Journal of Criminal Law and Criminology

Volume 97
Issue 4 *Summer*

Article 6

Summer 2007

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0091-4169/07/9704-1261
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 97, No. 4
Printed in U.S.A.

COMMENT

GONZALES V. OREGON AND THE FUTURE OF AGENCY-MADE CRIMINAL LAW

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In 1994, Oregon voters passed Ballot Measure 16, which legalized physician-assisted suicide in limited cases. Seven years later, Attorney General John Ashcroft issued an interpretive rule that criminalized assisted suicide using drugs covered under the Controlled Substances Act. The Supreme Court heard the case Gonzales v. Oregon *and ruled in favor of Oregon. In so doing, the Court held that the Attorney General had no authority to create regulations that would preempt and criminalize areas traditionally reserved to the states, such as medicine. This ruling contrasts with* Gonzales v. Raich, *decided less than a year before, in which the Court upheld the Attorney General's ability to preempt state law to enforce provisions of the Controlled Substances Act as it applied to medical marijuana. Most scholars have attempted to reconcile the holdings in* Oregon *and* Raich *by focusing on the federalism doctrine. This Comment, however, argues that the explanation for the discrepancy lies in a synthesis of federalism and administrative law. This synthesized reading implicates actions taken by the Department of Justice as it attempts to apply the provisions of the Racketeer Influenced and Corrupt Organizations statute to the prosecution of the War on Terror.*

I. INTRODUCTION

Over the past decade, right-to-life issues have been thrust on the American political scene in ever-increasing fashion.[1] For months at a time,

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[1] Any discussion of the right-to-life debate in contemporary America necessarily encompasses the related right-to-death issues. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 735 (1997) ("Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."). The Court's decision in

one could hardly pick up a newspaper or turn on a television without being bombarded by media images stressing the importance of the right-to-life debate. Arguments over these matters have become increasingly caustic and political, spilling over into fresh battlegrounds both in the legislative and judicial branches. The Terri Schiavo saga best highlights the spillover of the right-to-life movement into politics.[2] When her husband attempted to remove the vegetative Ms. Schiavo from life support, activists on both sides of the debate entered into a grueling three-year campaign to settle the issue both by utilizing the court system and by pressuring politicians on the state and national level to intervene.[3]

With right-to-life and right-to-death issues preeminent on the national political scene, the Supreme Court decided *Gonzales v. Oregon*,[4] a case rife with these concerns. *Oregon* was a challenge to the Attorney General's Interpretive Rule of the Controlled Substances Act ("CSA").[5] The Attorney General attempted to assert his authority under the CSA to criminalize the use of drugs in physician-assisted suicide. The Supreme Court sided with the State of Oregon[6] and affirmed the Ninth Circuit's ruling[7] that the CSA does not empower the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide when state law permits such use.[8]

Since the Supreme Court delivered its opinion, most scholars who wrote about *Oregon* focused on its impact on federalism.[9] These scholars

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Glucksberg sets the stage for *Gonzales v. Oregon* by leaving these decisions up to state government.

[2] Michael Shelden, *"Her soul had gone, her body was ready" Pope and President opposed him, but after a 15-year battle Michael Schiavo was able to let his wife Terri die*, DAILY TELEGRAPH (London), Oct. 30, 2006, at 19 ("It was so political, you could smell it . . . . All of a sudden, Jeb Bush sees the chance to win votes from Catholics and others by making my life his business. . . . [W]hen he couldn't stop it in Florida, he turned to Washington.").

[3] *See* Patrick Kampert & Michael Martinez, *Florida Rushes Law to Place Woman Back on Life Support; Gov. Bush Orders Nutrients Resumed for Comatose Terri Schiavo*, CHI. TRIB., Oct. 22, 2003, at C1.

[4] 546 U.S. 243 (2006).

[5] 21 U.S.C. § 801 (2000).

[6] Justice Kennedy wrote the opinion for the 6-3 majority.

[7] Oregon v. Ashcroft, 368 F.3d 1118 (9th Cir. 2004).

[8] *Oregon*, 546 U.S. at 274-75. Justices Roberts and Thomas joined Justice Scalia's dissent. Justice Thomas wrote an additional dissent of his own, focusing on inconsistencies between the decision in *Oregon* and the Court's previous ruling in *Gonzales v. Raich*, 545 U.S. 1 (2005).

[9] *See, e.g.*, Annie Danino, *Dodging the Issue of Physician Assisted Suicide: The Supreme Court's Likely Response in* Gonzales v. Oregon, 10 J. MED. & L. 299, 303 (2006) (noting that one possible way the Court could decide would be by "evaluat[ing] whether the Attorney General violated federalism principles by usurping both Oregon's ability to govern

echo Justice Thomas's dissent because they view *Oregon* in light of *Gonzales v. Raich*, which focused on Commerce Clause federalism.[10] Accordingly, they argue that the Court's reasoning depends on subtle twists of federalism doctrine to maintain consistency between the two opinions.[11]

Many attempts have been made to explain how federalism concerns drove the Court's reasoning.[12] While federalism certainly played a role in deciding *Oregon*, this Comment will show that the decision gains more clarity when read as the Court's attempt to integrate the administrative law doctrines laid down in *United States v. Mead Corp.*[13] and *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*[14] This integration provides guidelines for the powers of the Attorney General, particularly as they apply to agency-made criminal law and regulatory preemption.

Reading *Oregon* as a synthesis of administrative law and federalism doctrines has many potential implications. This Comment will draw out the implications of this administrative law and federalism amalgam for an important arena of agency-made criminal law. In particular, this Comment will evaluate *Oregon*'s impact on agency enforcement of Racketeer Influenced and Corrupt Organizations ("RICO")[15] statute provisions as they affect the prosecution of terrorists in the United States. A synthesized reading of *Oregon* impacts the Attorney General's ability to utilize expansive criminal powers outside the textual bounds of RICO.[16] The

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its medical procedures and the wishes of the Oregon electorate"); Melvyn R. Durchslag, *The Inevitability (and Desirability?) of Avoidance: A Response to Dean Kloppenberg*, 56 CASE W. RES. L. REV. 1043, 1054-55 (2006) (discussing judicial avoidance of the primary federalism and constitutional issues in *Oregon*); Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated,"* 39 AKRON L. REV. 373, 413-14 (2006) (noting that *Raich* and *Oregon* were decided on federalism grounds); Ilya Somin, *A False Dawn for Federalism: Clear Statement Rules After* Gonzales v. Raich, 2005-2006 CATO SUP. CT. REV. 113 (evaluating federalism challenges to federal regulatory authority); Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507 (arguing that *Oregon* does not mitigate *Raich*'s stance on federalism).

[10] 545 U.S. at 1.

[11] *See infra* Part III; *see also, e.g.*, Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745 (2004) (providing an explanation for the federalism rulings of the recent Court).

[12] *See, e.g.*, Danino, *supra* note 9, at 2. This focus on federalism is understandable given the prominence of federalism issues in the Rehnquist Court era.

[13] 533 U.S. 218 (2001).

[14] 467 U.S. 837 (1984).

[15] 18 U.S.C. §§ 1961-1968 (2000).

[16] *See* Irvin B. Nathan & Kenneth I. Juster, *Law Enforcement Against International Terrorists: Use of the RICO Statute*, 60 U. COLO. L. REV. 553, 560-65 (1989) (noting that questions exist concerning the Attorney General's authorization to utilize RICO in the prosecution of the War on Terror).

application of RICO to terrorism creates significant challenges under this reading and may require Congress to delineate clearer boundaries to the Attorney General for effective prosecution of the War on Terror.

Part II of this Comment provides a brief history of agency deference, more closely examines the decisions in *Oregon* and *Raich*, and draws out the apparent discrepancy among the Justices' voting patterns in those two cases.[17] Part III more directly addresses whether *Oregon* is a decision determined solely along federalism lines. This Part examines five distinctions that could explain the Court's ruling: agency-made rules versus Congress-made statutes, criminal penalties versus civil penalties, explicit congressional approval versus congressional silence, economic versus non-economic factors, and vanguard state versus laggard state approaches.[18] Part III shows that none of these approaches fully explains why the Attorney General could criminalize behavior in *Raich* by using the CSA, but not criminalize similar behavior in *Oregon*. Part IV proposes an alternative reading by suggesting that the focus on federalism in *Oregon* obscures the intricate questions of administrative law that drive the case.[19] Part V of this Comment exposes the challenges a hybrid federalism/administrative law reading of *Oregon* creates for agencies that attempt to utilize RICO in the War on Terror.[20]

II. BACKGROUND

A. ADMINISTRATIVE LAW DOCTRINES

Deference granted by courts to agencies has been in a state of flux over the past several decades. For years, the Supreme Court utilized the doctrines laid out in *Universal Camera Corp. v. NLRB*[21] and *Skidmore v. Swift & Co.*[22] The landmark *Chevron* decision changed deference considerably.[23] Recently, the Supreme Court has begun to flesh out its *Chevron* doctrine, incorporating much of the previous *Skidmore* regime.[24]

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[17] *See infra* Part II.

[18] *See infra* Part III.

[19] *See infra* Part IV.

[20] *See infra* Part V.

[21] 340 U.S. 474 (1951); *see infra* text accompanying notes 25-29.

[22] 323 U.S. 134 (1944); *see infra* text accompanying notes 30-33.

[23] *See infra* text accompanying notes 34-38.

[24] *See infra* text accompanying notes 39-48.

*1. Pre-*Chevron *Deference*

After the passage of the Administrative Procedure Act ("APA") in 1946,[25] the Supreme Court addressed the issue of judicial review of agency action in 1951 with *Universal Camera Corp. v. NLRB*.[26] In *Universal Camera Corp.*, the Court laid out a very deferential standard of review, upholding agency action where "substantial evidence"[27] exists. Additionally, *Universal Camera Corp.* requires courts to consider the totality of the record.[28] The substantial evidence standard provided deference somewhere between that of the "jury standard" and the "clearly erroneous standard."[29]

Skidmore v. Swift & Co. provided for lesser, persuasive deference in certain cases.[30] In *Skidmore*, plant employees appealed a decision of the United States Department of Labor ("DOL") that would not require payment for "on-call" time at their plant.[31] The Supreme Court noted that while the DOL's decision did not bind courts, it did reflect "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[32] This deference is such that "[t]he weight of . . . 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."[33] Under the *Skidmore* paradigm, agency decisions that were not binding on courts were still granted deference to the extent that they were persuasive.

2. The Rise of the Chevron *Era*

Judicial review in administrative law, however, revolves around *Chevron USA v. Natural Resources Defense Council*.[34] Moving away from the multi-factor deference analysis applied in previous cases, the *Chevron* Court outlined a two-step approach to determining deference: First, is there an ambiguous statute? Second, is the agency's construction of that ambiguous statute reasonable? If a statute is silent or ambiguous with

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[25] Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946).

[26] 340 U.S. at 474.

[27] "Substantial evidence" is defined as "more than a mere scintilla." *Id.* at 477.

[28] *Id.* (citing Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

[29] *Id.*

[30] 323 U.S. 134, 140 (1944).

[31] *Id.* at 135-36.

[32] *Id.* at 140.

[33] *Id.*

[34] 467 U.S. 837 (1984).

respect to the specific issue, the court must consider whether the agency's action was based on a permissible construction of the statute.[35]

Chevron acts to achieve uniformity in federal law[36] and keep the courts out of political questions.[37] By deferring to reasonable agency interpretations, courts avoid becoming entangled in determinations of policy preference.[38]

*3. The Post-*Chevron *Era: Back to the Future?*

United States v. Mead Corp.,[39] decided in 2001, further refined the Court's approach to judicial deference. In *Mead*, the Court held that before applying *Chevron*, two questions must be answered in the affirmative.[40] First, has Congress delegated power to the agency to make rules with the

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[35] *Id.* at 843. The requirements of *Chevron* Step One were fleshed out in *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (no deference to agency at Step One); *Rapaport v. U.S. Dep't of Treasury*, 59 F.3d 212 (D.C. Cir. 1995) (agency does not administer statute unless it exclusively administers it); and *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (courts must consider the larger regulatory scheme surrounding agency action). *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 845 (2001) ("[I]f the legal question as to which Congress is silent is 'extraordinary,' then this congressional silence should be interpreted to mean that the agency is *not* entitled to mandatory deference.").

[36] *See generally* Peter L. Strauss, *One-Hundred-Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118-29 (1987) (arguing that the Supreme Court defers to agencies to maintain uniformity in federal law).

[37] *See, e.g.*, *Chevron*, 467 U.S. at 865-66:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

See Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822-24 (1990) (discussing jurisprudential reasons for *Chevron* doctrine); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2088 (1990) ("*Chevron* reflects a salutary understanding that these judgments of policy and principle should be made by administrators rather than judges." (citing Silberman, *supra* note 37, at 822-24)).

[38] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (1989) (noting that one argument for *Chevron* is that it enables policy to be shaped by the political process, rather than by the courts).

[39] 533 U.S. 218 (2001).

[40] *Id.* at 226-28.

force of law? Second, has the agency, in fact, acted with such authority?[41] The *Mead* variations have been called *Chevron* Step Zero because they determine the hurdles an agency must clear before being granted *Chevron* deference.[42] *Oregon* was the Court's first attempt to deal with regulatory preemption since *Mead*.[43]

Auer v. Robbins[44] provided for deference in situations where an agency determines the ambiguities of its own substantive regulation via an Interpretive Rule. In *Auer*, the plaintiff police officers sued their police commissioner to recover overtime pay.[45] The Secretary of Labor issued an interpretation of the "salary-basis" test which determined that the police officers were salaried and not eligible for overtime pay.[46]

On appeal, the Supreme Court stated that "[b]ecause Congress has not directly spoken to the precise question at issue, we must sustain the Secretary's approach so long as it is based on a permissible construction of the statute."[47] That is, an agency's interpretation of its own statute should be shown deference as long as it is a permissible construction of the statute.[48]

Taken as a whole, the evolving *Chevron/Mead* line of cases outlines some boundaries for the doctrine of judicial deference to agency action. Courts show deference to agencies when those agencies interpret their own statutes as long as the regulations promulgated by the agencies are enacted within the scope of their delegated legislative power.

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[41] *Id.*

[42] *See generally* Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006) (providing the basic framework the Court uses to determine whether to apply the *Chevron* test). In recent years, the Court has reaffirmed *Skidmore* as being relevant in agency deference doctrine. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 641-42 (1998) (*Skidmore* applies when *Chevron* does not apply); Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 257-58 (1991) (following pre-*Chevron Skidmore* analysis instead of *Chevron*), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981, *as recognized in* Landgraf v. Usi Film Prods., 511 U.S. 244, 251 (1994).

[43] For more background on the interplay between *Chevron* and regulatory preemption, see generally Paul E. McGreal, *Some Rice with Your* Chevron*? Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 840 (1995); Damien J. Marshall, Note, *The Application of* Chevron *Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263 (1998).

[44] 519 U.S. 452 (1997).

[45] *Id.* at 454-55.

[46] *Id.*

[47] *Id.* at 457 (citations omitted).

[48] This approach differs from an interpretation that does not have the force of law. Examples of this include opinion letters, policy statements, agency manuals, and enforcement guidelines. *See* Christensen v. Harris County, 529 U.S. 576, 586-88 (2000); Merrill & Hickman, *supra* note 35, at 845-48.

B. *GONZALES V. RAICH*[49]

In 1996, California voters passed Proposition 215, which legalized the use of marijuana for medical purposes.[50] Proposition 215 directly conflicted with federal law because the CSA listed marijuana as a Schedule One drug, which prevented its use in any circumstance, even if deemed medically necessary.[51]

In October of 2002, Angel Raich, Diana Monson, and two anonymous parties filed suit seeking injunctive and declaratory relief. Those parties claimed that the CSA impinged on their right to use medical marijuana under state law.[52] This challenge to the CSA focused primarily on Commerce Clause issues. The plaintiffs argued that homegrown marijuana did not affect "[c]ommerce . . . among the several States,"[53] and thus the CSA's prohibition against marijuana was outside the scope of the Commerce Clause powers of the federal government.[54]

The Supreme Court applied rational basis review to the challenged provisions. Specifically, the Supreme Court relied heavily on *Wickard v. Filburn*,[55] which established Congress's power to regulate purely intrastate activity that is not commercial if Congress concludes that failure to regulate that class of activity could affect the regulation of the entire interstate market in that commodity.[56] In relying on *Wickard*, the Court gave Congress the power to enforce comprehensive regulatory schemes such as the CSA's prohibition against marijuana, even if doing so infringed on state regulatory and criminal law spheres of influence.[57]

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[49] 545 U.S. 1 (2005).

[50] Proposition 215 was later codified as the Compassionate Use Act of 1996, which became effective November 6, 1996. *See* CAL. HEALTH & SAFETY CODE § 11362.5 (2005). *See generally* DANIEL A. SMITH, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES (2004) (providing background information about voter initiatives in the United States).

[51] 21 U.S.C. § 812(c) (2000 & Supp. II).

[52] Raich v. Ashcroft, 248 F. Supp. 2d 918 (N.D. Cal. 2003).

[53] U.S. CONST. art. I, § 8, cl. 2.

[54] *Raich*, 248 F. Supp. 2d at 922-23.

[55] 317 U.S. 111 (1942).

[56] Gonzales v. Raich, 545 U.S. 1, 20-21 (2005).

[57] *Id.* at 22. This is notable largely because it enables Congress to infringe upon areas traditionally regulated solely by the states. *See, e.g.*, Ann Althouse, *Theoretical and Constitutional Issues: Article: Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 807 (1996) (quoting United States v. Lopez, 514 U.S. 549, 576-77 (1995)):

> Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to

Some scholars saw *Raich* as supporting agencies' ability to preempt state criminal law.[58] The preemption in *Raich* is noteworthy because Congress did not explicitly endorse it; Congress did not give the Attorney General explicit permission to criminalize the use of marijuana under state law.[59] Rather, via the CSA, Congress gave the Attorney General power to control the regulation of drugs through a comprehensive scheme of classification and categorization. Part of this regulatory scheme included the preemption of state criminal law and regulations. *Raich* upheld the Attorney General's regulatory preemption of state criminal law when applying the CSA to the classification of drugs.

C. *GONZALES V. OREGON*[60]

In 1994, Oregon voters passed Oregon Ballot Measure 16, which legalized physician-assisted suicide[61] and created the Oregon Death with Dignity Act ("ODWDA").[62] The measure passed with fifty-one percent of the vote.[63] According to the ODWDA, doctors could give a lethal dose of a drug to patients who were expected to die within six months of an incurable disease, as determined by two separate doctors.[64] The ODWDA exempts from civil or criminal liability state-licensed physicians who prescribe a lethal dose of drugs when requested to do so by a terminally ill patient.[65] Interest groups challenged the ODWDA in a 1997 special election, but voters upheld the provision.[66]

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the citizens is more dangerous even than devolving too much authority to the remote central power.

[58] *See, e.g.*, Orde Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1490-92 (2006) (evaluating the impact of *Raich* on California agencies); Dean A. Strang, *Felons, Guns, and the Limits of Federal Power*, 39 J. MARSHALL L. REV. 385, 403-11 (2006) (noting the extension of "commercial activity" in *Raich* expands the reach of federal agency power).

[59] Nowhere in the text of the CSA does Congress give explicit permission to the Attorney General to treat marijuana differently than any other drug. 21 U.S.C. § 801 (2000 & Supp. II).

[60] 546 U.S. 243 (2006).

[61] Alexander Morgan Capron, *Sledding in Oregon: Assisted Suicide Bill*, 25-1 HASTINGS CENT. REP. 34 (Jan. 1995).

[62] OR. REV. STAT. § 127.800-97 (2005).

[63] Death with Dignity Act: About Us, http://egov.oregon.gov/DHS/ph/pas/about_us.shtml (last visited Nov. 17, 2006).

[64] § 127.800, 805 (2005).

[65] *Id.* § 885.

[66] Voters Guide: Oregon Ballot Measure 51, http://www.sos.state.or.us/elections/nov497/voters.guide/M51/M51.htm (last visited Nov. 17, 2006).

The provision remained in effect despite calls from Republican senators for federal intervention.[67] When John Ashcroft became the Attorney General in 2001, he promptly issued an Interpretive Rule that criminalized assisted suicide using drugs covered under the CSA.[68] The Interpretive Rule stated that physician-assisted suicide did not serve a legitimate medical purpose, and that a physician's use of drugs covered by the CSA to facilitate suicide constituted a crime under the CSA.[69] Violation of the CSA is a criminal offense, often a felony.[70]

Shortly after the Attorney General's ruling, a group of Oregon residents composed of a doctor, a pharmacist, and several terminally ill patients challenged the Interpretive Rule in the U.S. District Court of Oregon.[71] In the initial trial, the district court agreed with the plaintiffs and issued a permanent injunction against the enforcement of the Attorney General's ruling.[72] On appeal, the Ninth Circuit affirmed the decision of the district court.[73]

The Supreme Court granted certiorari and heard the case in late 2005.[74] The State of Oregon argued that it had historically regulated the practice of medicine within the state, and that the Attorney General had no authority to intervene simply because physician-assisted suicide was involved.[75] The State went on to argue that Congress had not intended to provide the Attorney General with such sweeping power to interfere with state medical regulations.[76]

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[67] Jim Barnett & Dave Hogan, *Senator Drops Effort to Block Suicide Law*, OREGONIAN, Oct. 15, 1998, at A01.

[68] 66 C.F.R. § 1306 (2001).

[69] The Interpretive Rule states:

> For the reasons set forth in the OLC Opinion, I hereby determine that assisting suicide is not a "legitimate medical purpose" within the meaning of 21 CFR § 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).

Id.

[70] 21 U.S.C. § 841 (2000 & Supp. II).

[71] Complaint at 1, Oregon v. Ashcroft, 192 F. Supp. 2d 1077 (D. Or. 2002) (No. CV 01-1647-JO).

[72] Oregon v. Ashcroft, 192 F. Supp. 2d 1077, 1084 (D. Or. 2002).

[73] Oregon v. Ashcroft, 368 F.3d 1118 (9th Cir. 2004).

[74] Gonzales v. Oregon, 543 U.S. 1145 (2005).

[75] *See* Brief of Respondent State of Oregon at 27-28, Gonzales v. Oregon, No. 04-623 (July 20, 2005).

[76] *Id.*

The Attorney General argued that the Court should defer to the Interpretive Rule as long as it was a reasonable interpretation of the CSA.[77] He also argued that under the doctrine laid out in *Auer*,[78] the Interpretive Rule should be given deference. The Attorney General went on to suggest that, per *Mead*,[79] Congress had delegated this sort of power to the agency, and that the agency had acted in accordance with the delegated authority. Thus, the agency ruling satisfied *Chevron* Step Zero and should be provided with broad deference.[80]

Justice Kennedy wrote the 6-3 majority opinion for the Court,[81] which ruled in favor of the State of Oregon and struck down the Attorney General's Interpretive Rule as beyond the scope of the power delegated by Congress.[82] The Court first discussed the issue of *Auer* deference and concluded that the Interpretive Rule "just repeats [some] phrases and attempts to summarize . . . others."[83] Because the Rule was only "parroting"[84] an already existing regulation, the Interpretive Rule added nothing to the statutory language and thus was not entitled *Auer* deference.[85]

The Court subsequently turned to the question of *Chevron* deference. The Court granted that the phrase "legitimate medical purpose," outlined in the CSA, lacked clarity,[86] but noted that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous . . . . [T]he rule must be promulgated pursuant to authority Congress has delegated to the official."[87] The Court then examined the statutory language relating to "control" of a

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[77] Reply Brief of Petitioner at 11, Gonzales v. Oregon, No. 04-623 (Aug. 25, 2005).

[78] 519 U.S. 452 (1997); *see supra* text accompanying notes 44-48.

[79] 533 U.S. 218 (2001).

[80] For further information about *Chevron* Step Zero, see *supra* note 42.

[81] Justices Kennedy, Stevens, O'Connor, Souter, Ginsburg, and Breyer composed the majority. Justice O'Connor was part of the majority even though she had announced her retirement in July of 2005, pending confirmation of her successor. Justice Alito had not yet been confirmed when the Court handed down its judgment.

[82] Gonzales v. Oregon, 546 U.S. 243, 269 (2006).

[83] *Id.* at 257.

[84] *Id.*

[85] The Court provided an additional reason for not granting *Auer* deference to the Interpretive Rule when it noted that "the current interpretation runs counter to the intent at the time of the regulation's promulgation." *Id.* (citations omitted).

[86] *Id.* at 258.

[87] *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)); *see also* 21 U.S.C. § 821 (2004) ("The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to listed chemicals.").

substance and determined that the Attorney General's actions could not fit within the text of the statute.[88]

The Court continued by examining the registration provisions of the CSA. In so doing, it noted that the Interpretive Rule "d[id] not undertake the five-factor analysis . . . and it concerns much more than registration."[89] The Court clarified that the Interpretive Rule was not an interpretation of the registration provision of § 823(f), but rather an interpretation of substantive federal law.[90] By interpreting substantive federal law, the Attorney General overstepped the limits given to him by Congress. The Court pointed out that, following the logic advanced by the Attorney General, any action deemed an illegitimate medical purpose by the Attorney General would subject registered physicians to the risk of being branded felons.[91] "This power to criminalize . . . would be unrestrained."[92] Clearly, Congress did not intend to create such unrestrained power when it promulgated the CSA.

After dismissing both *Auer* and *Chevron* deference arguments, the Court determined that the Attorney General's Interpretive Rule was only entitled *Skidmore* deference.[93] The Court noted that state governments, not the federal government, have traditionally regulated the medical field.[94] Further, the Court stated, "[i]n the face of the CSA's silence on the practice of medicine generally and its recognition of state regulation of the medical profession it is difficult to defend the Attorney General's declaration that the statute impliedly criminalizes physician-assisted suicide."[95] The Court thus rejected the Attorney General's position and decided in favor of the Respondents.

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[88] *Id.* at 259. ("As is evident from these sections, Congress did not delegate to the Attorney General authority to carry out or effect all provisions of the CSA. Rather, he can promulgate rules relating only to 'registration' and 'control,' and 'for the efficient execution of his functions' under the statute.") (citations omitted). *See* 21 U.S.C. § 801 (2000).

[89] *Oregon*, 546 U.S. at 261. The five-factor analysis included in the CSA is outlined in 21 U.S.C. § 823(f). *Id.* at 251.

[90] *Id.* at 261.

[91] *Id.*

[92] *Id.* at 262.

[93] *Id.* at 268. *Skidmore* deference is such that "[t]he weight of . . . 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." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[94] *Oregon*, 546 U.S. at 270-71.

[95] *Id.* at 272.

Under the CSA, Congress delegated to the Attorney General the power only to reschedule substances or to classify them into schedules.[96] Congress did not, however, intend to give the Attorney General carte blanche to create regulations that preempted state law in arenas traditionally reserved to the states.[97] The Court stated that "[e]ven if 'control' . . . were understood to signify something other than its statutory definition, it would not support the Interpretive Rule,"[98] which went far beyond the bounds intended by Congress.

The Court noted that Congress went to great lengths to outline the Attorney General's limited authority to classify or reclassify controlled substances.[99] This attention to detail stood in contradistinction to the argument proposed by the Attorney General that would have granted him wide-ranging power[100] to "declare an entire class of activity outside 'the course of professional practice,' and therefore a criminal violation of the CSA."[101]

In short, while the Attorney General could, with the help of the Secretary of Health and Human Services, schedule and reschedule drugs within the ambit of the CSA,[102] he overstepped his bounds by issuing an interpretive rule to define a "legitimate medical purpose" or "professional practice," both realms for state regulation.[103] The Attorney General can decide "compliance" with the law, but cannot determine substantive

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[96] *Id.*

[97] *Id.* at 272. Under the CSA, the Attorney General can only classify and categorize drugs onto various schedules. 21 U.S.C. § 812 (2000).

[98] *Oregon*, 546 U.S. at 260.

[99] *See id.* at 260 (citations omitted):

> To exercise his scheduling power, the Attorney General must follow a detailed set of procedures, including requesting a scientific and medical evaluation from the Secretary. The statute is also specific as to the manner in which the Attorney General must exercise this authority: "Rules of the Attorney General under this subsection [regarding scheduling] shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by [the Administrative Procedure Act]. The Interpretive Rule now under consideration does not concern the scheduling of substances and was not issued after the required procedures for rules regarding scheduling, so it cannot fall under the Attorney General's "control" authority.

[100] Congress did include a blanket provision to enable the Attorney General to carry out his duties, but the Court ruled that Congress did not intend to create unrestrained criminalization powers. *See* 21 U.S.C. § 871(b) (2000 ed. & Supp. II) ("The Attorney General may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this title.").

[101] *Oregon*, 546 U.S. at 262 (citing Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 744 (1973)).

[102] *Id.* at 265.

[103] *Id.* at 273.

portions of the law. Congress alone can determine substantive portions of the law.[104]

D. DISCREPANCIES BETWEEN *OREGON* AND *RAICH*

Upon superficial examination, the Court's positions in *Oregon* and *Raich* appear inconsistent. On the one hand, *Raich* suggests that the Attorney General can use the CSA to preempt state law to establish a criminal regulatory scheme.[105] On the other hand, the Court struck down a similar scheme in *Oregon*. In *Oregon*, the Court held that the Attorney General could not use the power of the CSA to preempt state law to criminalize certain behaviors generally regulated by state agencies.[106]

The discrepancies become even more apparent when examining how each Justice voted in *Oregon* and *Raich*. These votes are summarized in a table below:

Table 1

Voting on the Scope of Attorney General Power

Justice	Gonzales v. Raich[107] 2005	Gonzales v. Oregon[108] 2006
Stevens	Broad	Narrow
Kennedy	Broad	Narrow
Souter	Broad	Narrow
Ginsburg	Broad	Narrow
Breyer	Broad	Narrow
Scalia	Broad	Broad
O'Connor	Narrow	Narrow
Thomas	Narrow	Broad
Rehnquist	Narrow	—
Roberts	—	Broad

[104] *Id.* at 263; *see also* James Cummings, *"You're Telling Me?" Federalism's Role in the Physician-Assisted Suicide Debate:* Gonzales v. Oregon, 7 FLA. COASTAL L. REV. SPECIAL SUPP. 10 (2006) (foreshadowing the impact that federalism would have on the criminal law issue here).

[105] *See supra* text accompanying notes 49-59.

[106] *See supra* text accompanying notes 60-104.

[107] 545 U.S. 1 (2005).

[108] 546 U.S. 243 (2006).

As demonstrated by Table 1, a majority of the Justices changed their minds regarding the proper reach of the Attorney General's power between *Raich* and *Oregon*. In *Raich*, Justices Stevens, Kennedy, Souter, Ginsburg, Breyer, and Scalia all voted to provide the Attorney General with broad power to enforce the CSA in preemption of a state regulatory scheme.[109] Yet in *Oregon*, Justices Stevens, Kennedy, Souter, Ginsburg, Breyer, and O'Connor all voted to limit the scope of the power of the Attorney General to preempt state law by utilizing federal regulatory power to criminalize certain behaviors under the CSA.[110] Only Justices Scalia and O'Connor, both members of the "States' Rights Five,"[111] voted consistently. Justice Scalia voted both times to grant broad power to the Attorney General,[112] while Justice O'Connor twice voted to limit the power of the Attorney General to preempt state law under the CSA.[113] An adequate reconciliation of these outcomes must not only be explanative of past behavior but also predictive of future behavior by the Court.

E. WHY DOES *OREGON* MATTER?

As one of the primary cases addressing the scope of agencies' power to criminalize behavior, *Oregon* is poised to have far-reaching effects. Central to American democracy is a distrust of far-ranging criminal powers vested in a sovereign.[114] *Oregon* directly addresses the agencies' ability to criminalize certain behaviors. Consequently, any evaluation of *Oregon*

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[109] *See supra* Table 1.

[110] *Id.*

[111] The "States' Rights Five" are the late Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. *See* Lynn A. Baker, *The Future of Federalism?:* Pierce County v. Guillen *as a Case Study*, 50 N.Y.L. SCH. L. REV. 699, 700, n.4 (2005-2006); Editorial, *Fiddling with Federalism*, N.Y. TIMES, Oct. 15, 1999, at A34 (referring to the "States' Rights Five"). The "States' Rights Five" have supported limiting the federal government's influence over states. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). Justice O'Connor has since stepped down from the Supreme Court and has been replaced by Samuel Alito; John Roberts now presides as Chief Justice.

[112] Justice Scalia has been very consistent on agency deference questions. *See, e.g.*, Merrill & Hickman, *supra* note 35, at 860 ("Justice Scalia invokes *Chevron* more consistently than other Justices, but also ends up deferring to agency views *less* than other Justices.").

[113] *See supra* Table 1.

[114] *See, e.g.*, U.S. CONST. amend. V, VI; U.S. CONST. art. I, § 9, cl. 3; Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 374 (1976); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 765-66 (1999) (arguing that the purpose of requiring crimes to be defined by Congress is to "make evident the behaviors that are immune from the onerous intrusions of the state" (quoting FRANCES A. ALLEN, THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW, 77-93 (1996))).

must consider the tension between administrative efficiency, with agencies acting within their expertise to dispense justice, and concerns about an unelected body setting far-reaching criminal standards.[115] As one scholar has put it:

> It is a familiar premise that the Constitution separates legislative, executive, and judicial power to prevent tyranny and protect liberty. By preventing any one branch from accumulating too much authority, the separation of powers aims "not to promote efficiency but to preclude the exercise of arbitrary power." The price of separation is that it makes it more difficult for the federal government to act—whether for good or bad purposes. The rise of the administrative state put a spotlight on this cost of the separation of powers.[116]

Criminal sanctions hold a special place in the American political system; the Framers of the Constitution explicitly detailed provisions to protect people from sovereigns enacting unjust criminal penalties.[117] Excesses of the British agents in the colonies no doubt resulted in a backlash against vesting too much power in an unelected body.[118] As a result of this initial skepticism, non-statutory criminal law has experienced an uneasy history in the United States.[119] After several early cases denied agencies the freedom to criminalize behaviors outside of clear statutory guidelines,[120] *United States v. Grimaud*[121] provided agencies more leeway in enforcing criminal penalties. In *Grimaud*, a Congressional statute defined both the crime of illegal grazing on a forest reserve and the

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[115] *See* Mark D. Alexander, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612, 622-24 (1992); *see also* Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 657-59 (2006) (evaluating the problem of guilt without intent by means of criminalized regulatory statutes).

[116] Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 990-91 (2006) (citations omitted).

[117] The most salient examples of these protections are found in the Fifth and Sixth Amendments, with provisions addressing the requirement of a grand jury, double jeopardy, self-incrimination, due process, the right to a jury, and the right to counsel. *See also id.* (elaborating on the importance of criminal law to the Framers).

[118] Levi, *supra* note 114, at 374.

[119] *See, e.g.*, Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 194 (2002) ("That all federal criminal law derives from statutes is a cornerstone of federal criminal jurisprudence . . . . [Extra-statutorial crimes] run afoul of our deepest notions of due process and raise the specter of the judiciary imposing its will . . . against the citizens.").

[120] *See, e.g.*, *In re* Kollock, 165 U.S. 526 (1896) (allowing an agency to enforce a criminal penalty when the statute the agency administered clearly called for criminal sanctions); United States v. Eaton, 144 U.S. 677 (1891) (holding that a violation of a regulation cannot make one liable for a criminal penalty in the absence of a statute distinctly making the violation a criminal offense).

[121] 220 U.S. 506 (1911).

appropriate punishment, but left the determination of off-limit properties to the Secretary of Agriculture.[122] The defendants were indicted for permitting their sheep to graze on a forest reserve without first obtaining permission from the Secretary of Agriculture.[123] The Court upheld the criminal penalties and noted that the agency merely carried out the will of Congress as defined by the statute.[124]

From that inauspicious beginning, agency-made criminal law has consistently grown over the years with the addition of new agencies and regulations.[125] Recognizing that statutes can never be perfectly precise, courts often grant deference to the criminal regulations promulgated by agencies.[126] *Raich* exemplifies this approach to agency-made criminal law because the Court upheld the criminal sanctions enacted by the Attorney General under the CSA.[127] *Oregon*, on its surface, goes against this trend because it limits the Attorney General's ability to promulgate criminal penalties.[128]

The remainder of this Comment examines possible explanations for the discrepancy in *Oregon* and *Raich* and discusses how *Oregon*'s holding will affect agency-made criminal law in the future.

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[122] Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1103 (codified at 16 U.S.C. § 471 (1970)) (repealed 1976).

[123] *Grimaud*, 220 U.S. at 514-15.

[124] *Id.* at 522 (citations omitted):

> The Secretary of Agriculture could not make rules and regulations for any and every purpose. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

[125] *See, e.g.*, Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (arguing against deference to agencies' interpretations of criminal law). *See generally* Edmund H. Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51 (1943) (providing background on the rise of agency-made criminal law).

[126] *See* Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1, 47 (1996).

[127] *See supra* Part II.B.

[128] *See infra* Part III.B.

III. INTERPRETING *OREGON* THROUGH THE LENS OF FEDERALISM

Many scholars have approached the Court's recent federalism decisions[129] as variations on the "new federalism"[130] of the Rehnquist Court.[131] If *Oregon*'s logic resulted from the interface between states and the federal government, however, the federalism aspects could play out in variegated ways. What is clear is the unsettled nature of preemption doctrine, particularly as it regards the preemption of state law by federal agencies.[132] The ability of agencies to preempt state law—particularly in areas of regulation traditionally reserved to the states, such as medicine—has an unclear history.[133] As such, there exists a struggle to determine the precise lines upon which the Court rests its preemption doctrine in *Oregon*.

The state/federal distinctions that emerged from *Oregon* and *Raich* could be drawn in five ways. First, the Court could make a distinction between the ability of agency-made rules and congressional statutes to preempt state law. Second, the Court could draw its distinction on the basis of criminal versus civil penalties inherent in the CSA as compared to other agency actions. Third, the Court could base its reasoning on matters requiring explicit congressional approval instead of merely accepting congressional silence on an issue as tacit approval. Fourth, particularly in light of *Raich*, the *Oregon* ruling could be driven by the Commerce Clause and economic versus non-economic issues reasoning. A fifth approach has

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[129] This statement refers particularly to *Oregon* and *Raich*.

[130] "New federalism" here refers to the "Rehnquist Revolution," which utilized the Ninth and Tenth Amendments to limit the reach of the federal government. This approach is akin to what Justice Brandeis outlined in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."), exemplified in both *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995). *See* Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS 132 (2001) (examining the Rehnquist Court's move toward federalism). *See generally* Rosalie Berger Levinson, *Will the New Federalism Be the Legacy of the Rehnquist Court?*, 40 VAL. U. L. REV. 589 (2006) (discussing the implications of the Rehnquist Court's "new federalism"); Mark Tushnet, *Federalism and the Supreme Court: The 1999 Term: What is the Supreme Court's New Federalism?*, 25 OKLA. CITY U. L. REV. 927 (2000) (providing background on "new federalism").

[131] Thomas W. Merrill, *Rescuing Federalism After* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823 (2005); Ernest Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1 (1999).

[132] *See* Denise Morgan, *Introduction: A Tale of (at Least) Two Federalisms*, 50 N.Y.L. SCH. L. REV. 615, 620-21 (2005-2006) ("[T]he unsettled state of the Court's preemption doctrine only adds more confusion to the already muddy picture of Revolution and counter-Revolution.").

[133] *See generally* Robert Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 PEPP. L. REV. 25 (2005).

been suggested by Ann Althouse, comparing the Court's federalism actions in "vanguard" states versus those in "laggard" states.[134]

All of these approaches provide a possible distinction upon which the Court could have based its reasoning in both cases; however, a careful examination reveals potential problems and inconsistencies.

A. AGENCY-MADE RULES VERSUS CONGRESSIONAL STATUTES

One line of distinction that can be drawn between *Raich* and *Oregon* concerns rules made by an agency that appear to step outside the intended bounds set by Congress versus regulations that align themselves closely with the intentions of Congress. Under this explanation, Congress could pass legislation that preempts state law via the Commerce Clause, but agencies would not have the ability to create regulations that preempt state law.[135]

A close analysis of *Raich* lends some credence to this approach. In *Raich*, the Court relied on *Wickard*,[136] which permitted regulation of wheat because Congress enacted statutes specifically to address wheat prices as part of a national comprehensive regulatory scheme.[137] Similarly, Congress enacted the CSA as part of a comprehensive scheme to deal with the proliferation of drugs and other dangerous substances.[138] Under this explanation, when Congress creates a comprehensive scheme to address a particular issue, the provisions laid out by Congress, and determined to be necessary to the execution of that scheme, may preempt state law.

This approach seems to explain *Oregon* as well. Congress clearly did not pass the CSA to stop physician-assisted suicide;[139] rather, Congress passed the CSA to address the growing illicit drug problem in the United States. Thus, under this reading, the Attorney General's actions were not permissible because he stepped outside the bounds of his authority by issuing a ruling that used the CSA to serve a function other than that for

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[134] Althouse, *supra* note 11; *see also infra* notes 177-87 and accompanying text.

[135] Presumably, this distinction would be even more at issue in fields traditionally regulated by the states, such as medicine.

[136] 317 U.S. 111 (1942).

[137] *Id.* at 114-15.

[138] *See* 21 U.S.C. § 801 (2000):

> (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people .... (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

[139] The statute makes no mention whatsoever of the issue. *See id.*

which Congress intended the legislation, an approach that finds textual support in the decision.[140]

While this approach offers an explanation of the discrepancies between the two cases, it does not provide much indication about how the Court will decide cases in the future. The breakdown of the Justices in these two cases indicates that a straightforward textual reading is too simplistic. Justice Scalia, for example, favored broad authority for the Attorney General in both cases, while Justice O'Connor voted for the opposite—narrow power for the Attorney General—in both cases.[141]

Thus, while this analysis may provide an accurate explanation of the Court's decisions on a meta-level, it does not account for the individual variances in voting behavior. Consequently, a breakdown of agency-made rules versus congressional statutes may explain superficial reasons given by the Court for its ruling, but many scholars doubt whether the Justices took a strict functionalist approach to interpreting the CSA in these cases.[142] Rather, one questions whether the opinion in *Oregon* is simply a functionalist gloss on a normative opinion. Perhaps the Court had other reasons to be more amenable to physician-assisted suicide than medical marijuana.[143] At the very least, simply stating that Congress can preempt state law where agencies cannot seems to be an oversimplification of the issues addressed in *Raich* and *Oregon*.

In short, this approach provides a strong argument for explaining the discrepancy in the past but fails to provide suggestions about how the Court may decide cases in the future.

B. CRIMINAL VERSUS CIVIL PENALTIES

The Court could also draw a line differentiating agencies that enact criminal sanctions from those that enact civil penalties. Under this approach, an agency can abrogate the wall of federalism and preempt state legislation to regulate civil matters, but it will have less room to tread when enacting criminal sanctions.

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[140] Gonzales v. Oregon, 546 U.S. 243, 255-63 (2006) ("Deference in accordance with *Chevron* . . . is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law." (citations omitted)).

[141] *See supra* Table 1. If the decision were based upon a straightforward textual approach to the CSA, we would expect most of the justices, when confronted with similar cases, to adopt similar positions. Only Justices Scalia and O'Connor remained consistent with their votes, suggesting that the rest of the justices are not applying a simple textualist approach to the cases.

[142] That is, the Court would appear to be ascribing fairly mechanical rules to account for a more politically-motivated normative opinion. *See, e.g.*, Merrill, *supra* note 131.

[143] In particular, the political leanings of the justices may have provided a reason for distinguishing between physician-assisted suicide and medical marijuana.

Our nation has a history of heightened requirements for criminal law.[144] Mindful of this heightened standard, the Court could simply require more safeguards to prevent agencies from over-criminalizing behaviors not specifically intended by Congress. One plausible explanation of the Court's actions thus focuses on the distinction between civil and criminal matters reached by agency regulations, with courts providing more leeway for agency civil regulatory actions while constraining the ability of agencies to regulate criminal matters.[145]

Courts have good reason to be wary of the increase of regulatory offenses. Over-criminalization by means of regulatory offenses may have two unintended results. First, it opens the door to the possibility of tyranny, with an unelected agency free to criminalize behavior not intended by Congress to be criminalized.[146] The public only holds agencies politically accountable indirectly.[147] Moreover, the feedback loop on this accountability has a significant period of latency. If federal agencies overstep their bounds, the public must wait four years to create change in agencies by electing a new President.[148] Because of this delay in political accountability, courts have good reason to rein in agencies that exercise power not specifically delegated by Congress.[149]

Second, some question the existence of moral blame that attaches to a regulatory violation.[150] By criminalizing activities that appear not to carry

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[144] *See supra* text accompanying notes 114-24.

[145] *See Oregon*, 546 U.S. at 258-59 (expressing concern at the extent of power available to the Attorney General to criminalize behaviors under the argument presented by the U.S. government).

[146] Alexander, *supra* note 115, at 624.

[147] *Id.* at 627; *see also* Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 864-65 (1984); Merrill & Hickman, *supra* note 35, at 861; Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 209-10 (1997) (focusing on the problems inherent to the delegation of power to states through federal agencies).

[148] Or, in the alternative, Congress may act to rein in an overly zealous agency. The lag time in the political process may make this approach difficult in practice. *See, e.g.*, George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law, and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225, 280 (1997) (discussing the slow political process inherent in the federalist system); Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 99-100 & n.315 (1985) (arguing that Congress is too slow in making constitutional decisions).

[149] Alexander, *supra* note 115, at 625-28.

[150] *See* Mark A. Edwards, *Law and the Parameters of Acceptable Deviance*, 97 J. CRIM. L. & CRIMINOLOGY 49, 72-73 (2006) (citing TOM TYLER, WHY PEOPLE OBEY THE LAW 25 (1990)) (analyzing the role that normative public opinion plays in determining proper levels of regulatory enforcement); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a*

much moral weight, the overall public perception of the legitimacy of the state criminal law regime may be weakened.[151] As Lawrence Friedman notes, "[t]here are vast differences *among* regulatory crimes in their moral status within society. There is a huge gulf between what people feel about a corporation that pours tons of poison into a river and how they feel about someone who pulls the tag off a mattress."[152] The regulation and criminalization of trivial acts may lessen the overall legitimacy of the criminal justice regime. Furthermore, it may also impact the legitimacy of the agency creating and enforcing such regulations. Thus, courts often have very good reasons to limit the amount of freedom agencies have in trying to step outside the bounds delimited for them by Congress.

This reading, however, lacks plausibility because it does not align with agency behavior in general. Under the auspices of other statutes, agencies such as the Environmental Protection Agency have long preempted state law to criminalize certain behaviors.[153] Additionally, the Attorney General, under RICO, has broad powers to promulgate criminal provisions that are not explicitly authorized by Congress.[154] The existence of agencies with such wide-ranging criminalization powers casts doubt on a reading of *Oregon* and *Raich* that draws the distinction for the CSA along criminal versus civil lines.

Even more importantly, the Court previously addressed the Attorney General's power under the CSA to criminalize certain activities in preemption of state law. In *United States v. Oakland Cannabis Buyers' Cooperative*,[155] a California voter initiative allowed state citizens to grow and distribute marijuana for medical necessity.[156] The Attorney General ordered the Oakland Cannabis Buyers' Cooperative ("OCBC") to stop distributing marijuana in violation of the CSA.[157] The OCBC refused to do so and sought an injunction.[158]

Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 EMORY L.J. 1533, 1545 (1997).

[151] *See* Green, *supra* note 150, at 1545.

[152] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 285 (1993).

[153] *See generally* Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work That Remains*, 59 GEO. WASH. L. REV. 900 (1991); James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916 (1991).

[154] 18 U.S.C. §§ 1961-1968 (2006); *see infra* Part V.B.

[155] 532 U.S. 483 (2001).

[156] *Id.* at 486.

[157] *Id.* at 487-88.

[158] *Id.*

On appeal, the Supreme Court ruled against the OCBC and noted that the CSA contained explicit provisions that included marijuana on the list of controlled substances.[159] The Court noted that no federal common law crimes exist; federal crimes must be created by Congressional statute.[160] The Court also noted that Congress intended to both criminalize the growth and distribution of marijuana, as well as enable the Attorney General to oversee the enforcement of the CSA.[161] Thus, the Supreme Court permitted an agency to enforce criminal provisions specifically pertaining to the CSA.

Even though our system of law has long held that distinctions exist between civil and criminal penalties, this explanation fails to serve as a valid explanation for the Court's reasoning in *Oregon* and *Raich*. To acknowledge this distinction as the basis for the Court's reasoning is to overlook the reality that agencies have long had the power to criminalize through regulatory action; moreover, the Court addressed the issue of agency-made criminal law under the CSA in *Oakland* and came down on the side of the agency. In sum, past history of agency regulatory powers as well as previous opinions of the Supreme Court make clear that a distinction drawn on criminal versus civil lines fails to explain the apparent discrepancy between *Oregon* and *Raich*.

C. EXPLICIT CONGRESSIONAL APPROVAL VERSUS CONGRESSIONAL SILENCE

A third possible basis for the Court's discrepant decisions in *Oregon* and *Raich* lies in the difference between explicit congressional approval of an agency's actions versus congressional silence on an issue. Under this paradigm, while an agency may not have power to create regulations that preempt state law in the face of congressional silence, Congress could explicitly empower an agency[162] to create regulations that abrogate state law.[163]

This explanation would suggest that the differentiation between *Oregon* and *Raich* lies in the extent to which Congress addressed the issues

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[159] *Id.* at 491.

[160] *Id.* at 490.

[161] *Id.* at 492-93.

[162] For example, Congress could issue clear-statement rules to guide an agency in express preemption. *See generally* Merrill, *supra* note 131.

[163] A significant amount of material has been written about regulatory preemption and the issues involved. *See, e.g.*, Jack W. Campbell IV, *Regulatory Preemption in the* Garcia/Chevron *Era*, 59 U. PITT. L. REV. 805 (1998); Lior Evan, Note, *Regulatory Preemption and Federal Common Law: The Post-Sale Enforceability of Farmers Home Administrative Liens*, 88 COLUM. L. REV. 1362 (1988); Andrew T. Reardon, Note, *An Examination of Recent Preemption Issues in Banking Law*, 90 IOWA L. REV. 347 (2004).

in both cases. In *Raich*, Congress included marijuana in the CSA specifically to limit its use and propagation.[164] In *Oregon*, however, Congress did not even address the issue of physician-assisted suicide.[165] This paradigm suggests that agencies could trump federalism constraints where Congress spoke to the issue at hand, but could not act in the face of congressional silence.

While this paradigm could serve as an explanation for the Court's reasoning, it fails a "common sense" test; the intention behind the creation of agencies is to delegate congressional power to the agencies to deal with the minutiae involved with creating comprehensive legal systems.[166] Forcing Congress to detail with precision every instance of agency power defeats the purpose of the administrative state, as that would entail nearly as much work for Congress as passing particular laws to address the issues.[167] Agencies should not be required to pause in the face of congressional silence on issues when they act to fulfill an intelligible principle laid down by Congress. The inflexibility of the explicit congressional approval versus congressional silence dichotomy makes it a poor candidate for the Court's rationale in deciding *Oregon* and *Raich*.

D. ECONOMIC VERSUS NON-ECONOMIC FACTORS

Any case discussing the impact of federalism inevitably deals with Commerce Clause issues.[168] The federalism of the Rehnquist Court, in

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[164] Gonzales v. Raich, 545 U.S. 1, 29 (2005).

[165] Gonzales v. Oregon, 546 U.S. 243, 270 (2006).

[166] *See, e.g.*, Brian Galle, *The Justice of Administration: Judicial Responses to Executive Claims of Independent Authority to Interpret the Constitution*, 33 FLA. ST. U. L. REV. 157, 218-19 (2005) (noting that "agencies . . . are best equipped to carry out th[e] function [of governing because] their information . . . is 'closer to the ground'"). Galle goes on to note that agencies are "more nimble" than Congress and can react more quickly to changing circumstances. *Id.* at 219. *See also* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1497-98 (2000) (discussing the struggle between legislative supremacy and administrative expediency in the context of the nondelegation doctrine); Sunstein, *supra* note 42, at 197 (stating "it would be appropriate for agencies . . . to resolve competing interests . . . in light of everyday realities").

[167] Noah, *supra* note 166, at 1497-98.

[168] For much of the past century, federalism analyses have largely involved discussions of the Commerce Clause and Congress's ability to regulate interstate commerce. *See, e.g.*, Diane McGimsey, Comment, *The Commerce Clause and Federalism after* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675 (2002) (examining recent developments in the approach to interstate commerce after the Rehnquist Revolution).

particular, dealt heavily with Commerce Clause concerns.[169] If, as many suggest, *Oregon* and *Raich* are principally federalism cases,[170] it makes sense to consider whether the distinctions the Court used could be the result of Commerce Clause analysis.

In evaluating *Oregon* and *Raich*, the Court could draw a distinction based on economic and non-economic factors, an integral part of Commerce Clause analysis.[171] In *Raich*, the Court relied on *Wickard*,[172] which pointed out that locally cultivated wheat could have an impact on interstate commerce.[173] The Court thus concluded that locally cultivated and distributed medical marijuana could similarly have an effect on interstate commerce, falling under the ambit of Congress's Commerce Clause powers.[174] Conversely, physician-assisted suicide in *Oregon* does not involve the cultivation or trade of a controlled substance. One could reason that the Court concluded this activity was non-economic in nature and therefore outside the reach of Congress's Commerce Clause authority.

This distinction, however, fails to account for several factors. The physician likely obtained the drugs used to terminate a patient's life through interstate commerce.[175] At the least, one has a plausible argument that *Oregon* deals with economic factors. Additionally, any reading that attempts to reconcile *Oregon* and *Raich* on the grounds of economic and non-economic factors for Commerce Clause analysis overlooks one glaring problem: While *Raich* discusses Commerce Clause issues at length,[176] *Oregon* does not even broach the subject; the Court avoids a Commerce Clause analysis and instead focuses on the reach of the Attorney General's powers, not on the status of the substance being regulated.[177] It is not clear that the *Oregon* Court even considered Commerce Clause issues in rendering its opinion.

Even though economic and non-economic issues exist in both *Raich* and *Oregon*, the potential to make physician-assisted suicide an economic factor, as well as the Court's lack of concern over Commerce Clause issues

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[169] *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[170] *See generally* Danino, *supra* note 9; Huhn, *supra* note 9; Merrill, *supra* note 131.

[171] *Morrison*, 529 U.S. at 610-12; *Lopez*, 514 U.S. at 556-57.

[172] 317 U.S. 111 (1942).

[173] *Id.* at 128-29.

[174] *See supra* text accompanying notes 136-37.

[175] This interstate commerce could occur either directly or indirectly, as evinced in *Wickard* and *Raich*.

[176] Gonzales v. Raich, 545 U.S. 1, 15-19 (2005).

[177] Gonzales v. Oregon, 546 U.S. 243, 257-65 (2006).

in *Oregon*, renders this distinction a non-viable basis for understanding the Court's decision.

E. VANGUARD STATES VERSUS LAGGARD STATES

A final approach to explain the *Oregon* and *Raich* disparity has been proposed by Ann Althouse.[178] Noting the inconsistencies in court rulings on federalism,[179] Althouse suggests that the Court may have adopted a Brandeisian[180] approach to these cases: Viewing the states as experimental laboratories, the Court sets a floor of liberties to which all states must adhere, but provides states with the opportunity to raise the bar and provide more liberties. This argument explains why the liberal bloc[181] of the Court would come down hard on states that lag behind on rights[182] but would support federalism in instances where states are on the vanguard of civil rights.[183]

This approach gains more credence when one examines Kennedy's concurrence in *Lopez*,[184] in which he discussed the Court's role in addressing vanguard and laggard issues by means of federalism.[185] Nevertheless, significant concerns exist with creating a stock dichotomy to analyze a variety of matters. The Court would need to develop a working model to determine which state activities constitute the "vanguard" group and which constitute the "laggard" group. One envisions a scenario in which the Justices rely more on their own normative evaluations of where rights *should* be rather than a strict textualist interpretation of the Constitution. While the Warren Court certainly embraced this model to remedy the wrongs it perceived in society, courts that rely on normative

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[178] *See* Althouse, *supra* note 11.

[179] *Id.* at 1751.

[180] *Id.* at 1745.

[181] The "liberal bloc" of the Court is composed of Justices Souter, Ginsburg, Breyer, and Stevens. *See, e.g.*, Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043 (2006).

[182] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (liberal bloc opposes federalism where Virginia is a laggard on civil rights).

[183] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (liberal bloc supports federalism where New Jersey is in the vanguard of the civil rights movement).

[184] United States v. Lopez, 514 U.S. 549, 568-83 (Kennedy, J., concurring).

[185] *See, e.g., id.* at 577-79 ("Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." (citations omitted)).

judgments rather than textual support run the risk of appearing illegitimate to the public.[186]

Additionally, some Constitutional scholars suggest that a simplistic paradigm such as the vanguard/laggard approach fails to consider all of the possible factors weighing in on the Court's decisions.[187] Chemerinsky notes that no single theory explains all of the Court's federalism rulings.[188]

While Althouse's vanguard/laggard paradigm may provide a solid conceptual framework for the Court's approach to federalism in general, the difficulties in determining the composition of the vanguard/laggard classifications as well as the over-simplification of the method makes this model inapplicable to the specific situation of *Oregon* and *Raich.*

IV. AN ADMINISTRATIVE LAW APPROACH TO RECONCILING *OREGON* AND *RAICH*

While federalism certainly played a role in the Court's decisions in *Oregon* and *Raich*, none of these approaches adequately explains why the Attorney General could criminalize behavior in one instance[189] and not in the other.[190] Moreover, these approaches fail to predict future decisions of the Court. Much can be gained by taking the Court's reasoning in *Oregon* at face value: In a decision ostensibly about administrative law with an opinion that extensively discusses administrative law, perhaps the first place to which one should turn to understand the Court's reasoning is administrative law. The remainder of this Comment argues that even though federalism concerns exist in *Oregon*, administrative law doctrines provide the most insight into reconciling *Oregon* and *Raich.* Moreover, a

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[186] *See, e.g.*, Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 236-41 (1968) (citations omitted):

> Insofar as the Court also has a symbolic role to play in our society, however, it too is subject to the mandate of establishing, declaring, and appearing to live in accordance with, standards that are not of this world. In the case of the Court, those standards require the maintenance of an appearance not only of incorruptibility—which the society largely, and correctly, takes for granted—but also of adherence to principle, to logic, and to neutrality.

See also Edwards, *supra* note 150, at 83; David A. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1984) (evaluating the impact that judicial candor has on the public perception of court legitimacy); David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1857-58 (2005) (discussing the public perception of the illegitimacy of *Bush v. Gore* because the Court relied on normative judgments rather than legal precedent).

[187] *See* Erwin Chemerinsky, *Reconceptualizing Federalism*, 50 N.Y.L. SCH. L. REV. 729, 731 (2005-2006).

[188] *Id.*

[189] *See* Gonzales v. Oregon, 546 U.S. 243 (2006).

[190] *See* Gonzales v. Raich, 545 U.S. 1 (2005).

synthesized administrative law and federalism reading of *Oregon* provides a helpful framework by which to predict future decisions of the Court.

A. FEDERALISM AND INCIDENTAL CRIMINALIZATION POWERS

While many scholars see *Oregon* and *Raich* as federalism cases within the ambit of the traditional Rehnquist era approach, an administrative law reading clarifies the federalism differences presented by the two cases. *Raich* was a challenge to the constitutionality of the CSA under the Commerce Clause,[191] not a challenge to the reach of the Attorney General's powers. As such, the power to criminalize in *Raich* is only incidental to the power to categorize drugs into the schedules outlined by the CSA.[192] This categorization of drugs is the legitimate role of the Attorney General, which was not challenged in the case. No assertion was made in *Raich* that the Attorney General lacked the power to categorize.

The federalism issues in *Oregon* lie in contradistinction to those in *Raich*. In *Oregon*, the constitutionality of the CSA as a whole is assumed. The case focuses on more than the authority to criminalize that arises from the power to categorize.[193] Rather, the State of Oregon argued that the power to determine "legitimate medical purpose" has *substantive* criminalizing effects apart from the power merely to categorize.[194]

Thus, while *Raich* and *Oregon* both address federalism concerns under the CSA, the cases deal with different issues. An administrative law reading of *Oregon* supplements the conventional federalism approach to reconciling the cases.

B. READING *OREGON* FOR WHAT IT SAYS

A facial reading of *Oregon* suggests that the case involves more than just federalism.[195] In particular, *Oregon* is best understood as the Court's attempt to flesh out the intersection between federalism and administrative law. The majority opinion never discusses federalism concerns and only briefly touches on the preemption provisions of the CSA.[196] *Oregon*

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[191] *Id.* at 5.

[192] 21 U.S.C. § 812 (2000).

[193] *Oregon*, 546 U.S. at 247-50.

[194] *Id.* at 286.

[195] This is a common theme in cases involving regulatory preemption. Justice Scalia, in particular, has pointed out that the invocation of federalism in regulatory preemption cases obfuscates issues that do not primarily involve federalism. *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378-79 n.6 (1999). *But see* Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 39-42 (arguing that *Iowa Utils.* was actually the most important federalism case of the Supreme Court term).

[196] *Oregon*, 546 U.S. at 270-72.

revolves around the Supreme Court's setting of strict limits on the Attorney General's power to criminalize behaviors without clear authorization from Congress. Applied to agencies generally, the holding in *Oregon* indicates that when agencies step into areas traditionally regulated by the states,[197] the agencies may only criminalize actions to the extent that Congress plainly authorized such regulations by statute. In areas where the federal government has not traditionally been involved, agencies must tread carefully when preempting state law; the regulations they pass must come from clear federal authority to pass *Chevron* Step Zero.[198]

Viewed in another light, *Oregon* ushers in a broad reading of *Mead*.[199] The Court makes clear that it will only defer to an agency's interpretation of law where: (1) Congress gives evidence that it intended the agency to make rules that have the force of law; and (2) the agency has actually made rules consistent with the intention of Congress.

Thus, *Oregon* applies the *Mead* doctrine to the realm of regulatory preemption. *Raich* laid out guidelines for implied preemption, with agencies able to preempt state law when part of a comprehensive federal scheme.[200] But *Oregon* interprets *Mead* to deal with express regulatory preemption; if Congress desires for agency regulations to preempt state law, Congress must clearly state its intention. If such authorization is not clear and if Congress did not intend to create a comprehensive regulatory scheme, *Oregon* provides courts with guidance to limit agencies' ability to criminalize behavior through regulatory means.

This explanation of the Court's decision fundamentally changes the nature of *Chevron* analysis. Moving forward, courts have license to review agency actions more aggressively before granting them *Chevron* deference. On the whole, this intuitively seems like a good move: Pre-*Oregon*, as evinced by *Raich*, courts almost always upheld agency actions that made it through the *Chevron* gate.[201] *Oregon* does not change the nature of cases that are granted *Chevron* deference. It does, however, make it more difficult for agencies to obtain that deference by aggressively reviewing their actions and insisting that the agency, particularly in matters of criminal law, only act within the limits of authority explicitly provided by congressional statute.

Nevertheless, *Oregon* reaffirms that agency deference is not an "all or nothing" approach. If a court does not grant an agency *Chevron* deference,

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[197] For example, both the medical profession and tort law have been largely controlled by the individual states.

[198] *See* Merrill, *supra* note 131; Sunstein, *supra* note 42.

[199] United States v. Mead Corp., 533 U.S. 218 (2001).

[200] Gonzales v. Raich, 545 U.S. 1, 22 (2005).

[201] *See generally* Merrill & Hickman, *supra* note 35.

that agency still maintains some right to deference. Specifically, *Oregon* clarifies that agencies not granted *Chevron* deference can still receive persuasive *Skidmore* deference. In the future, the Court can rely on the administrative doctrines outlined in *Oregon* as it evaluates regulatory preemption cases.

V. POTENTIAL ISSUES WITH AN ADMINISTRATIVE LAW APPROACH TO *GONZALES V. OREGON*

Several potential issues arise from an administrative law explanation to the Court's ruling in *Oregon*. In particular, one must determine if an administrative law approach passes the "common sense" test; if so, does the approach really solve anything or shed light on "new federalism"? Moreover, will lesser deference accorded to agency actions impact the War on Terror?

A. THE "COMMON SENSE" TEST

The primary difficulty in determining how the Court decided *Oregon* lies not in *Oregon* itself but in its comparison to *Raich*. Simply put, does an administrative law explanation properly account for the voting discrepancies between *Oregon* and *Raich*? To be a valid understanding of the Court's decision, this approach must provide a common-sense explanation of the two cases.

Analyzing *Oregon*, there is apparent irony in the liberal bloc of the Court sticking closely to the Constitution to permit federalism, while the traditional federalists on the Court sided with governmental authority, apparently utilizing a normative or functionalist approach.[202] By focusing entirely on federalism, these discrepancies are difficult to reconcile without adopting a cynical, politics-driven approach to Court decision-making.[203] If *Oregon*, however, turns on questions of administrative law, the Justices' positions on federalism pale.[204] Using an administrative law approach, the Court has the flexibility to decide difficult cases without resorting to the overly politicized battleground of federalism.

B. *OREGON*'S HOLDING APPLIED TO RICO AND THE WAR ON TERROR

The tightening of agency-made criminal law evinced by the Court in *Oregon* may affect the Attorney General's ability to promulgate effective

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[202] *See supra* Table 1.

[203] Strauss, *supra* note 186, at 1857-58 (noting that decisions apparently driven by political concerns undermine the legal and moral authority of the Court).

[204] *But see* Gonzales v. Oregon, 546 U.S. 243, 300-01 (2006) (Thomas, J., dissenting) (noting federalism issues involved with reconciling *Raich* and *Oregon*).

criminal regulations under RICO[205] when attempting to deal with the War on Terror. Congress passed RICO in response to growing organized crime in the United States.[206] Under the *Oregon* holding, because Congress did not pass RICO to deal with international terrorism, the Attorney General may not be able to utilize RICO to deal with terrorism concerns.[207]

RICO criminalizes conduct constituting a pattern of racketeering offenses if they are committed in conjunction with a criminal enterprise.[208] Four elements must be proved to establish a RICO claim: (1) the presence of a defendant "person," (2) an "enterprise," (3) and a "pattern" of (4) "racketeering" acts.[209] A U.S. Attorney is able to charge defendants under RICO if they have committed any two of thirty-five crimes within a ten-year period.[210] Criminal provisions of RICO create penalties ranging to a maximum of twenty years imprisonment, fines of up to $250,000 per offense for individuals, fines of up to $500,000 per offense for organizations, and forfeiture to the United States government of all property and proceeds derived from the illegal activity.[211]

The difficulty of applying RICO to international terrorism lies in the definitions inherent to the statute. To use RICO's provisions against terrorists, the Department of Justice ("DOJ") must show that the terrorists

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[205] 18 U.S.C. §§ 1961-1968 (2000).

[206] Act of Oct. 15, 1970, Pub. L. 91-452, 84 Stat. 922:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption . . . and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

[207] RICO, originally devised to combat organized crime, has rarely been used to deal with terrorism. *See* Nathan & Juster, *supra* note 16, at 560. RICO has both civil and criminal provisions and enables the government to take wide-ranging actions to combat criminal organizations. The primary recent case involving the application of RICO in the War on Terror occurred when victims of the September 11, 2001 attacks attempted to use RICO to recover against terrorists and state sponsors of terror. *In re* Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. 2005). *See generally* Ann Althouse, *Our New Federalism? National Authority and Local Autonomy in the War on Terror: The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004) (discussing federalism issues involved with the War on Terror).

[208] Sarah Baumgartel, *The Crime of Associating with Criminals? An Argument for Extending the* Reves *"Operation or Management" Test to RICO Conspiracy*, 97 J. CRIM. L. & CRIMINOLOGY 1, 5 (2006).

[209] 18 U.S.C. § 1962; Baumgartel, *supra* note 208, at 5.

[210] 18 U.S.C. § 1961(1).

[211] *Id.* at § 1963(a); *see* Nathan & Juster, *supra* note 16, at 564 n.67.

form part of a particular criminal "enterprise."[212] As one scholar notes, applying RICO to the War on Terror "presents [RICO's] most innovative face, and its most significant challenge to orthodox notions of criminal law, procedure, and evidence."[213]

The seminal case dealing with criminal enterprise in the context of terrorism is *Doe I v. State of Israel*.[214] In *State of Israel*, the plaintiffs, who owned land in the West Bank, alleged that soldiers of the defendant State of Israel pointed guns at them, threatened to shoot them if they did not leave, set fire to their property, and destroyed their olive groves.[215] The Court decided in favor of the defendant, noting that the plaintiffs never showed how the defendant was an organized enterprise with a shared decision-making infrastructure.[216] Merely alleging a pattern of abuse by various loosely related groups did not meet the standard of criminal enterprise in RICO; a higher standard exists to prove enterprise.[217]

Under an administrative law approach to *Oregon*, the *State of Israel* holding could create problems for the DOJ as it attempts to utilize RICO in the War on Terror. Because terror cells are loosely affiliated, if at all, it may be difficult for the DOJ to show that these cells meet levels of infrastructure required to prove the existence of a criminal enterprise. Since criminal enterprise must be established for the DOJ to use RICO, the inapplicability of the term "criminal enterprise" applied to loosely affiliated terror cells may disrupt the DOJ's ability to proceed. As such, the War on Terror does not fall within the strict statutory language of RICO.

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[212] 18 U.S.C. § 1962(b)-(c). "[E]nterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* at § 1961(4).

[213] Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 920, 932 (1987); *see also* Teresa Bryan, Kyle Cohen, C.J. Eaton & Stephen Love, *Racketeer Influence and Corrupt Organizations*, 40 AM. CRIM. L. REV. 987, 1021-23 (2003) (providing additional background on RICO criminal provisions).

[214] 400 F. Supp. 2d 86 (D.D.C. 2005).

[215] *Id.* at 99. The plaintiffs filed a 140-page complaint with over 600 paragraphs, "broadly alleging that plaintiffs, or their loved ones, have been personally and financially injured by the actions of the Israeli defendants—and those acting under their command or policies—regarding settlement activities in the West Bank." *Id.* at 97.

[216] *Id.* at 120.

[217] *See* United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 290 (3d Cir. 1983) (citing United States v. Riccobene, 709 F.2d 214, 221 (3d Cir. 1983), *cert. denied*, 464 U.S. 849 (1984)) (holding that the U.S. Attorney must demonstrate "evidence of an ongoing organization, formal or informal," that the organization's "various associates function as a continuing unit," and that it exists "separate and apart" from "pattern of activity in which it engages"), *cert. denied*, 476 U.S. 1140 (1986); Robinson v. Kidder, Peabody & Co., 674 F. Supp. 243 (E.D. Mich. 1987) (commission of felonies by a few persons cannot constitute "enterprise" where there is no infrastructure between them in support of continuing relationship).

An administrative law reading of *Oregon* requires congressional authority for an agency to promulgate and enforce criminal penalties against offenders. With Congress not yet speaking directly to the application of RICO in the War on Terror, the DOJ may find that courts, acting under the auspices of *Oregon*, render the agency less deference in its actions.

VI. CONCLUSION

After shocking federalism scholars with its decision in *Gonzales v. Raich*, the Supreme Court backpedaled with its decision in *Gonzales v. Oregon*. In *Oregon*, most of the Justices adopted positions opposite those they took in *Raich*. Even though both cases concerned agency-made criminal law under the CSA, the Court decided each differently. Most scholars who analyze *Oregon* and *Raich* have focused on the federalism issues, pointing out that the distinction between the two cases can be drawn along several lines: agency-made rules versus Congress-made rules; criminal penalties versus civil penalties; explicit congressional approval versus congressional silence; economic impact versus non-economic impact; and vanguard states versus laggard states. An analysis of each of these approaches has shown how each fails to account for the discrepancies.

This Comment puts forward a new approach. Rather than focusing solely on federalism, *Oregon* is best read as an administrative law case that limits agencies' power to expand criminal regulatory provisions without clear statutory authority from Congress. Reading *Oregon* in this light, however, puts pressure on the DOJ as it attempts to deal with the War on Terror and yet still stay within the explicit statutory guidelines of RICO. The *Oregon* holding represents a new shift in criminal law, away from agency-made provisions and back toward increased congressional oversight. *Oregon* sends a strong signal that agencies should not criminalize behaviors that are outside the scope of congressional statutory approval.