THE YALE LAW JOURNAL

WILLIAM N. ESKRIDGE, JR. AND KEVIN S. SCHWARTZ[†]

Chevron and Agency Norm-Entrepreneurship

If Congress has delegated lawmaking authority to an agency *and* has not specifically addressed an issue covered by the statute, the Supreme Court's *Chevron* doctrine requires judges to defer to reasonable agency interpretations.[1] Justice Scalia maintains that deference is grounded, at least in part, in the executive branch's own lawmaking authority; hence, judges should defer to virtually all agency interpretations not inconsistent with statutory plain meaning.[2] This Symposium reveals that Scalia's reading is gathering academic support.[3] Yet the Court continues to reject his understanding of *Chevron*, as illustrated by the recent decision of *Gonzales v. Oregon*.[4]

The Federal Controlled Substances Act of 1970 (CSA) makes it a crime to possess or distribute addictive or psychotropic drugs.[5] The Act requires doctors to register before they can issue such controlled substances, and the Attorney General has the authority to deny registration when it would be in the "public interest."[6] In 1994, Oregon's legislature enacted a statute authorizing doctors to administer lethal drugs to terminally ill patients.[7] Concluding that Oregon's

---

† John A. Garver Professor of Jurisprudence, Yale Law School, and Law Clerk, Hon. Guido Calabresi, U.S. Court of Appeals for the Second Circuit, J.D. Yale Law School, 2006. Professor Eskridge filed a brief supporting the respondents in *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

1. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984); *see* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).
2. *See Mead*, 533 U.S. at 256-57 (Scalia, J., dissenting).
3. *See* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2297-2301 (2006); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580 (2006).
4. 126 S. Ct. 904 (2006).
5. Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801-904 (2000)).
6. 21 U.S.C. § 823(f) (2000).
7. OR. REV. STAT. § 127.815 (2005).

Imaged with the Permission of Yale Law Journal

HeinOnline -- 115 Yale L.J. 2623 2005-2006

statutory regime involved wrongful use of controlled substances, Attorney General Ashcroft in 2001 issued a Directive interpreting the CSA to bar such medical practices, effectively preempting Oregon's euthanasia law.[8] Ashcroft's interpretation is an example of agency norm-entrepreneurship, the reasoned application of fundamental norms by agencies when they apply statutory directives.

Over Scalia's objections, the Supreme Court rejected Ashcroft's interpretation in *Oregon*. Because there had been no congressional delegation, the Court found *Chevron* deference inapposite; the majority further ruled that the "public interest" standards of the Act did not justify preempting state regulation of medical practices.[9] As *Oregon* illustrates, agencies have become an important situs for the expression and testing of public norms. We argue that their norm-entrepreneurship complicates the *Chevron* debate. When public values are implicated, the sharp rule-like edges of both the *Chevron* framework and Scalia's alternative will be fuzzier and more standard-like in practice.

I. ADMINISTRATIVE NORM-ENTREPRENEURSHIP

Traditional justifications for agency lawmaking (and judicial deference) sound value-neutral: Agencies fill in the details of statutory schemes based upon their expertise. *Oregon* illustrates how even these justifications are often normative, for they involve interpretation of statutory purposes and policies. The CSA's drug-control purpose is a great national policy, but its precise contours were sharply contested in *Oregon*. Ashcroft understood the CSA to reflect a nationalization of medical standards,[10] including the precept that doctors should "do no harm." Oregon viewed the statute's purpose more narrowly: to prevent doctors from encouraging drug addiction.

Normative laws such as the CSA are now quite common; they include antitrust, civil rights, environmental, and other "super-statutes."[11] Super-statutes, rather than judicial articulations of the Constitution, are an increasingly important source of the fundamental rights Americans enjoy and those public values that we celebrate. Agencies have key roles in enforcing most super-statutes. They provide an indispensable forum for the application of foundational principles through deliberation by experts and public feedback

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

9. *See Oregon*, 126 S. Ct. at 918.

10. Dispensing of Controlled Substances To Assist Suicide, 66 Fed. Reg. at 56,608.

11. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 2001 DUKE L.J. 1215.

Imaged with the Permission of Yale Law Journal

HeinOnline -- 115 Yale L.J. 2624 2005-2006

over time. Examples include the Justice Department's antitrust guidelines, the EEOC's regulations implementing various civil rights laws, the EPA's regulations implementing the environmental nondegradation principle, and Ashcroft's Directive.

Executive departments and agencies are also, increasingly, important forums for constitutional discourse. A dramatic example is the George W. Bush Administration's expansive understanding of the President's Article II powers and narrow interpretation of the Bill of Rights in its implementation of anti-terrorism and domestic programs.[12] As the administration's interpretations of statutes authorizing the use of force against Iraq and regulating torture illustrate, executive branch constructions of statutes are often informed by constitutional norms as understood by those officials.[13] Ashcroft's Directive reflects the variety of sources from which the executive derives norms. Its conclusion that euthanasia is *not* a "legitimate medical practice" was based upon federal and state statutory consensus, professional medical opinion, and pro-life constitutional principles.[14]

Administrative norm-entrepreneurship through statutory interpretation can enrich our national discourse about fundamental values. First, it offers opportunities for the application of reasoned and expert judgment to difficult issues that represent our national commitments. In value-laden debates, agency-type expertise can lower the stakes and improve decision-making by providing factual grounding and consequences. Well-informed institutions, like agencies, are better able to cut away issues that should not be a matter of dispute and to reconcile colliding norms.[15] As Ashcroft read it, the CSA not only reflects America's struggle against drug abuse, but also nationalizes the regulation of medical practice. While controversial as applied to "assisted suicide" (Ashcroft's term) or "death with dignity" (Oregon's term), this

12. *See* Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006) (defending the administration's broad interpretation of the President's Article II powers).

13. *See* Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 107 COLUM. L. REV. (forthcoming 2007).

14. Dispensing of Controlled Substances To Assist Suicide, 66 Fed. Reg. at 56,608; *see also* Memorandum from Sheldon Bradshaw, Deputy Assistant Attorney Gen., to the Attorney Gen. (June 27, 2001), *reprinted as* App. E to Petition for Writ of Certiorari at 113a-130a, *Oregon*, 126 S. Ct. 904 (No. 04-0623) [hereinafter Bradshaw Memorandum] (surveying the authorities that distinguish between the legitimate medical use of drugs and the illegitimate use of drugs to assist suicides).

15. *See* HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY (2002).

Imaged with the Permission of Yale Law Journal

HeinOnline -- 115 Yale L.J. 2625 2005-2006

nationalization norm reflects persuasive experience with federal regulation of health and medical issues.[16]

Second, administrative norm-entrepreneurship may expand the constitutional reach of liberal values such as personal autonomy and individual flourishing. Judges only apply constitutional norms against state actors, but most abusive exercises of power are by private actors. The modern liberal state ought to protect vulnerable citizens against private as well as public violence, and sometimes that responsibility is best carried out by administrators enforcing statutes. Ashcroft's Directive sought to head off what the administration considered to be murder—a goal that like-minded judges were not in a position to pursue.

Third, administrative norm-entrepreneurship is potentially more democratically accountable than judicial value elaboration. Our elected Congress structures agency decision-making to reflect legislative policy preferences and, further, to assure multiple mechanisms for ongoing accountability.[17] Thus, agencies usually issue rules only after notice and comment from the public, which provides various mechanisms for public feedback as legislated norms evolve. Illustrating a republican virtue absent in judicial norm elaboration, citizens and groups are able to present their evidence and arguments to public officials who are required to take their input seriously. Indeed, from past struggles over the passage of civil rights and other super-statutes, competing social movements have extended their mobilization of public campaigns into the executive arena as part of the dialogic process in which interactive institutions debate and consolidate public values.[18]

Agencies are also directly accountable to the democratically elected President and Congress. From executive removal procedures, to White House review imposed through the Office of Management and Budget, to congressional feedback in budget and oversight committees, it is agencies—more than courts—that remain subject to democratically legitimate inputs that endorse or constrain their norm elaboration.[19] Directly responsible to a

16. *See* Bradshaw Memorandum, *supra* note 14, at 109a-113a.

17. ARTHUR LUPIA & MATTHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 215-23 (1998).

18. *See, e.g.*, RICHARD K. SCOTCH, FROM GOODWILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984).

19. *See, e.g.*, Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arguments and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006).

Imaged with the Permission of Yale Law Journal

HeinOnline -- 115 Yale L.J. 2626 2005-2006

national constituency, the President provides a potentially robust democratic guide for the exercise of policy discretion "in light of everyday realities."[20]

Fundamental norms we take for granted today have been the product of administrative elaboration of statutes. These include obligations of the government to maintain a national free market, to provide old-age security, to ensure voting rights, and to police workplace discrimination and harassment. Well-considered administrative judgments have become part of American public law. In some cases, such as the right of women to be free from pregnancy-based discrimination, administrative norm-entrepreneurship has vindicated public equality values more satisfactorily than Supreme Court opinions.[21]

II. ADMINISTRATIVE NORM-ENTREPRENEURSHIP AND THE LIMITS TO *CHEVRON* DEFERENCE

According to the Supreme Court's largely settled doctrine, important formal constraints limit courts' deference to agency decisions. Under *Chevron*'s Step One, deference does not save agency rules that are inconsistent with the statutory command, however determined. Step Two overrides agency interpretations that are "unreasonable." Under "Step Zero," *Chevron* does not apply unless Congress has delegated authority to create binding legal orders or rules.[22]

Although the CSA gives the Attorney General authority to issue rules "relating to the registration and control" of controlled substances used in euthanasia,[23] the *Oregon* Court held that the statute did not delegate lawmaking authority on the euthanasia issue (Step Zero). On the merits, the Court construed the CSA not to preempt the Oregon law (Step One).[24] *Oregon* illustrates how *Chevron*'s seemingly formal structure sometimes operates in a functional, purposive way. The cautions the country should bring to agency norm-entrepreneurship also help to justify some doctrinal exceptions to *Chevron* deference. The *Oregon* euthanasia litigation provides three examples.

---

20. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984); *see also* Rust v. Sullivan, 500 U.S. 173, 187 (1991).

21. *See* Kevin S. Schwartz, Equalizing Pregnancy: The Birth of a Super-Statute (2005) (unpublished manuscript, on file with author).

22. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

23. 21 U.S.C. § 821 (2000).

24. Gonzales v. Oregon, 126 S. Ct. 904, 922, 924 (2006).

Imaged with the Permission of Yale Law Journal

HeinOnline -- 115 Yale L.J. 2627 2005-2006

A. What Value Is the Agency Adding to Public Debate?

The *Oregon* Court was unimpressed with the Attorney General's ability to contribute to the euthanasia debate.[25] Indeed, the CSA delegated authority to the Department of Health and Human Services (HHS), not the Attorney General, to make medical determinations.[26] Ashcroft did not seriously consult HHS or other medical bodies in making his policy determination. It would have been more legitimate for HHS to make this move, both because the statute vested that agency with primary authority and because HHS would generate more professional support for this shift.

This example suggests caution in affording *Chevron* deference to agencies' decisions that expand their own jurisdiction.[27] Critics' primary concern has been agency self-dealing: Foxes should not set rules for the henhouse. Our analysis suggests two additional concerns. In some cases, aggressive agency assertions of jurisdiction may preempt decision-making by more qualified agencies and even by the democratic process itself. As to the latter, Ashcroft's Directive would have overridden the norm adopted by Oregon's legislature and voters. Because Oregon's law offered an opportunity to falsify dire predictions about the tragic effects of death-with-dignity laws, voters in other states had a democratic interest in not terminating that experiment.

B. Is This a "Major Issue" Better Left to the Legislative Process?

Another reason the Court refused to find delegation is that the Attorney General's Directive was a major normative move on the part of the federal government, and one properly left to Congress. The legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."[28]

Because it is broadly accountable, Congress is the most legitimate forum for creating determinative legal rules for hot-button moral issues such as euthanasia. Especially when it has not sought out public comment or engaged in serious expert deliberation, an agency ought not be able to settle major

---

25. *Id.* at 920-21.

26. 21 U.S.C. § 811(b); *see* H.R. REP. NO. 91-1444, pt. 1, at 33 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4569.

27. *See, e.g.*, Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 386 (1988) (Brennan, J., dissenting); Merrill & Hickman, *supra* note 22, at 909-14.

28. *Oregon*, 126 S. Ct. at 921 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

Imaged with the Permission of Yale Law Journal

HeinOnline -- 115 Yale L.J. 2628 2005-2006

issues under the aegis of general delegations. In other cases, the Court has invoked the "major issue" exception to *Chevron* in its Step One analysis,[29] but *Oregon* demonstrates that this exception can also be relevant to Step Zero.

C. Are There Norms Cutting Against the Agency's Position?

Resting upon pro-life norms, the Attorney General's Directive is in tension with norms of privacy, federalism, and lenity. Under the constitutional right of privacy, the state cannot impose life-saving measures on unwilling patients.[30] Oregon's understanding of privacy (an understanding five Justices invited in the 1998 right-to-die cases[31]) includes the right to decide the timing of one's death. The Directive preempted Oregon's effort to demonstrate the advantages of such a legal regime and to falsify pro-life predictions that it would victimize vulnerable persons. Contrary to the delegation and due process concerns of the rule of lenity, the Directive also extended heavy criminal sanctions to activities that Oregon had deemed beneficent.[32]

In other cases, the Court has expressed meta-norm concerns through clear statement rules relevant to Step One.[33] Understanding *Chevron* as an expression of legislative expectations, the *Oregon* Court credited the countervailing federalism norm in the process of rejecting the Attorney General's CSA interpretation on its merits: "Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints"—the "major issue" reservation to *Chevron*—"the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate [medical practice] traditionally supervised by the States' police power."[34]

Even this brief analysis of *Oregon* suggests that there is not a sharp demarcation between ordinary judicial review (under which agencies often

29. *E.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000).

30. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278-79 (1990).

31. *See* Washington v. Glucksberg, 521 U.S. 702, 736 (1997) (O'Connor, J., concurring); *id.* at 738 (Stevens, J., concurring); *id.* at 752 (Souter, J., concurring); *id.* at 789 (Ginsburg, J., concurring); *id.* (Breyer, J., concurring).

32. *See* Brief for Professors of Law Richard Briffault et al. as Amici Curiae Supporting Respondents at 19, *Oregon*, 126 S. Ct. 904 (No. 04-0623).

33. *See* EEOC v. Aramco, 499 U.S. 244, 248-51 (1991) (overriding an agency application of a statute extraterritorially because there was no statutory clear statement); *id.* at 260 (Scalia, J., concurring) (same).

34. *Oregon*, 126 S. Ct. at 925.

Imaged with the Permission of Yale Law Journal

HeinOnline -- 115 Yale L.J. 2629 2005-2006

lose) and deferential *Chevron* review (under which agencies almost always win). Instead, there is a continuum. The variables include whether Congress has formally delegated authority for an agency to create binding law; how detailed the statute is; what expertise the agency brings to bear; the degree to which the agency's deliberations were open to public participation and feedback; and how well the agency persuades the Court that its norm-entrepreneurship is either modest or widely supported (or both).

The mechanical-sounding *Chevron* formula will not necessarily be applied mechanically. In *Oregon*, the government would have had a better argument for deference if the statute had not been criminal, if a more expert agency had issued the Directive, and if the record had revealed better deliberation and professional support. Without strong statutory (i.e., congressional) support, judges will be reluctant to defer to administrative settlements of major normative issues, especially ones with constitutional overtones.

III. ADMINISTRATIVE NORM-ENTREPRENEURSHIP AND EFFORTS TO TOUGHEN UP *CHEVRON*

Justice Scalia and his followers object that the continuum sketched above is inconsistent with the determinate, agency-driven rule of the law they find in *Chevron*.[35] For important normative issues, however, formal limits are unlikely to insulate agencies from judicial second-guessing. The deeper lesson of *Oregon* is that process-based interpretive constraints are less effective when judges are confronted with deep normative issues, such as the question of the right to die.

Justice Scalia rejects the *Chevron* Step Zero inquiry and argues that agencies should win under Step One unless their interpretations are contrary to statutory plain meaning. In *Oregon*, he would have deferred to the Attorney General—but he also agreed with the Directive on the merits. Normative preferences probably played a role in *both* judgments, for Scalia is notably undeferential when reviewing politically "liberal" agency decisions. By one count, in *Chevron* cases decided between 1994 and 2005, he deferred only 42% of the time to liberal agency decisions, but about 69% of the time to nonliberal agency decisions.[36]

Like administrators, judges applying value-packed language and statutory purposes to norm-charged issues will be influenced by their own normative

35. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 242-43 (2001) (Scalia, J., dissenting); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006); Sunstein, *supra* note 3.

36. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 832 (2006).

Imaged with the Permission of Yale Law Journal

HeinOnline -- 115 Yale L.J. 2630 2005-2006

evaluations, or those of their interpretive communities. In *Oregon*, the Attorney General was interpreting the statutory requirement that registration of doctors be "in the public interest."[37] Applying that language to euthanasia is normative, not mechanical. The Court treated euthanasia as a practice subject to an "'earnest and profound debate' across the country,"[38] which it considered very different from the CSA's mission of controlling the "abuse" of addictive drugs.[39] In contrast, echoing the White House's value-laden vocabulary, Scalia considered it settled that "assisted suicide" is an objectively unreasonable practice of medicine.[40]

In his contribution to this Symposium, Professor Cass Sunstein expresses optimism that the substantive canons of statutory construction will engender predictability in a *Chevron*-deference regime.[41] Our analysis suggests that the canons are a weak constraint. First, especially in the norm-charged cases, cross-cutting canons may apply.[42] Second, the canons themselves evolve, as new ones are created and old ones come to be ignored.[43] Third, all the canons are subject to clear statements by Congress – but the clarity required varies over time and by judge.[44]

Indeed, Scalia created one of the new canons, an anti-deference rule that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[45] As the Court later put it, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[46] The Court relied on this

---

37. 21 U.S.C. § 824(a)(4) (2000). The Attorney General was also interpreting the requirement that drugs could only be used by doctors for a "legitimate medical purpose." 21 C.F.R. § 1306.04 (2005).

38. *Oregon*, 126 S. Ct. at 921 (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

39. *Id.* at 924-25.

40. *Id.* at 932-33 (Scalia, J., dissenting) (quoting Bradshaw Memorandum, *supra* note 14).

41. Sunstein, *supra* note 3, at 2607-09.

42. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

43. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term: Foreword – Law as Equilibrium*, 108 HARV. L. REV. 26, 68-75 (1994).

44. *See id.* at 81-87; *accord* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005).

45. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); *see* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 231 (1994) (Scalia, J.) (recognizing, for the first time, this new clear statement rule).

46. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. at 160 (citing *MCI*, 512 U.S. at 231).

Imaged with the Permission of Yale Law Journal

HeinOnline -- 115 Yale L.J. 2631 2005-2006

canon in *Oregon*.[47] The *Oregon* Court also invoked federalism canons, which Scalia has favored in other cases, as "background principles" against which to understand Congress's intent in the CSA.[48] Finally, under the rule of lenity, the Court ought not read criminal laws expansively unless Congress, not just the Attorney General, has made an explicit judgment of moral culpability – another principle with which Scalia has elsewhere agreed.[49]

The inability of the canons to constrain is, unfortunately, not limited to *Oregon*. Professors James Brudney and Corey Ditslear have demonstrated that, in the Court's workplace cases, conservative Justices (like Scalia) systematically deploy linguistic and substantive canons to override interpretations supporting employee rights.[50] Previous scholars have made the same point, though less empirically, regarding these Justices' interpretations of civil rights statutes.[51] At this point, it is impossible to say that the substantive canons constrain the Court in the norm-charged cases.

Chevron properly recognizes that executive agencies have an important role to play in developing public norms. For many super-statutes, agency rulemaking will, and should, be the primary forum for norm elaboration. But the important normative role of agencies should not obscure the primacy of Congress, nor the fact that judges, state governments, and municipalities also contribute powerfully to a national normative dialogue with many points of entry.[52] Under these circumstances, we find the *Chevron* framework, as flexibly applied by the Court, workable and desirable in part because it contains play within its joints.

---

47. Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006) (quoting *Am. Trucking*, 531 U.S. at 468).

48. *Id.* at 925.

49. *See* Muscarello v. United States, 524 U.S. 125, 139 (1998) (Ginsburg, J., dissenting, joined by Scalia, J.).

50. Brudney & Ditslear, *supra* note 44, at 6-7.

51. *E.g.*, Jack M. Beerman, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199.

52. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006).

Imaged with the Permission of Yale Law Journal

HeinOnline -- 115 Yale L.J. 2632 2005-2006