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Gonzales v. Oregon: How Administrative Law Worked to the Attorney General's Disadvantage.

The Oregon Death With Dignity Act (ODWDA)[1] is one of the most controversial laws ever passed in the United States. With the ODWDA's passage, Oregon became the first state to permit physicians to prescribe lethal doses of medication to terminally ill Oregon residents so those people could take their own lives. Attorney General John Ashcroft, head of the U.S. Department of Justice (DOJ), was so opposed to this law that he issued an interpretive ruling that rendered the ODWDA virtually ineffective. The State of Oregon challenged the basis on which the Attorney General issued this ruling. One of the most controversial laws in American history was upheld, not on its merits, but rather because the Attorney General of the United States did not heed administrative law principles.

Questions of law may arise regarding how an agency adopts a rule after that agency interprets a statute that authorizes or requires the agency to make the rule. When courts are asked to answer such questions of law, they must decide whether to accord an agency's statutory interpretation deference. There are two types of deference: *Chevron*, named for *Chevron, Inc. v. Nat. Resources Def. Council, Inc.*,[2] and *Skidmore*, named for *Skidmore et al. v. Swift & Co.*[3]

The *Chevron* doctrine was developed to deal with decisions involving administrative agencies and involves a two-step process to determine whether deference to agency interpretations of a regulation or statute is permitted.[4] *Skidmore* deference allows courts to look beyond legislative intent, especially when that intent is unclear or absent, to determine if they

[1] OR. REV. STAT. §§ 127.800-.897 (2005).
[2] *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984), *reh'g denied*, 468 U.S. 1227 (1984).
[3] *Skidmore et al. v. Swift & Co.*, 323 U.S. 134 (1944).
[4] H. Drewry Gores, *Sutton v. United Air Lines, Inc.: Textualism, Intentionalism, The Chevron Doctrine, and Judicial Policy-Making*, 27 N. KY. L. REV. 853, 860 (2000). *See* Chevron, 467 U.S. at 842-843.

should defer to an administrative agency's ruling.[5] Before discussing *Gonzales v. Oregon* in detail, a brief overview of what "*Chevron* deference" and "*Skidmore* deference" are and how they work is in order.

Interpretations of ambiguous statutes made through notice-and-comment rulemaking or formal adjudication will receive *Chevron* deference.[6] The *Chevron* doctrine sets out a two-step approach, which is sometimes referred to as the "*Chevron* two-step."[7] The first step is to determine whether the statutory language being interpreted is ambiguous, or whether using traditional tools of statutory construction the meaning of the provision is clear.[8] Traditional tools of statutory construction have been identified as analysis of text, legislative history and application of various canons of construction.[9] The familiar canon of statutory construction has been that remedial legislation should be construed broadly to effectuate its purposes.[10] If the meaning of the provision is clear, then the court simply announces the clear meaning of the statute.[11]

The first step of *Chevron* is performed without strong deference.[12] The court independently determines whether the statute directly addresses the issue or is ambiguous.[13] If a court believes the text of a statute leaves the meaning unclear, then the court may use other

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[5] *See* Skidmore, 323 U.S. at 140.
[6] WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW EXAMPLES AND EXPLANATIONS 267 (Aspen Publishers 2001).
[7] Gores, *supra* note 4, at 870. *See* Chevron, 467 U.S. at 842-843.
[8] *Chevron*, 467 U.S. at 842; Gores, *supra* note 4, at 870.
[9] Gores, *supra* note 4, at 860. *See, e.g.*, Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 YALE L.J. 969, 971 (1992) (identifying the traditional tools of statutory construction in the pre-Chevron era as: analysis of the text, legislative history and various canons of construction).
[10] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999) (J. Stevens dissenting); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); Gores, *supra* note 4, at 867-868.
[11] *Chevron*, 467 U.S. at 842-843. *See* Gores, *supra* note 4, at 870.
[12] FUNK & SEAMON, *supra* note 6 at 257.
[13] *Chevron*, 467 U.S. at 847; Gores, *supra* note 4, at 871.

interpretive tools.[14] In *Chevron*, the Supreme Court said that courts should use traditional tools of statutory construction.[15]

If, however, after using traditional tools of statutory construction, the meaning of the provision cannot be deemed clear, but rather remains ambiguous, then the court goes to the second step.[16] The second step is to determine whether the agency's interpretation is reasonable or permissible,[17] or if the interpretation is outside the range of ambiguity in the provision.[18] "Permissible" is read to mean "reasonable."[19] If the agency's interpretation is reasonable, then the court upholds the agency's interpretation.[20] The Court is under no obligation to conclude that an interpreting agency's construction was the only permissible way to construe the statute to uphold that construction; a reviewing court need not determine that the agency's reading was the one the court would have reached if the question initially had arisen in a judicial proceeding.[21] Thus, courts are permitted to go beyond the text of the statute to resolve apparent ambiguities.[22]

Use of *Chevron* is not constitutionally compelled; Congress by statute could direct courts not to use the *Chevron* two-step in a particular statute or generally.[23] The Court does not see *Chevron* as the "universal test" when deciding when to defer to administrative agency

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[14] FUNK & SEAMON, *supra* note 6 at 257.
[15] *Chevron*, 467 U.S. at 843.
[16] *Id.*
[17] *Id.*
[18] FUNK & SEAMON, *supra* note 6 at 256.
[19] Gores, *supra* note 4, at 871. *See, e.g.*, Kenneth W. Starr, Judicial Review in the Post-Chevron Era, 3 YALE J. ON REG. 283, 288 (1986). *See also* Richard J. Pierce, Jr., Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 VAND. L. REV. 301, 302 (1988) (stating that "permissible" is to be read as "reasonable").
[20] *Chevron*, 467 U.S. at 847; Gores, *supra* note 4, at 871.
[21] *Chevron*, 467 U.S. at 843, n. 11; *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 75 (1975); *Udall v. Tallman*, 380 U.S. 1 (1965); *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 153 (1946); *McLaren v. Fleischer*, 256 U.S. 477, 480-481 (1921).
[22] FUNK & SEAMON, *supra* note 6 at 257.
[23] *Id. at* 258.

interpretations of statutory issues.[24] In fact, in the decade following the *Chevron* decision, the Court used *Chevron* in only about half of the administrative deference cases it decided.[25]

Interpretations such as those in opinion letters- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law- do not warrant *Chevron*-style deference.[26] The interpretation contained in formats such as opinion letters are "entitled to respect" under the Supreme Court's decision in *Skidmore v. Swift & Co.*,[27] but only to the extent that those interpretations have the "power to persuade."[28] This type of deference is referred to as *Skidmore* deference.

Under *Skidmore*, "agency interpretations, opinions, and rulings constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[29] However, such interpretations, opinions, and rulings "are not controlling on the courts by reason of their authority."[30] "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 to the power to persuade, if lacking power to control."[31]

Unlike the second step of *Chevron*, at which . . . courts are to accept any reasonable or permissible agency interpretations, *Skidmore* deference still leaves to courts the determination of what is the proper interpretation of an ambiguous statutory provision.[32] In making that determination, however, a court should give some consideration to the interpretation of the

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[24] Gores, *supra* note 4, at 871. *See* Merrill, *supra* note 9, at 970. *See also* Richard J. Pierce, The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 COLUM. L. REV. 749, 750 (1995) ("The Supreme Court has not applied the Chevron test in a consistent manner. Its post-Chevron jurisprudence is so confused that it is difficult to determine what remains of the original deferential test.").
[25] Gores, *supra* note 4, at 871-872; Merrill, *supra* note 9, at 970.
[26] *Christensen v. Harris County*, 529 U.S. 576 (2000).
[27] *Skidmore*, 323 U.S. 134.
[28] *Christensen*, 529 U.S. 576.
[29] *Skidmore*, 323 U.S. at 140.
[30] *Id.*
[31] *Id.*
[32] *See* Skidmore, 323 U.S. at 137. *See also* Kirschbaum v. Walling, 316 U.S. 517, 523 (1942).

administering agency because of its experience and expertise.[33] As the language in *Skidmore* indicates, the weight of that consideration depends on a number of factors.[34] For example, one factor could be when an agency administrator's policies are made part of his official duties, based on specialized experience and broader investigations and information than is likely to come before a judge in a particular case.[35] That such policies may be reached without the result of an adversarial proceeding does not preclude the Court from giving respect to those policies.[36]

The federal government made the argument that it was within its authority under the Controlled Substances Act (CSA)[37] to issue its interpretive rule effectively preempting the Oregon Death With Dignity Act. Oregon responded that the federal government had failed to comply with the "notice and comment" rulemaking the CSA required when the Attorney General sought to issue interpretive rules. At the end of the day, the Supreme Court sided with Oregon.

In 1994, Oregon became the first State to legalize assisted suicide when voters approved a ballot measure enacting the Oregon Death With Dignity Act (ODWDA).[38] ODWDA exempts from civil or criminal liability state-licensed physicians who, in compliance with the specific safeguards in ODWDA, dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient.[39] These drugs, as well as the physicians who prescribe them,[40] are regulated under a federal statute, the Controlled Substances Act (CSA or Act).[41]

For an Oregon resident to be eligible to request a prescription under the ODWDA, that person must be diagnosed by a physician as terminally ill because he or she has an incurable and irreversible disease that, within reasonable medical judgment, will cause death within six

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[33] FUNK & SEAMON, *supra* note 6 at 266.
[34] *Id.*
[35] *See* Skidmore, 323 U.S. at 139.
[36] *Id*.
[37] 21 U.S.C. §§ 801-971 (2005).
[38] OR. REV. STAT. §§ 127.800-.897 (2003); *Gonzales v. Oregon*, 129 S. Ct. 904, 907 (2006).
[39] *Gonzales*, 129 S. Ct. at 908.
[40] OR. REV. STAT. §§ 127.815(1)(L); *Gonzales*, 129 S. Ct. at 910.
[41] 21 U.S.C. §§ 801-971 (2005); *Gonzales*, 129 S. Ct. at 908.

months.[42] Then, an individual diagnosed as terminally ill must voluntarily make three requests, two oral and one written, with each request separated by a statutorily specified time period and manner.[43] Oregon physicians may dispense or issue a prescription for the requested drug, but may not administer the drug.[44] In 2005, 38 patients ended their lives by ingesting a lethal dose of medication prescribed under the ODWDA.[45]

In 1970, Congress passed the CSA primarily to combat drug abuse and to control the legitimate and illegitimate traffic in controlled substances.[46] This Act creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act's five schedules.[47] The Act places substances in one of five schedules based on statutorily-defined criteria,[48] with Schedule I the most restricted, and Schedule V the least.[49] On scientific and medical matters, the Attorney General must accept the findings of the Secretary of Health and Human Services when adopting rules related to those matters.[50] These proceedings for doing so involve making particular findings and must be on the record after an opportunity for comment.[51] In promulgating the CSA, Congress did not give the Attorney General the power to determine what a "legitimate medical purpose" is without "notice and comment."[52]

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[42] OR. REV. STAT. §§ 127.815, 127.800(12)(2003); *Gonzales*, 129 S. Ct. at 909.
[43] OR. REV. STAT. §§ 127.815, .825, .840; *Gonzales*, 129 S. Ct. at 909.
[44] OR. REV. STAT. §§ 127.815(L), .880; *Gonzales*, 129 S. Ct. at 909-10.
[45] Or. Dept. of Human Serv., EIGHTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT 11 (Mar. 9, 2006).
[46] 21 U.S.C. § 801 (2005); *Gonzales*, 129 S. Ct. at 908.
[47] 21 U.S.C. §§ 841, 844 (2000 ed. and Supp. II); *Gonzales*, 129 S. Ct. at 908; *Gonzales v. Raich*, 125 S. Ct. 2195, 2203 (2005).
[48] *Gonzales*, 129 S. Ct. at 908.
[49] 21 U.S.C. § 812 (2005); *Gonzales*, 129 S. Ct. at 908; *Gonzales, 125 S. Ct. at* 2204-05.
[50] *Gonzales*, 129 S. Ct. at 908.
[51] *Id. See* 21 U.S.C.A. § 811 (main ed. and Supp. 2005).
[52] Gores, *supra* note 4, at 876; *see* Sutton, 527 U.S. at 479 (stating that no agency has been given the authority under the ADA to issue regulations implementing the applicable provisions of the ADA and, more pointedly, no agency has been given the authority to interpret the term "disability.").

The Attorney General issued an interpretive rule in 2001 that addresses the implementation and enforcement of the CSA with respect to the ODWDA.[53] It was this interpretive rule's validity under the CSA that was the issue before the Supreme Court.[54] Attorney General Ashcroft announced his intent to restrict the use of controlled substances for physician-assisted suicide without consulting Oregon or apparently anyone outside of the Department of Justice, using only a legal memorandum he had solicited from his Office of Legal Counsel to justify his intent.[55] The Attorney General ruled that "assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 C.F.R. 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the CSA. Such conduct by a physician registered to dispense controlled substances may 'render his registration . . . inconsistent with the public interest' and therefore subject to possible suspension or revocation under 21 U.S.C. § 824(a)(4)." His conclusion applies regardless of whether state law authorizes or permits such conduct by practitioners or others and regardless of the condition of the person whose suicide is assisted."[56] This rule is what led to the dispute between the federal government and the State of Oregon.

The dispute between the federal government and the State of Oregon involved controlled substances in Schedule II, the types prescribed in Oregon by most physicians under the ODWDA, generally available only pursuant to a written, nonrefillable prescription by a physician.[57] Shortly after Congress passed the CSA, the Attorney General promulgated a rule that required every prescription of a controlled substance to be for a "legitimate medical

[53] Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56607 (November 9, 2001).
[54] *Gonzales*, 129 S. Ct. at 908.
[55] *Gonzales*, 129 S. Ct. at 908, 912; Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56607.
[56] *Gonzales*, 129 S. Ct. at 912-13; Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56607.
[57] *Gonzales*, 129 S. Ct. at 908. *See* 21 U.S.C. § 829(a).

purpose."[58] The Attorney General also established a procedure to determine whether physicians were complying with this rule.[59]

The 2001 interpretive rule thus would put a physician's DEA registration at risk if that physician were to prescribe Schedule II controlled substances in the manner proscribed by the interpretive rule.[60] Because of that, the State of Oregon, joined by several private parties, challenged the interpretive rule in federal court.[61] The lower federal courts agreed with the State of Oregon's position that the interpretive rule would alter the constitutional balance between the States and the federal government or, alternatively, that the interpretive rule did not align with the CSA's plain language,[62] targeted at conventional drug abuse and not the ODWDA.[63]

The Court refused to grant *Chevron* deference to the Attorney General's interpretive rule. First, such deference is not accorded merely because the statute in question is ambiguous and an administrative official is involved.[64] For an interpretive rule to receive such deference, Congress must have delegated authority to the executive actor issuing the interpretive rule.[65] The CSA does not grant the Attorney General broad power to promulgate rules such as the interpretive rule in *Gonzales v. Oregon*.[66]

Second, the Attorney General has limited powers that can be exercised in specific ways.[67] The Court ruled that the Attorney General could promulgate rules under the Act related to "registration" and "control," and "for the efficient execution of his functions" under the statute,[68]

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[58] 21 U.S.C. §§ 822(a)(2), 823(f), 824(a)(4); *Gonzales*, 129 S. Ct. at 908-909.
[59] 21 U.S.C. §§ 822(a)(2 & 4), 823(f); *Gonzales*, 129 S. Ct. at 908.
[60] *Gonzales*, 129 S. Ct. at 913.
[61] *Id.*; *Ashcroft v. Oregon*, 268 F. 3d 1118 (9th Cir. 2004); *Oregon v. Ashcroft*, 192 F. Supp 2d 1077 (D. Or. 2002).
[62] *Gonzales*, 129 S. Ct. at 914; *Ashcroft v. Oregon*, 268 F. 3d 1118 (9th Cir. 2004); *Oregon v. Ashcroft*, 192 F. Supp 2d 1077 (D. Or. 2002).
[63] *Gonzales*, 129 S. Ct. at 914.
[64] *Gonzales*, 129 S. Ct. at 917.
[65] *Id.*; *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).
[66] *Gonzales*, 129 S. Ct. at 918.
[67] *Id.*
[68] *Id.*

but not for the definition of medical practice standards.[69] Here, the 2001 interpretive rule did not concern the scheduling of substances, nor was it issued after the required procedures regarding scheduling.[70] Therefore, the Court held that this interpretive rule was issued outside the Attorney General's "control" authority.[71]

This authority did not exist even when the Court expanded "control" beyond the statutory definition. The Court observed that while the Attorney General can establish controls "against diversion," he may not define diversion based on what his view of legitimate medical practice is.[72] Had "control" been given the broad meaning required to sustain the Attorney General's interpretive rule, then the carefully described limits on his authority over registration and scheduling would be no more than suggestions.[73]

Third, the Attorney General's actions did not come within the authority gained when Congress in 1984 allowed the Attorney General to deny registration to an applicant "if he determines that the issuance of such registration would be inconsistent with the public interest."[74] This amendment to the CSA did not change the need for the Attorney General to determine consistency with the public interest by considering five factors, including: the State's recommendation; compliance with state, federal, and local laws regarding controlled substances; and public health and safety.[75] In the instant case, the Attorney General did none of these things, and the interpretive rule addresses far more than registration.[76] Rather, what the interpretive rule does, the Court said, is to interpret substantive federal law requirements for a valid

[69] *Id*.
[70] *Gonzales*, 129 S. Ct. at 919.
[71] *Id*.
[72] *Id*.
[73] *Gonzales*, 129 S. Ct. at 919-20.
[74] 21 U.S.C. § 823(f); *Gonzales*, 129 S. Ct. at 920.
[75] *Id*.
[76] *Gonzales*, 129 S. Ct. at 920.

prescription.[77] This goes well beyond the Attorney General's power to register or deregister.[78] Therefore, the Court could not grant either *Chevron* deference or *Skidmore* deference to Attorney General Ashcroft's ruling.

It is now clear that when Attorney General Ashcroft issued his interpretive rule of 2001,[79] he was so focused on bringing the practice of physician-assisted suicide to an end that he failed to abide by the requirements of the very act he was trying to enforce. Had he followed the proper procedures of the Controlled Substances Act, it is very likely the Court would have ruled in favor of the federal government and not the State of Oregon.

[77] *Id.*
[78] *Gonzales*, 129 S. Ct. at 920-21.
[79] Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56607.