Expanding Federalism Clear Statement Canons Instead of Chevron Step Zero

Statutory construction in administrative law has become the modern battlefield over federalism. Two recent Supreme Court cases make this abundantly clear. First, in Gonzales v. Oregon, the Court had to determine whether the Controlled Substances Act allowed the U.S. Attorney General or the State of Oregon to dictate assisted suicide policy. The Court invalidated the Ashcroft Directive, an interpretive rule which essentially prohibited the dispensing of controlled substances for purposes of assisted suicide. This holding protected federalism because Oregon had legalized the use of controlled substances for assisted suicide.

Second, in Rapanos v. United States, the issue was whether the Clean Water Act permitted the U.S. Army Corps of Engineers to regulate “immense stretches of intrastate land.” The Court struck down the Corps’s regulation, thus preventing “an unprecedented intrusion into traditional state authority.”

But it was by no means a preordained consequence that the modern battles over federalism should involve administrative law. Rather, a series of three decisions in which the Supreme Court crafted the current structure of our government has led to this result. First, after Gonzales v. Raich, the Court appears unlikely to place many substantive limits on congressional power. Second, the modern Court rejects the nondelegation doctrine. Through both of these decisions, the Court has expanded federal power at the expense of state sovereignty.

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2 Id. at 912–13 (citing OR. REV. STAT. § 127.815(L) (2003)).
4 Id.
5 See Gonzales v. Raich, 545 U.S. 1 (2005); see also Rapanos, 126 S. Ct. at 2246 (Kennedy, J., concurring in the judgment).
decisions, the Court has chosen to underenforce a particular constitutional norm.\textsuperscript{7} Third, *Chevron* accords broad deference to administrative interpretation, thus exacerbating the underenforcement of federalism and nondelegation.\textsuperscript{8}

As a result, the Court has resorted to procedural limits as a second-best alternative to substantively enforcing federalism and the nondelegation doctrine.\textsuperscript{9} In essence, procedural limits do not take away any substantive power from Congress. Rather, they merely require Congress to provide specific indicia of its intent to achieve certain results—like stretching the bounds of federalism and nondelegation.

Indeed, before the Rehnquist Court had five votes for imposing substantive limits on congressional power, it was fashioning procedural limits on congressional power. In *Gregory v. Ashcroft*, the Rehnquist Court implemented a clear statement canon of statutory construction based on federalism; in other words, the Court required Congress to provide a clear statement of its intent when it “upset[s] the usual constitutional balance of federal and state powers.”\textsuperscript{10} Absent a clear statement, the Court would interpret the statute or agency interpretation at issue as not altering the federal-state balance (thus rejecting *Chevron* deference for such agency interpretations).

\textsuperscript{10} *Id.* at 460.
However, as Gonzales v. Oregon confirms, the current Court has selected a different procedural limit for protecting federalism: “Chevron Step Zero.”11 Under Chevron Step Zero, the Court can deny deference to agency interpretations by concluding that (1) Congress did not intend to give an agency the power to create rules with the “force of law”12 and (2) the agency’s interpretation is unpersuasive.13 In fact, Gonzales v. Oregon adopted this very approach by denying deference to the Ashcroft Directive, largely on the grounds that it altered the federal-state balance.14

But this Essay argues that the Court is going down the wrong doctrinal path. Instead of using Chevron Step Zero, the Court should expand the Gregory clear statement canon if it truly wants to protect state autonomy. As this Essay proposes, the Court should reject an administrative interpretation made in an area of traditional state regulation unless Congress has provided a clear statement permitting the agency to make such an interpretation. By limiting this expansion of the Gregory canon to administrative interpretations (instead of congressional acts), it can be tailored to directly address instances of the underenforcement of both federalism and the nondelegation doctrine.

Expanding the Gregory v. Ashcroft Clear Statement Canon

There is substantial support for expanding the Gregory canon to require a congressional clear statement when an administrative interpretation is made in an area of traditional state

13 Id. at 228.
14 Gonzales v. Oregon, 126 S. Ct. 904, 922 (2006); Sunstein, supra note 11, at 191 n.19.
regulation. First, *Gregory v. Ashcroft* itself contemplates a clear statement canon that is triggered by interpretations made in “areas traditionally regulated by the States.” Second, cases after *Gregory v. Ashcroft* expanded the *Gregory* canon because of the underenforcement of federalism. Third, a separate line of cases applied a clear statement canon exclusively to administrative interpretations because of the underenforcement of the nondelegation doctrine.

Most importantly, the language of *Gregory v. Ashcroft* itself supports a clear statement canon for administrative interpretations made in “areas traditionally regulated by the States.” Some cases have limited the *Gregory* canon to situations involving traditional state government functions that implicate “a core aspect of state sovereignty.” But the language of *Gregory* suggests that legislation involving traditional state government functions is a sufficient condition for triggering the *Gregory* canon—not a necessary condition. Rather, the necessary condition for triggering the *Gregory* canon is legislation in “areas traditionally regulated by the States.” After all, *Gregory* explained that while “Congress may legislate in areas traditionally regulated by the States,” that is an “extraordinary power in a federalist system” that “Congress does not exercise lightly.” Thus, *Gregory v. Ashcroft* easily triggered a clear statement canon because a law like the one at issue went “beyond an area traditionally regulated by the States” as it

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16 Id.

17 See, e.g., United States v. Lot 5, Fox Grove, 23 F.3d 359, 362 (11th Cir. 1994); Gately v. Massachusetts, 2 F.3d 1221, 1230 (1st Cir. 1993).


19 *Gregory*, 501 U.S. at 460.

20 Id. (emphasis added).

21 Id.
involved “a decision of the most fundamental sort for a sovereign entity.”

Thus, a “decision of the most fundamental sort for a sovereign entity” is merely one easily identifiable, specialized example of an area traditionally regulated by the states.

Subsequently, three cases after *Gregory v. Ashcroft* expanded the *Gregory* canon based on the underenforcement of federalism. First, *BFP v. Resolution Trust Corp.* expanded the *Gregory* clear statement canon to cover “traditional state regulation[s].” Second, *SWANCC v. United States Army Corps of Engineers* applied the *Gregory* canon and explained that its concern was “heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” Third, *Raygor v. Regents of the University of Minnesota* applied the *Gregory* canon because Congress had legislated in a “traditionally sensitive area[]” that “affect[s] the federal balance.”

Additionally, three other cases applied a clear statement canon exclusively to administrative interpretations due to the underenforcement of the nondelegation doctrine. Namely, the Court has essentially developed a clear statement canon for administrative interpretations that implicate major questions. The Court’s most cogent statement of this canon came in *Whitman v. American Trucking Assocs.*: “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not,

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22 Id.

23 Id.


25 *SWANCC*, 531 U.S. at 173.


one might say, hide elephants in mouseholes.”\(^{28}\) The *Whitman* major question canon was premised on statements from two other cases—*MCI Telecommunications Corp. v. AT&T Co.* and *FDA v. Brown & Williamson Tobacco Corp.*\(^{29}\) Questions of federalism would be one easily identifiable major question as they necessarily implicate the “fundamental details of a regulatory scheme” by setting the outer limits of an agency’s power and jurisdiction.\(^{30}\)

That said, there are two main objections to a clear statement canon for administrative interpretations made in areas traditionally regulated by the states. First, such a canon would expand the power of courts and decrease predictability in statutory interpretation. Second, the Court may not be able to create a workable test for what counts as an area of traditional state regulation. In many respects, the Court’s Commerce Clause jurisprudence has struggled in defining formalistic categories, such as what constitutes an area traditionally regulated by states.\(^{31}\)

However, the costs of incorrectly invoking a canon are drastically reduced when the consequence is simply to “remand” the question back to Congress instead of categorically prohibiting Congress or agencies from acting.\(^{32}\) Thus, while the canon would increase the power of courts, there are countervailing constraints as Congress has the final say under a clear statement canon. Even if the Court invalidates a federal administrative interpretation by using a


\(^{29}\) See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”); *MCI Telecomms. Corp. v. AT&T Corp.*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.”).

\(^{30}\) *Whitman*, 531 U.S. at 468.


clear statement canon, Congress can subsequently amend the statutory delegation to provide a clear statement. Likewise, the Court can afford to experiment in finding the correct definition of “area of traditional state regulation” without the fear of prohibiting Congress from having adequate power to regulate our national economy.

Moreover, the Court relies on this formalistic dichotomy even in light of these objections. To increase predictability and provide a better definition of “area of traditional state regulation,” the Court should either abandon its reliance on this formalistic dichotomy or genuinely accept and recognize this reliance. Unfortunately, Gonzalez v. Oregon did neither, even though after Gonzalez v. Oregon, each Justice of the Rehnquist Court has at one time relied on the area of traditional state regulation dichotomy. As is shown below, Gonzalez v. Oregon invoked Chevron Step Zero, while simultaneously alluding to the area of traditional state regulation dichotomy.

Chevron Step Zero: An Unworkable Doctrine for Protecting Federalism

Chevron Step Zero is a recently created doctrine that the Court has invoked to avoid according Chevron deference to certain administrative interpretations. Essentially, Chevron Step Zero is a complex threshold question to the entire Chevron deference framework that proceeds in two sub-steps.

At the first sub-step, the Court examines the format of the agency interpretation at issue. If the format is a regulation or an agency’s adjudicative opinion (in other words, if the


34 See Gonzalez v. Oregon, 126 S. Ct. at 925; SWANCC, 531 U.S. at 161; Gregory, 501 U.S. at 454.
interpretive method used is informal rulemaking or formal adjudication), then the Court will continue to the *Chevron* inquiry.\(^{35}\) But if the format of the interpretation is less formal,\(^{36}\) then the Court will proceed to the second sub-step of Chevron Step Zero.

The second sub-step of Chevron Step Zero is a balancing test that essentially asks whether Congress intended to delegate the authority for an agency to make authoritative interpretations.\(^{37}\) This balancing test examines five primary factors: (1) Breadth of the Statutory Delegation,\(^{38}\) (2) Agency Expertise,\(^{39}\) (3) Consistently Observed Past Agency Interpretations,\(^{40}\) (4) Agency Deliberation (Procedures Used for Current Agency Interpretation),\(^{41}\) and (5) Nature of the Question Addressed by the Current Agency Interpretation.\(^{42}\) When an agency interpretation is denied *Chevron* deference under these factors, the Court states that Congress did not intend to delegate “authority to the agency generally to make rules carrying the *force of law*.”\(^{43}\) However, the interpretation could still be entitled to *Skidmore* deference if it is “persuasive.”\(^{44}\)

On its face, instead of focusing on the underenforced constitutional norms of federalism and nondelegation as clear statement canons do, Chevron Step Zero tries to compensate by


\(^{37}\) *Mead*, 533 U.S. at 226.

\(^{38}\) *Id.* at 237.

\(^{39}\) Barnhart v. Walton, 535 U.S. 212, 222 (2002); *Mead*, 533 U.S. at 228.

\(^{40}\) *Mead*, 533 U.S. at 228.

\(^{41}\) *Barnhart*, 535 U.S. at 222; *Mead*, 533 U.S. at 228.

\(^{42}\) *Barnhart*, 535 U.S. at 222; see also Gonzales v. Oregon, 126 S. Ct. 904, 921–22 (2006).

\(^{43}\) *Mead*, 533 U.S. at 226 (emphasis added); see also *Christensen*, 529 U.S. at 587.

limiting the use of *Chevron* deference. But besides the fact that Chevron Step Zero is an attenuated means of protecting federalism, there are additional problems with using the doctrine to protect federalism.

First, Chevron Step Zero is an arbitrary, unpredictable doctrine—much more so than this Essay’s proposed expansion of the *Gregory* clear statement canon. Chevron Step Zero practically invites judges to evade the *Chevron* framework, which drastically expands the power of courts. As Justice Scalia quipped, the Court opted for “th’ ol’ ‘totality of the circumstances’ test” through Chevron Step Zero.45 Worse yet, the Court’s current Chevron Step Zero test is doctrine piled upon doctrine that has produced a maze-like standard for according deference to agency interpretations. In Cass Sunstein’s words, “The Court seems to have opted for standards over rules in precisely the context in which rules make the most sense: numerous and highly repetitive decisions in which little accuracy is to be gained by a more particularized approach.”46

Second, contrary to the outcome of *Gonzales v. Oregon*, Chevron Step Zero does not always protect federalism. Chevron Step Zero would still grant *Chevron* deference to an agency interpretation altering the federal-state balance in two situations. First, if that interpretation was in a more formal format, *Chevron* deference would be accorded. Thus, any time an agency uses informal rulemaking, Chevron Step Zero will not prevent the agency from encroaching on the power of states. Second, *Chevron* deference could be accorded if the other balancing factors outweigh the fact that the interpretation involved a major question of federalism.

Finally, to protect federalism under Chevron Step Zero, the Court must engage in the same inquiry as it would under a clear statement approach. To find the Ashcroft Directive

45 *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

46 Sunstein, *supra* note 11, at 248.
unpersuasive and reject Skidmore deference, Gonzales v. Oregon noted that “when Congress wants to regulate medical practice in the given scheme, it does so by explicit language in the statute.”47 Likewise, the Gonzales v. Oregon Court inferred that Congress would not use “muffled hints” through an “obscure grant of authority” to give an agency the power “to regulate areas traditionally supervised by the States’ police power.”48 Thus, Gonzales v. Oregon essentially held that an agency interpretation altering the federal-state balance will never be persuasive unless Congress provided a clear statement permitting this result. But why jump through Chevron Step Zero’s hoops simply to address the question that a clear statement canon could tackle head on?

Conclusion

Gonzales v. Oregon may be remembered as a much more important federalism case than recent history suggests.49 It represents a choice between protecting “Our Federalism”50 from administrative encroachment through Chevron Step Zero or clear statement canons of statutory construction. During the Rehnquist Court, we were used to seeing federalism cases analyzing the substantive limits of congressional power,51 but after Gonzales v. Raich in 2005, those days may be over. Rather, cases of statutory construction will become the “true test of the federalist


48 Id. at 925.

49 Cf. David Sclar, U.S. Supreme Court Ruling in Gonzales v. Oregon Upholds the Oregon Death With Dignity Act, 34 J.L. MED. & ETHICS 639, 642 (2006) (“But in this case, issues of federalism are generally tangential to questions of statutory interpretation.”).


principle.”52 Given the pervasiveness of federal administrative regulation, the bulk of such statutory construction cases will probably come in the context of administrative law.

Admittedly, the expanded Gregory clear statement canon for administrative interpretations made in areas of traditional state regulation risks creating an arbitrary and unpredictable doctrine that expands the power of courts. But this must be weighed against the systematic underenforcement of federalism, which reduces the ability of states to respond to the divisive needs of a diverse citizenry, it eliminates the ability of states to serve as experimental policy laboratories, it decreases public participation in democracy, and it undermines liberty.53 Not to mention that if the Court is worried about arbitrariness and unpredictability, it should not be using the Chevron Step Zero approach taken by Gonzales v. Oregon.

A clear statement canon for administrative interpretations in areas of traditional state regulation effectively balances the competing needs of protecting federalism with the need to limit the power of courts. Plus, there is ample support for expanding the Gregory v. Ashcroft canon in such a manner. The Court has identified federalism-based clear statement canons, and now it simply needs to effectively develop them before Chevron Step Zero leads the Court too far astray.
