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## Who Defers to Whom? The Attorney General Targets Oregon's Death With Dignity Act

### Cover Page Footnote

J.D. Candidate, 2003, Fordham University School of Law. I wish to thank Professor Matthew Diller, Professor James E. Fleming, and Professor Abner S. Greene for their insights; my family for always being there; my friends at Fordham for their support; and, most especially, my wife Georgetta for her unending patience, understanding, and love.

# WHO DEFERS TO WHOM? THE ATTORNEY GENERAL TARGETS OREGON'S DEATH WITH DIGNITY ACT

*Joseph Cordaro\**

*"[A] State cannot, by its unilateral action, take its physicians' conduct out of the scope of otherwise nationally applicable prohibitions on the dispensing of controlled substances."*

—U.S. Department of Justice<sup>1</sup>

*"You don't hear me complaining about Oregon's law."*

—Justice Antonin Scalia<sup>2</sup>

## INTRODUCTION

In 1986, Peggy Sutherland was diagnosed with lung cancer.<sup>3</sup> For fourteen years she fought back courageously, but in 2000 the cancer launched a painful, and decisive, attack against the bones of the sixty-eight-year-old Oregon resident.<sup>4</sup> After three major surgeries,<sup>5</sup> chemotherapy, and implantation of a device that pumped painkillers into her spinal fluid, Peggy's life became one of constant pain and incapacity, and her sickbed defined the physical limits of her world.<sup>6</sup> In most states, Peggy would have been forced to endure constant agony as the cancer advanced to its inevitable victory.<sup>7</sup> Oregon,

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1. Memorandum from Office of Legal Counsel, U.S. Dep't of Justice to John Ashcroft, Attorney General of the United States 16 (June 27, 2001) (on file with *Fordham Law Review*) [hereinafter OLC Memorandum].

2. Sam Howe Verhovek, *Government and Oregon Vie over Doctor-Aided Suicide*, N.Y. Times, Mar. 23, 2002, at A11.

3. Carol M. Ostrom, *Ore. Suicides Steady, Still Sharply Divisive*, Seattle Times, Feb. 10, 2002, at B1.

4. Susan Okie, *'I Should Die the Way I Want To,'* Wash. Post, Jan. 1, 2002, at A1.

5. Ostrom, *supra* note 3.

6. Okie, *supra* note 4. Peggy's symptoms also included breathing difficulties and periodic coughing up of blood. *Id.*

7. Thirty-six states and territories explicitly prohibit the assistance or promotion of suicide; three states have homicide statutes that would encompass physician-

however, is not “most states.” Since 1999, Oregon law has permitted residents to use the ultimate weapon against the final assault of a terminal disease: physician-assisted suicide.<sup>8</sup> Under the provisions of Oregon’s Death with Dignity Act,<sup>9</sup> competent Oregonians who are terminally ill<sup>10</sup> may request medication for the purpose of ending their lives “in a humane and dignified manner.”<sup>11</sup>

Late in 2000, Peggy informed her physician that she wanted to take advantage of the Death with Dignity Act.<sup>12</sup> After the mandatory fifteen-day waiting period, Peggy’s daughter Julie McMurchie picked up a prescription for secobarbital, which was the most commonly-used medication for this purpose at the time.<sup>13</sup> On January 25, 2001, Peggy’s family gathered in her bedroom and together read the Twenty-Third Psalm.<sup>14</sup> When they finished, Peggy drank the medication.<sup>15</sup> Julie later remembered, “I think within five minutes she was asleep. Within 20, she passed away. . . . I think she loved her five children an awful lot and wanted to leave them something. After just an awful, wretched several months . . . we were given a gift that morning.”<sup>16</sup>

Under the Model Penal Code and most state statutes, such gifts are prohibited, and Peggy’s physician would have been powerless to grant

assisted suicide; six states and the District of Columbia, in absence of such laws, have condemned the practice; and Maryland’s Attorney General equates physician-assisted suicide with crimes constituting reckless endangerment. See Christine Neylon O’Brien & Gerald A. Madek, *Physician-Assisted Suicide: New Protocol for a Rightful Death*, 77 Neb. L. Rev. 229, 275-76 (1998). For a listing of the various state statutes, see *id.* at 275 nn.314-17.

8. See Or. Rev. Stat. § 127.805 (2001) (permitting residents suffering from terminal illnesses to commit suicide with the assistance of a physician). On March 7, 2002, the Hawaii House of Representatives approved two bills that would make Hawaii the second state to permit physician-assisted suicide, but these bills face potential opposition in the Hawaii Senate. *Assisted Suicide Measures Gain*, L.A. Times, Mar. 8, 2002, at A42.

9. Or. Rev. Stat. §§ 127.800-127.897.

10. For the purposes of the statute, patients must be suffering from “terminal disease,” which is defined as “incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months.” *Id.* § 127.800(12).

11. *Id.* § 127.805.

12. Okie, *supra* note 4.

13. *Id.* In May 2001, pharmaceutical corporation Eli Lilly stopped producing secobarbital. Or. Dep’t of Human Services, Fourth Annual Report on Oregon’s Death with Dignity Act 10 (2002), available at <http://www.ohd.hr.state.or.us/chs/pas/01pasrpt.pdf> [hereinafter Fourth Annual Report]. Patients who did not ingest secobarbital in 2001 ingested pentobarbital. *Id.*

14. Okie, *supra* note 4. The Twenty-Third Psalm begins: “The Lord is my shepherd; I shall not want.” *Psalms* 23.

15. Okie, *supra* note 4. Patients sometimes take a shot of brandy after ingesting the medication. See Timothy Egan, *First Death Under an Assisted-Suicide Law*, N.Y. Times, Mar. 26, 1998, at A14.

16. Okie, *supra* note 4 (second alteration in original).

her request for the medication necessary to end her suffering.<sup>17</sup> Since June 1998, Congressional opponents of assisted suicide have attempted, with little success, to bring Oregon into line with the Code and these other states.<sup>18</sup> In November 2001, with matters apparently stalled indefinitely on Capitol Hill, the United States Department of Justice (“DOJ”) leapt into the crusade against the Death with Dignity Act.<sup>19</sup> In an interpretive rule dated November 6, 2001, Attorney General John Ashcroft determined that physician-assisted suicide was not a “legitimate medical purpose” under Drug Enforcement Administration (“DEA”) regulation 21 C.F.R. § 1306.04(a), and that the prescribing or administering of controlled substances for the purpose of assisting suicide was therefore “inconsistent with the public interest” under the Controlled Substances Act (“CSA”).<sup>20</sup> Accordingly, Ashcroft directed the DEA Administrator Asa Hutchinson to implement this determination, which reversed former Attorney General Janet Reno’s permissive approach toward the Death with Dignity Act,<sup>21</sup> by subjecting non-compliant physicians to possible suspension or revocation of their licenses.<sup>22</sup> The Oregon Department of Justice immediately sought a temporary restraining order, which United States District Judge Robert E. Jones granted.<sup>23</sup> On April 17, 2002, Judge Jones issued a permanent injunction preventing the DOJ “from enforcing, applying, or otherwise giving any legal effect to the Ashcroft directive.”<sup>24</sup>

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17. Model Penal Code § 210.5(2) (1980); *see supra* note 7.

18. See Joy Fallek, Note, *The Pain Relief Promotion Act: Will it Spell Death to “Death with Dignity” or Is It Unconstitutional?*, 27 Fordham Urb. L.J. 1739, 1746-58 (2000) (describing the failed Lethal Drug Abuse and Prevention Act of 1998 and the now-delayed Pain Relief Promotion Act of 1999).

19. See *infra* text accompanying notes 85-89.

20. Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001); *see* 21 U.S.C. § 824(a) (2000) (granting the Attorney General power to suspend or revoke the licenses of physicians for, *inter alia*, actions “inconsistent with the public interest”).

21. See Letter from Janet Reno, U.S. Attorney General, to Henry J. Hyde, Chairman, Committee on the Judiciary, U.S. House of Representatives (June 5, 1998), available at <http://www.house.gov/judiciary/attygen.htm> [hereinafter Reno Letter] (concluding that “the CSA does not authorize DEA to prosecute, or to revoke the DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law”).

22. Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. at 56,608.

23. Oregon v. Ashcroft, No. 01-1647 (D. Or. Nov. 8, 2001), available at <http://www.dwd.org/pdf/transcript.pdf>.

24. Oregon v. Ashcroft, No. 01-1647-JO, slip op. at 5 (D. Or. Apr. 17, 2002). Judge Jones’s thirty-page opinion focused on the language of the CSA, the legislative history of the statute, and the lack of precedential support for prosecuting a physician under the CSA for actions in compliance with state law. *Id.* at 19-26. While acknowledging the existence of the administrative law issues discussed in this Note, Judge Jones declined to resolve the case as an administrative matter and instead held that the DOJ interpretive rule “exceeds the authority delegated to the defendants [the DOJ] under the CSA.” *Id.* at 14.

Should the DOJ decide to appeal, a key battleground in the litigation will be whether the reviewing court should defer to Ashcroft's interpretation of 21 C.F.R. § 1306.04, which in turn interprets the CSA. This Note will examine this issue from an administrative law standpoint. Part I, Section A will explain the important provisions of the Death with Dignity Act and the uneasy relationship between the Act and the federal government. Specifically, the section will explore the failed equal protection challenge to the Act;<sup>25</sup> Attorney General Janet Reno's refusal to enforce the CSA against Oregon doctors who assisted suicides;<sup>26</sup> the fight against the Act in the Congress;<sup>27</sup> and, finally, the Ashcroft directive that reversed Ms. Reno's ruling.<sup>28</sup>

Part I, Section B examines the legal background against which this battle likely will play out. The section begins with an examination of two very important federal statutes, one obviously implicated in the controversy, and one perhaps not so obviously implicated, but just as important: the CSA<sup>29</sup> and the Administrative Procedure Act ("APA").<sup>30</sup> The section surveys the Supreme Court's key administrative procedure decisions in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>31</sup> *Bowles v. Seminole Rock & Sand Co.*,<sup>32</sup> *Skidmore v. Swift & Co.*,<sup>33</sup> and recent cases building on these important decisions.<sup>34</sup> This survey of rulemaking decisions also includes an explanation of the avoidance canon of statutory construction, which dictates that courts, where possible, interpret statutes in a manner that avoids constitutional conflict, unless there is clear congressional intent to the contrary.<sup>35</sup> The section concludes with a brief survey of the Supreme Court cases that have assessed the so-called "right to die" and the roles that the federal and state governments have to play in determining this right.<sup>36</sup>

With Part I of this Note having outlined the historical and legal background of the controversy, Part II focuses on the likely arguments for both sides on the issue of whether the Attorney General's order to the DEA is entitled to judicial deference. Section A explores the argument that the DOJ directive is not entitled to judicial deference.

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25. See *infra* text accompanying notes 56-60.

26. See Reno Letter, *supra* note 21; *infra* text accompanying note 68.

27. See *infra* text accompanying notes 70-80.

28. See *infra* text accompanying notes 85-89.

29. See *infra* Part I.B.1.

30. See *infra* Part I.B.2.a.

31. 467 U.S. 837 (1984).

32. 325 U.S. 410 (1945).

33. 323 U.S. 134 (1944).

34. Two recent Supreme Court decisions are of particular importance: *Christensen v. Harris County*, 529 U.S. 576 (2000), and *Auer v. Robbins*, 519 U.S. 452 (1997). See *infra* Part I.B.2.ii-iv.

35. See *infra* Part I.B.3.

36. See *infra* Part I.B.4.

At the heart of this argument is *Christensen v. Harris County*,<sup>37</sup> in which the Supreme Court refused to defer to an agency's interpretation of a statute because, like the directive at issue here, the interpretation was not the product of formal adjudication or notice-and-comment rulemaking.<sup>38</sup> The argument continues by offering that the proper means for reviewing the directive is *Skidmore* analysis, in which the court assesses, among other things, the consistency of the interpretation with prior interpretations and the expertise of the promulgating agency.<sup>39</sup>

Section B, by contrast, focuses on DOJ's contention that physician-assisted suicide is not a "legitimate medical purpose" under 21 C.F.R. § 1306.04 and therefore runs afoul of the CSA. The section then examines the argument that judicial deference to DOJ's interpretation of the regulation is appropriate under the Supreme Court's decision in *Auer v. Robbins*,<sup>40</sup> in which the Court deferred to an agency's interpretation of its own regulation.<sup>41</sup> The DOJ interpretive rule, itself an interpretation of a regulation promulgated by the DEA, one of its own agencies, fits into this schema.<sup>42</sup>

Part III engages these arguments and contends first that automatic deference under *Seminole Rock* should not apply to administrative interpretations of regulations that do not arise out of formal adjudication or notice-and-comment rulemaking.<sup>43</sup> Courts, therefore, should apply *Skidmore* to these interpretations, thereby assuring that an agency's informal interpretations of regulations and statutes are subject to a closer judicial scrutiny than formal interpretations.<sup>44</sup> The part argues further that application of *Skidmore* analysis to the DOJ interpretive rule should result in scant, if any, respect for its reading of 21 C.F.R. § 1306.04 and the CSA because the interpretation reverses prior DOJ policy and the promulgating agency lacks expertise in the field at issue (medicine). In addition, under the avoidance canon, the courts should not permit the DOJ to construe the CSA in a way that overturns state legislation, thereby leading to potentially serious federalism issues.<sup>45</sup> Therefore, even if the DOJ interpretive rule

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37. 529 U.S. 576 (2000).

38. *Id.* at 587.

39. See *infra* text accompanying notes 213-20.

40. 519 U.S. 452 (1997).

41. *Id.* at 461. The agency interpretation at issue in *Auer* was the Secretary of Labor's reading of 21 C.F.R. § 541.118(a). *Auer*, 519 U.S. at 455.

42. See *infra* Part II.B.

43. See *infra* Part III.A.

44. See *infra* Part III.B.2.

45. This tool of statutory construction is sometimes known as the avoidance canon. Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759, 835 (1997); see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 599 (1992) (calling the avoidance canon "[p]robably the most important of the constitutionally based canons"). The

were eligible for some form of deference, the courts should prefer the interpretation of the statute epitomized by the hands-off approach of Attorney General Reno, who refused to apply the CSA to Oregon physicians who assisted suicides in compliance with the laws of their state.<sup>46</sup>

This Note concludes that the proper interpretation of 21 C.F.R. § 1306.04 with respect to physician-assisted suicide is that of Attorney General Reno in 1998. Because Attorney General Ashcroft's interpretation lacks persuasiveness under *Skidmore* and implicates potential constitutional questions, the court should revert to the Reno view that the DOJ may not use either 21 C.F.R. § 1306.04 or the CSA to punish physicians who assist suicides in compliance with Oregon law.

### I. THE HISTORICAL AND LEGAL BACKGROUND OF THE CONFRONTATION BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE AND THE STATE OF OREGON

The present incarnation of the Death with Dignity Act is the product of a four-year gestation period.<sup>47</sup> As currently codified, the Act provides the following:

An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner.<sup>48</sup>

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general philosophy behind the canon, a "cardinal principle" in Supreme Court jurisprudence, is that, in the absence of clear congressional intent to the contrary, the courts should decline an otherwise acceptable interpretation of a statute if that interpretation leads to constitutional problems and instead construe the statute in a manner that avoids these problems. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see infra* Part III.B.3.

46. *See* Reno Letter, *supra* note 21.

47. *See* Fallek, *supra* note 18, at 1740-43.

48. Or. Rev. Stat. § 127.805(1) (2001). The Death with Dignity Act contains a number of procedural safeguards to prevent potential misuse or abuse. *See* Fallek, *supra* note 18, at 1743. In addition to the limitation that patients must be suffering from a "terminal disease," *see supra* note 10, age or disability may not be the sole qualifications for utilization of the Death with Dignity Act. *Id.* § 127.805(2). Only "capable" persons qualify for the provisions of the Act, *id.* § 127.805(1), and "capable," according to the statutory language,

means that in the opinion of a court or in the opinion of the patient's attending physician or consulting physician, psychiatrist or psychologist, a patient has the ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the patient's manner of communicating if those persons are available.

*Id.* § 127.800(3). One who seeks to use the Death with Dignity Act to commit suicide must make two oral requests to his or her physician, followed by a written request, and fifteen days must separate the two oral requests. Or. Rev. Stat. § 127.840. Two



A maelstrom of statutes,<sup>49</sup> judicial precedents,<sup>50</sup> voter referenda,<sup>51</sup> court challenges,<sup>52</sup> and one all-important DEA regulation<sup>53</sup> surrounds this statute. This part begins by examining the ongoing love-hate (mostly hate) relationship between the federal government and the Death with Dignity Act.

A. *The Death with Dignity Act and the Ongoing Federal Effort To Prevent Its Usage*

The Death with Dignity Act became law after a four-year gestation period that saw two voter referenda, a district court injunction which was vacated by a circuit court, and a bitter fight in the United States Congress.<sup>54</sup> On November 8, 1994, the Death with Dignity Act made its first appearance at the Oregon ballot box as Ballot Measure 16, which the voters passed by an approximate margin of 51% to 49%.<sup>55</sup>

people must witness this written request in the presence of the patient, and the witnesses must attest that they believe that the patient is competent and making a voluntary decision. *Id.* § 127.810(1). As a further safeguard, one of the witnesses may not be a relative through blood, adoption, or marriage, a potential heir, an employee or operator of the patient's health-care facility, or the patient's doctor. *Id.* § 127.810(2)-(3).

The Act also provides that the physician must make a judgment as to the patient's competence and must discuss alternative means of care with the patient. *Id.* § 127.815(1)(a), (1)(c)(E). A second physician's opinion is necessary to confirm that the patient is competent, suffering from a terminal disease as defined in the statute, and acting voluntarily. *Id.* § 127.815(1)(d). If either physician believes that depression or mental disorder is present, the patient must be sent to a psychologist or psychiatrist for a final determination. *Id.* § 127.825. If the patient is found to suffer from depression or mental disorder, he or she cannot utilize the Death with Dignity Act. *Id.*

49. See Administrative Procedure Act, 5 U.S.C. § 553 (2000); Controlled Substances Act, 21 U.S.C. §§ 823, 824, 841 (2000).

50. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001) (interpreting the *Chevron* standard of deference with respect to administrative interpretations); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486 (2001) (refusing to read a medical-use exception for marijuana into the CSA); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001) (interpreting the avoidance principle); *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (holding that states may prohibit assistance of suicide); *United States v. Moore*, 423 U.S. 122, 138 (1975) (holding that 21 U.S.C. § 841(a) is applicable to physicians).

51. See *infra* text accompanying notes 55, 62-63

52. See *Oregon v. Ashcroft*, No. 01-1647 (D. Or. Nov. 8, 2001), available at <http://www.dwd.org/pdf/transcript.pdf>; *Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995), vacated by 107 F.3d 1382 (9th Cir. 1997).

53. See Purpose of Issue of Prescription, 21 C.F.R. § 1306.04(a) (2001).

54. *Banning Use of Drugs for Assisted Suicide: Hearing on H.R. 4006 Before the House Subcomm. on the Constitution House Comm. on the Judiciary*, 105th Cong. (1998) (statement of John A. Kitzhaber, M.D., Governor, State of Oregon), available at 1998 WL 403636. For a comprehensive history of the Death with Dignity Act, see *Oregon Death with Dignity: Respect the Will of the People*, at <http://www.dwd.org/law/chronology.asp> (last visited Apr. 8, 2002) [hereinafter *DWDA Web Site*].

55. *U.S. Judge Keeps Oregon's New Suicide Law in Limbo*, L.A. Times, Dec. 28,

After placing a preliminary injunction on the Death with Dignity Act,<sup>56</sup> District Court Judge Michael Hogan declared that Measure 16 violated the Equal Protection Clause of the Fourteenth Amendment.<sup>57</sup> In February 1997, however, the Ninth Circuit ruled that the federal courts lacked jurisdiction to hear the matter.<sup>58</sup> The court vacated Judge Hogan's ruling and dismissed the complaint against the Death with Dignity Act.<sup>59</sup> After the Supreme Court denied certiorari in October,<sup>60</sup> the Death with Dignity Act again went to the voters of Oregon.<sup>61</sup> On November 4, 1997, Oregon voters considered Measure 51, which was structured as a referendum on the repeal of Measure 16.<sup>62</sup> The Oregon voters decisively rejected Measure 51 by a 60%-40% margin, and the Death with Dignity Act was retained.<sup>63</sup> At this point, just when it looked as though the Act's three-year fight for existence had come to an end, the federal government attempted to intervene.

Soon after Oregonians rejected Measure 51, DEA Administrator Thomas A. Constantine, acting at the request of Senator Orrin Hatch<sup>64</sup> and Representative Henry J. Hyde,<sup>65</sup> issued a policy statement warning that doctors who assisted suicides by prescribing drugs to terminally ill patients could be in violation of the CSA.<sup>66</sup> Constantine opined that physician-assisted suicide was not a "legitimate medical purpose" and that those who assisted suicides risked DEA revocation of their registrations under the CSA.<sup>67</sup> On June 9, 1998, however,

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1994, at A5.

56. *Id.*

57. *Lee*, 891 F. Supp. at 1437. Judge Hogan concluded that "Measure 16 provide[d] a means to commit suicide to a severely overinclusive class" including those who may have been "competent, incompetent, unduly influenced, or abused by others." *Id.*

58. *Lee v. Oregon*, 107 F.3d 1382, 1386 (9th Cir. 1997).

59. *Id.*

60. *Lee v. Harclerod*, 522 U.S. 927, 927 (1997).

61. Lynda Gorov, *Campaign to Repeal Assisted Suicide Law Rivets Oregon Voters*, Boston Globe, Oct. 27, 1997, at A1.

62. Judith Graham & Judy Peres, *Assisted-Suicide Door Opens Wide: Vote Puts Oregon at Forefront*, Chi. Trib., Nov. 6, 1997, at 1.

63. DWDA Web Site, *supra* note 54.

64. Mr. Hatch, a republican senator from Utah, was elected to the Senate in 1976 and served as Chair of the Senate Committee on the Judiciary from 1995-2001. See Neil A. Lewis, *At the Bar: A Republican Senator Forces the Administration to Rethink Its Strategy on Judicial Appointments*, N.Y. Times, Dec. 9, 1994, at B7.

65. Mr. Hyde, a republican representative from Illinois, was elected to the House of Representatives in 1974 and served as Chair of the House Committee on the Judiciary from 1995-2001. Biography: Congressman Henry J. Hyde, at <http://www.house.gov/hyde/bio.htm> (last visited Apr. 8, 2002).

66. John A. Brennan, Note, *A State Based Right to Physician Assisted Suicide*, 79 B.U.L. Rev. 231, 259 (1999).

67. Letter from Thomas A. Constantine, Administrator, Drug Enforcement Administration, to Representative Henry J. Hyde, Chairman, Judiciary Committee, U.S. House of Representatives (Nov. 5, 1997), available at <http://www.house.gov/judiciary/constantine.htm>.

Attorney General Reno reversed Mr. Constantine's opinion in a letter to Representative Hyde:

There is no evidence that Congress, in the CSA, intended 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* in the absence of a federal law prohibiting that practice.

....

... [W]e have concluded that the CSA does not authorize DEA to prosecute, or to revoke the DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law.<sup>68</sup>

With this ruling having effectively relegated the executive branch to the sidelines, Congress became the primary site for the next round of the federal battle against the Death with Dignity Act.<sup>69</sup>

The same day as the Reno ruling, Representative Hyde introduced the "Lethal Drug Abuse Prevention Act" (H.R. 4006) in the House, and Senator Don Nickles<sup>70</sup> introduced a companion bill in the Senate.<sup>71</sup> H.R. 4006 purported to reverse the Reno ruling by giving the DEA power to rescind the registrations of physicians who intentionally "dispense or distribute a controlled substance with a purpose of causing, or assisting in causing, the suicide or euthanasia of any individual."<sup>72</sup> Because of significant opposition, however, the House took no action on H.R. 4006 before the expiration of the Congressional session in late 1998.<sup>73</sup>

In 1999, Senator Nickles and Representative Hyde launched a second attack on the Death with Dignity Act with the Pain Relief Promotion Act ("PRPA"), which they introduced concurrently in the Senate and House.<sup>74</sup> The PRPA sought to allow a physician to distribute large quantities of painkilling medications to a patient even

68. Reno Letter, *supra* note 21 (emphasis added). The emphasized phrase in Attorney General Reno's ruling closely parallels the key language of 21 C.F.R. § 1306.04: "legitimate medical purpose." On March 24, 1998, in the interim between Constantine's letter and Attorney General Janet Reno's final ruling on the matter, a female victim of breast cancer from Portland, Oregon became the first person to commit assisted suicide under the Death with Dignity Act. Egan, *supra* note 15.

69. Raphael Cohen-Almagor & Monica G. Hartman, *The Oregon Death with Dignity Act: Reviews and Proposals for Improvement*, 27 J. Legis. 269, 276 (2001).

70. Mr. Nickles, a representative from Oklahoma, was elected to the Senate in 1980 and has served as Assistant Republican Leader since 1996. See Biography, Senator Don Nickles, at <http://www.senate.gov/~nickles/personal/biography.cfm> (last visited Apr. 8, 2002).

71. Fallek, *supra* note 18, at 1746.

72. H.R. 4006, 105th Cong. § 2(c)(2) (1998), available at <http://www.missourilife.org/legislation/drugsuicide.htm>.

73. Fallek, *supra* note 18, at 1748.

74. *Id.*

if the *unintended* result was the death of the patient.<sup>75</sup> In contrast, physicians who *intentionally* distributed controlled substances for the purposes of assisting suicide would have their licenses suspended and would be subject to *criminal prosecution* under the CSA.<sup>76</sup> On October 27, 1999, the House of Representatives passed the PRPA by a vote of 271-156.<sup>77</sup> Senate Republicans, however, never managed to get the PRPA to the floor for a vote.<sup>78</sup> Amid filibuster threats from Oregon's Senator Ron Wyden,<sup>79</sup> the 1999 and 2000 sessions came and went without a vote on the PRPA.<sup>80</sup> In the meantime, Texas Governor George W. Bush, who supported the PRPA during a campaign stop in Oregon,<sup>81</sup> became President of the United States after a bitterly contested election.<sup>82</sup> He appointed John D. Ashcroft, former Governor of Missouri and recently-defeated United States Senator from that state,<sup>83</sup> to succeed Janet Reno as Attorney General.<sup>84</sup>

With the fight against the Death with Dignity Act indefinitely stalled in Congress, the DOJ jumped back into the fray.<sup>85</sup> In a November 6, 2001, "interpretive rule," Attorney General Ashcroft reversed Janet Reno's policy toward the Death with Dignity Act and

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75. Christin A. Batt, Comment, *The Pain Relief Promotion Act of 1999 and Physician-Assisted Suicide: A Call for Congressional Self-Restraint*, 38 San Diego L. Rev. 297, 308 (2001).

76. *Id.* at 309.

77. Final Vote Results for Roll Call 544, at <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1999&rollnumber=544> (last visited Apr. 8, 2002). Not surprisingly, all five of Oregon's representatives voted against passage. *Id.*

78. Stephanie Hendricks, Note, *Pain Relief, Death with Dignity, and Commerce: The Constitutionality of Congressional Attempts to Regulate Physician-Assisted Suicide in Oregon via the Commerce Clause after Lopez and Morrison*, 37 Willamette L. Rev. 691, 693 (2001).

79. Mr. Wyden, a democratic senator from Oregon, was elected to the Senate in 1996 after serving for fifteen years in the House of Representatives. United States Senator Ron Wyden, Biographical Information, at <http://www.senate.gov/~wyden/bio.htm> (last visited Apr. 8, 2002).

80. Robert A. Klinck, *Recent Development: Pain Relief Promotion Act*, 38 Harv. J. on Legis. 249, 253 (2001).

81. See R.G. Ratcliffe, *Bush Says His Plan Could Result in Privatizing of Social Security*, Houston Chron., May 17, 2000, at 4A.

82. Richard L. Berke & Katharine Q. Seelye, *Bush Pledges to be President for "One Nation," Not One Party; Gore, Conceding, Urges Unity*, N.Y. Times, Dec. 14, 2000, at A1.

83. John Ashcroft served two terms as Governor of Missouri from 1985 until 1993. He served as a United States Senator from that state from 1995 until he became Attorney General in 2001. See Laurie Goodstein, *Ashcroft's Life and Judgments are Steeped in Faith*, N.Y. Times, Jan. 14, 2001, § 1, at 22. In just one of the many unusual twists of the November 2000 election, Ashcroft lost his Senate seat to the late Missouri Governor Mel Carnahan, who died in a plane crash on October 16, 2000. *Dead Man Wins Race in Missouri*, N.Y. Times, Nov. 8, 2000, at A1.

84. David E. Sanger, *Conservative for Justice Post: Whitman Chosen to Head E.P.A.*, N.Y. Times, Dec. 23, 2000, at A1.

85. See Sam Howe Verhovek, *Federal Agents Are Directed To Stop Physicians Who Assist Suicides*, N.Y. Times, Nov. 7, 2001, at A20.

reinstated the original Constantine opinion.<sup>86</sup> According to Ashcroft's directive: "[A]ssisting suicide is not a 'legitimate medical purpose' within the meaning of 21 CFR § 1306.04 (2001), and . . . prescribing, dispensing, or administering federally controlled substances to assist suicide violates the CSA."<sup>87</sup> Ashcroft explicitly stated in this interpretive rule that physicians participating in assisted suicide could be punished by suspension or revocation of their licenses under the CSA.<sup>88</sup> The Attorney General based his reasoning in this two-page directive on a twenty-four page advisory opinion authored by two attorneys in the Office of Legal Counsel at DOJ, and this opinion delineated several legal, ethical, and policy-related arguments supporting Ashcroft's decision.<sup>89</sup>

The dispute between Oregon and the DOJ centers around the reach of the CSA with respect to physicians, agency rulemaking procedures under Supreme Court precedent, and the avoidance canon, with particular attention paid to federalism and right-to-die issues.<sup>90</sup> This part now turns to these issues.

## B. *The Legal Background*

### 1. The Controlled Substances Act

The Controlled Substances Act, which Congress enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, regulates and controls the trafficking of illicit drugs and provides penalties for statutory infractions.<sup>91</sup> The statute separates the

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86. See *Dispensing of Controlled Substances to Assist Suicide*, 66 Fed. Reg. 56,607, 56,607-08 (Nov. 9, 2001).

87. *Id.* at 56,608.

88. *Id.* Notably, this DOJ interpretive rule mentioned nothing on the subject of criminal prosecution of physicians, an important component of the Pain Relief Promotion Act. See *supra* text accompanying note 76.

89. OLC Memorandum, *supra* note 1, *passim*. This opinion was the work of Deputy Assistant Attorney General Sheldon Bradshaw and Special Counsel Robert J. Delahunty. *Id.* at 1. Though not available in the Federal Register, the full opinion may be obtained from the Office of Diversion Control of the Drug Enforcement Administration. *Dispensing of Controlled Substances to Assist Suicide*, 66 Fed. Reg. at 56,608.

90. See Memorandum in Support of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment and in Opposition to Plaintiff's Motions for Summary Judgment at 12-35, 44-52, *Oregon v. Ashcroft* (D. Or. 2002) (No. 01-1647-JO), available at [http://www.compassionindying.org/news/ashcroft\\_ruling/DOJ\\_Memo\\_SJ.pdf](http://www.compassionindying.org/news/ashcroft_ruling/DOJ_Memo_SJ.pdf) (last visited Apr. 8, 2002) [hereinafter DOJ Memorandum] (discussing the reach of the CSA with respect to physicians, the constitutional avoidance canon, and the APA); Oregon's Memorandum in Support of Motion for Summary Judgment at 20-26, *Oregon v. Ashcroft* (D. Or. 2002) (No. 01-1647-JO), available at <http://www.doj.state.or.us/ags09436.pdf> (last visited Apr. 8, 2002) [hereinafter Oregon Memorandum] (discussing same issues).

91. Lisa Scott, *The Pleasure Principle: A Critical Examination of Federal Scheduling of Controlled Substances*, 29 Sw. U. L. Rev. 447, 451-52 (2000). The

differing varieties of illicit substances into five schedules.<sup>92</sup> The listing of a drug in a particular schedule gives an indication of factors such as its “potential for abuse”;<sup>93</sup> whether it has a recognized “medical use in treatment”;<sup>94</sup> and whether “[a]buse of the drug or other substances may lead to severe psychological or physical dependence.”<sup>95</sup> Schedule I, for example, contains highly addictive drugs such as lysergic acid diethylamide (“LSD”), marijuana, and heroin.<sup>96</sup> Substances in Schedule II also have a high addiction potential, but Congress separated them from Schedule I because those substances also have accepted medical uses.<sup>97</sup> Pentobarbital and secobarbital, the two most commonly prescribed assisted-suicide drugs in Oregon,<sup>98</sup> fall into Schedule II.<sup>99</sup> Authority to add substances to the schedules rests with the Attorney General,<sup>100</sup> and the statute compels all who seek to dispense controlled substances, including physicians, to register with the Attorney General.<sup>101</sup>

Before Congress amended the CSA in 1984, the Attorney General maintained the authority to suspend or revoke the registrations of a physician only for the following reasons: “1) falsification of an application to dispense, distribute, or manufacture a controlled substance, 2) a felony conviction related to a controlled substance, or 3) denial, revocation, or suspension of a state license or registration.”<sup>102</sup> The 1984 amendment, known as the Dangerous Drug Diversion Control Act, added an important provision giving the Attorney General additional power to “deny an application for . . . registration if he determines that the issuance of such registration would be inconsistent with the public interest.”<sup>103</sup> The Attorney

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constitutionality of the CSA is beyond question. *See United States v. Lopez*, 459 F.2d 949, 953 (5th Cir. 1972) (holding that Congress acted within the scope of its Commerce Clause power when it passed the CSA).

92. 21 U.S.C. § 812(b) (2000); Scott, *supra* note 91, at 452-55.

93. 21 U.S.C. § 812(b)(1)(A).

94. *Id.* § 812(b)(1)(B).

95. *Id.* § 812(b)(2)(C).

96. *Id.* § 812(c) Sched. I.

97. *Id.* § 812(b)(2)(B); *see United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486 (2001) (denying the existence of a medical exception for the penalties accompanying the illegal use of Schedule I drugs such as marijuana).

98. Fourth Annual Report, *supra* note 13, at 4.

99. U.S. Dep't of Justice, Drug Enforcement Admin., Diversion Control Program, *Controlled Substances by Schedule*, at [http://www.deadiversion.usdoj.gov/schedules/listby\\_sched/sched2.htm](http://www.deadiversion.usdoj.gov/schedules/listby_sched/sched2.htm) (last visited Apr. 8, 2002).

100. 21 U.S.C. § 811(a)(1).

101. *Id.* § 822(a)(2).

102. Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California's Compassionate Use Act*, 2 DePaul J. Health Care L. 155, 169 n.113 (1997).

103. 21 U.S.C. § 823(f); Bergstrom, *supra* note 102, at 169 n.113. The CSA lists five factors that the Attorney General should consider in determining the “public interest”: (1) recommendations of the State licensing board; (2) the applicant's dispensing or research experience; (3) the applicant's criminal record for controlled

General also has power to revoke or suspend existing registrations for the same reason.<sup>104</sup>

The responsibility for administering and enforcing the CSA rests with the DOJ, and specifically the Attorney General.<sup>105</sup> One of the ways in which the DOJ, like any federal agency, interprets and enforces statutes is through the promulgation of regulations.<sup>106</sup> The most important DOJ regulation for the purposes of the Death with Dignity Act is 21 C.F.R. § 1306.04(a): “A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”<sup>107</sup> Because the Attorney General has used it as his legal basis for concluding that physicians’ licenses may be revoked or suspended under the CSA for assisting in suicides, 21 C.F.R. § 1306.04 is at the center of the Death with Dignity controversy.<sup>108</sup>

Before Attorney General Ashcroft may enforce 21 C.F.R. § 1306.04 or the CSA against Oregon physicians, however, he must confront the fact that neither the regulation nor the statute explicitly prohibits physician-assisted suicide. Consequently, an interpretation of the regulation or statute, or both, is required.<sup>109</sup> Agency interpretations of statutes and regulations are commonplace,<sup>110</sup> and, in large part, they are governed by the APA and the Supreme Court’s APA precedents.<sup>111</sup>

## 2. Administrative Rulemaking

### a. *The Administrative Procedure Act*

Promulgated in 1946, the APA<sup>112</sup> sets the general standards for agency rulemaking and allows public accessibility and participation in

substance offenses; (4) compliance with local, state, and federal controlled substance laws; (5) “other conduct which may threaten the public health and safety.” 21 U.S.C. § 823(f).

104. 21 U.S.C. § 824(a).

105. *See id.* § 821.

106. *See* Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 112 (2000).

107. Purpose of Issue of Prescription, 21 C.F.R. § 1306.04 (2001). This regulation officially is listed as a DEA regulation, but DEA falls under the auspices of DOJ. For the sake of simplicity, this Note will refer to the regulation as a DOJ regulation. Incidentally, 21 C.F.R. § 1306.04 is similar to one of Oregon’s statutes, which reads: “Except in good faith and in the course of professional practice only, a practitioner or a pharmacist may not dispense controlled substances.” Or. Rev. Stat. § 475.185(5) (2001).

108. *See* Verhovek, *supra* note 85.

109. *See* Angstreich, *supra* note 106, at 87-88.

110. *See id.* (describing the large set of “unpersuasive but reasonable interpretations of ambiguous regulations and statutes”).

111. *Id.* at 76.

112. *See* 5 U.S.C. §§ 551-59 (2000).

the process.<sup>113</sup> Among other things, the APA provides for notice-and-comment rulemaking and sets the ground rules for statutorily-mandated proceedings and adjudications.<sup>114</sup> The notice-and-comment provision requires that “[g]eneral notice of proposed rule making shall be published in the Federal Register” and that such notice must contain the “time, place, and nature of public rule making proceedings.”<sup>115</sup> A rule that follows this format is called a “legislative rule,” and this type of rule carries the force of law and must be affirmed by courts as long as the agency has validly exercised its authority to promulgate it.<sup>116</sup> Several CSA provisions directly implicate this provision of the APA.<sup>117</sup> For example, the CSA requires the Attorney General to follow APA notice-and-comment requirements before adding a controlled substance to one of the five schedules.<sup>118</sup> Indeed, if the Attorney General wished to promulgate another regulation to implement the CSA, he or she would have to follow the notice-and-comment provisions of the APA.<sup>119</sup>

A statutory exception to the APA notice-and-comment requirement involves “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>120</sup> Though interpretive rules carry this exemption, making it easier for agencies to promulgate them quickly, interpretive rules differ from legislative rules because they do not bind the courts, public, or the agency itself.<sup>121</sup> Instead, a particular interpretive rule derives its power from the court itself when the court, during the process of statutory interpretation, chooses to defer to the interpretation contained in the rule.<sup>122</sup>

The Supreme Court recently has suggested that interpretive rules are not entitled to the same level of judicial deference as rules that are products of “formal adjudication or notice-and-comment rulemaking” (e.g., legislative rules or regulations).<sup>123</sup> Not surprisingly, many administrative law cases turn on how much deference the court should

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113. Jamie A. Yavelberg, Note, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. Aramco*, 42 Duke L.J. 166, 199 (1992).

114. 5 U.S.C. § 554.

115. *Id.* § 553(b).

116. 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 233-34 (3d ed. 1994).

117. See 21 U.S.C. §§ 811, 824(c) (2000).

118. *Id.* § 811(a).

119. See 1 Davis & Pierce, *supra* note 116, at 233-34.

120. 5 U.S.C. § 553(b)(A). As stated previously, Attorney General Ashcroft's directive to the DEA is an interpretive rule. See *supra* text accompanying note 86.

121. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995); 1 Davis & Pierce, *supra* note 116, at 234.

122. 1 Davis & Pierce, *supra* note 116, at 234.

123. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).



accord to a rule or interpretation that falls under the APA's exception to its notice-and-comment provision.<sup>124</sup>

### b. *Chevron* and *Seminole Rock*

A landmark administrative law case that grapples with the question of deference outside the notice-and-comment context is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>125</sup> In *Chevron*, the Supreme Court assessed an Environmental Protection Agency regulation interpreting the Clean Air Act.<sup>126</sup> The Court upheld the regulation:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.<sup>127</sup>

*Chevron* analysis involves a two-step process.<sup>128</sup> In "step one," the court assesses whether Congress has given the agency administrative authority to interpret the statute.<sup>129</sup> If the agency has interpretive authority, the court must determine whether Congress's intent is clear from the statute.<sup>130</sup> If so, "that is the end of the matter,"<sup>131</sup> and the court enforces the clear congressional intent.<sup>132</sup> If Congress's intent is ambiguous, however, the court proceeds to "step two."<sup>133</sup> In this step, the court will defer to the agency's reading of the statute if the interpretation is "based on a permissible construction of the statute."<sup>134</sup>

The *Chevron* doctrine generally applies when an agency attempts to interpret a statute.<sup>135</sup> In this case, however, the Attorney General's interpretive rule purports to interpret the "legitimate medical purpose" language of 21 C.F.R. § 1306.04, which is a *regulation*. A separate line of Supreme Court cases deals with this issue, and the wellspring of this line is *Bowles v. Seminole Rock & Sand Co.*<sup>136</sup> The Court in *Seminole Rock* ruled that an "administrative interpretation . . . becomes of controlling weight unless it is plainly

124. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001)

125. 467 U.S. 837 (1984).

126. *Id.* at 840.

127. *Id.* at 843-44.

128. See Gary Lawson, *Federal Administrative Law* 588 (1998).

129. Angstreich, *supra* note 106, at 62.

130. *Chevron*, 467 U.S. at 842.

131. *Id.* at 842-43.

132. *Id.*; Angstreich *supra* note 106, at 61.

133. Angstreich, *supra* note 106, at 61.

134. *Chevron*, 467 U.S. at 843.

135. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *Yale L.J.* 969, 979 (1992).

136. 325 U.S. 410 (1945).

erroneous or inconsistent with the regulation.”<sup>137</sup> This standard, which the Court continues to apply, obviously does not give a reviewing court much opportunity to overrule agency interpretations of regulations. As a practical matter, it would be difficult for an agency to construct an interpretation, no matter how controversial, that was plainly erroneous or inconsistent with the language of its regulation.

This fact has led to sharp criticism of *Seminole Rock*. Robert A. Anthony calls the *Seminole Rock* test “an indulgent, if not downright abject standard of deference,” and complains that *Seminole Rock* weakens *Chevron* by encouraging agencies to promulgate vague regulations and then “clarify” them with interpretive rules that receive *Seminole Rock* deference without notice-and-comment procedure.<sup>138</sup> John Manning also has considered this problem and suggests that courts should first address the *Chevron* issue of whether a regulation, as interpreted by the agency, violates the statute, and then, under *Seminole Rock*, whether the interpretation is consistent with the regulation.<sup>139</sup>

Scott H. Angstreich, in a spirited defense of *Seminole Rock*, disagrees with Manning’s approach and argues that *Seminole Rock* should be interdependent with the *Chevron* test.<sup>140</sup> If an agency interprets an ambiguous statute through one of its regulations, the court must decide if the regulation, as interpreted by the agency, represents an unreasonable reading of the statute (*Chevron* step two).<sup>141</sup> *Seminole Rock* analysis helps the court determine the meaning of the regulation in the first place: either the Court will defer to the agency’s reading of the regulation or it will reject the agency reading as plainly erroneous or inconsistent and substitute its own reading of the regulation.<sup>142</sup> At that point, the court can review the

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137. *Id.* at 414.

138. See Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 Admin. L.J. Am. U. 1, 4-5 (1996).

139. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 627 n.78 (1996). The problem with Manning’s approach is that a court “could hold that (a) the regulation, as interpreted, does not violate the statute [*Chevron*], but (b) the interpretation is inconsistent with the regulation [*Seminole Rock*].” Angstreich, *supra* note 106, at 73. Along these lines, at least one circuit court has said that “there are few, if any, cases in which the standard applicable under *Chevron* would yield a different result than the ‘plainly erroneous or inconsistent’ standard set forth in [*Seminole Rock*].” *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997). Some lower courts actually have applied *Chevron*, rather than *Seminole Rock*, to administrative interpretations of regulations. See *Samsung Elecs. Am., Inc v. United States*, 106 F.3d 376, 378 (Fed. Cir. 1997); *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 369 (4th Cir. 1994).

140. Angstreich, *supra* note 106, at 74.

141. *Id.* at 72-73.

142. See *id.* at 71-72.

relationship between regulation and statute under *Chevron*.<sup>143</sup> Hence, Angstreich claims, “[I]n many cases, the *Seminole Rock* one-step [test] will be a prelude to the *Chevron* two-step, because the output of applying *Seminole Rock* deference is an input in the application of *Chevron* deference.”<sup>144</sup>

c. *Chevron Deference and the Lack of Adjudication or Notice-and-Comment Rulemaking*

In determining the appropriateness of deferring to administrative interpretations, the Court, especially in recent times, has considered whether an agency promulgated the interpretation in accordance with APA rulemaking standards such as adjudication or notice-and-comment procedures (in other words, whether the interpretation resembles a legislative rule or an interpretive rule).<sup>145</sup> Two recent cases, *Auer v. Robbins*<sup>146</sup> and *Christensen v. Harris County*,<sup>147</sup> demonstrate that the application of *Chevron* to agency interpretations lacking adjudicatory or notice-and-comment pedigree depends on whether the agency is interpreting a regulation or whether it is interpreting a statute.<sup>148</sup>

In *Auer*, the Court considered a Labor Department interpretation of its own regulation,<sup>149</sup> which in turn interpreted the Fair Labor Standards Act.<sup>150</sup> Writing for a unanimous Court, Justice Scalia first determined that *Chevron* deference was appropriate with respect to the regulation itself because congressional intent was unclear (step one) and the regulation was not an unreasonable reading of the statute (step two).<sup>151</sup> Justice Scalia then moved to the Secretary’s interpretation of the *regulation*.<sup>152</sup> Despite the fact that the interpretation was put forth in an *amicus* brief and was not the product of adjudication or notice-and-comment rulemaking, Justice Scalia found it deserving of deference under the “plainly erroneous or inconsistent” standard of *Seminole Rock*.<sup>153</sup> Apparently untroubled

143. *Id.* at 72.

144. *Id.* at 73.

145. Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803, 833 (2001).

146. 519 U.S. 452 (1997)

147. 529 U.S. 576 (2000).

148. Angstreich, *supra* note 106, at 54-55.

149. The regulation at issue was 29 C.F.R. § 541.118(a) (2001), which outlines the so-called “salary basis test” by which the Secretary of Labor may determine whether a public-sector employee is exempt from overtime pay under 29 U.S.C. § 213(a)(1) (2000).

150. The provision of the Act at issue is codified at 29 U.S.C. § 213(a)(1). According to this provision, “bona fide executive, administrative, or professional” employees are exempt from overtime pay.

151. *Auer*, 519 U.S. at 457-58.

152. *Id.* at 461.

153. *Id.* at 461.

by the interpretation's informal genesis, Justice Scalia noted the following: "[The Secretary] is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute."<sup>154</sup>

In contrast, the Court in *Christensen* refused to defer to a Department of Labor opinion letter interpreting the Fair Labor Standards Act because the letter was not the product of formal adjudication or notice-and-comment rulemaking.<sup>155</sup> Eschewing the traditional *Chevron* two-step formula, Justice Thomas's majority opinion first found the Secretary's interpretation of the statute "unpersuasive"<sup>156</sup> and then substituted its own "better reading" of the statute.<sup>157</sup> The Court then moved to the *Chevron* question and noted that the interpretation in question was not "arrived at after . . . a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters . . . do not warrant *Chevron*-style deference."<sup>158</sup> For good measure, Justice Thomas noted that *Seminole Rock* deference was not appropriate for the Secretary's interpretation of the regulation because the language of the regulation was not ambiguous, and regulatory ambiguity is necessary for *Seminole Rock* to apply.<sup>159</sup>

The next term, the Supreme Court returned to the topic of *Chevron* deference in *United States v. Mead Corp.*<sup>160</sup> *Mead* presented the Court with a *Christensen*-type situation: an administrative interpretation of a statute.<sup>161</sup> Once again, the Court refused to apply *Chevron* to the interpretation because, among other reasons, the interpretation lacked notice-and-comment pedigree.<sup>162</sup> While refusing to bind itself to a bright-line rule, the Court noted that "the overwhelming number of . . . cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."<sup>163</sup>

Though *Auer* stands for the proposition that deference is permissible for informal agency interpretations of regulations, *Christensen* and *Mead* demonstrate that the Court will not defer to interpretations of statutes unless the interpretation under consideration is a legislative rule or the product of public proceedings outlined in the APA. That a court refuses to defer to an informal

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154. *Id.* at 463.

155. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). *But see* *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995) (using *Chevron* to uphold Comptroller's interpretation of the National Bank Act despite lack of adjudicatory or notice-and-comment rulemaking).

156. *Christensen*, 529 U.S. at 583.

157. *Id.* at 585.

158. *Id.* at 587.

159. *Id.* at 588.

160. 533 U.S. 218 (2001).

161. At issue in *Mead* were United States Customs Service interpretations of tariff classifications in 19 U.S.C. § 1202 with respect to three-ring binders. *See id.* at 221-25.

162. *Id.* at 233.

163. *Id.* at 230.

interpretation of a statute should not end the analysis, however, because the interpretation still may be entitled to some respect from the reviewing court.

#### d. Skidmore Analysis

As stated earlier, the Supreme Court is reluctant to apply *Chevron* to interpretations of statutes not arising out of notice-and-comment rulemaking. In such cases, courts may give “some deference” to an agency’s interpretation out of respect for the agency’s “specialized experience and broader investigations and information” concerning the subject-matter of the statute or regulation.<sup>164</sup>

This form of deference dates back to the Supreme Court’s 1944 decision in *Skidmore v. Swift & Co.*, in which a unanimous Court, speaking through Justice Jackson, ruled that an agency judgment is “entitled to respect,” and that 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.”<sup>165</sup> In *Mead*, the Supreme Court characterized the application of *Skidmore* to an agency interpretation not as a matter of “deference,” as with *Chevron*, but as a matter of “respect according to its persuasiveness.”<sup>166</sup>

A major difference between the doctrines is that *Skidmore* demands a different judicial mindset than *Chevron/Seminole Rock*:

A court applying *Skidmore* is seeking the interpretation that is correct, in the sense that it is the most persuasive. A premise of both *Chevron* and *Seminole Rock* deference, however, “is that no such thing exists.” . . . [A] court applying *Chevron* and *Seminole Rock* asks whether the agency has arrived at a reasonable answer, of which there likely are many.<sup>167</sup>

*Skidmore*, which tests persuasiveness, clearly presents a higher bar for the agency’s interpretation than *Chevron*, which tests permissibility.<sup>168</sup> Some commentators feel that this higher standard is appropriate when informal agency interpretations are at issue.<sup>169</sup> Despite the protestations of Justice Scalia,<sup>170</sup> the Supreme Court in *Mead* upheld

164. See *id.* at 234 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)).

165. *Skidmore*, 323 U.S. at 140.

166. *Mead*, 533 U.S. at 221.

167. Angstreich, *supra* note 106, at 88 (quoting Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 Admin. L.J. Am. U. 187, 196 (1992)).

168. See Manning, *supra* note 139, at 687; *supra* note 134 and accompanying text.

169. Anthony, *supra* note 138, at 10; Manning, *supra* note 139, at 686.

170. Justice Scalia, formerly a professor of administrative law, argues that *Chevron* rendered *Skidmore* obsolete:

*Chevron*-type deference can be inapplicable for only three reasons: (1) the

the use of the *Skidmore* doctrine where an agency interpretation of a statute fails to satisfy the requirements of the *Chevron* test.<sup>171</sup>

When a court has to assess an agency's interpretation of a statute, it may decide that an agency has come too close for comfort to the outer limits of constitutionality.<sup>172</sup> The court may decide that, unless Congress clearly intended the constitutionally questionable interpretation, a construction of the statute that avoids the constitutional dilemma is preferable.<sup>173</sup> This canon of statutory construction is known as the avoidance canon.

### 3. The Avoidance Canon

In *Chevron*, the Supreme Court approved the use of traditional tools, or canons, of statutory construction in determining congressional intent.<sup>174</sup> One such canon states that if an interpretation of a statute raises serious constitutional questions, courts will construe the statute to avoid these questions unless Congress clearly intended the constitutionally dubious construction.<sup>175</sup> The Supreme Court has long accepted this canon of avoidance as a "cardinal principle" of statutory construction.<sup>176</sup> For example, in *Solid Waste Agency v. U.S. Army Corps of Engineers*, the Court applied the avoidance canon to

statute is unambiguous, so there is no room for administrative interpretation; (2) no interpretation has been made by personnel of the agency responsible for administering the statute; or (3) the interpretation made by such personnel was not authoritative, in the sense that it does not represent the official position of the expert agency. All of these reasons preclude *Skidmore* deference as well.

*Christensen v. Harris County*, 529 U.S. 576, 589 n.\* (2000) (Scalia, J., concurring in part and concurring in the judgment). *But see* Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 Wm. and Mary L. Rev. 1105, 1111 (2001) (disagreeing with Justice Scalia's position).

171. *Mead*, 533 U.S. at 234.

172. *See, e.g.*, *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001).

173. *Id.*

174. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("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.").

175. *See Solid Waste Agency*, 531 U.S. at 172. At issue in this case was the Clean Water Act, which granted the U.S. Army Corps of Engineers authority "to issue permits 'for the discharge of dredged or fill material into the navigable waters at specified disposal sites.'" *Id.* at 163 (quoting 33 U.S.C. § 1344(a) (1994)). An Environmental Protection Agency regulation known as the "Migratory Bird Rule" granted the Corps authority over *intrastate* waters "[w]hich are or would be used as habitat by . . . migratory birds which cross state lines." *Id.* at 164. Because the regulation would have resulted in Commerce Clause questions invoking "the outer limits of Congress' power," the Court demanded "a clear indication that Congress intended that result." *Id.* at 172. In the absence of such intent, the Court rejected the "Migratory Bird Rule." *Id.* at 173-74.

176. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

save a provision of the Clean Water Act from a Commerce Clause challenge.<sup>177</sup> In *United States v. Bass*, the Court refused to allow an interpretation of a statute that “render[ed] traditionally local criminal conduct a matter for federal enforcement” and “dramatically intrud[ed] upon traditional state criminal jurisdiction.”<sup>178</sup>

To take an example, in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,<sup>179</sup> an important avoidance case, a federal statute prevented labor unions from encouraging an employee strike against secondary employers.<sup>180</sup> A union protested the payment of substandard wages by a construction company by encouraging workers to distribute handbills at the mall entrance asking customers to boycott the mall until the company raised its wages.<sup>181</sup> The National Labor Relations Board interpreted the statute to prohibit this handbilling.<sup>182</sup> The Supreme Court disagreed because the NLRB interpretation of the statute implicated a possible First Amendment issue that the Court did not wish to reach.<sup>183</sup> According to the Court, the statute could be just as viably interpreted not to prohibit the handbilling—a reading not contradicted by clear congressional intent—and the Court settled on this interpretation in order to save the statute from constitutional difficulties.<sup>184</sup>

In light of the current Supreme Court’s willingness to strike down congressional actions that exceed the limits of the Commerce Clause or the separation of powers doctrine,<sup>185</sup> the federal government could find the avoidance canon a considerable obstacle to otherwise acceptable interpretations of statutes and regulations that infringe on

177. *Solid Waste Agency*, 531 U.S. at 173-74.

178. *United States v. Bass*, 404 U.S. 336, 350 (1971).

179. 485 U.S. 568 (1988).

180. See 29 U.S.C. § 158(b)(4) (1994).

181. *DeBartolo*, 485 U.S. at 570-71.

182. *Id.* at 573.

183. See *id.* at 578.

184. *Id.* at 588.

185. See *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (finding that the Migratory Bird Rule resulted in “significant impingement of the States’ traditional and primary power over land and water use”); *United States v. Morrison*, 529 U.S. 598, 613 (2000) (striking down the Violence Against Women Act because “[g]ender-motivated crimes of violence are not . . . economic activity”); *Printz v. United States*, 521 U.S. 898, 925-28 (1997) (holding interim provisions of the Brady Act unconstitutional because the federal government cannot compel the States to enact or implement federal regulatory programs); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding that the Gun Free School Zones Act “has nothing to do with ‘commerce’ or any sort of economic enterprise”); *New York v. United States*, 505 U.S. 144, 161 (1992) (warning that “Congress may not simply ‘commande[e]r’ the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program” (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)) (alteration in original)); *United States v. Bass*, 404 U.S. 336, 350 (1971) (refusing to construe a federal firearms statute in such a manner that “dramatically intrude[d] upon traditional state criminal jurisdiction”).

traditional state powers.<sup>186</sup> Another area of the law in which the Supreme Court has refused to trample on traditional state powers bears directly on the Death with Dignity controversy: the so-called "right to die."<sup>187</sup>

#### 4. The "Right To Die" Cases

The Supreme Court has entered the right-to-die debate in a well-known trio of cases: *Cruzan v. Director, Missouri Department of Health*,<sup>188</sup> *Washington v. Glucksberg*,<sup>189</sup> and *Vacco v. Quill*.<sup>190</sup> In *Cruzan*, the Court upheld a Missouri law that would not allow a third party to make end-of-life decisions regarding life-sustaining medical treatment of an unconscious patient without clear and convincing evidence of that patient's desires.<sup>191</sup> In concurrence, Justice O'Connor noted that "we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' of the States."<sup>192</sup> Justice Scalia emphasized the same point in his concurring opinion: "[E]ven when it is demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored."<sup>193</sup>

Seven years later, in *Washington v. Glucksberg*, the Court upheld Washington's ban on the promoting of suicide<sup>194</sup> in the face of an equal protection challenge.<sup>195</sup> Writing for the Court, Chief Justice

186. Cf. Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 Chi.-Kent L. Rev. 481, 486 (1990) (arguing that the requirement of congressional intent to enter a constitutionally dangerous area "actually has the effect of enhancing judicial activism in some significant respects"); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 816 (1983) ("The practical effect of interpreting statutes to avoid raising constitutional questions is . . . to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution . . .").

187. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277 (1990).

188. 497 U.S. 261 (1990).

189. 521 U.S. 702 (1997).

190. 521 U.S. 793 (1997).

191. *Cruzan*, 497 U.S. at 280-81.

192. *Id.* at 292 (O'Connor, J., concurring); see *Glucksberg*, 521 U.S. at 737 (1997) (O'Connor, J., concurring) ("[T]he . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States." (citations and internal quotation marks omitted)).

193. *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring).

194. Wash. Rev. Code Ann. § 9A.36.060 (West 2000).

195. *Washington v. Glucksberg*, 521 U.S. 702 (1997). The companion case to *Glucksberg*, *Vacco v. Quill*, 521 U.S. 793 (1997), was decided on the same day. At issue in *Quill* was New York's ban on the assistance of suicide. N.Y. Penal Law § 125.15 (McKinney 1987). Again writing for the Court, Chief Justice Rehnquist quickly disposed of the Equal Protection challenge to the statute: "Everyone,



Rehnquist noted that “our laws have consistently condemned, and continue to prohibit, assisting suicide.”<sup>196</sup> Nevertheless, the Chief Justice left final resolution of the matter to the individual states: “Americans are engaged in earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”<sup>197</sup> Justice O’Connor took the same view, and her concurring opinion reproduces her *Cruzan* formulation: “States are presently undertaking extensive and serious evaluation of physician-assisted suicide . . . . In such circumstances, the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the laboratory of the States . . . .”<sup>198</sup>

*Glucksberg* stands for the proposition that while the states *may* ban the assistance of suicide, they do not *have* to.<sup>199</sup> Judging from his recent actions with respect to the Death with Dignity Act, Attorney General Ashcroft apparently disagrees with this view as long as the method of assisting suicides involves federally controlled substances.<sup>200</sup> The interpretive rule embodying this disagreement has led to the current battle between the DOJ and Oregon.<sup>201</sup> Having sketched the pertinent historical legal background of this battle, the next part of this Note examines the conflict in detail.

## II. ARGUMENTS FOR AND AGAINST JUDICIAL DEFERENCE TO THE DOJ’S INTERPRETATION OF 21 C.F.R. § 1306.04

The United States Department of Justice and the Oregon Department of Justice sharply disagree over whether the CSA permits revocation of the licenses of physicians who assist suicides under Oregon’s Death with Dignity Act.<sup>202</sup> Section A outlines the argument that the DOJ interpretive rule is not entitled to judicial deference under the *Chevron* line of Supreme Court cases. This argument

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regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide.” *Id.* at 800. Justice O’Connor again provided the fifth vote, and her opinion repeated her *Glucksberg* concurrence. See *Glucksberg*, 521 U.S. at 736-38 (O’Connor, J., concurring).

196. *Glucksberg*, 521 U.S. at 719.

197. *Id.* at 735.

198. *Id.* at 737 (O’Connor, J., concurring) (citations and internal quotations omitted).

199. See Steven B. Datlof, *Beyond Washington v. Glucksberg: Oregon’s Death with Dignity Act Analyzed from Medical and Constitutional Perspectives*, 14 J.L. & Health 23, 44 (1999-2000) (“The Court has shown great willingness to allow the states to determine their own policies regarding end-of-life decision making through debate and legislation.”).

200. See DOJ Memorandum, *supra* note 90, at 32.

201. See *supra* notes 20-23 and accompanying text.

202. See Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001); Oregon Memorandum, *supra* note 90, at 26-30.

emphasizes the Supreme Court's refusal in *Christensen* to defer to informal agency interpretations of statutes.<sup>203</sup> Section B, in contrast, sketches the argument that the DOJ interpretive rule *is* entitled to *Chevron* deference. This argument relies on the Supreme Court's holding in *Auer* that informal agency interpretations of regulations may qualify for *Chevron* deference.<sup>204</sup>

A. *The Argument that the Courts Should Not Defer to the DOJ's Interpretation of 21 C.F.R. § 1306.04*

The strongest argument for refusing *Chevron* deference to the DOJ interpretive rule follows the Supreme Court's recent rulings in *Christensen* and *Mead*. In *Christensen*, the Court clearly stated that administrative interpretations lacking the force of law "do not warrant *Chevron*-style deference."<sup>205</sup> Interpretive rules such as the one at issue here do not carry the force of law<sup>206</sup> and therefore appear exempt from *Chevron* treatment under the Court's holding in *Christensen*. That the Court pulled back somewhat from this holding in *Mead* does not affect the analysis, for the Court still acknowledged that the "overwhelming" number of cases in which *Chevron* was applied involved adjudication or notice-and-comment rulemaking.<sup>207</sup>

After disposing of the *Chevron* issue, the *Christensen* Court next assessed the *Seminole Rock* problem.<sup>208</sup> The Court found *Seminole Rock* inapplicable in that case because the regulation at issue was not ambiguous.<sup>209</sup> The Court, therefore, chose to enforce what it perceived as the clear meaning of the regulation over the administrator's contrary interpretation.<sup>210</sup> In the Death with Dignity controversy, unlike in *Christensen*, the regulation at issue *is* ambiguous because the word "legitimate" in the phrase "legitimate medical purpose" is undefined.<sup>211</sup> The *Seminole Rock* "plainly erroneous or inconsistent" test therefore applies.<sup>212</sup> Even if, however, the court decided that the DOJ interpretation of 21 C.F.R. § 1306.04 qualified for *Seminole Rock* deference, *Chevron* deference already has been ruled out. Under the Supreme Court's holding in *Mead*, the next analytical step is to apply the *Skidmore* standards because "*Chevron*

203. See *supra* notes 155-159 and accompanying text.

204. See *supra* notes 149-54 and accompanying text.

205. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

206. See *supra* note 121 and accompanying text.

207. *United States v. Mead*, 533 U.S. 218, 230 (2001). The Court added, "That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case . . ." *Id.* at 230-31.

208. See *Christensen*, 529 U.S. at 588.

209. See *id.*

210. See *id.*

211. See 21 C.F.R. § 1306.04(a) (2001).

212. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see *supra* text accompanying note 137.

did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form."<sup>213</sup>

One of the important factors in *Skidmore* analysis is whether the statutory interpretation at issue conflicts with a prior interpretation by the same agency.<sup>214</sup> In *Hall v. EPA*,<sup>215</sup> for example, the Ninth Circuit did not accord *Skidmore* deference to the Environmental Protection Agency's reading of the Clean Air Act because the EPA's interpretation of the Act "[did] not fit with [the EPA's] prior interpretations."<sup>216</sup> Similarly, the DOJ interpretive rule does not fit with the DOJ's prior interpretation of the CSA with respect to the Death with Dignity Act because it reverses Attorney General Reno's 1998 ruling on the matter.<sup>217</sup> Furthermore, the Ninth Circuit assessed the agency's "special expertise in advocating [the] interpretation."<sup>218</sup> The DOJ's expertise in the area of physician-assisted suicide is dubious at best because it is a law-enforcement agency, not a group of medical professionals or ethicists.<sup>219</sup> In the opinion of two influential commentators, this factor is extremely important in the assessment of administrative interpretations.<sup>220</sup> The inconsistency and the expertise factors working together, therefore, would weigh against the persuasiveness of the interpretive rule. Therefore, the rule would be entitled to little, if any, respect under *Skidmore*.

Consequently, Oregon can use *Christensen* and *Skidmore* to argue that the courts should not afford deference or respect to the DOJ interpretive rule. The DOJ, on the other hand, can make a counterargument for deference by highlighting the *Auer* case and the *Mead* Court's refusal to set hard-and-fast rules about *Chevron*'s relationship to informal rulemaking.

### B. *The Argument that Courts Should Defer to the DOJ Interpretation of 21 C.F.R. § 1306.04*

A potential response to the arguments against deference begins with the contention that *Auer* is the controlling precedent in this dispute, not *Christensen* or *Mead*. The support for this contention lies in the fact that *Auer* dealt specifically with an administrative interpretation of a regulation,<sup>221</sup> and that *Auer* is more faithful than

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213. *United States v. Mead*, 533 U.S. 218, 234 (2001); see *supra* note 171.

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

215. 273 F.3d 1146 (9th Cir. 2001)

216. 273 F.3d at 1156.

217. See *supra* note 68 and accompanying text.

218. *Hall*, 273 F.3d at 1156.

219. See Oregon Memorandum, *supra* note 90, at 25.

220. See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1312-13 (1994) (noting the significance of an "agency's expertise and first-line status").

221. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

*Christensen* to the two-step *Chevron* analysis.<sup>222</sup> Under the *Auer* formulation, the DOJ interpretive rule could pass muster.

An *Auer* analysis would begin in the same place as *Chevron* step one: an assessment of whether the statute at issue is ambiguous.<sup>223</sup> The CSA gives the Attorney General power to revoke the licenses of physicians under the “inconsistent with the public interest” provision of 21 U.S.C. § 824(a)(4).<sup>224</sup> Phrases such as “public interest” are the epitome of vagueness and demonstrate obvious congressional ambiguity.<sup>225</sup> Furthermore, delegation of rulemaking authority to the Attorney General is explicit in the statute,<sup>226</sup> thereby satisfying the first step of the *Chevron* test.<sup>227</sup>

Following the lead of *Auer*, the court would allow any reasonable interpretation of the statute to stand under *Chevron* step two.<sup>228</sup> The “legitimate medical purpose” standard of 21 C.F.R. § 1306.04(a) certainly is a *reasonable* reading of the CSA’s prohibition on the prescribing of drugs in a manner “inconsistent with the public interest.”<sup>229</sup> Under *Chevron*, therefore, the reviewing court would defer to the regulation. Finally, the court would have to assess whether the agency’s interpretation of that regulation is “plainly erroneous or inconsistent with the regulation.”<sup>230</sup> There is at least some evidence that the DOJ’s reading of the regulation, if not the *best* reading, is at least *not inconsistent* with the “legitimate medical purpose” language of the regulation.

For example, one key to the reasonableness of the DOJ’s interpretation is the meaning of the regulatory word “legitimate.”<sup>231</sup> In order to determine if the DOJ’s reading of the regulation is reasonable, a definition of that word is necessary. Because the regulation itself is silent on this issue, the best place to start is with a dictionary, which is exactly what Justice Scalia did in *Auer*.<sup>232</sup> The Oxford English Dictionary defines “legitimate” as “[c]onformable to law or rule; sanctioned or authorized by law or right; lawful; proper” and “[n]ormal, regular; conformable to a recognized standard type.”<sup>233</sup>

222. *See id.* at 457-58.

223. *Id.*

224. *See supra* notes 103-04 and accompanying text.

225. Anthony, *supra* note 138, at 11. Professor Anthony calls this phrase, among others, “[v]acuous” and “deficient in identifiable meaning.” *Id.*

226. *See* 21 U.S.C. § 821 (2000).

227. *See supra* text accompanying notes 129-33.

228. *See Auer*, 519 U.S. at 458.

229. 21 U.S.C. § 823(f).

230. *Auer*, 519 U.S. at 461 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

231. Purpose of Issue of Prescription, 21 C.F.R. § 1306.04(a) (2001).

232. *Auer*, 519 U.S. at 461. In this case, the Court found the agency’s interpretation to be consistent with the dictionary definition of the words at issue in the statute and upheld the interpretation. *Id.*

233. Oxford English Dictionary, *OED Online*, at <http://dictionary.oed.com/cgi/find>

The primary definition in Black's Law Dictionary is similar: "Complying with the law; lawful."<sup>234</sup> For the vast majority of states, physician-assisted suicide is not lawful,<sup>235</sup> and therefore not "legitimate" under these definitions. DOJ's interpretation of 21 C.F.R. § 1306.04(a), therefore, clearly does not run counter to the language of the regulation.

Under an *Auer* analysis, therefore, the DOJ interpretive rule would clear the "plainly erroneous or inconsistent with the regulation" test.<sup>236</sup> As in *Auer*, this agency interpretation would be entitled to deference, and the DOJ could argue that courts should allow it to stand notwithstanding the Supreme Court's decisions in *Christensen* and *Mead*.

### III. THE COURTS NEED NOT DEFER TO THE DOJ'S INTERPRETATION OF 21 C.F.R. § 1306.04

Though the DOJ interpretative rule may not be the *best* reading of the 21 C.F.R. § 1306.04, it is a *plausible* interpretation of the regulation that should satisfy the *Seminole Rock* test. Nevertheless, the Attorney General's lack of compliance with standards of adjudicatory or notice-and-comment rulemaking found both in the APA and in the Supreme Court's recent jurisprudence should disqualify the DOJ directive from receiving *Chevron* deference.<sup>237</sup> Furthermore, the interpretation is not persuasive, and the courts should afford it little respect under *Skidmore*. Finally, the interpretation implicates constitutional problems. The Supreme Court has indicated a willingness to use the avoidance canon to sidestep unnecessary confrontations of constitutional issues.<sup>238</sup> While the Court may have been unenthusiastic about invoking the canon when the constitutional issue involved abortion,<sup>239</sup> the Court has been more than willing to use it where, as here, federalism questions were involved.<sup>240</sup>

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word?query\_type=word&queryword=legitimate (last visited Apr. 8, 2002). The DOJ focuses exclusively on the various dictionary definitions of "medical," while ignoring "legitimate." See DOJ Memorandum, *supra* note 90, at 33.

234. Black's Law Dictionary 912 (7th ed. 1999).

235. See *supra* note 7.

236. *Auer*, 519 U.S. at 461; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

237. See 5 U.S.C. 553(b) (1994); *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000).

238. M. Gavan Montague, Note, *Should Aliens Be Indefinitely Detained Under 8 U.S.C. § 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny*, 69 *Fordham L. Rev.* 1439, 1447 (2001).

239. See *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991) (holding that a Department of Health & Human Services regulation that prevented abortion counseling in federally-funded facilities did not implicate a constitutional question serious enough to merit use of the avoidance doctrine).

240. See *Solid Waste Agency v. United States Army Corps. of Eng'rs*, 531 U.S. 159

A. *Outright Judicial Deference Is Not Appropriate in Cases Involving Informal Administrative Interpretations of Statutes and Regulations*

The DOJ interpretive rule brings into focus two radically differing approaches to administrative deference. One approach, favored by Professors Anthony and Manning, Justice Thomas in *Christensen*, and, more cautiously, Justice Souter in *Mead*, would all but completely deny *Chevron* deference to any agency interpretation that did not arise out of adjudication or notice-and-comment rulemaking. A competing approach, taken by Mr. Angstreich and Justice Scalia in *Auer*, favors a liberal use of *Seminole Rock* to uphold an agency's informal interpretations of regulations that already merit *Chevron* deference. This section argues that the former approach is preferable.

Under *Seminole Rock*, courts may treat informal agency interpretations with deference even though those interpretations carry no force of law and do not technically bind the courts.<sup>241</sup> After *Christensen* and *Mead*, however, the Court is faced with two choices: (1) reaffirm *Auer* and explain the differences between *Seminole Rock* and *Chevron* that led to the distinction between informal interpretations of regulations (reviewed under *Seminole Rock* per *Auer*) and informal interpretations of statutes (reviewed under *Skidmore* per *Christensen*); or (2) support *Christensen*'s holding that informal agency interpretations do not warrant *Chevron* deference, a holding which may signal an overruling of *Auer* and an undermining of *Seminole Rock*.<sup>242</sup> The latter approach is preferable for several reasons.

First, the distinction between interpretations of statutes and interpretations of regulations is highly complicated and is best avoided. The DOJ interpretive rule at issue here demonstrates the difficulty. On the one hand, the Attorney General states, "I hereby determine that assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 CFR § 1306.04 (2001),"<sup>243</sup> which is clearly an interpretation of the regulation. The regulation, however, mentions nothing of suspension of physicians' licenses. For that provision, the Attorney General must interpret the *statute*: "Such conduct by a physician . . . may render his registration . . . subject to possible suspension or revocation under 21 U.S.C. § 824(a)(4)."<sup>244</sup> A court assessing this interpretive rule would have to determine what kind of interpretation it is (regulatory or statutory) before applying *Auer* or *Christensen*. Such a distinction is unnecessary: the Ashcroft directive has the same practical force with either reading. The crucial fact that

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(2001); *United States v. Bass*, 404 U.S. 336 (1971).

241. See *supra* text accompanying note 121.

242. Angstreich, *supra* note 106, at 56-57.

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

244. *Id.* (internal quotations omitted).

does not change, however, is that it was not promulgated through adjudication or notice-and-comment rulemaking.

When agencies are allowed to promulgate interpretations of regulations with the expectation that they will enjoy judicial deference under *Seminole Rock*, a second problem arises. Agencies will have an incentive to formulate vague regulations which must be clarified by broad interpretive rules that receive deference under *Seminole Rock*. Professor Anthony notes that *Seminole Rock* results in agencies "issuing 'interpretations' to create . . . new law without observance of notice and comment procedures."<sup>245</sup> Professor Manning makes a similar point: "[S]ince the agency can say what its own regulations mean . . . the agency bears little, if any, risk of its own opacity or imprecision."<sup>246</sup> At the heart of the APA is public participation in the making of rules that bind the public and the courts.<sup>247</sup> Professors Anthony and Manning point out that *Seminole Rock* allows the administrators to make binding rules while ignoring the requirements of the APA.<sup>248</sup>

This problem leads, in turn, to a third difficulty. The *Seminole Rock* "plainly erroneous or inconsistent" test is so easy for the agency to pass that "[r]easonable contrary interpretations favoring other parties are trampled."<sup>249</sup> Furthermore, agencies can promulgate informal interpretations at their whim without the rigors of the notice-and-comment process. The regulated parties, such as the Oregon physicians in this case, would have little warning of the state of the law and would find themselves waiting in limbo while the agency moves from interpretation to interpretation with each new presidential administration (as seems to have happened here).<sup>250</sup>

Finally, Professor Anthony contends that application of *Seminole Rock* to informal agency interpretations violates the APA itself.<sup>251</sup> The APA requires the court to "determine the meaning or applicability of the terms of an agency action."<sup>252</sup> According to Anthony, "it is wrong for the courts to abdicate their office of determining the meaning of the agency regulation and submissively give controlling effect to a not-inconsistent agency position."<sup>253</sup> For Anthony, *Chevron* and *Skidmore* pass muster under the APA.<sup>254</sup> With *Chevron*, the court follows the APA by asking whether Congress has granted rulemaking power to the agency and giving deference to a

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245. Anthony, *supra* note 138, at 12.

246. Manning, *supra* note 139, at 655.

247. See *supra* note 113 and accompanying text.

248. See Anthony, *supra* note 138, at 4.

249. *Id.* at 10.

250. See Manning, *supra* note 139, at 671.

251. Anthony, *supra* note 138, at 9-10.

252. 5 U.S.C. § 706 (2000).

253. Anthony, *supra* note 138, at 9.

254. See *id.* at 10, 23-24.

permissible interpretation exercised pursuant to that delegation of power (i.e. via adjudication or notice-and-comment rulemaking).<sup>255</sup> With *Skidmore*, the court itself determines the persuasiveness of the interpretation, which clearly comports with the APA.<sup>256</sup>

Professor Anthony argues that *Seminole Rock* must be subject to the same restrictions. He claims that

Issuance of informal rule documents without observing legislative rulemaking procedures cannot be “lawmaking,” even if their subject is interpretation of regulations. While the agency may indeed possess delegated subject-matter authority to interpret its own regulations, the exercise of that power to make law depends upon using the procedure and format that Congress has specified for making law, usually notice-and-comment.<sup>257</sup>

Anthony’s position appears consistent with *United States v. Mead Corp.*, in which the Supreme Court held that the agency did not have a “lawmaking pretense in mind” when it interpreted the statute at issue without notice-and-comment procedures.<sup>258</sup> Accordingly, the Court held the interpretation “beyond the *Chevron* pale.”<sup>259</sup> Even in the midst of his defense of the *Seminole Rock* doctrine, Scott Angstreich concedes that Professor Anthony’s APA criticism “poses a significant obstacle to the doctrine’s retention.”<sup>260</sup>

The criticisms of Professors Anthony and Manning argue compellingly in favor of reducing *Seminole Rock* to a minor player in the contest between Oregon and the DOJ. The better approach is to follow the Supreme Court’s recent *Christensen* and *Mead* decisions, which give great weight to the procedural genesis of the rule at issue. In essence, this approach adds an “intermediate step” to *Chevron* analysis (sort of a *Chevron* step one-and-one-half) whereby the court determines “whether the agency’s interpretation appears in a format that has the force of law.”<sup>261</sup> If so, the court moves to *Chevron*, step two (permissibility test).<sup>262</sup> If not, the court assesses the interpretation under *Skidmore* (persuasiveness test).<sup>263</sup>

Lest it seem completely forgotten, there is a place for *Seminole Rock* in this formulation. As Mr. Angstreich has pointed out, “[w]hen an agency’s interpretation of a statute is contained in a regulation, a court reviewing that interpretation under *Chevron* must first ascertain the meaning of the regulation. The initial inquiry is governed by

255. *Id.* at 25.

256. *Id.* at 11.

257. *Id.* at 10 n.29.

258. *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001).

259. *Id.* at 234.

260. Angstreich, *supra* note 106, at 112.

261. *Id.* at 64.

262. *Id.*

263. *Id.*



*Seminole Rock*.<sup>264</sup> This Note now turns to this initial inquiry with respect to the DOJ interpretive rule.

## B. *Judicial Deference Is Not Appropriate*

### 1. *Seminole Rock* and *Chevron*

The first determination that a court should make when beginning a *Seminole Rock* assessment of a regulatory interpretation is whether the regulation is ambiguous.<sup>265</sup> If the regulation is clear, the court will not defer to an interpretation that is inconsistent with the regulation's plain meaning because such action would result in essentially the promulgation of a new regulation.<sup>266</sup> The second determination, which is usually ignored by the courts, should be whether the interpretation at issue actually is an *interpretation* of the regulation,<sup>267</sup> or is an *amendment* disguised as an interpretation.<sup>268</sup> Finally, if the court determines that the interpretation actually is an interpretation, the court should apply the *Seminole Rock* "plainly erroneous or inconsistent" test in order to determine if the interpretation merits deference.<sup>269</sup> If the interpretation does not pass this low bar, there is no need to invoke *Chevron* or *Skidmore*.

The DEA regulation at issue, 21 C.F.R. § 1306.04, clearly is ambiguous with respect to the meaning of "legitimate medical purpose" in the context of physician-assisted suicide. Neither the regulation nor the CSA makes any mention of physician-assisted suicide, so the first *Seminole Rock* requirement easily is met.<sup>270</sup> The second, whether the purported interpretation actually is an *interpretation*, is more complicated. Professor Anthony proposes that courts should look closely at this issue rather than passing immediately to the "erroneous or inconsistent" test: "there must be a logical connection between the substantive content of the established regulation . . . and the substantive content of the document that purports to interpret it, such that the latter flows fairly from and is justified by the former."<sup>271</sup> Under this formulation, a plausible argument can be made that the Attorney General's directive does not

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264. *Id.* at 74.

265. *Id.* at 71.

266. Christensen v. Harris County, 529 U.S. 576, 588 (2000).

267. Anthony, *supra* note 138, at 6.

268. Angstreich, *supra* note 106, at 76-77.

269. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); *see supra* note 137 and accompanying text.

270. In making this determination, the courts could look to the administrative history of the regulation to determine whether the regulatory language has clear meaning, but they generally refuse to do so. Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 Hastings L.J. 255, 288-89, 291-92 (2000).

271. Anthony, *supra* note 138, at 8 (citations omitted).

logically flow from the regulation and is nothing other than a *new* regulation that disguises itself as an interpretation of an existing one. This point is a difficult one, however, because there is no clear evidence that the DOJ or the DEA intended to exclude physician-assisted suicide from the "legitimate medical purpose" requirement. Furthermore, the Supreme Court typically refuses to address this issue in the first place,<sup>272</sup> and there is no indication from the current line of *Seminole Rock* cases that the Justices will take up the matter in the future.<sup>273</sup> Since there is no convincing evidence that the Attorney General's memorandum is *not* an interpretation, the courts should treat it as such and proceed to the "plainly erroneous or inconsistent" analysis.

Even if the regulatory issue were framed in ethical terms, the DOJ's reading of the regulation still passes muster under *Seminole Rock*. The American Medical Association ("AMA") has argued that "the power to assist in intentionally taking the life of a patient is antithetical to the central mission of healing that guides both medicine and nursing."<sup>274</sup> Even despite a contrary argument that physician-assisted suicide is a form of "healing," the Attorney General's interpretation of 21 C.F.R. § 1306.04 is not clearly inconsistent with the AMA view that physician-assisted suicide is improper.

Consequently, the DOJ's view that physician-assisted suicide does not constitute a "legitimate medical purpose" passes the *Seminole Rock* test. Notwithstanding Attorney General Reno's contrary interpretation,<sup>275</sup> the current DOJ interpretation of § 1306.04(a) is not "plainly erroneous or inconsistent" with the "legitimate medical purpose" wording of the regulation. The practical consequence of extending *Seminole Rock* deference is merely that the court should respect this interpretation of the regulation as controlling when applying the *Chevron* or *Skidmore* tests.<sup>276</sup>

## 2. *Skidmore* Analysis

As stated above, the CSA is clearly ambiguous with respect to its "inconsistent with the public interest" standard for the suspension of physician's licenses.<sup>277</sup> Furthermore, Congress clearly delegated

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272. *See id.* at 7.

273. *See, e.g.,* Auer v. Robbins, 519 U.S. 452, 461 (1997); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Arkansas v. Oklahoma, 503 U.S. 91, 112 (1992); Gardebring v. Jenkins, 485 U.S. 415, 430 (1988); United States v. Larionoff, 431 U.S. 864, 872 (1977).

274. Brief of Amici Curiae American Medical Ass'n et. al. at 5, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110).

275. Reno Letter, *supra* note 21.

276. *See* Angstreich, *supra* note 106, at 73-74.

277. *See supra* text accompanying note 224. Even in the presence of the five factors that should inform the Attorney General's decision is unhelpful in clearly resolving what is meant by "inconsistent with the public interest." The statute does not

rulemaking authority to the Attorney General.<sup>278</sup> The DOJ interpretive rule, therefore, easily satisfies *Chevron* step one. The rule fails, however, to satisfy the new intermediate *Chevron* step that arose out of *Christensen*.<sup>279</sup> Because it was not promulgated under adjudication or notice-and-comment rulemaking, the Ashcroft Interpretive Rule does not pass the new *Chevron* step one-and-one-half. Therefore, the analysis switches immediately to *Skidmore*. The question now is not one of deference, but of whether the regulation, as interpreted by DOJ, is a persuasive reading of the statute.

The Ashcroft directive presents a very close *Skidmore* question. As Professor Michael Asimow notes, “[A]gencies are often immersed in administering a particular statute. Such specialization gives those agencies an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations.”<sup>280</sup> Certainly, the DOJ has experience interpreting the CSA; on the other hand, the DOJ lacks “specialized expertise” in the medical field. Furthermore, Attorney General Ashcroft’s interpretation of the CSA completely contradicts the prior interpretation of Attorney General Reno, who concluded that “the CSA does not authorize DEA to prosecute, or to revoke the DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law.”<sup>281</sup> This factor is one of the tests explicitly stated in the *Skidmore* opinion itself,<sup>282</sup> and the DOJ interpretive rule clearly fails it. In light of these two factors, the courts should find that the rule lacks persuasiveness and, therefore, need not be afforded more than slight respect.

Because the Ashcroft directive fails the tests set out in the *Seminole Rock*, *Chevron*, and *Skidmore* cases, the courts should afford it no deference and, at most, minor respect. However, even if a court *did* decide that the directive was worthy of some degree of respect, the directive’s interpretation of the CSA is inconsistent with the Supreme Court’s consistent refusal to allow an agency to interpret a statute in such a way as to straddle unconstitutionality.<sup>283</sup> The next part of this

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mention if *all* the factors have to be answered, or which factors are most important. It merely lists factors that “shall be considered.” 21 U.S.C. § 823(f) (2000). The Attorney General could make the argument that physician-assisted suicide, while compliant with state law and thereby satisfying part of the fourth factor, may fail the fifth factor as a threat to the public health. *See supra* note 103.

278. *See supra* note 226 and accompanying text.

279. *See supra* text accompanying note 261.

280. Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1196 (1995).

281. Reno Letter, *supra* note 21.

282. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

283. *See, e.g., Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

Note examines this doctrine in detail and concludes that the Ashcroft directive dangerously pushes the Controlled Substances Act toward a federalism violation that Congress did not intend when it enacted the statute.

### 3. Avoidance: The Attorney General Applies the CSA In a Constitutionally Questionable Manner

In *Chevron*, the Supreme Court approved the use of canons of statutory construction to determine Congress' intent with respect to its statutes.<sup>284</sup> According to one well-established canon, if an interpretation of a statute raises serious constitutional questions, courts will construe the statute to avoid these questions unless Congress clearly intended the constitutionally dubious construction.<sup>285</sup> This "avoidance" canon should come into play in this case because the DOJ's interpretation of the CSA "invokes the outer limits of Congress' power."<sup>286</sup> This concern is particularly "heightened where the administrative interpretation alters the federal-state framework by permitting a federal encroachment upon a traditional state power."<sup>287</sup>

Current Supreme Court Commerce Clause jurisprudence stands for the proposition that Congressional commerce power does not reach predominantly intrastate activities.<sup>288</sup> For example, the Court in *United States v. Lopez* struck down the Gun Free School Zones Act of 1990,<sup>289</sup> holding that a federally regulated activity under the Commerce Clause must be a commercial or economic endeavor, and that the activity must substantially affect interstate commerce.<sup>290</sup> In *United States v. Morrison*, the Court struck down the Violence Against Women Act as beyond Congress's commerce power, despite

284. See *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("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.").

285. See *Solid Waste Agency*, 531 U.S. at 172.

286. *Id.* But see William K. Kelley, *Avoiding Constitutional Problems as a Three-Branch Problem*, 86 Cornell L. Rev. 831, 881 (2001) (contending that the avoidance canon results in a judiciary invasion of the executive's Article II authority to execute the laws); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 915 (2001) (arguing that the avoidance canon should not be applied in cases arising under the *Chevron* doctrine).

287. *Solid Waste Agency*, 531 U.S. at 173.

288. See *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act).

289. *Lopez*, 514 U.S. at 551. The Gun Free School Zones Act made knowing possession of a firearm within a school zone a federal offense. 18 U.S.C. § 922(q)(2)(A) (2000).

290. *Lopez*, 514 U.S. at 554-59. Applying this reasoning to the statute, the Court determined (1) that possession of a firearm is not a commercial activity, and (2) that, even when viewed cumulatively, handgun possession does not substantially affect interstate commerce. *Id.*

extensive congressional findings that domestic violence substantially affects commerce.<sup>291</sup> Clearly, the Commerce Clause in the hands of the current Supreme Court has limits.

The echoes of *Lopez* and *Morrison* are readily apparent in *Solid Waste Agency*, where the Court preserved its restrictions on the Commerce Clause by refusing to address the question of whether the Migratory Bird Rule comported with the Commerce Clause.<sup>292</sup> DOJ's attempt to use the CSA to prevent Oregon physicians from acting in accordance with the Death with Dignity Act should suffer the same fate because DOJ's interpretation of 21 C.F.R. § 1306.04, which in turn interprets the CSA, leads to a potential constitutional problem: whether physician-assisted suicide affects interstate commerce. The Court made clear in *Lopez* that Congress cannot "use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."<sup>293</sup> Instead, the regulated activity must "substantially affect" interstate commerce.<sup>294</sup> Physician-assisted suicide under the Death with Dignity Act is an activity that does not do so. The Death with Dignity Act is available to Oregon residents only,<sup>295</sup> and the Act mandates that the physicians involved must be licensed to practice medicine by the Oregon Board of Medical Examiners.<sup>296</sup> These facts alone begin to raise a constitutional question.

Congress passed the CSA under its Commerce Clause power,<sup>297</sup> and even though the CSA may regulate the general movement of controlled substances in interstate commerce, the practice of medicine has little to do with interstate commerce. As Professor Deborah Jones Merritt points out, "the more an activity is . . . traditionally regulated by the states, the less likely it is to be interstate commerce."<sup>298</sup> The practice of medicine long has been recognized as just such an area.<sup>299</sup> Therefore, congressional regulation of intrastate

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291. *Morrison*, 529 U.S. at 614.

292. *Solid Waste Agency*, 531 U.S. at 173 (holding that the Migratory Bird Rule falls outside of the Commerce Clause limits found in *Lopez* and *Morrison* because it would force the Court to "evaluate the precise object or activity [under the Act] that, in the aggregate, substantially affects interstate commerce"); Louis J. Virelli III & David S. Leibowitz, "Federalism Whether They Want It or Not": *The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. Pa. J. Const. L. 926, 967 (2001).

293. *Lopez*, 514 U.S. at 558.

294. *Id.* at 559.

295. Or. Rev. Stat. § 127.805(1) (2001).

296. *Id.* § 127.800(10).

297. *United States v. Lopez*, 459 F.2d 949, 953 (5th Cir. 1972).

298. Deborah Jones Merritt, *Commercel*, 94 Mich. L. Rev. 674, 746 (1995).

299. See *Linder v. United States*, 268 U.S. 5, 18 (1925) (concluding that "direct control of medical practice in the States is beyond the power of the Federal Government"); see also *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341, 347 (2001); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992).

medical activities at least implicates the "outer limits" of federalism.<sup>300</sup> *Lopez* and *Glucksberg* show that the Justices should be sensitive to this issue. In *Lopez*, Justice Kennedy, in concurrence, complained that the Gun Free School Zones Act "foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise."<sup>301</sup> Writing for the Court in *Glucksberg*,<sup>302</sup> Chief Justice Rehnquist took the same view with respect to physician-assisted suicide itself: "[T]he States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues."<sup>303</sup> Justice O'Connor spoke even more explicitly of the need to leave such issues to the "laboratory of the States."<sup>304</sup> Therefore, even if not strictly unconstitutional, the DOJ's interpretation of the relationship between the CSA and physician-assisted suicide would force the court to consider whether the prescription of controlled substances to effect suicide truly is an *interstate* activity. Under the avoidance canon, the court should choose not to heed the DOJ's interpretation and instead construct the CSA *not* to forbid physician-assistance suicide, just as Attorney General Janet Reno did in 1998.<sup>305</sup>

Even the role of the states in prosecuting doctors who violate both state law and the CSA is at least concurrent with that of the federal government. In numerous cases that have reached the circuit courts involving the prosecution of physicians under the CSA, state law enforcement agents either have taken the lead or have worked alongside federal agents in investigations to catch rogue physicians who prescribed excessive amounts of stimulants or depressants to patients without any medical reason to do so.<sup>306</sup> The Ashcroft directive disrupts this delicate federal-state balance by attempting to enforce federal criminal law over state criminal law in a subject area that has no relation to commerce, an action that triggered the avoidance canon in *United States v. Bass*.<sup>307</sup> In order for this move to survive under *Solid Waste Agency*, clear congressional intent would be required.

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300. See *supra* notes 177-78 and accompanying text.

301. *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

302. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

303. *Id.* at 719.

304. *Id.* at 737 (O'Connor, J., concurring) (internal quotations omitted).

305. See Reno Letter, *supra* note 21. Attorney General Reno's reading is important because it demonstrates that there is another interpretation of the CSA with respect to physician-assisted suicide that is just as valid as DOJ's current interpretation. Therefore, 21 C.F.R. § 1306.04(a) is "open to a construction" that avoids the constitutionally-questionable interpretation. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578 (1988).

306. See, e.g., *United States v. Singh*, 54 F.3d 1182, 1186 (4th Cir. 1995); *United States v. Vamos*, 797 F.2d 1146, 1148 (2d Cir. 1986).

307. 404 U.S. 336 (1971).

The legislative history of the CSA demonstrates that Congress *did not* intend for the CSA to bring about the federalism problems outlined above. According to the legislative history, the target of the CSA was drug abuse,<sup>308</sup> and Congress noted that the CSA “combines both the punitive and rehabilitive [sic] approaches to the problem of drug abuse.”<sup>309</sup> Most importantly, Congress noted that “[s]ince drug abuse involves illegal activities *under both State and Federal law*, reliable statistics cannot be obtained on the actual extent of drug abuse in the United States.”<sup>310</sup> Congress, therefore, contemplated that the CSA would target an activity that was illegal under *both* federal and state law. This statement hardly can be said to demonstrate Congress’s desire to pre-empt intrastate activities. In fact, quite the opposite is true because the CSA presents itself as working in tandem with state law.

Therefore, the Supreme Court’s demand for clear and convincing evidence that Congress intended its statute to reach the outer limits of constitutionality—in this case, a disturbance of the federal-state balance and serious commerce clause questions—clearly is not met here. In fact, the legislative history leads to the opposite conclusion: Congress contemplated concurrent state and federal regulation of the drug trade when it passed the CSA. Therefore, the Ashcroft directive, even if eligible for *Chevron* deference, should trigger the avoidance canon. In order to avoid federalism issues, the courts should return to Attorney General Janet Reno’s interpretation from 1998 and construe the CSA as not forbidding physicians from complying with state laws permitting physician-assisted suicide.<sup>311</sup>

### CONCLUSION

The Founders understood that federalism was the safeguard of liberty; consequently, they granted the federal government only the powers enumerated in the Constitution and reserved the remaining powers for the states, and for themselves.<sup>312</sup> The long history of the

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308. In the legislative history, Congress claimed that “[d]rug abuse in the United States is a problem of ever-increasing concern, and appears to be approaching epidemic proportions.” H.R. Rep. No. 91-1444, at 6 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4572.

309. *Id.* at 8, *reprinted in* 1970 U.S.C.C.A.N. at 4574. According to a report of the President’s Advisory Commission on Narcotic and Drug Abuse, which was known as the “Prettyman Commission,” the fight against drug abuse encompassed three goals: (1) attacking illegal drug trafficking; (2) rehabilitating individual drug abusers and eliminating the causes of drug abuse; and (3) penalizing small-time dealers and users, but with an emphasis on rehabilitation. *Id.* at 9-10, *reprinted in* 1970 U.S.C.C.A.N. at 4575.

310. *Id.* at 7, *reprinted in* 1970 U.S.C.C.A.N. at 4572 (emphasis added).

311. *See supra* note 68 and accompanying text.

312. Robert W. Scheef, Note, “*Public Citizens*” and the Constitution: Bridging the Gap Between Popular Sovereignty and Original Intent, 69 Fordham. L. Rev. 2201, 2228 (2001).

Death with Dignity Act in Oregon is a clear demonstration of how the people in one state carried out this ideal and made a collective decision regarding a profound moral issue. If the Supreme Court's decision in *Washington v. Glucksberg*<sup>313</sup> stands for anything, it stands for the proposition that the federal government should not disturb a state's use of its reserved powers to resolve this issue, and that the ultimate choice in the matter is left, through the democratic process, to the people. Oregonians have spoken. The federal government must not silence them.

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313. 521 U.S. 702 (1997).