rights, but on legislative power versus executive power.<sup>50</sup> The Court correctly recognized that a finding upholding the Attorney General's interpretation of the CSA removed the issue of physician-assisted suicide from public discourse in state legislatures and placed it solely in the realm of executive office authority,

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44. *Id.* at 925 (holding interpretive rule invalid because it exceeded authority granted to Attorney General under CSA).

45. *Id.* at 923 (acknowledging both state authority over medical practice and Congress's authority to overrule state medical regulations). The Court recognized that state legislatures traditionally regulate the practice of medicine and noted ODWDA is exemplary of the "state regulation of medical practice that the CSA presupposes." *Id.* at 923. Although the Court recognized traditional state authority over the regulation of medicine, it tempered this authority by noting that Congress has the power to prohibit physician-assisted suicide. *Id.* at 923.

46. 126 S. Ct. at 925 (avoiding application of "clear statement rule").

47. *Id.* at 925 (invalidating interpretive rule via application of *Skidmore*, stating application of "clear statement rule" unnecessary).

48. *Id.* at 910 (noting public discourse over physician-assisted suicide). An application of a federalism-based theory of statutory construction favors state sovereignty at the expense of federal power. *See Cordaro, supra* note 30, at 2513-14 (emphasizing federalism principles limit federal government's ability to regulate medical practice).

49. *See* 126 S. Ct. at 921-22 (stating CSA does not grant Attorney General authority to issue legally binding rules); *id.* at 924 (critiquing argument that CSA grants executive officer power to unilaterally bar specific medical practice); *id.* at 925 (discounting argument that CSA shifts authority over medical practice from state legislatures to executive officer).

50. *Id.* at 925 (declining to apply clear statement rule analysis). Instead of applying a federalism-based theory of statutory construction focusing on the balance of power between the federal government and state legislatures, the Court based its analysis on the exercise of executive branch powers and the weight to afford the executive officers' interpretation of the legislative act. *See id.* at 914-17 (noting lower court's clear statement analysis but applying different analysis based on deference). The Court noted that Congress has the authority to grant an Attorney General the ability to make unilateral determinations over issues of legitimate medical practice; it merely chose not to assert this power under the CSA. *See id.* at 923.

a result incongruous with the structure of the CSA and the historical nature of state control over the practice of medicine.<sup>51</sup> Ultimately, the Court determined that while Congress could grant the Attorney General authority to define legitimate medical practice, Congress did not choose to exercise this power under the CSA.<sup>52</sup>

Although Justice Scalia argued in the dissent that the majority's logic rejecting *Auer* deference is flawed, the Court's reasoning is consistent with recent Court decisions denying agencies the ability to create rules with the force of law outside the consent of Congress.<sup>53</sup> The majority correctly recognized that affording substantial deference to the Attorney General's interpretive rule created a precedent enabling agencies to usurp the legislative powers of Congress by merely restating a statute as a regulation and then interpreting that regulation.<sup>54</sup> Following such precedent to its final extension would result in diminished congressional oversight over the delegation and direction of an agency's powers.<sup>55</sup> Affording substantial deference to Ashcroft's interpretive rule demonstrates this risk, as it would have enabled the Attorney General to achieve what he had not been able to achieve via traditional legislative means.<sup>56</sup>

In *Gonzales v. Oregon*, the Supreme Court invalidated a United States Attorney General's interpretive rule prohibiting the use of controlled substances for physician-assisted suicide. In striking down the rule, the Court did not find a lack of congressional authority to regulate the practice of medicine; it merely asserted the common understanding that an executive officer has no power to co-opt legislative authority and unilaterally create new laws. The Supreme Court's decision reaffirms the legislative will of the people and provides that control over the determination of valid medical practice resides with state legislatures unless overridden by Congress. As a result, the public is able to continue its debate over the appropriateness of physician-

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51. *Id.* at 921-22 (discounting conclusion CSA granted Attorney General authority to make unilateral determinations regarding medical practice). In analyzing the CSA, the Court noted that the structure of the CSA "conveys unwillingness to cede medical judgments to an Executive official who lacks medical expertise." *Id.* at 921.

52. 126 S. Ct. at 923 (reaffirming congressional authority to regulate medical practice).

53. *Id.* at 927 (Scalia, J., dissenting) (criticizing majority's rejection of *Auer* deference when regulation paraphrases ambiguous statute's language); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (rejecting substantial deference per *Chevron* when agency interpretation not developed via congressionally authorized means).

54. 126 S. Ct. at 915-16 (determining regulation paraphrasing ambiguous statute not entitled to substantial deference per *Auer*).

55. See *Merrill & Hickman*, *supra* note 23, at 900 (discussing detrimental effect resulting from affording substantial deference to interpretive rules based on ambiguous statutes). The authors note that allowing this result risks enabling agencies to evade procedural requirements of the APA and avoid the qualities of "public participation associated with legislative rules." *Id.*

56. See *supra* note 10 (describing Ashcroft's failed efforts to ban physician-assisted suicide while in Congress).

2007]

CASE COMMENT

557

assisted suicide and state legislatures remain free to determine its legality.

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